

MICHIGAN SUPREME COURT

PUBLIC HEARING
September 24, 2014

CHIEF JUSTICE YOUNG: Good morning and welcome to the first public administrative conference of our new term. We have 11 administrative items. This is the occasion when the public can come and address us on the concerns they have about the various proposed administrative items. We have 3 - I'm sorry - we have 1, 2, 3, 4, 5 of the 11 have endorsed speakers. Each speaker has an opportunity to speak to us for 3 minutes-interrupted or not. And with that I'll call the first item which is the proposed amendments to MCR 2.302. There are two alternatives concerning the scope of discovery-only depositions. The first endorsed speaker is Mr. Brian Whitelaw.

ITEM 1: 2012-02 - MCR 2.302

CHIEF JUSTICE YOUNG: Yes, that is the first test.

JUSTICE CAVANAGH: It's by design.

MR. WHITELAW: I knew Anne Boomer had a role here today.

CHIEF JUSTICE YOUNG: Yeah. Anne is the ubiquitous answer to everything administrative.

MR. WHITELAW: Thank you. Greetings. I'm Brian Whitelaw with Aardema Whitelaw in Grand Rapids. We were here in September addressing this issue and the Court asked if I would try to craft a rule that I felt matched the practice a little better than the existing rule and expressed what I thought ought to be the way the rule reads as opposed to the existing rule or the rule proposed as Proposal A. This all arises out of, as your honor indicated, the right to conduct discovery depositions of the opposing experts to learn what the opinions are of the opposing expert to prepare for trial. And the rule in question is MCR 2.302 - its entitled General Rules Regarding Discovery. Subsection (b) governs the scope of discovery and the part pertaining to expert witnesses is subpart (4) and it's entitled Trial Preparation Experts and it gives us the right to take the deposition of the opposing experts in order to prepare for trial. Now one of the problems that happened after our court rule was amended to include that language - or actually created

in 1985 - was some of the attorneys on the other side after discovery deposition was taken would then say well I'm going to be reading this into the record at the time of trial or after I finish my cross-examination of the expert they would start to qualify him and ask them their own questions and - which would create an objection and say look we're taking this for discovery purposes. The issue came up pretty quickly 3 years after the court rules were created in 1985 - the 1988 case of *Petto v Raymond* -

CHIEF JUSTICE YOUNG: Abrogated the rule.

MR. WHITELAW: Or interpreted it in a slightly different way.

CHIEF JUSTICE YOUNG: It couldn't possibly -

MR. WHITELAW: Pardon me?

CHIEF JUSTICE YOUNG: It couldn't possibly.

MR. WHITELAW: Well, I think -

CHIEF JUSTICE YOUNG: I mean the rule makes it quite clear there is no right to a discovery-only deposition without stipulation or a court order, right?

MR. WHITELAW: No.

CHIEF JUSTICE YOUNG: That's not what it says.

MR. WHITELAW: Well, it says we have a right to take the discovery deposition to prepare for trial. There's another rule that says if we want to limit a deposition in its purposes for discovery only -

CHIEF JUSTICE YOUNG: Yes.

MR. WHITELAW: we can ask the court for a protective order. And what the *Petto* -

CHIEF JUSTICE YOUNG: Correct, otherwise - otherwise you are subject to the rules that any deposition have including being used for impeachment or anything else.

MR. WHITELAW: Right.

CHIEF JUSTICE YOUNG: If you want it limited, you have to get a court order or stipulation.

MR. WHITELAW: Which completely abrogates the purpose of the rule and its title.

CHIEF JUSTICE YOUNG: It's a process.

MR. WHITELAW: If the title of the rule is to prepare for trial and those are the 2 tools we have - interrogatories and depositions - of what use is it if we learn the opinions at trial.

CHIEF JUSTICE YOUNG: I have not yet - I've not yet understood what the burden is of having either to get the stipulation of the opposing counsel or the approval of the court to limit the discovery deposition to the purposes of discovery only. What is that burden?

MR. WHITELAW: I anticipate that the other side - I'm a defense attorney - and the plaintiffs' lawyers that we face don't like the idea that we can go out, take their expert's deposition -

CHIEF JUSTICE YOUNG: I understand.

MR. WHITELAW: so I expect opposition; I don't expect stipulation.

