State Bar of Michigan

Workers' Compensation Section Newsletter

Winter 2011-2012

Contents

From the Chair

Brave New World

Yesterday the governor signed the new "Workers' Disability Compensation Act." It is now the law in Michigan. In the next few days, months, and years, we will learn what has been created. I expect that it will be by trial and error that we see what the law turns out to be.

I know most of you who know me have a clear understanding of my reaction to the new legislation, but I find myself noting the nature of my office and the need to refrain from voicing my personal opinions in this forum. It has been clear to me during my term of service on the council that our duty is to all of the members of the section.

At this time I would like to thank a lot of people who gave a lot of their time and efforts to the process that concluded with the enactment of this new "Workers' Disability Compensation Law," not the least of whom were the members of the Council who attempted to provide the legislature with the thoughts and opinions of the section as we derived them through communication with you, the membership of the section.

You should know that having attended most of the hearings in the House and Senate, as well as watching the Senate votes on the Internet service, I came away with a new appreciation of how little others outside of our section really understand what we do and what happens to our clients during the progression of a workers' compensation claim through the system. Perhaps this is why the section's views on the new legislation were not sought by the legislature at the outset. It had seemed strange to me that a re-write of the workers' compensation law would take place without conferring with or obtaining the input of the entirety of the Workers' Compensation Section in the drafting of the proposed law. Instead, had the council not acted to submit a proposal of the section, our voices as a section of the Bar would not have been voiced.

In the next few months of my term I have determined that I must find out how we have come to a situation where our opinions are not sought on such a subject and how to rectify that situation. I ask for your help in this endeavor.

Sincerely, *John M. Sims*

This newsletter is published by the Workers' Compensation Section, State Bar of Michigan

Tom Ruth, Newsletter Editor

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

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Board of Magistrates Update

By Lisa Klaeren, Magistrate

In the November/December *Annotations* (a publication of the Kalamazoo County Bar Association) President Hon. Anne E. Blatchford wrote a column that I thought had parallels to what the section is undergoing right now. She wrote that most of us, at any given time, are like the plate spinner on the old Ed Sullivan Show. She pointed out that we all have individual plates spinning for various family members, individual plates spinning for all of our personal obligations and plates spinning for our various work obligations. If all we manage to do is keep the plates spinning without a purpose, we are making little progress toward our goals.

Judge Blatchford indicated that it is only when the spinning is done with purpose that we find a measure of steadiness in our own spinning. She gave as examples things like holding the door for a woman with a child, waving people into her lane of traffic, and taking soup to a neighbor. She indicated that in taking the time to help others spin their plates, we too can help our spinning plates stay steady.

With the recent legislation, it is not unexpected for many of us to feel we are adding new plates to our spinning collection. Although at first it may seem frustrating and overwhelming, we need to bear in mind that if there is a clear purpose and determination to our spinning, our plates will be steady and successful.

Over the next few weeks, it is my intention to carefully read and review the amendments so that I have a clear understanding of what the numerous changes will mean to everyone involved in the workers' compensation system. I will be talking with attorneys, magistrates, and other stakeholders in an effort to assist everyone in handling the changes and new additions to our spinning system of plates. We need to be purposeful in positively addressing the multitude of changes we face in our effort to continue to provide a strong network of support for those who need our expertise and guidance.

As these changes are placed upon us, please realize that although it will take time, we are a strong community and we will adjust to the new legislation. With continued integrity and professionalism in our respective positions, let's keep our individual plates purposefully spinning. All of us working together will make this a successful transition. 🛠

Please be advised that this year's Annual Meeting of the Workers' Disability Compensation Section will be held from June 21, 2012 - June 23, 2012 at Mission Point Resort on Mackinac Island.

Reserve the dates....be there or be square...

Claim for Review

Effective March 1, 2012 in accordance with MCL 418.861a (6) and (7) and Rules 4 and 6 the following policy will be strictly adhered to:

Parties must file a Claim for Review (clearly labeled "cross" at the top of the Form WC-262) not later than 30 days after the appellant's brief is received. The cross-appellant's brief is due 30 days after the appellant's brief is received. **EXTENSIONS FOR FILING BRIEF IN SUPPORT OF CROSS-APPEAL WILL NO LONGER BE GRANTED.** A party filing a cross appeal shall attach an affidavit stating the date on which the appellant's brief was received. A reply to the cross appeal, while optional, is due 30 days after the cross-appellant's brief is filed. Cross appeals are derivative; if the appeal is withdrawn or dismissed, the cross appeal is extinguished.

