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From the Chair

By Beth A. Wittmann

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In this Issue

Welcome to the first electronic-only edition of the *Michigan Appellate Practice Journal*!

It is hard to believe that my term as Chair of the Section is almost over. I will turn over the gavel to the incoming Section Chair, Gaëtan Gerville-Réache, at the Appellate Practice Section's annual business meeting and program. The annual meeting and program which will take place on September 22, 2016, in conjunction with the State Bar of Michigan's Annual Meeting at the DeVos Place Convention Center in Grand Rapids.

The Section's annual business meeting begins at 1:00 p.m., followed by the program at 2:00 p.m. There is no charge to attend the section meeting or program, and we encourage all Section members to attend.

The Section holds its annual elections for officers and council meetings at the business meeting. If you are interested in running for one of the open positions, or in simply finding out more about service on the council, please contact me. Information about our current roster of officers and council members and the positions for which terms will be expiring can be found on the Section's SBM Connect Page at: *http://connect.michbar.org/appellatepractice/council*. Candidate nominations will be accepted from the floor at the annual meeting.

Following the business meeting, our current Chair-Elect, Gaëtan Gerville-Réache, will present the program entitled "Stay of Execution: Protecting the Client Pending Appeal." The program will involve a panel discussion on how to protect the parties' conflicting interests during a pending appeal. The panel will address difficult questions concerning stays and bonds, such as whether the bias toward bonds is a mistake and how courts should decide what security (if any) is necessary before granting a stay. Panelists include the Honorable Elizabeth Gleicher, Michigan Court of Appeals; Gaëtan Gerville-Réache, Warner Norcross & Judd, LLP; as well as other panelists from the judiciary, financial industry, and private practice.

It will be a fun and busy time in Grand Rapids at the time of the annual meeting. ArtPrize, a free international art competition that occurs every fall in Grand

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Rapids, will be taking place. ArtPrize is open to the public, and the art is located in various venues throughout Grand Rapids, including at DeVos Place. The ability to experience and explore Artprize is a wonderful "perk" to attending the Section's annual meeting.

Enjoy the remainder of your summer, and I hope to see you at the annual meeting and program on September 22!

—Beth A. Wittmann

Originalism-Part One: From Where It Originated

By Howard Yale Lederman

On February 13, 2016, originalism's most prominent developer and proponent, U.S. Supreme Court Justice Antonin Scalia, died. His death has raised the question: What will happen to the constitutional interpretation theory that he championed so vigorously: Originalism? I am going to change that question to: What should happen to originalism? That includes asking: Should its influence grow? Should its influence shrink? Should its influence remain the same? Should it influence modern constitutional interpretation? If so, how? I will respond to these questions in digestible pieces. So, my response will take a few articles. This first article will focus on what originalism is and from where it came. I invite you to respond. Our *Michigan Appellate Practice Journal* is open to vigorous appellate-issue debates and discussions. Let's have one here. (Don't worry. We can wait until after the 90-degree temperatures have ended.)

Harvard Law School Professor Alan M. Dershowitz has called Justice Scalia's originalist doctrine his "`most fundamental contribution'" to American constitutional law.[1] Indeed, originalism has emerged from the law into the general media and the general public. Many Americans have been voicing their opinions about it. According to a 2008 poll, "nearly half of Americans claim to believe that the original intentions of the Constitution's authors should be the sole consideration in Supreme Court constitutional interpretation, and about seven in ten believe it is `very important' for a good Supreme Court justice to `uphold the values of those who wrote our Constitution two hundred years ago.'"[2] In another poll, 40% claimed to believe in originalism.[3]

Columbia Law School Professor Jamal Greene found that "the terms `originalism' or `originalist' had appeared in the *Washington Post,* the *New York Times,* and the *Wall Street Journal* `a total of eighty-five times in the three-year period from 2005 to 2007.'"[4] On television, in books, on blogs, in newspapers, in presidential campaigns, and at water coolers, Americans talk about originalism.[5] For example, on January 11, 2011, *Saturday Night Live* presented a skit on originalism and the Second Amendment.[6]

Let's start by "describing" originalism and its origins. I didn't say, by "defining" originalism on purpose. "Defining" originalism states or implies that originalism is one unified doctrine with united proponents. But originalism is not. Rather, originalism is a semi-unified theory with at least four subtheories. These subtheories sometimes conflict. One subtheory has become predominant. One subtheory began as predominant, but has declined to marginal. Other subtheories are even more marginal. Indeed, the earliest known use of "originalism" included two subtheories: "By `originalism[,]' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters [ratifiers].'"[7] Most originalists are conservatives. Some are even reactionaries. But others are liberals. Even among conservatives, applying originalism to major constitutional issues has led to different conclusions.

Originalism includes original-intent originalism divided into three subcategories (original framers', original ratifiers', and combined original framers' and ratifiers' intent), original-public-meaning originalism, original-methods originalism, and other variations.[8] In this first article, we will focus on the earliest and oldest originalism, original-intent originalism. In later articles, we will focus on the others.

What unites these originalisms? "Most or almost all originalists agree that [the Constitution's] original meaning was *fixed* or determined at the time each [constitutional] provision was fixed and ratified." Georgetown University Law Center Professor Lawrence B. Solum calls this agreement *"the fixation thesis."*[9] Also, "most originalists agree that courts should view themselves as constrained by original meaning, and that very good reasons are required for legitimate departures from that constraint." Professor Solum calls this agreement *"the contribution thesis."*[10]

Modern originalism is both ideological and methodological. It arose from original intent, a constitutional interpretation method as old as the Constitution. Original intent focuses on finding and interpreting the Constitution's drafters,' or ratifiers,' or both drafters' and ratifiers' subjective intent.[11] For example, a leading original intentionalist, University of Connecticut Law Professor Richard S. Kay, described original intention as a process of discovering, interpreting, and applying "the subjective intentions" of the drafters.[12] Thus, the Constitution's original meaning was fixed during the framing process, the ratification process, or the combined process.[13] Likewise, each constitutional amendment's original meaning

was fixed during the framing process, the ratification process, or the combined process.