CHIEF JUSTICE YOUNG: So - I understand that, but you still have a court - a judge who you can say, judge, we want the ability to understand what this is about without being subject - having this be a deposition for all purposes. And you anticipate that the judges of this state will be unsympathetic to that plea, is that what you're saying?

MR. WHITELAW: Well, if we alter the rule to indicate that you need to get the judge's permission or stipulation first - it's already a matter of discretion - but if you take away the existing case law which says - the way the Court of Appeals read this rule is that the defense has a right to take the discovery deposition of the opposing expert. If the plaintiff wants to use it for trial purposes, he has to notice it as a trial deposition. And if the defense doesn't like that - I'm just using defense because it fits me that way - we can file a motion for a protective order asking the judge to limit it for that purpose. So *Petto* interpreted this rule 3 years after it was

created. It's been - we've been practicing that way since 1988 - we didn't think the rule needed to be fixed, but the Court correctly noted that the rule and the practice are not a perfect fit. And so I drafted a rule that adds a single sentence that makes it clear that we can take a discovery deposition to be used for purposes of discovery and impeachment only without the necessity of a protective order.

CHIEF JUSTICE YOUNG: So the answer to my question -

JUSTICE ZAHRA: The Chief - the Chief asked you about trial judges being unsympathetic to this request and it's been a long time since I was in a court to make such a request. But what I recall is that if the expert was out-of-state then, yes, the trial judges were very unsympathetic because of the cost of either going there to do it or bringing the expert in and my question to you is has that changed. When the expert is an out-of-state expert, which more often than not that's what you have in many of these bigger cases, are the trial judges reluctant to give you a discovery-only dep?

MR. WHITELAW: No, because of the *Petto* case which interpreted the rule to provide that I have that right and that plaintiff cannot read it absent the plaintiff in my case filing a motion for protective order - or actually filing a notice to take the same deposition for trial purposes. I file my dep notice then he files a notice for trial purposes as well, and if I don't like that I can oppose it, so that has been the way the law has been followed since 1988. The Court is absolutely right there's an ambiguity in it and I think we correct it with the addition of that one sentence.

CHIEF JUSTICE YOUNG: So your best argument is to do nothing, isn't it?

MR. WHITELAW: Um, that was our original argument. The Court asked me to try to make the rule match the practice so that the practice matches the rule and the one sentence addition does it I think.

CHIEF JUSTICE YOUNG: I get ya. All right. Thank you.

MR. WHITELAW: Thank you.

CHIEF JUSTICE YOUNG: The next endorsed speaker is Randall Juip, is it?

MR. JUIP: Yes, your honor, thank you. I appreciate the opportunity to again address this panel on this issue. Discovery-only depositions are very important, not to just medical malpractice attorneys, but I think in other practice areas. I would have liked to have seen some of my colleagues from other areas come to comment as I think the medical malpractice defense Bar has -

JUSTICE McCORMACK: Can I ask you about that for a second? Is that right? It seems like they were obvious very important to medical malpractice cases, but you know medical malpractice cases make up only about 2 percent of our civil filings each year. Can you give me any information about how this you know how your Proposal B would affect the rest - the 98 percent of filings that we also have to think about?

MR. JUIP: I think it may assist them. I think what one of the fundamental differences is in complex civil litigation - products liability, auto liability, things like that - many times you have experts in those fields writing written reports.

JUSTICE McCORMACK: Yeah.

MR. JUIP: So unlike in medical malpractice cases where you don't have it, you have an affidavit of merit that's very cursory, you have these extensive, extensive expert reports that allow the basis, the ideas, the literature, all of that's discussed so you can effectively then cross-examine an individual if you want without a protection of discovery-only deposition. In medical malpractice cases, what we get at the very beginning is a cursory affidavit. We may get some borderline answers to interrogatories that flush out some of the issues, but the real currency is how deeply can I explore this expert's opinions. And without the protection of a discovery-only deposition, I'm essentially - I think in answer to the Chief Justice's question - bankrolling the plaintiff's case. I'm paying out of my pocket for a deposition of an expert that is required by our laws. You know the plaintiff is required to present expert testimony, required to present those proofs - I'm now paying for that deposition because I need to know what his opinions are or her opinions are in order to properly prepare for trial. It's flipping the American rule on its head. I think the other consideration this Court must take into account significantly is that the court rules are meant for the efficient and fair administration of justice. The court rule that's proposed - the changes proposed in Alternative A - will do nothing more than increase motion practice dramatically,