Delayed cross appeals will not be accepted. An extension of time in which to file a reply brief does not extend the time in which to file a cross appeal. 🛠

Quotable Quotes

"*I'll moider da bum.*"
- Heavyweight boxer Tony Galento, when asked what he thought of William Shakespeare

"*Do, or do not. There is no 'try'.*"
- Yoda ('The Empire Strikes Back')

"*Never interrupt your enemy when he is making a mistake.*"
- Napoleon Bonaparte (1769-1821)

"*I have not failed. I've just found 10,000 ways that won't work.*"
- Thomas Alva Edison (1847-1931)

"*The significant problems we face cannot be solved at the same level of thinking we were at when we created them.*"
- Albert Einstein (1879-1955)

"*Knowledge speaks, but wisdom listens.*"
- Jimi Hendrix

"*We all agree that your theory is crazy, but is it crazy enough?*"
- Niels Bohr (1885-1962)

What Every Practitioner Needs to Know About Social Security and Child Support: You Can't Go Back

By Elizabeth A. Silverman

While I originally set out to write an article for publication in the Workers' Compensation newsletter, I realized that the information I wanted to impart affects any lawyer who has clients paying child or spousal support in the state of Michigan. If your client has filed for disability, can't work, can't find work, or suffers any type of financial setback, you need to file a motion to reduce his support immediately. If your client has become primarily responsible for his minor children, you need to file a motion to reduce his support immediately. If the other parent consistently refuses to exercise her parenting time, file a motion to increase his support immediately. There is an ironclad rule against retroactive modification, MCL 552.603. Even if the child changes residences and lives with the payor, support is still owed until a motion is filed. *Waple v Waple*, 446 NW2d 536, 179 Mich App 673 (1989). The rule has a particularly harsh effect on people who apply for Social Security Disability Income (SSDI) and Social Security Income (SSI).

SSDI is funded by Social Security taxes and provides cash benefits based upon the person's earning history. A disabled person qualifies for SSDI if he has worked long enough and paid Social Security taxes. Social Security Income (SSI) is a federal income supplement program funded by general tax revenues (not Social Security taxes) designed to help aged, blind, and disabled people who have little or no income. About 4.4 million children receive approximately $2.4 billion each month because one or both of their parents are disabled, retired, or deceased.

Within a family, a child may receive up to 50 percent of the parents full retirement or disability benefit. The maximum payment to a family can be from 150 percent to 180 percent of the parents' full benefit amount. Michigan Child Support Manual ("MCSF") excludes from income any means tested sources including Supplemental Security Income (SSI). With respect to SSDI benefits, 2008 MCSF 2.01(I) states that the Friend of the Court should attribute all SSDI benefits to the parent whose earning record is the source of the benefit. Based upon the current child support guidelines, if the payor had $1,000.00 of Social Security Disability benefits, his children would each receive one-half of his benefit ($500.00) up to a maximum benefit to the family of between $1,600.00 and $1,800.00 per month. Except in the case where the payor has four or more children, the marginal rate for child support will always be less than the amount of the SSDI benefit paid to the children.

Since there is a delay between the time for applying for SSDI or SSI, and the time it is granted, there is normally a substantial retroactive payment to be made both to the parent and to the child. 2008 MCSF 3.07 provides a credit for any SSDI benefit paid to a child against that parent's child support obligation. Arrearages are another matter. The current state of the law is that Social Security benefits received by a mother on behalf of the minor child because of the father's disability are credited towards his child support arrearage *as long as* the arrearage accumulated after the disability. Even if there is an excess of funds, the payor will not be entitled to any credit for SSDI or SSI benefits for an arrearage which accumulated before he or she was disabled. *Frens vs. Frens,* 478 NW2d 750; 191 MichApp 654 (1992).