For a long time, original intent predominated as the constitutional interpretation method. As Professor Kay recognized: "The idea that judicial interpretation of the Constitution should be governed by the real subjective intentions of the human beings who established it as governing law was, for a long time, so natural as to require no name."[14] Chief Justice John Marshall saw applying original intent as a great duty: "`The great duty of a judge who construes an instrument is to find the intention of its makers [.]'"[15] "A construction `within the words' of a constitutional provision is legitimate regardless of whether the framers saw or intended it."[16] To interpret constitutional provisions, many early U.S. Supreme Court constitutional decisions used original intent.[17] By 1838, the U.S. Supreme Court had adopted original intent as its main constitutional interpretation method.[18]

Original intent spread beyond court decisions. For example, the 1798 Kentucky and Virginia Resolutions adopted original intent as the favored constitutional interpretation method: Their constitutional doctrines rested on "`the plain intent and meaning in which [the compact-the Constitution] was understood and acceded to by the several parties,'… and `the plain sense and intention of the instrument constituting that compact.'"[19] As another example, in defending nullification, John C. Calhoun asserted that judicial review and abrogation of state sovereignty violated the Framers' original intent. "[Calhoun] sounded the call for a return to the original intentions of the founding generation."[20]

The *Dred Scott* decision featured Chief Justice Roger B. Taney's infamous use of original intent to interpret the Constitution to deny blacks any constitutional rights and make them permanent fifth-class citizens:

"No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes."[21]

When the Civil War broke out, "`intentionalism in the modern sense reigned supreme.'"[22] Notwithstanding Chief Justice Taney's use of original intent to justify blacks' permanent status as property, the Civil War, and the post-Civil War constitutional amendments, original intent remained the predominant constitutional interpretation method for decades afterward. Liberals, radicals, and conservatives alike endorsed and applied it. For example, Senator Charles Sumner declared: "`Every Constitution embodies the principles of its Framers. It is a transcript of their minds. If its meaning in any place is open to doubt,[]…we cannot err if we turn to the framers.'"[23]

Modern originalism arose from many conservatives' reactions to the liberal Warren Court.[24] For example, at Justice Thurgood Marshall's confirmation hearings, Senator Sam Ervin asked: "``Is not the role of the Supreme Court simply to ascertain and give effect to the intent of the framers of this Constitution and the people who ratified the Constitution?'"[25] As another example, "in his [1971]confirmation hearings…, soon-to-be Justice William H. Rehnquist promised that he would not `disregard the intent of the framers of the Constitution and change it to achieve a result that he thought might be desirable for society.'"[26]

In the 1970s, conservative academics and judges, like Justice Rehnquist, Robert Bork, and Raoul Berger, began promoting and defending original-intent originalism. They sometimes sounded totalitarian: "Rehnquist demanded allegiance to the `language and intent' of the `framers of the Constitution.'"[27] "Bork insisted that `original intent is the only legitimate basis for constitutional decisionmaking.'"[28] Bork also declared that "the framers' intent with respect to freedoms [is] the sole legitimate premise from which constitutional analysis may proceed."[29] "And Berger decreed that any [other] constitutional interpretive theory" besides `original intention' [was] "nothing more than a `judicial power to revise the Constitution.'"[30] Other proponents did not sound totalitarian. "`Judges should be guided by the intent of the Framers of the relevant constitutional provisions.'"[31]

President Ronald Reagan's Attorney General, Edwin Meese, strongly supported original intent. Meese advocated originalism "as a defense against `a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court.'"[32] In three 1985 speeches, he brought originalism based on original intent out of academia and judicial opinions and injected it into the public media. "He called for a return to a 'jurisprudence of original inten-

tion,'…. Acting on that principle, he said the Justice Department stood prepared to challenge the incorporation doctrine, according to which nearly all of the provisions of the original Bill of Rights have been applied against the states under the fourteenth amendment."[33]

Meese explained: "`As the faithful guardians of the Constitution,' the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of the framers should guide constitutional interpretation."[34]

Thus, modern originalism began as a conservative reaction in ideology and method to the liberal Warren Court and the living-Constitution interpretation method. The original aims were to restore original intent as the predominant constitutional interpretation method, to promote their idea of judicial restraint, and to restrict many federal government powers and many individual rights severely.

Original-intent opponents hit back hard. Their criticism was "savage."[35] First, they emphasized that determining "a single collective intent of a large group of [framers and ratifiers]" with possible "different intentions" was "nearly impossible."[36] Second, original-intent opponents cited substantial evidence showing that "the Framers in fact intended for future generations *not* to interpret the Constitution according to their intent — thus requiring the paradoxical conclusion that the only way to follow the intent of the Framers is not to follow the intent of the Framers."[37] Some original-intent opponents have concluded that, with the passage of so much change and time, modern justices and judges are unable to look at the Constitution the way the framers did. Thus, Justice William J. Brennan declared:

Original intent, in its most "doctrinaire" form, "demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them…. It is a view that feigns self-effacing deference to the specific judgments of those who forged our social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Documents, like the "ratifications debates" records, "provide sparse or ambiguous evidence of the original intention." Usually, they show "that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality." Further, "whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states" is unclear. Finally, "our distance of two centuries cannot but work as a prism refracting all we perceive."[38]

Stanford Law School Professor Paul Brest summarized the many criticisms of original intent:

1. Ascertaining a multimember's body, like the Constitutional Convention's, institutional intention was almost impossible.
2. Ascertaining the many state ratifying conventions' institutional intentions was also almost impossible.
3. Determining how general or specific the drafters' and ratifiers' intents was almost impossible.
4. Inferring intentions from constitutional structure was difficult.
5. Given great and many changes over 240 years, translating the drafters' and ratifiers' beliefs and values into modern-day beliefs and values was difficult.
6. Since the Constitutional Convention and the ratifying conventions arose from political processes excluding slaves, women, and lower-class people, the conventions' legitimacy was questionable.
7. Constitutional interpretation based on original intent becomes fixed, rigid, and unable to adapt to changing situations.[39]

Other critics rejected giving the original-intent authority to the drafters and advocated giving this authority to the ratifiers. One critic compared the first to giving authority to the lobbyists drafting congressional bills, rather than to the Congresses enacting them.[40] Beyond method, some original-intent opponents denounced original intent for freezing constitutional law and interpretation in 1787-1791 and similar constitutional-amendment framing years and denying the impact of change — political, economic, social, and cultural — on American society. We will explore this in another article. We will also see how the original-intent advocates responded to these criticisms, defended their doctrine, and kept it alive. Lastly, we will see how some originalists turned originalism in a new direction. Justice Scalia led the way. But he was far from alone.