dramatically. When the HIPPA rules changed - you know we had *Holman v Rosic* for years which gave us access to the treating physicians, we could interview them, we can find out, we can conduct this informal discovery - that was a cost effective, cost efficient way of conducting discovery and finding out facts. HIPPA comes along and we have all sorts of confusion in every case now. We have to file a motion for HIPPA qualified protective order. Many attorneys are getting the idea that those are going to be granted and they're not opposing them, but we still have firms that are not. If Alternative A is adopted, in every single case you'll have motions. You'll have a great division between the circuit courts as to who is approving discovery-only depositions, who's not. The best practice would be just to allow discovery-only depositions absent some you know some objection from the party and to bring it in that fashion - in a negative you know put the burden on the party who opposes the discovery-only deposition that would allow for the efficiencies that I think we've seen in the current practice following *Petto* and *Roe*.

CHIEF JUSTICE YOUNG: Let me simply ask the question. It would seem to me your position is equally served by the status - maintaining the status quo as it is adopting the proposal you were asked to develop - or your colleague was asked to develop.

MR. JUIP: Yes and no, if you'll allow me the luxury of a fudge answer.

CHIEF JUSTICE YOUNG: I asked the question, so.

MR. JUIP: I think, yes. The current practice - we have *Petto* we have *Roe v Cherry-Burrell* - I mean those are very, very good pieces. And in our original letter - the letter signed by the agent attorneys we quoted some of that language. The Court obviously is aware of that. I think if the Court wants to - wants to crystalize rules which in my opinion lawyers like crystal rules - good or bad - we like knowing what the rules are so we can provide guidance to our clients, we can budget, things along those lines. Proposal B that's out there really does clarify what this practice is and puts it into context that we can present to courts if there's a distinction or if there's a disagreement to say this is a - this is an important part of practice. We should be allowed trial preparation - that's what the subtitle is.

CHIEF JUSTICE YOUNG: Thank you.

MR. JUIP: Thank you very much for your time, it was a pleasure.

CHIEF JUSTICE YOUNG: There are no endorsed speakers for Item 2 which is the proposed amendment of MCR 3.216 to arguably to clarify that distribution of property is subject to domestic relations mediation. Item 3 there is no endorsed speaker, but it is a proposed amendment to MCR 9.106 and 9.128 to - a request by the Attorney Grievance Commission that would identify costs and restitution imposed on an attorney in a disciplinary proceeding as a fine, penalty, or forfeiture. Item 4 has one endorsed speaker and it is a proposed amendment to MCR 3.206 concerning whether there should limit the ability of the court to require one party to pay another's attorney fees in domestic relation proceedings only in those cases that involve divorce or separation of married persons. And Mr. Kobliska is endorsed.

ITEM 4: 2013-17 - MCR 3.206

MR. KOBLISKA: Matt Kobliska on behalf of the Family Law Section. Thank you for the opportunity to comment. Just as an aside, the Family Law Section is a little bit different from other family law sections in that we don't really advocate on behalf of any particular constituent group. As family law attorneys, we represent men, we represent women, we might be appointed as GALs or LGALs on behalf of children, we're mediators, and we represent people of all financial circumstances. I might appear in the morning on a case where the husband earns \$60,000 and the wife earns \$12,000. I might appear in the afternoon in a case where the mother earns \$150,000 a year and the husband \$80,000. So it's not a rich versus poor scenario quite often, but almost never are the circumstances exactly the same between two parties. So it's not from any particular perspective that I say that our membership very strongly believes that this proposal if enacted would effectively deny access to justice to thousands of Michigan families. It would be wrong to say that this proposal would create an uneven playing field because the playing field was never even to start with. The party with superior financial resources has also been able to retain better more experienced counsel, has been able to retain experts, has been able to engage in exhaustive discovery, and has had staying power which is a critical factor in many of these cases. In domestic relations litigation it's not always necessary to outrun the bear, sometimes all you need to do is outrun the other hiker. And in this - I mean this is simply the reality on the ground. Those of us in the trenches can say that fee allocation is the

