Michigan Appellate Practice Journal

An official publication of the State Bar of Michigan Appellate Practice Section

From the Chair

by Phillip J. DeRosier

Fall 2012, Vol. 16, No. 4

In this Issue

The Section kicked off its new year at the State Bar Annual Meeting by presenting the Section's 2012 Lifetime Achievement Award to Justice Marilyn Kelly, who will be retiring from the Supreme Court this year after nearly twenty-five years of distinguished service as an appellate judge. Justice Kelly began her judicial career in 1988 when she was elected to the Court of Appeals. She then ran for and won a seat on the Supreme Court in 1996, and was re-elected in 2004. Justice Kelly also served as chief justice from 2009 to 2011. In addition to her duties as a member of the Court, Justice Kelly was involved in countless community activities, especially those involving children. Justice Kelly also championed equal access to the courts, establishing the "Solutions on Self-Help (SOS) Task Force" in April 2010. This past summer, the SOS Task Force launched a self-help website, Michigan Legal Help (*http://www.michiganlegalhelp.org*). Thanks to Justice Kelly for all of her outstanding contributions to the legal profession.

The Section was also treated during its Annual Meeting to a lively panel discussion on issue preservation and presentation. Court of Appeals Judges Elizabeth Gleicher and Amy Ronayne Krause, joined by accomplished appellate specialists Linda Garbarino and Mark Granzotto, offered their valuable insights on a range of topics and "best practices." The panel began by addressing issue preservation strategies, both before and during trial. The panel covered everything from motions for summary disposition to motions in limine to raising objections to evidence and jury instructions at trial. The panel also discussed how best to deal with an unpreserved issue and the circumstances under which the Court of Appeals might consider addressing such an issue. Finally, the panel offered advice on various topics relating to briefing, such as how detailed the statement of questions presented should be and how to ensure that an argument is not rejected for being too "cursory." Audience members were also active in the discussion, posing many thought-provoking questions for the panel. All in all, it was a great presentation by our distinguished panel members.

Continued on next page

From the Chair
Continued from page 1

So what's next for the Section? One of our primary functions has been, and will continue to be, to comment on proposed court rule amendments and to look for ways to improve appellate practice in Michigan. For example, the Section recently commented on proposed amendments to MCR 5.801, 7.102, 7.103, 7.108, and 7.109 that would require all appeals from probate courts to be considered by the Court of Appeals, as opposed to the current practice of some orders being appealed to the Court of Appeals and others to the circuit court. The Section is also working with other several other sections on a proposal to amend MCR 7.205 to reinstate the 12-month period for filing a delayed appeal (in lieu of the current 6-month period).

Finally, a number of Section members are involved in the planning for the upcoming 2013 Michigan Appellate Bench Bar Conference, which will be held on April 24, 25, and 26, 2013, at the St. John's Inn and Conference Center in Plymouth. So stay tuned for that. For additional information about the conference, go to *http://www.benchbar.org*.

Scenes from the Annual Meeting

Michigan's Changed Appellate Abuse of Discretion Standard

Part III: The Old Standard's Death and the New Standard's Birth

by Howard Yale Lederman

Welcome to this series, Part III. In Part I, we began with the almost insurmountable *Spalding v Spalding* abuse of discretion standard:

"The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an `abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will[,] but perversity of will, not the exercise of judgment[,] but defiance thereof, not the exercise of reason[,] but rather of passion or bias.'" [1]

In creating this standard, the Court did not cite any supporting authorities.[2] We then focused on its sudden emergence from the pre-*Spalding* standard to address the problem of too many fact-oriented decisions overloading the Court. Then we moved to three Michigan appellate decisions reversing lower court decisions for abuse of discretion, but refusing to apply the Spalding standard. Their refusal to use *Spalding* arose from the standard's problems themselves.

In Part II, we saw how the Michigan Supreme Court created a big *Spalding* exception: Criminal law. Then, we traced how Justice Levin urged the Court to repudiate *Spalding* and to adopt the US Supreme Court's *Lagnes* abuse of discretion standard[3] as "[a] more balanced view of judicial discretion[:]

> "`The term `discretion' denotes the absence of a hard and fast rule * * * When invoked as a guide to judicial action[,] it means a sound discretion,…a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'"[4]

Next we saw how Justice Riley and several Michigan Court of Appeals judges and panels approved or endorsed Justice Levin's challenge and position. Further we saw how the Michigan Supreme Court refused to apply *Spalding* in favor of results-oriented abuse of discretion decisions. Moreover, we found that the Michigan Court Appeals sometimes applied *Spalding,* sometimes applied it only in name, and sometimes did not apply it.