About the Author

Howard Yale Lederman *has been a Michigan appellate lawyer since 1984, representing civil plaintiffs and defendants and criminal defendants and a State Bar of Michigan Appellate Practice Section charter member since 1996. He has written over 12 appellate law and practice articles and has co-written an ICLE appellate law book section. He is a Cooley Law School Adjunct Professor. He has just opened his new law firm, Ledermanlaw, PC, to do appeals and legal writing projects for other lawyers and the general public.*

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Endnotes

1 Dr. Susan Berry, *Alan Dershowitz: `Originalism' Scalia's `Most Fundamental Contribution,'* Breitbart News (February 14, 2016), available at *http://www.breitbart.com/…/alan-dershowitz-originalism-scalia's-most-fundamental-contribution*

2 Ozan O Varol, *The Origins and Limits of Originalism: A Comparative Study,* 44 Vand J Transnat Law 1239, 1241-1242 & EN4 (2011), available at *https://www.wp0.its.vanderbilt.edu/wp-content/uploads/sites/78/Varol-pdf.pdf,* quoting Jamal Greene, *Selling Originalism,* 97 Geo L J 657, 659 (2009).

3 Varol, *supra,* p 1242 EN 4, citing Jill Lepore, *The Commandments: The Constitution and Its Worshippers,* The New Yorker (January 17, 2011), p 70.

4 Varol, *supra,* p 1242 EN 4, quoting Jamal Greene, *Selling Originalism,* p 659.

5 Varol, *supra,* p 1242 EN3, citing Jamal Greene, *On The Origins Of Originalism,* 88 Tex L Rev 1, 17 (2009).

6 Varol, *supra,* p 1242 EN3, citing *Saturday Night Live* (NBC Television Broadcast January 15, 2011), available at *http://www.hulu.com/watch/207598/saturday-night-live-update-constitutional-corner.*

7 Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory,* (2011), p 2, available at *http://www.scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2362&context=facpub*, quoting Paul Brest, *The Misconceived Quest for the Original Understanding,* 60 BUL Rev 204, 234 (1980).

8 Solum, *What Is Originalism,* p 28.

9 Solum, *What Is Originalism,* p 29.

10 Solum, *What Is Originalism,* p 33. *Accord,* Keith E. Whittington, *Originalism: A Critical Introduction,* 82 Fordham L Rev 375, 378 (November 2013), available at *https://www.fordhamlawreview.org/wp-content/uploads/assets/pdfs/Vol_82/Whittington_November.pdf*. *Accord,* Lawrence B. Solum, *Originalism and the Unwritten Constitution,* U of Ill L Rev 1935, 1943 (2013), available at *https://illinoislawreview.org/wp-content/ilr-content/articles/2013/5/solum.pdf*.

11 Jamal Greene, *The Case for Original Intent,* 80 George Wash L Rev 1683, 1702 (November 2012), available at *http://www.gwlr.org/wp-content/uploads/2012/11/Greene_80_6.pdf*; Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation,* 103 Nw U L Rev 703, 704-705 (2009).

12 Kay, *supra,* p 710.

13 *See* Solum, *What Is Originalism,* p 29.

14 Kay, *supra,* p 704.

15 H. Jefferson Powell, *The Original Understanding of Original Intent,* 98 Harv L Rev 885 (March 1985), available at *http://www.scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1390&context=faculty_scholarship*, quoting and citing John Marshall, *A Friend of the Constitution,* Alexandria Gazette (July 2, 1819), *reprinted in* Gerald Gunther, *John Marshall's Defense* (Stanford University Press 1969), 155, 168-16

16 *Trustees of Dartmouth College v Woodward,* 17 US (4 Wheat) 518, 644-645; 4 L Ed 629 (1824).

17 *Eg, Chisholm v Georgia,* 2 US 419, 432; 1 L Ed 440 (1793), *Calder v Bull,* 3 US (3 Dallas) 386, 391 (1798) (quoting and citing *The Federalist Papers* for original intent), *Marbury v Madison,* 5 US (1 Cranch) 137, 179-180; 2 L Ed 60 (1803) (same), *McCullough v Maryland,* 17 US (4 Wheat) 316, 433 (1819) (referring to *The Federalist Papers* for original intent), *Cohens v Virginia,* 19 US (6 Wheat) 264, 418 (1821) (quoting and referring to *The Federalist Papers* for original intent), *Trustees of Dartmouth College,* 17 US (4 Wheat) 518, 644-645.

18 *Rhode Island v Massachusetts,* 37 US (12 Pet) 657, 721; 9 L Ed 1233 (1838).

19 Powell, *supra,* p 930, quoting Kentucky Resolutions of 1798, *reprinted in The Virginia and Kentucky Resolutions of 1798 & 99* (J Elliott ed 1832) pp 15, 18; Virginia Resolutions of 1798, *reprinted in The Virginia and Kentucky Resolutions of 1798 & 99* (J Elliott ed 1832) pp 5, ___.

20 Matthew P. Cassady, *`Our Liberty Most Dear: The Political Reforms of John C. Calhoun,* 7 Constructing the Past 16, 27 (2006), available at *http://digitalcommons.iwu.edu/constructing/*vol7/iss1/6, citing Richard K. Cralle ed., *The Works of John C. Calhoun, Vol. 1, Discourse on the Constitution and Government of the United States* 313, 319, 339, 383 (Appleton & Co 1888).

21 *Dred Scott v Sandford,* 60 US (19 Howard) 393, 426; 15 L Ed 691 (1857).

22 Raoul Berger, *An Anatomy of False Analysis, Original Intent,* 1994 BYY L Rev 715, 722 (1994), available at *http://digitalcommons.law.byu.edu/lawreview/vol1994/iss4/1*, quoting Powell, *supra,* p 947.

23 Berger, *supra,* p 723, quoting Cong Globe, 39th Cong, 1st Sess 677 (1866) (Senator Charles Sumner).

24 Chief Justice Earl Warren was the Chief Justice from 1953 to 1969. His tenure became famous for its liberal and progressive constitutional law decisions and interpretations.

25 Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 Duke L.J. 239, 247 EN26 (October 2009), quoting Keith E. Whittington, *The New Originalism,* 2 Geo J L & Pub Policy 599, 599-600 (2004).