exception rather than the rule - 90 percent or more of all cases settle before the court makes a final disposition on its own - and when there is a fee allocation it usually involves a half or less from the actual fees that were incurred. Even so it enables attorneys to accept cases with the possibility that there might be a fee awarded. Otherwise, it's simply just another party seeking pro bono which is a segment which is largely unserved as it is. What happens when you take an uneven playing field and you tip it as such that it's virtually guaranteed that one party will not be able to retain counsel is that you impose upon the trial court the obligation to safeguard the rights of the unrepresented party and it's something which the trial court judge is probably - probably has insufficient information and insufficient resources in order to do. This is the reason I think among several others that the Michigan Judges Association opposes - or I should say strongly opposes - their words - this proposal. This proposal raises significant due process concerns which is outlined in our position paper. We believe that the - that there's an intermediate level of scrutiny that applies based upon illegitimacy, according to *Spada v Pauley* and other U.S. and Michigan Supreme Court cases, and that any rule affecting the rights of illegitimate children must be substantially related to an important governmental interest and, in fact, it's our position quite the contrary.

CHIEF JUSTICE YOUNG: You should be concluding your remarks, sir. Please conclude your remarks.

MR. KOBLISKA: Okay. The most important point I think that I can make to you today - because I think there is some belief that there is not a statutory authority for the court to award fees - I would - the Revised Judicature Act of 1963 which defines the judicial branch of government, §2401, the court shall regulate the taxation of costs in any action or proceeding in the Michigan Supreme Court or courts and district courts. Section 2405, the following items may be taxed and awarded as costs unless otherwise directed. Subsection (6), any attorney fees authorized by statute or court rule. So the court does have the ability and it has - there have been many cases where the ability of the court to assess costs for mediation sanctions and other awards of fees have been found. I'll cite *Helou v City of Sterling Hgts*, Justice Cavanagh's opinion of 2005 which was unanimous of this Court, indicates that the court does have authority to award costs. So there's a lot more I could say on this issue, but if there are any questions I'd be happy to address them.

CHIEF JUSTICE YOUNG: There appear to be none. Thank you, sir.

MR. KOBLISKA: Thank you.

CHIEF JUSTICE YOUNG: Item 5, proposed amendments to MCR 6.112 and 113, whether to retain the amendments regarding how the prosecutor's notice of enhanced sentence required by statute is to be provided by the courts in which an arraignment has been eliminated. There are no endorsed speakers on Item 5. Item 6, a proposed amendment to MCR 4.201, whether to adopt an amendment to clarify that the procedure set forth to set aside a default in MCR 2.603 applies in landlord/tenant cases involving a default money judgment. And there is one speaker, Judge Appel.

ITEM 6: 2013-22 - MCR 4.201

JUDGE APPEL: It feels a little funny being here. It's been awhile since I stood here.

CHIEF JUSTICE YOUNG: Welcome.

JUDGE APPEL: Okay. I'm here on behalf of the Michigan District Judges Association; it has filed comments in reference to this. And what I really wanted to do is just walk through a landlord/tenant case so you could understand what the practical ramification would be in adoption of this rule. And I understand that safeguard is the goal, that there be proper notice and that there'd be the opportunity to set aside, but when we're dealing with the landlord/tenant case a decision is made by a landlord at the outset whether to file a 30-day notice or a 7-day notice. The 30-day notice is if they just want to terminate that landlord/tenant relationship; the 7-day notice is if it turns into what we call in the business pay or stay—either you pay for your rent or - and stay or you're gonna leave. Once those notices are filed and the notice has expired - the time has expired - the 7 days or the 30 days - they come in and file their complaint. They then have to make a second choice as to whether or not they want to file what's called a count two—count two is the money judgment. So you can file an action to terminate interest, you can file what's called a pay or stay, and then you can also decide whether or not you want to seek the money judgment within this single procedure. You don't waive your right to a money judgment, but it's your choice whether or not you want to do it within this context - that has to be made at the outset. In order to get a default judgment on the money judgment portion of a landlord/tenant - I'm not talking about

possession, I'm not talking about the pay or stay - you must have personal service. The court rule does not allow you to get a money judgment without personal service. Everything in a landlord/tenant case has a 10-day appeal period so the writ is a 10 day, the appeal from the judgment of possession is 10 day, and the default judgment appeal period is also 10 day. If you change this one portion you are creating a second appeal period within a single action and we just think the confusion - especially with the safeguard that you would never get a default money judgment without personal service - will create not only confusion within the court, it will require two tracks to be created and it's just a safeguard that I think doesn't promote efficiency and that's why the district judges are -