Lastly, we saw how in *Alken-Ziegler*,[5] the Michigan Supreme Court revived and reinforced *Spalding.* The Court declared: "An abuse of discretion involves far more than a difference in judicial opinion."[6] The Court emphasized: "This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters."[7] Thus, the Court reaffirmed and reemphasized *Spalding,* slammed the door on any *Spalding* challenges and challengers, and told the Michigan Court of Appeals: On appeals from discretionary decisions, the strong rule is to uphold the trial court. Therefore, the Michigan Supreme Court gave *Spalding* a new lease on life.

As I asserted in Part II, based on *Alken-Ziegler, Spalding's* resurgence and reign for at least 20 or 25 years was a good prediction. Likewise, substantial sanctions for attorneys challenging *Spalding* was a good prediction. Now, we will see how a new abuse of discretion standard emerged from nowhere to predominate.

As I said in Part II, to almost all Michigan litigators, what kind of abuse of discretion standard prevails does matter. Michigan appellate courts review many different kinds of trial court decisions for abuse of discretion. Examples include whether to permit pleading amendments,[8] which discovery sanctions amounts to impose,[9] which case evaluation sanctions amounts to impose,[10] whether to uphold default entry or default judgment,[11] which hearing and trial evidence to admit or exclude,[12] whether to reconsider an order,[13] and whether to adjourn a motion or hearing.[14] If the abuse of discretion standard practically compels appellate courts to uphold lower court discretionary decisions, negative outcomes from appeals from such decisions are near certainties. But if the abuse of discretion standard permits appellate courts some latitude in reviewing and deciding

Continued on next page

Appellate Abuse
Continued from page 3

these appeals, positive outcomes are likelier. So, the kind of abuse of discretion standard in place has far more than mere theoretical significance. Indeed, the standard has immense practical impacts.

The New Standard's Emergence

Based on the old standard's history, the only possible area for a new standard's emergence was the criminal area. The combination of the Michigan Supreme Court's restriction of *Spalding* to non-criminal areas and the Court's strong reaffirmation of *Spalding* in *Alken-Ziegler* practically guaranteed this. Another factor encouraged a new standard's emergence in the criminal area: Neither the Michigan Supreme Court nor the Michigan Court of Appeals had defined a new abuse of discretion standard for that area. Two more factors did the same: *Lagnes* was an available and known starting point, and several Michigan appellate judges, including Justices Levin and Riley, had approved or endorsed *Lagnes*. What kept a new, defined criminal abuse of discretion standard from emerging was no situation necessitating its emergence.

That would soon change. In 1994, the Michigan Legislature passed an Act establishing the Michigan Sentencing Commission to develop a new sentencing guidelines system.[15] In 1998, the Legislature enacted a new sentencing guidelines system.[16] The Act's purpose was to reduce unjustified sentencing differences for the same crime. The aim was to "reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences."[17] Translated, the purpose and the aim was to narrow the range of trial courts' sentencing discretion. The Act permitted trial courts to depart from the guidelines only for substantial and compelling reasons.[18] For such departures, the review standard was undefined abuse of discretion.[19]

The Act's purpose and aim inherently conflicted with *Spalding's* extremely deferential abuse of discretion standard. *Spalding* would preserve broad trial court sentencing discretion, thus contradicting the Act's aim and purpose. But these could also conflict with *Lagnes.* There, the reference to the law was not the constraint necessary to fulfill the Act's purpose and aim, but more an encouragement and guideline for trial courts to do so. In this environment, *Lagnes* might be a starting point for a standard, but not the standard itself. Therefore, cases involving appellate review of trial courts' guidelines departures would compel the Court to confront the abuse of discretion review standard for such departures.