26 Colby & Smith, *supra, Living Originalism*, p 247, quoting Whittington, *supra,* p 600 (quoting *Nominations of William H Rehnquist and Lewis F Powell, Jr: Hearings Before the S Comm on the Judiciary,* 92nd Cong 55, 19 (1971) (Statement of Senator McClellan, Member, Senate Committee on the Judiciary)). *Accord,* Greene, *The Case for Original Intent,* p 1689.

27 Colby & Smith, *supra,* p 248 (October 2009), quoting Justice William H Rehnquist, *The Notion of a Living Constitution,* 54 Tex L Rev 693, 694-697 (1976).

28 Colby & Smith, *supra,* p 248, quoting Robert H. Bork, *The Constitution, Original Intent, and Economic Rights,* 23 San Diego L Rev 823, 823 (1986).

29 Robert H. Bork, *Tradition and Morality in Constitutional Law* in Robert H Bork, *A Time to Speak: Selected Writings and Arguments* 397, 403 (ISA Books 2008) (originally published 1984).

30 Colby & Smith, *supra,* p 248, quoting Raoul Berger, *Government By Judiciary: The Transformation Of The Fourteenth Amendment* 364 (1977).

31 Colby & Smith, *supra,* p 248, EN31 (October 2009), quoting Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory,* 63 BUL Rev 811, 811-812 (1983).

32 Greene, *The Case for Original Intent,* p 1689 EN37, quoting Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution,* 27 S Tex L Rev 455, 464 (1986), available at *http://www.fed-soc-org/resources/id.49/default.asp*.

33 Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed,* 40 Ohio St L J 1085, 1086 (1989).

34 Solum, *What Is Originalism,* p 8, quoting Edwin Meese, *Speech Before the American Bar Association* (July 9, 1985), *reprinted in The Great Debate: Interpreting Our Written Constitution* (Paul G. Cassel ed 1986).

35 Colby & Smith, *supra,* p 248.

36 Colby & Smith, *supra,* p 248. citing Brest, *supra,* pp 209-222. *See also,* Farber, *supra,* p 1089.

37 Colby & Smith, *supra,* p 248, citing Powell, *supra,* p 907.

38 William J. Brennan, *The Constitution of the United States: Contemporary Ratification,* 27 S Tex L J 433, 438 (1986). *See also,* Larry Kramer, *Two More Problems With Originalism,* 31 Harv J L & Pub Policy 907, 909 (1985), available at http://www.harvard-jlpp.com/wp-content/uploads…/Kramer%200nline%20-%20pragmatism.pdf (sparse constitutional convention records).

39 Lawrence B. Solum, *District of Columbia v Heller & Originalism,* 103 Nw L Rev 923 (2010), available at *http://scholarship.law.georgetown.edu/facpub/854*, citing Brest, *supra,* pp 214-231.

40 Kramer, *supra,* p 909.

Social Security Administration Raises the Bar on the Internet Disability Appeals Application

By Nancy Berryhill

The Social Security Administration (SSA) strives to provide world class, convenient customer service to individuals who come to us for help, including representatives who provide assistance in the process. Since the agency first established a presence on the Internet in 1993, we have increased and enhanced the services we provide online, including to those appealing a disability decision. In February 2004, SSA made online filing for disability appeals available with the introduction of the Disability Report (SSA-3441) portion of the internet Disability Appeals Application. In that first year, about 15,000 internet Disability Reports were filed. In FY 2007, the forms for requesting hearings (HA-501) and reconsiderations (SSA-561) were made available online, and more than 200,000 internet appeals were submitted. The online volumes have increased every year, with over 1 million in FY 2015, representing 45 percent of all 501/561s and 33 percent of all 3441s.

Earlier this year, SSA released a new and improved version of the Internet Disability Appeals Application. More than 90,000 applicants and representatives conveniently use our online appeals application each month. After listening to customer feedback, the new online appeals process is now easier to use and improves the speed and quality of our disability and non-disability decisions.

The application allows the customer to simultaneously submit either the Request for Reconsideration (i-561) or Request for Hearing by Administrative Law Judge (i-501), along with the Disability Report for Appeals (i-3441) to the Social Security Administration via the Internet.

The new enhancements improve the application's functionality and efficiency to provide better online service to customers. The new process:

- Allows customers to submit an appeal request and medical documentation simultaneously.
- Makes third party information automatically available in all appeal applications within a single session.
- Simplifies the screen language and saves time by propagating information from the appeal request to the disability report.
- Improves navigation and on-screen help links.
- Expands the user base to include customers with a Foreign, Army, Fleet or Diplomatic Post Office address.
- Allows the user to upload supporting documents to complete the application process, making the entire online process electronic.

In August 2015, the Social Security Administration hosted a webinar entitled: "Internet Disability Appeals Application Revitalizations and Attachment Utility Update." The webinar was designed to demonstrate to advocates, social service agencies, and representatives how to easily navigate the internet Disability Appeals Application and request their assistance in promoting this improved online service option. The webinar also included a live Q&A session.

The ability to file an appeal online is only one of a wide range of online services that our agency provides. Today people can file online for Title II Social Security retirement and disability benefits, as well as Medicare. In addition, SSA has plans to allow people to initiate Title XVI Supplemental Security Income (SSI) applications online in the future. Individuals age 18 and over can now open a secure, online mySocialSecurity account to have 24/7 access to their Social Security records. If still working, an individual can check their earnings record for accuracy, obtain future benefit estimates and access other tools to better plan for retirement. If already receiving monthly benefits, an individual can monitor their payments and make secure changes to their record such as a change of address or direct deposit information.

The agency's suite of online services allows people a choice in how they conduct business with us. Either they can conduct their business online at their convenience, or for those who do not prefer online services, or whose cases may be too complex for an online experience, the traditional office and telephone services remain fully available.

To view the webinar presentation, please visit *www.ssa.gov/multimedia/webinars/*.

To file an appeal, visit *secure.ssa.gov/iApplsRe/start*.

About the Author

Nancy Berryhill *currently serves as the Social Security Administration Deputy Commissioner for Operations and has held this position since July of 2013.*

Meet Judge William B. Murphy

By Conor B. Dugan

We meet in Judge Murphy's chambers in Grand Rapids on a mild February day. Judge Murphy's office has a large bank of windows, many law books, photos of family and friends, and the awards and honors earned from nearly 30 years of service on the Michigan Court of Appeals. Judge Murphy steps away from his daily duties to give a relaxed and forthright interview. We spend an hour discussing a variety of topics. What follows are some of the highlights of the subjects we discuss.