CHIEF JUSTICE YOUNG: Is it fair to say that the Association doesn't necessarily oppose having a standard, but wants to have standards that are at least congruent with all the other -

JUDGE APPEL: Correct.

CHIEF JUSTICE YOUNG: So that's - if we gave you an opportunity to kind of work out that bit of disjunctive appellate period, would that satisfy the Association?

JUDGE APPEL: It wouldn't bother us; I suspect the landlords wouldn't be very happy if you start extending out those kinds of things because they're waiting - you know those 10 days are the difference between -

CHIEF JUSTICE YOUNG: I'm talking about having congruency about the periods - that seemed to be what the district judges were most concerned about.

JUDGE APPEL: Correct. So okay I don't -

CHIEF JUSTICE YOUNG: You're not opposed to having a standard of - for setting aside default judgments that applies in this -

JUDGE APPEL: Correct, it's just that 21 versus the 10 day - I'm sorry.

CHIEF JUSTICE YOUNG: All right. Thank you.

JUDGE APPEL: Thank you.

CHIEF JUSTICE YOUNG: Item 7, a proposed amendment to MCR 2.203 that adds explicit language allowing parties to be added by counterclaim or cross-claim and requires the court clerk to issue a summons for added parties. There are no endorsed speakers on that so we'll go to number 8 which involves amendments to MCR 5.108, 5.125, 5.208, and 5.403 concerning revisions to comport with recent legislation regarding guardianships and conservatorships. I show Michele Marquardt is endorsed.

ITEM 8: 2013-29 - MCR 5.108, 5.125, 5.208, and 5.403

MS. MARQUARDT: Thank you Mr. Chief Justice.

CHIEF JUSTICE YOUNG: Good morning.

MS. MARQUARDT: Good morning. May it please the Court. My name is Michele Marquardt. I'm here today as Chair of the Court Rules Procedures and Forms Committee for the Probate Council to the State Bar of Michigan. And this committee reviewed the administrative matter 2013-29 and recommended proposed changes to the Probate Council which voted in support. Simply put, our comments are practical in nature. We recommend that under MCR 5.125(c)(6) - and please indulge me by correcting my comments to see what's left out on that page - notice to all interested persons for approval of an accounting we suggest need not include all claimants because by the time the final accounting is filed some claimants have already been satisfied in full. So rather we suggest that claimants need only receive notice of an accounting if their interest might still be adversely affected. And this change is accomplished by removing the proposed 5.125(c)(6)(h) and then adding such claimants to (6)(i) which includes those who might be adversely affected. With the Court's indulgence may I also take a moment to make a quick reference to the comments of the Civil Procedure Committee. We're in accord with its comments to MCR 5.125(c)(6) regarding the removal of the term "and can be located." We think that is a good suggestion. However, we're not in accord with the committee's suggestion that we remove the phrase "or applicant" from MCR 5.125(c)(19)(e), (22)(h), or (24)(f), and we can't agree with that recommendation for two reasons. Most importantly, the appointment of an - or the application of an out-of-state guardian or conservator to become a Michigan guardian or a conservator is commenced by application and not by petition and this is done on Probate Court Forms 683, 684, and 685, that applies only when an out-of-state guardian or conservator is applying to act here. But for that reason, the term applicant is

absolutely necessary. Secondly, the Civil Procedure Committee's comments seem to miss the point that sometimes and quite often a guardian and conservator are separate individuals. So it is possible that upon application of one there might be a petition from the other and for that reason the term petitioner is also necessary. And so the Committee for Probate Council would recommend that the proposed sections remain as they appear in the administrative 2013-29.

CHIEF JUSTICE YOUNG: Thank you very much.

MS. MARQUARDT: Thank you.