In *People v Babcock,*[20] the Michigan Supreme Court did so. In *Babcock,* based on a plea bargain, Babcock pleaded guilty to two criminal sexual conduct II counts. The applicable sentencing guidelines minimum prison sentence range was 36-71 months. But the trial court departed from the guidelines downward to sentence him to 12 months in jail and three years probation. The trial court also suspended all but 60 days of his jail sentence. The trial court cited the following reasons for its downward departure: "(1) [The] defendant had no prior criminal record, (2) the crime involved a family member, (3) a three-year minimum was too `harsh,' and (4) treatment outside a prison environment was more likely to rehabilitate [the] defendant."[21] After finding these reasons not "substantial and compelling," the Michigan Court of Appeals vacated the sentence.[22]

On remand, the trial court resentenced Babcock as above, but added several more reasons: (1) the probation officer recommended probation, rather than a prison term; (2) [the] defendant's trial counsel, in an affidavit, recommended against a prison term; (3) a great portion of the victim's emotional harm was caused by [the] defendant's uncle[,] who abused her[,] and from separation from [the] defendant's grandmother; (4) letters from [the] defendant's brother's special-education teacher and attorney indicated that [the] defendant's brother is severely disabled because of cerebral palsey and mental retardation[,] and that [the] defendant is his brother's primary caregiver; (5) a letter from [the] defendant's physician indicated that [the] defendant suffers from herniated discs; and finally, (6) the fact that [the] defendant's uncle, who has a normal intelligence level, played a much greater role in harming the victim than did [the] defendant, who has a `borderline-to-normal' intelligence level."[23] Based on these additional reasons, the Michigan Court of Appeals affirmed the sentence.

The Michigan Supreme Court vacated the sentence and remanded for resentencing. In doing so, the Court had to instruct the lower courts on the abuse of discretion standard for sentencing guidelines departures. The Court rejected *Spalding.* The Court explained that while intending to "to accord deference to the trial court's departure from the sentencing guidelines range," the Legislature "did not intend this determination to be entitled to *Spalding's* extremely high level of deference."[24] After recognizing the Legislature's above purpose and aim in adopting the guidelines, the Court concluded that declaring *Spalding* the abuse of discretion standard for sentencing guidelines departures would prevent implementation of "the Legislature's intent to reduce unjustified [sentencing] disparities."[25]

The Court also rejected changing the review standard to de novo. Doing so would have accorded with and implemented the Legislature's above purpose and aim. But a de novo standard involves more appellate time and effort in deciding the issues than an abuse of discretion standard does. Since the issues were procedural, as opposed to substantive, the Court probably rejected de novo review on these issues to reserve more time and effort to review on substantive issues.

Then, the Court outlined its new abuse of discretion review standard and its sources: "Therefore, the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding* abuse of discretion standard…..an abuse of discretion standard recognizes that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[26] "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion[,] and, thus," the appellate court should "defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes."[27] The Court believed that this new standard would "contribute significantly to more consistent sentencing, both by enabling the Court of Appeals to more effectively constrain departures from the appropriate range of discretion by trial courts and by imposing a more consistent standard of review upon the Court of Appeals itself."[28]

But the new principled range of outcomes abuse of discretion standard could so contribute only if the lower courts understood and implemented it. In the new standard itself, the key phrase was "principled range of outcomes." In the two cited federal decisions, the key phrases were "range of reasonable outcomes," "range of options," "one would expect," and "reasonable trial judge." Just before *Penny,* the Seventh Circuit illuminated the new standard:

"Of course, an abuse of discretion standard does not mean no review at all. It simply means that we shall not second-guess the decision of a trial judge…in conformity with established legal principles[,] and, in terms of its application of those principles to the facts of the case, is within the range of options from which one could expect a reasonable trial judge to select."[29]

In understanding the new standard, *Koen's* key contributions were two: First, *Koen* defined principled range of outcomes as including conformity to established legal principles. That definition was clear. Nevertheless, it is open to challenge. In some cases, conformity to emerging or new legal principles is just as principled as conformity to established legal principles. But since abuse of discretion issues are more procedural and less substantive, the legal principles involved have been more stable. Second, *Koen* separated the issue of whether a lower court's discretionary decision conforms to established legal principles from the issue of whether their application to the facts is within a reasonable trial court's range of options. So, in applying the new standard, *Koen* gave reviewing courts a starting point and a framework for evaluation and decision. *Koen* enabled appellate courts to understand and use the new standard.

Accordingly, in the criminal sentencing context, the Court adopted a new abuse of discretion standard. These questions arise: How different is the new standard from the old? If the difference is significant, how significant is it?