In *Jenerou vs. Jenerou*, 503 NW2d 744, 200 Mich App 265 (1993), the amount of the payor's child support arrearage was more than the amount of the Social Security lump sum payment to his daughter. All of the arrearage was incurred after the defendant payor became disabled. The court based its decision to deny the defendant any credit on the basis that the moneys were paid to his daughter (who had reached the age of majority) and not to the daughter's mother to whom the defendant owed support. The court noted that the defendant previously filed a petition to modify his support order but "abandoned his claim" before the trial court rendered its decision; therefore, no petition for modification of the order was pending, hence retroactive modification of the order was not possible per MCL 552.603. The court in *Jenerou* did acknowledge that the federal government sometimes takes years to make a decision on whether an individual is entitled to SSDI benefits, and this can lead to a retroactive award of benefits. The court stated the only way to avoid an unjust result would be for the party applying for federal benefits to petition the trial court for modification of a support order based on the "apparent inability to work" caused by the disability and "alert" the court to the pending application for benefits. This would negate the effect of MCL 552.603 and provide notice to the other parent that modification is a possibility.

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The Court of Appeals suggests that the trial court can defer its ruling on the petition for years to see if the federal government decides to award benefits. As a practical matter, it is difficult to keep a file open in any court for more than a year from the commencement of the action. It is unrealistic to expect that the trial court will defer ruling on the petition for modification for years unless counsel for the payor attaches a copy of the *Jenerou* case and reads the last paragraph into the record. Even then, whether it will be properly administered is questionable.

There is also the issue that the child must be supported by both parents on a daily and immediate basis. What happens when a parent continues to make child support payments while his disability claim is pending? In *Fisher vs Fisher*, 741 NW2d 68; 276 Mich App 424 (2007), the FOC withheld $510.00 a month from the payor's SSDI payment. The child's mother began receiving SSDI benefits on the child's behalf, and those benefits exceeded the amount of support ordered by the court. The trial court determined the direct payments could be credited to his child support obligation and the excess applied to any arrearage accumulating after his disability. The funds withheld by FOC, $510.00 a month, could be used to satisfy any pre-disability arrearages. Even with these two adjustments, there was still an overpayment of approximately $24,000.00. The trial court ruled that MCL 552.603 prohibited the payor from receiving any refund for the overpayment as there was no pending petition to modify support. "This Court explained that a party seeking benefits (SSDI or SSI) should petition for modification on the basis of the "anticipated" change of circumstances, and the trial court could then defer ruling on the petition until the change occurs or until it becomes clear that the change will not occur." *Fisher*, Id at 428.

What happens when the client's claim for disability is pending and he/she is denied any modification of support? The case which prompted me to write this article to warn my fellow attorneys involved a client who suffered injuries involving his knees and spine. He hadn't worked steadily since 2004 and did not have a significant work history and hence did not qualify for SSDI benefits. He applied for SSI benefits in May 2009. He filed a motion to reduce his support in 2009 in Wayne County. As is the custom, the motion was first heard by a referee, who denied his request to reduce support. At the time, he was in pro per and did not exercise his option to appeal the referee's ruling to the circuit judge, believing it would be futile. In June 2011, he finally received a ruling from the Social Security Administration that he qualified as totally disabled and unable to work retroactive to July 1, 2009. He is currently denied disability benefit payments, as his current wife earns in excess of the allowed amount of income for his household.

He files another motion, this time represented by the author of this article. The court accepts the Social Security Administration's determination that the petitioner is totally disabled and abates support. The court refuses to make the abatement retroactive to the date of disability on the basis it would violate the rule against retroactive modification, MCL 552.603. Further, the court requires that the petitioner make payments of $50.00 a week toward the arrearage. Was the trial court correct?

SSI benefits are a means tested source of income and may not be counted as income. 2008 MCSF 2.04(A). *Ghidotti vs. Barber*, 459 Mich 189 (1998), established that the court cannot impute income where the payor's sole source of income is means tested. SSI benefits are also exempt from alienation pursuant to 42 USC 1383(d)(1). Under Michigan law, means-tested income is inalienable pursuant to MCL 400.63. In the above case, the payor's sole source of income was SSI benefits which he was currently ineligible to receive, despite being totally disabled, as his wife earned in excess of the maximum allowed. The client has no available source of income to satisfy the court's ruling. The court should not have ordered ongoing payments towards the arrearage as the payor has no source of income and was totally disabled.