Family and Private Practice

Judge Murphy grew up in Champaign, Illinois and had a younger sister. After high school his mother, a widow, married a family friend and widower in Michigan. Judge Murphy moved to Michigan and began attending Aquinas College. It is there he met Paula, his wife of nearly 49 years. He later transferred to and graduated from Michigan State University, before obtaining a law degree from Wayne State University. Judge Murphy and his wife have four grown daughters and eight grandchildren.

After law school, Judge Murphy clerked for year with a Michigan Court of Appeals judge. He then moved to Grand Rapids and worked at Rhoades McKee for a couple of years. He left to start his own law firm with several other lawyers, including David Neff, the husband of his future Court of Appeals colleague, Judge Janet Neff. Although Judge Murphy was mainly a trial lawyer, it was a broad practice. "When we started our firm, I'd do anything," and he began by "doing a fair amount of criminal defense work" and "some insurance defense work." His practice then shifted into doing more "personal injury, medical malpractice" and products-liability work. He also handled individual appeals and also would handle his own cases through appeal. The firm grew to around a dozen attorneys before he left to join the Court of Appeals.

Becoming a Judge

After 15 years at his own firm, Judge Murphy began thinking of running to be a circuit court trial judge. Governor James Blanchard had different ideas, however, and in 1988 nominated Judge Murphy to fill a vacancy on the Michigan Court of Appeals. Judge Murphy was able to honor his Irish heritage and make his appointment effective Saint Patrick's Day 1988. Since then Judge Murphy has been reelected numerous times, most of his races being unopposed. In 2012, Judge Murphy was elected to his final six-year term. He will retire from the Court of Appeals in January 2019.

Changes on the Court of Appeals

We discuss some of the changes that Judge Murphy has seen in his 28 years on the bench. Judge Murphy notes that changing technology has been one of the most significant influences on the court. Technology allows attorneys to "remind" him that he "was on a case that was decided not too long ago that went this way, even if it was an unpublished opinion, so technology has helped them really stay abreast, if they do their research appropriately, not only of the law but the panel they're going to have." Attorneys will "know if Judge Murphy or any other judge on the panel" spoke "on a similar type case with similar issues and decided the case in a certain way."

In terms of how the judges do their jobs, Judge Murphy has also seen the influence of technology. For the positive, Judge Murphy states that it "has changed the speed on which we can consider cases, consider opinions, and release opinions." In the past, the process of rendering an opinion would require it to be circulated via mail. This meant that "it would take a week or two before the other Judges saw it," and additional time for them to respond. Now, however, "it's instantaneous." Judge Murphy states, "I can have an opinion from a colleague on the computer today, and I can read and review it, and unless I have a problem with it, I can respond today with my vote on it. So that's a big change, and I think that's been helpful."

Not all changes have been positive, however. Because the judges are "doing so much now with computers and emails some of the personal contact is missing." Previously, judges would walk down the hall to discuss a case or pick up the phone. As Judge Murphy states, "Now a lot of the communication back and forth is emails. We do have the opportunity at conference to sit down and talk, but there's a change there, and I'm not sure that the lack of personal contact in the process is necessarily a beneficial one."

Judge Murphy also says that over his time on the Court of Appeals, the level of questioning at oral argument has increased. He states that for oral argument, the Court's judges "are really engaged." While some of the judges ask more questions than others, they all come prepared.

Oral Arguments Matter

When I ask whether oral arguments matter, Judge Murphy is unequivocal: "They definitely matter." Indeed, Judge Murphy has told students that it "really borders on malpractice not to request oral argument, because . . . that's the way you can make sure that something doesn't slip through the cracks." Still, not every approach to oral argument is equal. It does not help "to come to oral argument and simply read your brief or read your argument." Judge Murphy notes:

> I think the most important thing you can do at oral argument is to give the Court a brief indication of what the facts are, and then get right to the issue or issues that you think are controlling. And then do what you should do as a lawyer—*listen to the judges*. If a judge has a question, you need to be able to respond and answer.

The good oral advocate is the attorney who comes both to "help educate the judges" and also "to elicit concerns or questions that they may have and be prepared to respond to them."

While Judge Murphy says it is "always dangerous to toss out percentages," he estimates that 10%-15% of the time, he comes to argument "not at all sure which way it should go." Even in those cases in which he is pretty sure which way the case should go, there is a decent percentage where oral argument changes his initial conclusion or the analysis of how one gets to a certain judgment.

Good Advocacy

Judge Murphy states that good written and oral advocacy is very helpful to the Court. "If you have two good lawyers arguing, one for the appellant and one for the appellee, it just really helps you try to come to the proper conclusion, as opposed to attorneys who are not quite as good and particularly if one side is not particularly good, their briefing is not very good, it doesn't help that much." Furthermore, Judge Murphy has some tips on what constitutes good advocacy. He jokes that he prefers "briefs that are brief," but stresses that "professionalism" in brief writing and oral advocacy are extremely helpful. He states that it is problematic if he receives a brief with "incorrect grammar" or inaccurate citations where he tries to "locate the case and it's nowhere to be found."

With respect to oral argument, Judge Murphy stresses preparation. Regurgitating one's brief at argument is "not helpful." A good advocate needs to "be able to count to two" at the Court of Appeals level. Judge Murphy also stated that you cannot ignore the questions of a judge on the panel even if you believe you have two votes already. Honesty is also the best policy. Judge Murphy states that an attorney needs "to be able to say to the Court, Judges, I don't know the answer, I'm not sure what the record says, I haven't had a chance to look at that particular opinion, but if you'll permit me, let me do that, and let me follow up with a supplemental brief to the court if that's an issue that the Court's concerned about." In closing at oral argument, a good advocate asks if there is "anything else that would be helpful to the Court.

What He Misses About Private Practice

I ask Judge Murphy, what, if anything, he misses about private practice. He answers:

> I really miss the personal contact, not only with clients, because I really enjoyed working with clients, but I particularly enjoyed working with other lawyers. . . . So the isolation was an adjustment for me initially. Now, there are obviously attorneys in the community that are friends of mine and I have some exposure there, but I have to be somewhat careful. But I greatly missed practicing law, working with clients, trying to help clients resolve problems, and working with the lawyers in this community and going back 28 years, it was a whole different practice around this community, and just a really high standard of professional practice, a particularly high standard of ethics, and all the lawyers knew each other, or knew of the other attorney, and you didn't have some of the business aspects of practicing law that put tremendous pressure on lawyers now that sometimes may not be as collegial as they could be or as cooperative. It was a good time to practice law.