Another issue was whether the Court would extend *Babcock* to civil cases, extend it to other criminal cases alone, or restrict it to criminal sentencing cases, thus retaining *Spalding* for civil cases. Both yes and no decisions were plausible. In the 1970s, the Court had repudiated *Spalding* for criminal cases. But the Court had not defined any separate criminal case abuse of discretion standard. Thus, the Court had at least de facto restricted *Spalding* to civil cases. Therefore, the Court had established a de facto divided abuse of discretion standard—an undefined standard for criminal cases and *Spalding* for civil cases. So, a two-way divided abuse of discretion standard, with *Babcock* defining the criminal case standard, was well within the realm of possibility. However, due to *Babcock's* statutory basis and origins, a three-way divided abuse of discretion standard, with *Babcock* defining the criminal sentencing case standard, a continued undefined or differently defined other criminal case standard, and the *Spalding* civil case standard, was equally within the realm of possibility.

A unified abuse of discretion standard was also within the realm of possibility. Though the new principled range of outcomes abuse of discretion standard arose in a legislative restriction of trial court discretion context and in a criminal law context, nothing inherent restricted the new standard to either or both those contexts. To be effective, it did not need legislative constraints on trial court discretion or criminal cases involving imprisonment and fines, as opposed to damages and injunctions. The only restrictions on the new standard's extension to civil cases were *Spalding* and *Alken-Ziegler.* So, a trifurcated, bifurcated, and unified abuse of discretion standard all remained plausible outcomes.

In Part IV, we will look at the Michigan Supreme Court's surprising response to this dilemma.

Endnotes

1 *Spalding v Spalding,* 355 Mich 382, 384-385; 94 NW2d 810 (1959).

2 *Spalding v Spalding,* 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Continued on next page

Appellate Abuse
Continued from page 5

3 *People v Talley,* 410 Mich 378, 397-398; 301 NW2d 809 (1981) (Levin, J, concurring).

4 *Id* at 398 (Levin, J, concurring), quoting *Langnes v Green,* 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931).

5 *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 227-228; 600 NW2d 638 (1999) (unanimous decision).

6 *Id* at 227, citing *Williams v Hofley Mfg Co,* 430 Mich 603, 619; 424 NW2d 278 (1988).

7 *Alken-Ziegler,* 461 Mich 219, 228.

8 *Eg, Weymers v Khera,* 454 Mich 639, 655, 666-667; 563 NW2d 647 (1997).

9 *Eg, Dean v Tucker,* 182 Mich App 27, 82; 451 NW2d 571 (1990).

10 *Eg, Ivezaj v ACIA,* 275 Mich App 349, 356; 737 NW2d 807 (2007).

11 *Eg, Saffian v Simmons,* 477 Mich 8, 9; 727 NW2d 132 (2007).

12 *Eg, People v Gursky,* 486 Mich 596, 606; 786 NW2d 579 (2010).

13 *Eg, In Re Beglinger Trust,* 221 Mich App 273, 279; 561 NW2d 130 (1997).

14 *Eg, Tisbury v Armstrong,* 194 Mich App 19, 20; 486 NW2d 51 (1992).

15 MCL 769.32 *et seq.* (on sentencing commission's duties, repealed by PA 32 (2002)).

16 MCL 777.1 *et seq.*

17 MCL 769.33 (on sentencing commission's duties, repealed by PA 32 (2002)).

18 MCL 769.34(3).

19 *See, eg, People v Fields,* 448 Mich 58; 528 NW2d 176 (1995) (while defining substantial and compelling reasons narrowly, the Court did not define the abuse of discretion review standard for trial courts' sentencing guidelines departures).

20 469 Mich 247; 666 NW2d 231 (2003).

21 *Id* at 251-252.

22 *Id* at 252, citing *People v Babcock (Babcock I),* 244 Mich App 64; 624 NW2d 479 (2000).

23 *Babcock,* 469 Mich 247, 252-253.

24 *Babcock,* 469 Mich 247, 266.

25 *Id* at 267.

26 *Id* at 269, citing *Talley,* 410 Mich 378, 398 (Levin, J, concurring) and *Langnes,* 282 US 531, 541.