If the client doesn't pay $50.00 a week, what happens? Likely, the FOC will periodically issue show cause orders against the client. Can the court force him to beg, borrow, or steal to comply? The answer is no. The trial court is not allowed to use the contempt power to require a party to pay child support from inalienable government benefits. *Proudfit vs O'Neal*, 193 Mich App 608 (1992). In my case, the defendant continued to pay $50.00 per week towards his prior arrearage by "borrowing" the funds from his current wife. However, this ruling is inconsistent with the court's finding the defendant to be totally disabled and without any income. Although the trial court did not doubt the finding of the Social Security Administration that the defendant was disabled since July 1, 2009, the statute on retroactive modification, MCL 552.603, prohibited providing any relief.

I think it is very important for every practitioner to understand the impact of filing a request to modify child support at the commencement of any Social Security filing. Hopefully, with the very specific language of *Jenerou*, the trial court can be persuaded to defer its decision until the Social Security Administration determines if disability benefits are warranted and modify support retroactive to the date of filing in compliance with MCL 552.603.

Elizabeth A. Silverman is chair-elect of the General Practice-Solo and Small Firm Section of the State Bar of Michigan and has twice been its chairperson. She has been in sole practice since 1990. She can be reached at elizabethasilverman@gmail.com.

But Did You Know...

By Martin L. Critchell

Practitioners are well familiar with the statute in the Workers' Compensation Act that bars a lawsuit against an employer except for intentionally injuring an employee. MCL 418.131(1), first and second sentences. ("The right to the recovery of benefits as provided in this [workers' compensation] act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort.") But did you know…an intentional tort is not the "only" exception. There are actually four other exceptions.

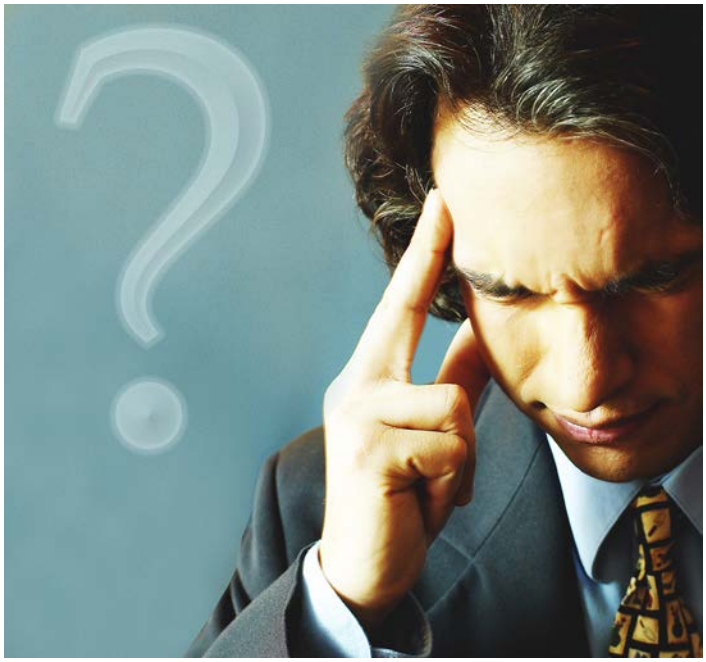
The first sentence of MCL 418.171(4) allows suing an employer for encouraging an employee to pose as a contractor. ("Principals willfully acting to circumvent the provisions of this section or section 611 by using…means to encourage persons who would otherwise be considered employees…to pose as contractors…shall be liable subject to the provisions of section 641.")

The second and third sentences of MCL 418.301(3) allow suing an employer when an injury occurs while socializing or pursuing some form of recreation. ("An injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. Any cause of action brought for such an injury is not subject to section 131.")

Section 301(11) allows suing the employer and anyone else who discriminates against an employee for claiming compensation. ("A person shall not discharge or in any manner discriminate against an employee because the employee filed a complaint…under this act or because of the exercise… of a right afforded by this act.")

MCL 418.641(2) also allows suing an employer that did not have insurance for workers' compensation or the approval of the director of the workers' compensation agency to self-insure under MCL 418.611(a) or (b). ("The employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131.")