Words of Advice

In an age in which work/life balance seems harder and harder to find, I ask Judge Murphy for his advice on how to strike that balance. His first words are that "life goes by pretty quickly." The "more any lawyer can do to spend time with his or her family and children growing up, the better." He understands the demands of practice but his "advice is family's first . . . don't neglect the family."

They are good words to live by from a Judge who has been faithfully living them for 28 years on the bench.

About the Author

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Selected Decisions of Interest to the Appellate Practitioner

By Barbara H. Goldman

Published Opinions

Authority not cited/Issue conceded

People v Allen

___ Mich ___ (Docket No. 151843, rel'd 6/15/16)

Supreme Court (Zahra, with Young, Markman, McCormack and Larsen).

Trial court: Ionia Circuit Court

Appellate counsel: John W. Ujaky (defendant-appellant); Cheri Bruinsma (plaintiff-appellee).

The defendant had been required to register as a sex offender as a result of a misdemeanor conviction in 2007. He did not register and, in 2010, pled guilty to the separate offense of failing to register, a felony. He registered in 2012, but in 2013, the police discovered he had used a false address. He was convicted of violating the registration requirement. The trial court sentenced him as a "second-offense habitual offender," which increased his sentence. He appealed. The Court of Appeals vacated the sentence and the prosecution appealed. The Supreme Court reversed. In a footnote, it rejected the defendant's argument that "his sentence is inappropriate because his [first conviction under the sex offenders registration act] was used to support his [second] conviction and as the predicate to enhance his sentence as a second-offense habitual offender." "[D]efendant objects [but] . . . offers no statutory or legal analysis to support the contention that his claimed double enhancement is inappropriate." *Id*. at n. 50.

Justices Viviano and Bernstein, concurring, noted that the defendant had conceded one of the prosecution's main points in his brief. "And in conceding the issue, defendant provided no briefing on it, leaving this Court without a full discussion of the arguments that may run counter to the prosecution's position." "In light of this lack of briefing, [we] would leave [an issue] open for another day" and "instead rely on defendant's concession . . ."

Inadequate briefing/issue abandoned

Arbuckle v General Motors LLC

___ Mich ___ (Docket No. 151277), rel'd 7/15/16

Supreme Court (Larsen; unanimous).

Trial court: Michigan Compensation Appellate Commission

Appellate counsel: Robert J. MacDonald (plaintiff-appellant); Martin L. Critchell (defendant-appellee).

The plaintiff was a GM employee injured at work in 1991. He retired in 1993. Under the union contract, he received a "total and permanent" disability pension. He was later awarded workers compensation and social security disability benefits. MCL 418.354 allowed an employer to coordinate workers compensation with disability pension benefits, but GM and the UAW had agreed to waive that provision. In 2010, however, the UAW agreed to a change that would allow coordination of workers compensation and SSD. The Supreme Court held that the contract controlled the outcome and GM could reduce the plaintiff's benefits. It declined to consider the plaintiff's argument that MCL 418.354(11) prevented GM from coordinating social security disability and workers compensation, because "plaintiff failed to adequately brief and argue the issue in this Court, thereby abandoning it."

Attorney fees - appeal

Cramer v Village of Oakley

___ Mich App ___ (Docket No. 330736, rel'd 6/23/16)

Panel: Boonstra, Markey, Owens)

Trial Court: Shiawassee Circuit Court

Appellate counsel: Richard A. Hamilton (defendant-appellant); Philip L. Ellison (plaintiff-appellee).

In an FOIA case, the defendant sent the plaintiff's attorney a letter "granting" the request, but did not provide the requested documents at the same time. The plaintiff filed suit shortly afterwards. The trial court granted her motion for summary disposition and awarded attorney fees to the plain-

tiff. The defendant appealed and the plaintiff cross-appealed. The Court of Appeals reversed, holding the trial court erred both in find that the defendant had "fail[ed] to comply with" the applicable statute and "effectively denied" the plaintiff's request. It also "decline[d] to award appellate attorney fees, costs, or disbursements in plaintiff's cross-appeal."

Unpublished opinions

Attorney fees - appeal

Griffin v Griffin
Docket nos. 321988; 324840, rel'd 10/20/15

Panel: Kelly, Murray, Shapiro

Trial court: Livingston Circuit Court

Appellate counsel: Heather K.S. Nally (plaintiff-appellee); Judith A. Curtis (defendant-appellant).

In a custody and support case, the trial court granted custody to the defendant (father). In a prior appeal, the Court of Appeals remanded for a "best interests" hearing. A successor judge again awarded custody to the plaintiff (mother) and ordered the defendant to pay 75% of the attorney fees. The plaintiff then filed a motion for attorney fees for the appeal. The trial court granted the motion, ordering the defendant to pay 75% of the appellate fees. The defendant appealed and the Court of Appeals affirmed. Based on "the trial court's findings under controlling law and the deferential standard of review" the court affirmed. The plaintiff was also allowed to tax costs.

Record on appeal

Bollenbaugh v Enbridge, Inc.
Docket No. 325063, rel'd 6/14/16

Panel: Servitto, O'Brien, Gadola

Trial court: Calhoun Circuit Court

Appellate counsel: Plaintiff-appellant in pro per; Philip J. DeRosier (defendant-appellee)

After the 2010 oil spill in Kalamazoo, Enbridge hired a clean-up company called SET Environmental. Plaintiff worked for SET but was fired for violating a company policy about videotaping. His claim was dismissed and he appealed. He included out-of-record material in his brief, but the Court of Appeals denied a motion to strike it. He "filed an amended brief that addressed some, but not all, of these errors." The Court of Appeals limited its review to "the evidence that was presented to the trial court at the time the motion was decided." "[O]ur review and analysis of . . . relates to whether the trial court erred in granting summary disposition to defendant based on the evidence and arguments that were considered by the trial court." The court also noted that the "defendant correctly notes that plaintiff did not appeal the trial court's dismissal" of one of his claims.