27 *Babcock,* 469 Mich 247, 269, citing *Conoco, Inc v J M Huber Corp,* 289 F3d 819, 826 (CA Fed 2002) ("`Under an abuse of discretion review, a range of reasonable outcomes would survive review.'"), *US v Penny,* 60 F3d 1257, 1265 (CA 7, 1995), *cert den* 516 US 1121; 116 S Ct 931; 133 L Ed 2d 858 (1996) ("`a court does not abuse its discretion[,] when its decision `is within the range of options from which one would expect a reasonable trial judge to select'") (citation omitted).

28 *Babcock,* 469 Mich 247, 269-270.

29 *US v Koen,* 982 F2d 1101, 1114 (CA 7, 1992). *Accord, Cincinnati Insurance Co v Flanders Electric Motor Service,* 131 F3d 625, 628 (CA 7, 1997).

Note

Wayne County Circuit Court dockets (both criminal and civil)
are now available online at https://cmspublic.3rdcc.org

Selected Decisions of Interest to the Appellate Practitioner

By Victor S. Valenti

***In re Parole of Hill*, __ Mich App __ (No 301364, 11/8/12)**

Prosecutor sought leave to appeal/stay at court from Parole Board grant of parole. Over prosecutor's objection, parolee was granted court-appointed counsel by circuit court. Court of Appeals found no abuse of discretion in circuit court's application of inherent discretionary powers to appoint counsel.

Abuse of Discretion Standard of Review – An abuse of discretion occurs when a court's decision falls outside the range of reasonable and principled outcomes.

Question of Law Standard of Review – The scope of a circuit court's powers is a question of law that is reviewed de novo.

Constitutional Issue Standard of Review – Constitutional issues are reviewed de novo on appeal.

Appellate Consideration of Moot Issue, Public Significance – Appellate courts will not ordinarily decide moot questions or declare principles or rules of law that have no practical legal effect to the case before it unless the issue is of public significance and likely to reoccur yet evade judicial review.

***Wilson v King*, __ Mich App __ (No 305468, 11/6/12)**

Trial court granted summary disposition for failure to state a claim predicated on sibling visitation.

Affirmance on Alternate Grounds – declining to reach issue of whether a cause of action exists for sibling visitation, Court of Appeals affirmed on the alternative basis that three adopted older children of natural mother no longer had a sibling relationship with the youngest child.

***People v King*, __ Mich App __ (No 301793, spec panel den 8/20/12) lv pending**

Defendant was sentenced to prison and lifetime electronic monitoring following conviction on two counts of CSC-1.

Issue Preservation – An unpreserved claim is reviewed for plain error affecting substantial rights.

Issue Preservation – An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.

Affirmance, Correct Result – Court will not reverse when lower court reaches the correct result even if for the wrong reason.

***Davis v Detroit Financial Review Team*, __ Mich App __ (No 309218, 5/21/12)**

A financial review team appointed by the Governor under the Emergency Financial Manager Act is not a "public body" under the Open Meetings Act definition.

Claim Abandonment – A party may not leave it to the appellate court to discover the basis for the claim, nor may the party give issue cursory treatment with little or no citation of supporting authority. Further, a party's failure to properly address the merits of an assertion constitutes abandonment of the issue.

Record, Incomplete Transcript – If missing transcripts were not relevant to the issue on appeal and the issues are legal questions subject to de novo review, the lack of a complete transcript does not require waiver of the appeal. MCR 7.210(B)(1)(a).

***Bronson Methodist Hospital v Michigan Assigned Claims Facility*, __ Mich App __ (No 300035, rel'd for public 10/23/12)**

Consolidated no-fault appeals resulting in affirmance of summary dispositions for insurer.

Issue Abandonment, Failure to Present Argument or Authority.

Issue Presentation, Reply Brief – Appellant failed to properly raise issue involving named driver exclusion where the issue was raised for the first time in the reply brief. Reply brief must be limited to rebuttal of the arguments in the appellee's or cross-appellee's brief. MCR 7.212(G).

***Loutts v Loutts*, __ Mich App __ (No 297427, 9/20/12)**

Appeal from judgment of divorce following bench trial where court failed to address defendant's request for attorney and expert witness fees.

Preservation – Issue Raised Before, But Not Addressed by Trial Court – An unruled upon issue raised before the trial court, but not ruled upon there is preserved for appellate review.

***Adair v Michigan* (On Third Remand), __ Mich App __ (No 230858, 11/6/12)**

Denying Headlee Amendment attorney fees following review of special master's report, objections from parties, and "meager" evidentiary record.