The idea that these other four exceptions cannot apply because the exception for intentional tort is the "only" exception to the first sentence of § 131(1) is not substantial. Such an idea rests only on the principal that amending § 131(1) to add the second sentence implicitly repealed these other, existing exceptions. However, the principal of implicit repeal



of statutes by an amendment is most disfavored. *Brown v McCormick*, 28 Mich 215 (1873).

Doubtless, the text "only" was used because none of the existing exceptions were in § 131(1)—three were in other chapters—and none were referenced by § 131(1). It appears that the Legislative Oversight Committee which is responsible for punctuation, grammar, and syntactical continuity—plural form verb following singular noun (he runs)—lived up to its title and simply overlooked the four existing exceptions when "only" was inserted in the intentional tort exception.

The four exceptions can have broad application. For example, one employee can sue an employer for damages from an injury under the first sentence of § 171(4) because *another* had been encouraged to pose as a contractor. The exception is not limited to the injured employee who had been encouraged to pose as a contractor. And almost any statement or action can be characterized to constitute encouragement.

The exception under § 301(11) is unbounded for it refers to discrimination in *any* manner by *a person*, not just firing by the employer. This can include any disparate administration of one employee's claim compared to another by an insurance company—a person—even though the employee worked for another employer. Section 301(11) is not just for firing.

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But Did You Know ...
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An employer cannot either defend or reduce the amount of the damages because of the negligence of the injured employer or a co-employee because of MCL 418.141(1)(a)-(c), that state,

> "In an action to recover damages for personal injury sustained by an employee in the course of his employment or for death resulting from personal injuries so sustained it shall not be a defense:
>
> (a) That the employee was negligent, unless it shall appear that such negligence was wilful.
>
> (b) That the injury was caused by the negligence of a fellow employee.
>
> (c) That the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

Subsections (a) and (c) have the effect of allowing an injured employee to recover 100 percent of the available damages from an injury by precluding any consideration of the contributing or comparative negligence of the injured employee or a coworker under the rule of non-party at-fault. Subsection (a) vitiates any "waiver" of liability that might apply at a workout room or sporting event. It might even obviate the application of the "open and obvious" rule.

Of course, a recovery of damages under any exception is subject to reduction by the amount of compensation under the collateral source rule of the revised judicature act unless the compensation insurer of the employer waives its right to be paid under MCL 418.827(5). See *Rodriguez v ASE Ind, Inc*, 275 Mich App 8, 15-18; 738 NW2d 238 (2007). 🛠

Editor's Note: *Your section council has confirmed that the new act (contrary to some popular opinions) became effective December 19, 2011. This was confirmed by the agency. Legislative action allowing its immediate effect was in fact carried out during the sessions.*

Caselaw Update

By Martin L. Critchell

Supreme Court

The Michigan Supreme Court ruled that an injured employee qualified for only partial compensation under *Lofton v AutoZone, Inc*,[1] because "…'none of the physicians [said] that [the injured employee] was completely unable to work during [the] relevant time periods.'" *Geoghegan v Northwest Airlines, Inc*.[2] This is noteworthy for two reasons. One, the **Court** understands *Lofton* to be authoritative under the rule of stare decisis and beyond any need of plenary review, as *Geoghegan* was a peremptory disposition of an application for leave to appeal. And two, *Lofton* can be avoided only when an injured employee is "completely unable to work." Full compensation may be available only during the time that an attending physician confines an injured employee to home to recuperate or prohibits all work activity until a firm diagnosis and course of treatment is established.

Court of Appeals

Liljana Djelaj was injured driving her own car from one job assignment to another and paid auto no-fault benefits for three years. She then claimed compensation that her employer opposed on multiple grounds. The Michigan Court of Appeals rejected each objection in *Djelaj v RGIS Inventory Specialists*[3] with the application of established caselaw:

- Djelaj had a personal injury under *Rakestraw v Gen Dynamics Land Sys*,[4] because a physician had reported instability of ligaments that had not been seen during treatment before the crash which *was* some evidence of a change in pathology.
- The crash was work-related under *Thomas v Staff Builders Health Care*[5] because she was driving between two work assignments and not "commuting" between home and work.
- The claim three years after the injury was in time, having been suspended while Djelaj was paid auto no-fault benefits under *Colbert v Conybeare Law Office*.[6]
- The two-year "back" rule applied to the claim by Djelaj and the auto nofault carrier alike under *Beverly v Reynolds Metals Co*.[7]

The decision may be retained, for it collects and applies so many existing authorities on an array of subjects.