CHIEF JUSTICE YOUNG: Item 9, whether to adopt amendments that require service on a prison inmate be brought through MDOC's Central Records Section, that would amend MCR 2.004 and allow an inmate's participation by video or videoconferencing. There are no endorsed speakers for that item. Item 10, which would amend MCR 3.221, whether to retain the amendments that strike the term "magistrate" from subsection (C) and (I) because there's no statutory authority for district magistrates to conduct bond review hearings on support and parenting-time enforcement of bench warrants. There are no endorsed speakers. And finally, Item 11, which is whether to adopt the amendment to MCR 6.001 to expand the list of procedural rules found in Chapter 6 that are applicable to misdemeanor cases in district court. And we have a return engagement from Judge Appel.

ITEM 11: 2014-18 - MCR 6.001

JUDGE APPEL: I figured if I was showing up I would show up.

CHIEF JUSTICE YOUNG: You might as well do it twice.

JUDGE APPEL: Right. All right. We have actually - the Rules Committee has submitted a fairly lengthy letter in connection with this especially for district court judges who don't generally write long opinions, but - so we do outline the law in reply and rely on the case of *Plymouth v McIntosh*. And, again, I would like to discuss the practical ramifications. Certainly, the rules that are suggested to be applied provide safeguards that we do not object to in response to the earlier question. We have no issue with the notice and the safeguards but, again, we do think they exist and outline the statutes and the court rules that support our position and would point out the practical ramification. For instance, yesterday where I had a garden variety misdemeanor call where I had probably 50

misdemeanors - most of them based on citations, the exception would be the domestic violence that requires a sworn complaint and which means a prosecutor or a city attorney would have appeared before the court for that purpose. Absent that you know on retail frauds, on possession of marihuana, on the cases that we see on a regular basis, this would add a procedural requirement that would just be overwhelming to the district court. I wouldn't object to it -

CHIEF JUSTICE YOUNG: Just explain a little bit more what the procedural burden that you're talking about.

JUDGE APPEL: It would require city attorneys to prepare complaints and warrants on every single misdemeanor case.

CHIEF JUSTICE YOUNG: I see.

JUDGE APPEL: So instead of an office -

CHIEF JUSTICE YOUNG: Proceeding on the citation you could -

JUDGE APPEL: Right -

CHIEF JUSTICE YOUNG: you have to get a -

JUDGE APPEL: and then appearing before the court. So not only would the city have to have their city prosecutors - I'm not talking about felonies with the Oakland County -

CHIEF JUSTICE YOUNG: No, just misdemeanors.

JUDGE APPEL: their city prosecutors prepare complaints, they would then have to appear in front of the court, swear to those, so the court would have to entertain those complaints and issue the warrants in connection with that. Currently, we proceed on citations on retail frauds, on possession of marihuana, the motor vehicle portion of it is authorized by statute, but I do believe that we've laid out in our letter how all of these different types of cases are, in fact, authorized to proceed by citation and, in fact, there is authorization for the officer's sworn citation to act as a complaint. And it's our position we would just be repeating that process and it would be an undue burden with no practical effect.

JUSTICE MARY BETH KELLY: I understand the burden side of it, but the correspondence suggests that there is no practical effect or that there is no benefit to be had.

JUDGE APPEL: Correct.

JUSTICE MARY BETH KELLY: And I'm curious your perspective as a district judge from the citizens' perspective. Is it really true that you see no benefit in a sworn complaint or in a city attorney appearing on behalf of a misdemeanant?

JUDGE APPEL: It's usually an officer who's just reciting what was in the citation. I mean I would say the likelihood of it not being issued - I agree there is that small percentage of cases where perhaps it wouldn't be, but what would you rely on. It's exactly the information that's contained in the citation. When I issue a complaint and warrant on a felony case it's a police officer coming in reading his report. When an officer would come in with his citation for that same sworn purpose, I assume he is going to be doing that same thing - that same information. So I don't see where the safeguard is enhanced with that second process.

CHIEF JUSTICE YOUNG: Thank you.

JUDGE APPEL: Thank you. Thank you for the opportunity.

CHIEF JUSTICE YOUNG: That concludes the - all of the items that were listed for today's public hearing and all of the speakers that were endorsed. I thank those of you who came to address those concerns and the public administrative hearing is now adjourned.