Continued on next page

Select Decisions of Interest
Continued from page 7

Remand Scope – An issue not included within the scope of a Supreme Court remand order is not considered by the Court of Appeals.

***People v Russell*, __ Mich App __ (No 304159, 9/4/12)**

Following evidentiary hearing remand order on ineffective assistance of counsel claim, trial court was found to have complied with remand order, but erred in granting new trial.

Remand Scope Trial Court – When an appellate court remands a case with specific instructions, it is improper for a lower court to exceed the scope of the remand order.

***Brecht v Hendry*, __ Mich App __ (No 308343, 7/24/12)**

Appeal by leave from order denying motion to change domicile of daughter.

Common Law Review Standard – The interpretation and application of common law is a question of law subject to de novo review on appeal.

***Stand Up for Democracy v Secretary of State*, __ Mich App __ (No 310047, 6/18/12)**

Original mandamus action in Emergency Financial Manager ballot proposal("12-point type" case).
Justiciability Standard of Review – Threshold questions of justiciability, including ripeness, are reviewed de novo.

***Spectrum Health Hospital v Farm Bureau Mutual Insurance Co.*, __Mich __ (No 142874, 7/31/12)**

Any person, including a family member, who takes a vehicle contrary to a provision of the Michigan Penal Code including the "joyriding" statutes, is precluded from receiving PIP benefits.

Stare Decisis, Supreme Court Majority as to Result Only – A majority of the Supreme Court must agree on a ground for decision to make it binding precedent. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parties.

***De Frain v State Farm Mutual Auto Insurance Co.*, 491 Mich 359 (2012)**

Auto UM policy containing an unambiguous 30-day notice-of-claim provision is enforceable without a showing that failure to comply with the provision prejudiced the insurer.

Stare Decisis, Order Incorporating Opinion – An order of the Supreme Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reason for the decision.

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.

***Addison Twp v Barnhart*, SC 145144, COA 301294**

Zoning: Whether the Court of Appeals erred in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), when it held that, "to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls."

***Admire v Auto-Owners Ins Co*, SC 142842, COA 289080**

No Fault: Whether the defendant insurer is obligated to pay personal protection insurance benefits under the No Fault Act, MCL 500.3101 *et seq* for handicap-accessible transportation.

***Bazzi v MaCaulay*, SC 144238, COA 299239**

Family Law: Whether the plaintiff has standing under MCL 722.714 to bring an action to determine paternity where an acknowledgement of parentage had been signed by another man for a child born out of wedlock.

***Hoffman v Barrett*, SC 144875, COA 289011**

Medical Malpractice: Whether the plaintiff's complaint should have been dismissed with prejudice because her notice of intent did not comply with MCL 600.2912b(4).

***Lefevers v State Farm Mutual Auto Ins Co*, SC 144781, COA 298216**

No Fault: Whether the tailgate on the plaintiff's dump trailer was "equipment permanently mounted on the vehicle" for purposes of MCL 500.3106(1)(b), and, if so, whether the plaintiff's injury was "a direct result of physical contact with" the tailgate.

***People v Bylsma*, SC 144120, COA 302762**

Criminal: Whether the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq*., permits qualifying patients and registered primary caregivers to possess and cultivate marijuana in a collection or cooperative and whether, under the circumstances of this case, the defendant was entitled to immunity from prosecution for manufacturing marijuana under § 4 of the MMMA, MCL 333.26424, or entitled to dismissal of the manufacturing charge under the affirmative defense in § 8 of the Act, MCL 333.26428.

***People v Kiyoshk*, SC 143469, COA 295552**

Criminal: Whether the defendant waived family court jurisdiction by pleading guilty to a specified juvenile violation under MCL 712A.2(a)(1).

***People v Minch*, SC 144631, COA 301316**

Criminal: Whether under the felon-in-possession statute, MCL 750.224f, the trial court erred by ordering the police department to deliver the defendant's firearms to the defendant's designee.

***People v Mitchell*, SC 144239, COA 293284**

Criminal: Whether the Court of Appeals correctly remanded the case to the trial court for an evidentiary hearing regarding *Miranda* rights issues, including whether a statement was tainted by misleading advice concerning the defendant's right to counsel and whether a statement should have been excluded because it was preceded by another interrogation before the defendant was advised of his *Miranda* rights.