The decisions by the Court of Appeals in *Mansour v AZ Automotive Corp*,[8] *Brock v Gen Motors Corp*,[9] and *Angel v A1 South, LLC*,[10] each involved a decision by the Workers' Compensation Appellate Commission that had not been endorsed by two or three panelists. And

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the Court of Appeals vacated and remanded each for that procedural defect under *Findley v DaimlerChrysler Corp*.[11] The only remarkable thing about these cases is that the Court of Appeals chose to decide them while the case of *Findley* was before the supreme court.

The last case decided by the Court of Appeals during the survey—*Coleman v Gen Motors Corp*[12]—is forgettable. Willie N. Coleman claimed compensation from GM in Michigan for an injury in Michigan on October 18, 1995, and in Georgia—where he had moved—on November 30, 1997. The Workers' Compensation Appellate Commission decided that there had been no injury in Michigan and there was no authority to consider the claim of an injury in Georgia under *Karaczewski v Farbman Stein & Co*.[13] The Court of Appeals decided that there *was* jurisdiction to consider the claim of an injury in Georgia under *Bezeau v Palace Sports & Entertainment, Inc*,[14] which ruled that *Karaczewski* requiring both hiring and residency in Michigan did not apply to a claim for compensation when an employee was injured outside of Michigan before *Karaczewski* was decided.

Appellate Commission

The Michigan Compensation Appellate Commission denied compensation in another claim for compensation because of an injury outside of Michigan. *Decker v Lakeshore Engineering Services*.[15] The basis was not a lack of jurisdiction as Douglas Decker had been hired in Michigan and was a resident of Michigan when injured during an assignment outside of Michigan. Instead, the basis was the nature of the activity, recreation.

Decker was injured as he was leaving his lodging—a room in a motel that Lakeshore had provided—with some beer to rejoin his co-employees who were playing horseshoes and severely cut his finger on a broken/splintered door frame.

The Workers' Compensation Board of Magistrates decided that the statute concerning social and recreational activity, the second sentence of MCL 418.301(3), did not apply because Decker was not actually playing horseshoes when he was hurt. The Michigan Compensation Appellate Commission said that the statute did apply and denied the claim to compensation. The Commission said that the statute included injuries *during* social or recreational activity as the board had said but was not limited to that. The Commission based its decision in the case on the fact that Decker was *pursuing* a social or recreational activity by "going out with some beer to play horseshoes. This was in the pursuit of a social activity…."

The case shows some of the dangers of the out-of-state statute and the social activity statute. A claim for compensation under the foreign state could have been filed but is now time barred. Similarly, a tort claim here or in the other state is also time barred. 🛠

Endnotes

1 482 Mich 1005; 756 NW2d 85 (2008).

2 - Mich - ; - NW2d - (2011).

3 Unpublished opinion of the Court of Appeals, issued on October 13, 2011 (Docket nos. 292090, 292091).

4 469 Mich 220; 666 NW2d 199 (2003).

5 168 Mich App 127; 424 NW2d 13 (1988).

6 239 Mich App 608; 609 NW2d 208 (2000).

7 197 Mich App 436; 496 NW2d 307 (1992).

8 Unpublished opinion of the Court of Appeals, issued on October 13, 2011 (Docket no. 292241).

9 Unpublished opinion of the Court of Appeals, issued on October 13, 2011 (Docket no. 292938).

10 Unpublished opinion of the Court of Appeals, issued on October 13, 2011 (Docket no. 295015).

11 289 Mich App 483; 797 NW2d 175 (2010).

12 Unpublished opinion of the Court of Appeals, issued on November 8, 2011 (Docket no. 300010).

13 478 Mich 28; 732 NW2d 56 (2007).

14 487 Mich 455; 795 NW2d 797 (2010).

15 2011 Mich ACO 116. The author was counsel for defendants-appellants.