Brief - nonconforming Statement of facts

Galecka v Savage Arms, Inc.
Docket no. 326960, rel'd 6/16/16

Panel: Sawyer, Hoekstra, Wilder

Trial court: Clinton Circuit Court

Appellate counsel: Timothy McCarthy (plaintiff-appellant); Susan Healy Zitterman (defendant-appellee).

The plaintiff filed a consumer protection act, which was dismissed. In a prior appeal ("*Galecka I*"), the Court of Appeals reversed in part. On remand, the plaintiff added additional claims. The trial court again dismissed the CPA counts, because "the amended complaint violated the law of the case doctrine." The plaintiff appealed. On appeal, the defendant moved to strike the plaintiff's brief because the statement of facts was "cursory with minimal citation to the record" and "cite[d] and attaches documents that are not part of the record;" the argument "is less than comprehensive given the detail-oriented nature of this appeal;" and the plaintiff "cited an unpublished case without attaching it to the brief." Although the panel did not review several exhibits that were not in the lower court record," it did not strike the plaintiff's brief:

> Although brief and devoid of record citations, plaintiff's presentation of the background facts is consistent with the factual background set forth in *Galecka I*. Further, the procedural history of the case is easily discernible from the lower court record and the court's thorough opinion and order granting defendant's motion for summary disposition.

The Court of Appeals did not address the applicability of the "law of the case" doctrine.

Brief nonconforming Abandonment of appeal

Nortley v Art Van Furniture, Inc.
Docket no. 327542, rel'd 5/1/16

Panel: Gleicher, Sawyer, Kelly

Trial court: Washtenaw Circuit Court

Appellate counsel: Plaintiff-appellant in pro per; Jessica L, Greyerbiehl (defendant-appellee).

In a premises liability case, the trial court excluded the evidence of the plaintiff expert and the jury found no cause of action. She appealed, in pro per. Her "Statement of Questions Presented," consisting of two fragmentary fact

statements and no questions, did not comply with MCR 7.212(C)(5). The Court of Appeals held that it "does not implicate any particular act or omissions by anyone, let alone the trial court." "Because she failed to state her claims of error, there is nothing for this Court to consider." The court also noted that the plaintiff's brief consisted primarily of "copies of exhibits and pages from transcripts" of which "only four pages include anything of substance." The statement of facts did not comply with MCR 7.212(C)(6). The panel proceeded to examine the brief and the record, but concluded that the plaintiff "offered no reason to question either the admission of . . . evidence or the jury's finding." It also "fail[ed] to offer any analysis or citation to law that even suggests that the [defendant's attorney's] comments amount to error warranting relief."

> We are sympathetic to [the plaintiff's] circumstances as a pro se appellant; nevertheless, we must conclude that her failure to identify any claim of error, or otherwise make any effort to comply with the requirements stated under MCR 7.212(C), amounts to the abandonment of her appeal. . . By failing to identify any error in the lower court proceedings, [she] has left this Court with nothing to review. . . [A]n appellant must make some effort to identify and support his or her claim of error . . .

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

By Linda M. Garbarino

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.

Altobelli v Hartmann, SC 150656, COA 313470

Contracts Law: In an action addressing a law firm operating agreement which contains a mandatory arbitration clause covering any disputes, claims, or controversies between the law firm and current or former principals, the Supreme Court has directed the parties to address whether the Court of Appeals correctly affirmed the trial court's denial of the defendants' motion to dismiss based on the operating agreement's mandatory arbitration provision because the plaintiff's claims are directed at the individual defendants, rather than the law firm. In addition, the parties have been requested to address whether under theories, including but not limited to, agency or equitable estoppel, a mandatory arbitration provision covering disputes between the firm and any current or former principal may properly be invoked to resolve disputes between managing principals and a former principal.

Baruch v Twp of Tittabawassee, SC 152047, COA 319953

Tax: Whether *Wexford Med Group v City of Cadillac*, 474 Mich 192 (2006) correctly held that an institution does not qualify as a "charitable institution" under MCL 211.7o or MCL 211.9 if it offers its charity on a "discriminatory basis"; if so, how "discriminatory basis" should be given proper meaning; the extent to which the relationship between the institution's written policies and its actual distribution of charitable resources is relevant to that definition; and whether, given the foregoing, the petitioner is entitled to a tax exemption.

Bd of Trustees of the City of Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust v City of Pontiac, SC 151717, COA 316418

Municipal: In an action addressing the effectiveness of Executive Order 225, issued pursuant to section 19(1)(k) of 2011 PA4 (MCL 141.1519(1)(k)) by the city's Emergency Manager which purported to amend a tax exempt voluntary employees' beneficiaries association to remove the city's annual obligation to contribute to the trust agreement, the Supreme Court has requested the parties to address the meaning and applicability of the language "to continue to

make contributions" in the Emergency Manager's August 1, 2012 order No. 225.

***Bronson Methodist Hosp v Michigan Assigned Claims Facility*, SC 151343-4, COA 317864, 317866**

No Fault: In an action by a hospital against the Michigan Assigned Claims Plan (MACP) regarding an assignment of the hospital's claim for payment of medical services provided for the benefit of an insured driver, the Supreme Court has requested that the parties address whether the Court of Appeals erred when it concluded that the defendant MACP could not deny the hospital's application for assignment of its claim for benefits as "an obviously ineligible claim," MCL 500.3173a.

***Carter v Persinger (In re Estate of Cliffman)*, SC 151998, COA 321174**

Probate: Whether MCL 600.2922(3)(b) allows stepchildren of a decedent to make a claim for damages where the natural parent predeceased the decedent, and if so, whether the Court should overrule *In re Combs Estate*, 257 Mich App 622 (2003).

***Castro v Goulet*, SC 152383, COA 316639**

Medical Malpractice: Whether the filing of a motion for extension of time to file an affidavit of merit in a medical malpractice, required by MCL 600.2912d and MCL 600.2912e, is sufficient to toll the statute of limitations.

***City of Coldwater v Consumers Energy Co*, SC 151051, COA 320181**

Municipal: The issues concern whether the trial court misinterpreted or failed to apply Michigan Public Service Commission Rule 460.3411(11) and failed to follow binding precedent established by *Great Wolf Lodge of Traverse City, LLC v Public Serv Comm'n*, 489 Mich 27; 799 NW2d 155 (2011).