***People v Veilleux*, SC 145142, COA 302335**

Criminal: Whether sentences imposed after a finding of criminal contempt must be served consecutively under MCL 768.7a and whether a court may hold a person in contempt multiple times for each contemptuous act in a continuous course of conduct.

***Salem Springs v Salem Twp*, SC 146002, COA 312497**

Zoning: Whether the Township complied with the Zoning Enabling Act, MCL 125.3101, *et seq*., in regard to providing a notice of an adopted zoning ordinance amendment by publishing the notice in a newspaper of general circulation in the local unit of government within 15 days after adoption and whether a preliminary injunction should have been granted to the Township to prevent placing a referendum on the zoning ordinance amendment on the ballot.

* *Linda M. Garbarino is a civil practitioner who heads the appellate group at the law firm of Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*

Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

Reading Law: The Interpretation of Legal Texts
By Antonin Scalia and Bryan A. Garner
(Thomson West 2012)

Since law school, I have been fascinated by statutory interpretation, both as a matter of intellectual curiosity and as a matter of practical import to appellate advocates. In an age of statutes, familiarity with the tools of interpretation is an essential prerequisite to rendering competent advice to clients. And litigation involving written texts should only be handled by those who have studied the methods that courts employ to determine what a statute means and how it should be applied to a particular circumstance. Despite the critical nature of this body of law, for decades many law schools gave it short shrift focusing much more on the reasoning used to analyze common law principles.

After decades of academic and judicial neglect, Justice Scalia almost single-handedly rescued the subject from the backwaters of the law. I first began to study the subject, and to read the many scholars and judges debating methodology, during my time as a law clerk to Justice Patricia Boyle. She was a scholar of the law, and I was privileged to work on a number of cases involving statutory interpretation when I worked with her. Even then, scholars were writing about the new statutory interpretation of Justice Scalia, and supporting it or attempting to debunk it. Today, it remains a major focus of academic and judicial discussion. Law schools are increasingly likely to include courses on statutory interpretation in their curriculum and lawyers are more likely to focus on the question of interpretative tools in their briefs.

But until now, no single source offered a ready reference to the subject. *Reading Law: The Interpretation of Legal Texts*, co-written by Justice Scalia and Bryan A. Garner, will fill that gap. And just as their guide, *Making Your Case: The Art of Persuading Judges*, is the best single work on advocacy, this new volume should take its place on your shelf as the best go-to reference for any question involving statutory interpretation. Judge Easterbrook says in the foreword that "this book is a great event in American legal culture." And I agree.

The introduction to the book offers an overview of statutory interpretation, and characterizes Scalia and Garner's approach as "a return to the oldest and most commonsensical interpretative principle…." As articulated by Scalia and Garner the principle is that "I[i] their full context, words mean what they conveyed to reasonable people at the time they were written – with the understanding that general terms may embrace later technological innovations." The authors argue that textualism "in its purist form, begins and ends with what the text says and fairly implies." They insist that their book is "the first modern attempt, certainly in a century, to collect and arrange only valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation."

The book includes "sound principles of interpretation" that should serve as a guide for any appellate advocate. The authors start with the common sense notion that "[e]very application of a text to particular circumstances entails interpretation." The second interpretative principle the authors point to is that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." The third principle is that every canon of interpretation "may be overcome by the strength of differing principles that point in other directions." The fourth principle is the presumption against ineffectiveness. And the fifth is that "[a]n interpretation that validates outweighs one that invalidates."

The book also includes sections dealing with semantic canons, syntactic canons, and contextual canons. For each of these canons, the authors set forth the rule and explain how it fits into their overall interpretative approach. These sets of canons apply, according to Scalia and Garner, to all written legal instruments. But other canons reflect "special rules applicable to the interpretation of authoritative governmental dispositions – including statutes, ordinances, and regulations." Scalia and Garner have grouped these canons into four categories: "(1) those based on what one would normally expect the statute to say (one's own policy preferences aside); (2) those pertaining to the structure of government; (3) those reflecting a regard for individual rights; and (4) those favoring the stability and continuity of the law." This categorization is helpful as is the discussion of the various canons, their purpose, and how they should be used.

The last section of the book sets forth "thirteen falsities exposed." These range from the "false notion that words should be strictly construed" to the "false notion that the purpose of interpretation is to discover intent." Scalia and Garner provide a thoughtful analysis of some prevailing notions of interpretation and explain why they ought not to be followed.

Anyone engaged in the task of interpreting written texts will benefit from reading this book. It is highly readable, well-organized, and persuasive. Equally beneficial to bench and bar, the book sets forth the best interpretative tools and explains how to apply them persuasively. Advocates will enhance their chances of victory by studying this outstanding book.

Making Our Democracy Work
Stephen Breyer
(Vintage Books 2011)

Justice Stephen Breyer has written a second book about the United States Supreme Court, *Making Our Democracy Work*, which is intended to be understandable to a lay audience. Justice Breyer wrote the book to explain "how the Court first decided that it had the power to hold a federal law unconstitutional, by showing how and why it was long a matter of touch and go whether the public would implement the Court's decisions, and by explaining how, in my view, the Court can, and should, help make the Constitution, and the law itself, work well for contemporary Americans." Breyer succeeds in his goal – and the book is worth reading, and certainly also worth giving to your non-lawyer friends and family who have questions about the Court.

Not surprisingly, Justice Breyer's history of judicial review begins with *Marbury v. Madison*. In Breyer's view, "history, not legal doctrine tells us how Americans came to follow the Supreme Court's rulings." And his book follows several examples of Supreme Court cases from history that "illustrate the different challenges the Court and the nation faced as gradually, over time, the American public developed those customs and habits." Among the cases he discusses are the Cherokee Indian cases, involving a tribe's suit to protect ancestral lands, *Dred Scott*, the Little Rock desegregation case, and *Bush v. Gore*.

Emphasizing that "the Court has the duty to ensure that governmental institutions abide by the constitutional constraints on their power," Justice Breyer urges a pragmatic approach which "requires the Court to focus not just on the immediate consequences of a particular decision but also on individual decisions as part of the law, which is to say as part of a complex system of rules, principles, canons, institutional practices, and understandings." He disagrees with those who would suggest that pragmatism invites judges "to decide cases using political or subjective criteria." In his view, the "obligation to provide legally defensible reasoning in a publicly accessible format prevents a judge from escaping accountability."

Justice Breyer offers an insightful analysis of several other areas of constitutional and statutory analysis. He disagrees with those who would "strongly emphasize the first four tools [of statutory interpretation]… text, history, tradition, and precedent." In this view, a "primarily text-oriented system cannot work very well." In Breyer's view, the language is often unclear and the scope of its coverage may be at issue. Looking to the statute's purposes and consequences is better because it "helps to further the Constitution's democratic goals," "helps individual statutes work better for those whom Congress intended to help," and "help[s] Congress better accomplish its own legislative work." While textualists will disagree with Justice Breyer's analysis, it is a cogent explanation for the opposing view, and will be useful for those arguing to judges who embrace these other approaches.

Justice Breyer's chapter on the executive branch and administrative law provides a thoughtful explanation for sometimes complex legal doctrines involving deference to agency decisions, delegation and its consequences, and related issues of federal law. In his view, courts properly "ask which institution, court, or agency is comparatively more likely to understand the critical matters that underlie a particular kind of legal question, broadly phrased." And the courts then defer. Thus, since courts have more "experience with procedures, basic fairness to individuals, and interpreting the Constitution," the "courts are less likely to defer to agency decisions." On the other hand, where agencies have "experience with facts and policy matters related to their administrative missions," the courts "will likely give considerably more deference" to them. Lawyers seeking to understand how to frame and argue administrative decisions will benefit from reading Justice Breyer's explanation.

Justice Breyer also includes a chapter on the states and federalism that "concerns ways of maintaining a strong working relationship between the Court and the states." In Breyer's view, the questions that arise here often involve the question of at what level of government decisions should be made. He also spends some time on the subject of presidential powers, national security, and accountability. Using recent examples of well-publicized litigation including *Hamdan v. Rumsfield*, and *Boumediene v. Bush*, Breyer offers an interesting perspective on the over-arching principles that come into play when deciding questions of presidential power.

Justice Breyer characterizes the practical approaches discussed in this book as ways to "supplement other traditional legal tools, such as text, history, tradition, precedent, purposes, and consequences." He believes that these ways of thinking about judicial decision-making help assure that the public will be "more likely to understand and accept the Court's decisions as legitimately belonging to our democratic society." His book is well worth reading and should provide fodder for thoughtful appellate lawyers to use in their work, and to consider in their roles as citizens.

SBM

State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012