***City of Holland v Consumers Energy Co*, SC 151053, COA 315541**

Municipal: The issues concern whether the trial court created an exception to the applicability of Michigan Public Service Commission Rule 411 and whether the trial court erred in its interpretation of MCL 124.3 and whether a "customer" was receiving service, as well as whether the trial court misinterpreted or failed to apply MPSC Rule 460.3411(11) and failed to follow the binding precedent established in *Great Wolf Lodge of Traverse City, LLC v Public Serv Comm'n*, 489 Mich 27; 799 NW2d 155 (2011).

***City of Huntington Woods v City of Oak Park*, SC 152035, COA 321414**

Municipal: Whether, in the absence of an agreement for joint funding of a district court in districts of the third class where the court sits in only one political subdivision, all district funding units within the district have an independent obligation to fund the court; whether the parties in this case agreed that the 45th District Court would be funded entirely by the City of Oak Park; and whether the revenue from fees collected for building operations and retiree benefits is subject to revenue sharing under MCL 600.8379(1)(c).

***Employers Mutual Casualty Co v Helicon Assoc*, SC 152994, COA 322215**

Insurance: Whether a consent judgment amounts to a judgment or adjudication based on a determination of the insured's conduct; and, if so, whether it was a determination that acts of fraud or dishonesty were committed by the insured.

***Fowler v Menard, Inc*, SC 152519, COA 310890**

Premises: Whether the crosswalk installed by the defendant had a special aspect that could create liability for an open and obvious hazard, and whether such special aspect can exist if the condition was not unreasonably dangerous.

***Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Assoc*, SC 150001, COA 314310**

FOIA: Whether MCL 500.134 violates Const 1963, art 4, § 25, by creating an exemption to the Freedom of Information Act (FOIA – MCL 15.231 *et seq*.) without reenacting and republishing the sections of FOIA that are altered or amended.

***Graham v Foster*, SC 152058, COA 318487**

Family Law/Civil Procedure: In an action to revoke paternity, whether the Court of Appeals correctly held that a necessary-party defendant may be brought into a lawsuit after the expiration of the limitations period based on the relation-back doctrine.

***Kemp v Farm Bureau Gen Ins*, SC 151719, COA 319796**

No Fault: Whether the plaintiff's injury is closely related to the transportational function of his motor vehicle, and thus whether the plaintiff's injury arose out of the ownership, operation, maintenance, or use of his motor vehicle as a motor vehicle and whether the plaintiff's injury had a causal relationship to his parked motor vehicle that is more than incidental, fortuitous or but for.

***McLain v Lansing Fire Dept*, SC 151421, COA 318927**

Immunity: Whether the hospital intern's medical progress notes indicating that the plaintiff's decedent had been observed with the breathing tube lodged in her esophagus were admissible evidence, and if so, whether the Court of Appeals correctly ruled that even if they were admissible, the notes were insufficient to create a question of fact as to whether the defendants were grossly negligent.

***Papazian v Goldberg (In re Estate of Mardigian)*, SC 152655, COA 319023**

Probate: Whether the Court should overrule *In re Powers Estate*, 375 Mich 150 (1965). In *Powers*, the Court held that a will devising the bulk of an estate to a member of the family of the attorney who drafted the will which also named the attorney as an additional beneficiary was not necessarily invalid but rather created a question of whether undue influence existed and that such undue influence arising from the relationship is presumed to have been exerted as the means to secure the testamentary gift.

***People v Comer*, SC 152713, COA 318854**

Criminal: Whether the defendant's original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring, pursuant to MCL 750.520b(2)(d); and whether the trial court was authorized to amend the defendant's judgment of sentence on the Court's own initiative 20 months after the original sentencing.

***People v Crawford*, SC 152752, COA 319998**

Criminal: Whether the failure to administer any oath to the jury following jury selection, but before the beginning of trial, amounts to plain error requiring reversal.

***People v Dorsey*, SC 150298, COA 309269**

Family Law: Whether the family court lacked subject matter jurisdiction to issue an order compelling a parent to submit to random drug testing as part of the child's juvenile delinquency proceedings; whether Michigan recognizes any exceptions to application of the collateral bar rule, including (1) lack of opportunity for meaningful appellate review or (2) an appellant's irretrievable surrender of constitutional guarantees by complying with the drug testing order; and whether the appellant has properly preserved the question for appellate review.

***People v Franklin*, SC 152840, COA 322655**

Criminal: Whether the Court of Appeals erred in concluding that *Franks v Delaware*, 438 US 154 (1978) limited the trial court's discretion to order a hearing on the sufficiency of the affidavit in support of the search warrant.

***People v Frederick*, SC 153115, COA 323642**

Criminal: Whether the knock-and-talk procedures employed by law enforcement violated the general public's implied license to approach the defendants' residences and constituted unconstitutional searches; whether the conduct of law enforcement "objectively reveals a purpose to conduct a search" to obtain evidence without the necessity of obtaining a warrant; and whether the conduct of law enforcement was coercive.

***People v Roark*, SC 152562, COA 316467**

Criminal: Whether the defendant was accurately advised of the direct consequences of his guilty plea, including lifetime electronic monitoring; whether the defendant had demonstrated actual prejudice pursuant to MCR 6.508(D)(3)(b); and whether the defendant must demonstrate that

he would not have pled guilty if he had known about the lifetime electronic monitoring requirement.

***Pilgrim's Rest Baptist Church v Pearson*, SC 151680, COA 318797**

Civil Procedure/Jurisdiction: In an action between members of a church and the church, the issue is whether the claims were non-justiciable because of the Ecclesiastical Abstention Doctrine.

***Simpson v Pickens*, SC 152036, COA 320443**

Medical Malpractice: Whether, in order to bring a wrongful-death action under MCL 600.2922 for the death of a fetus or embryo, a plaintiff must meet the affirmative-act requirement of MCL 600.2922a.

***Smith v City of Flint*, SC 152844, COA 320437**

Whistleblower's Protection Act: Whether the Court of Appeals erred in applying *Peña v Ingham Co Rd Comm*, 255 Mich App 299 (2003) to the plaintiff's claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*; whether the plaintiff alleged sufficient facts to establish that he suffered an adverse employment under the WPA; and whether the plaintiff alleged sufficient facts to establish that he engaged in a protective activity under the WPA.

***Spectrum Health Hospitals v Westfield Ins Co*, SC 151419, COA 323804**

No Fault: Whether *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960 (2013), and if so, whether *Miller* should be overruled.

About the Author

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