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Michigan Supreme Court Announces Cases for April 2018 Oral Arguments

LANSING, MI, March 16, 2018—The Michigan Supreme Court announced that oral arguments in 10 cases will be heard April 11-12, 2018. The Court will convene to hear the first case at 9:30 a.m. in the sixth floor of the Hall of Justice, 925 W. Ottawa Street. The schedule of arguments is posted on the Supreme Court's oral arguments homepage.

The Court broadcasts its oral arguments and other hearings live on the Internet via streaming video technology. Watch the stream live only while the Court is in session and on the bench. Streaming will begin shortly before the hearings start; audio will be muted until justices take the bench. Follow the Court on Twitter to receive regular updates as cases are heard. Please contact the Office of Public Information at 517-373-0129 or SeaksL@courts.mi.gov for permission to film or photograph during the hearing. See the link to Request and Notice for Film and Electronic Media Coverage of Court Proceedings. The request must be submitted three days in advance of the hearing.

These brief accounts may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, issues, procedural history, and significance of these cases. For further details about the cases, please contact the attorneys.

Wednesday, April 11, 2018
Morning Session – 9:30 a.m.

156283, People of MI v Tarone Devon Washington
Defendant was convicted of maintaining a drug house, possessing a firearm during the commission of a felony (felony-firearm), and other offenses. The crime of maintaining a drug house is defined in the Public Health Code as a misdemeanor, punishable by up to two years in prison. Because it is punishable by more than one year in prison, it is treated as a felony for purposes of the Code of Criminal Procedure. In People v Smith, 423 Mich 427, 434 (1985), the Supreme Court held that Penal Code offenses labeled as two-year "misdemeanors" may nonetheless be considered as "felonies" for purposes of the Code of Criminal Procedure. The Smith Court also held that the definitions and labels contained in each code apply only within that code, and that "the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code . . . ." Id. at 434, 444. On appeal, the Court of Appeals directed the parties to address whether defendant's "misdemeanor" conviction of maintaining a drug house could serve as the predicate "felony" for his conviction of felony-firearm, a Penal Code offense. In an unpublished split opinion, the Court of Appeals majority,

relying on Smith, agreed with defendant and vacated his felony-firearm conviction. The majority noted that, if it were deciding this case on a blank slate, it would rule for the prosecutor, and encouraged the prosecutor to apply for leave to appeal to the Supreme Court. The dissenting judge understood Smith as holding that the definition of maintaining a drug house as a "misdemeanor" in the Public Health Code would not transfer to the Penal Code. The Supreme Court has ordered oral argument on the prosecutor's application for leave to appeal to address whether the crime of maintaining a drug house, MCL 333.7405(1)(d), MCL 333.7506, a misdemeanor punishable by up to two years in prison, may serve as the predicate felony for a conviction of felony-firearm, MCL 750.227b.

155361, People of MI v Benjamin Michael Bentz

Defendant's daughter alleged that defendant sexually abused her when she was 8 and 9 years old. At trial, the prosecutor called Dr. Debra Simms to offer expert testimony about her examination of the complainant. Dr. Simms testified that there were no physical signs of abuse, but she gave a diagnosis of probable pediatric sexual abuse based on the complainant's "clear, consistent, detailed and descriptive" history. Defense counsel did not object, but did cross-examine Dr. Simms regarding her opinions. The jury convicted defendant of four counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. On appeal, defendant argued that his trial counsel rendered ineffective assistance by failing to object to Dr. Simms' testimony, failing to object on hearsay grounds, and failing to impeach the complainant. The Court of Appeals affirmed defendant's convictions in an unpublished per curiam opinion, with one judge concurring separately. With regard to Dr. Simms' testimony, the majority concluded that defense counsel's performance was not deficient, and the concurring judge concluded that counsel did err in failing to object, but that the error did not sufficiently prejudice defendant. The Supreme Court has ordered oral argument on defendant's application for leave to appeal to address whether trial counsel's failure to object to Dr. Simms' testimony fell below an objective standard of reasonableness, and, if so, whether there is a reasonable probability that the outcome of defendant's trial would have been different if an objection had been made.

155747-8, People of MI v Lovell Charles Sharp

Defendant is charged with various criminal sexual conduct offenses. The prosecutor filed a pretrial motion to admit evidence that the 14-year-old complainant became pregnant, had no sexual partners other than defendant, and had an abortion. The trial court held that evidence of the complainant's pregnancy is admissible, but the other evidence is not. The prosecutor sought interlocutory leave to appeal and defendant filed a cross-appeal. The Court of Appeals granted leave to appeal and, in a published opinion, affirmed in part and reversed in part, holding that all of the evidence is admissible. The Supreme Court has granted defendant's application for appeal to address: (1) whether evidence related to the complainant's pregnancy, abortion, and lack of other sexual partners was within the scope of the rape-shield statute, MCL 750.520j(1), i.e., whether it constituted "[e]vidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, [or] reputation evidence of the victim's sexual conduct . . ."; (2) if the evidence was within the scope of the rape-shield statute, whether it was nonetheless admissible under one of the exceptions in MCL 750.520j(1); and (3) if the evidence was not within the scope of the rape-shield statute, whether it was admissible under general rules governing the admissibility of evidence, see MRE 402 and MRE 403.

154128, 154130, People of MI v Justly Ernest Johnson, Kendrick Scott

Defendants Johnson and Scott were convicted of first-degree felony murder for shooting a woman as she sat in her van with her children. At trial, two young men who were out in the neighborhood and admitted drinking alcohol and smoking marijuana identified defendants as the perpetrators. One of the young men testified that, before the shooting, defendants told him that they planned to "hit a lick," i.e., commit a robbery. This young man also testified that, after the shooting, he saw both defendants with long guns wrapped in sheets and that Johnson told him that Scott "shot the lady." The other young man testified that, after the shooting, he saw Scott hand his girlfriend a long object that was wrapped in clothing, and that the next day Johnson came to his home and told him that he had "hit a lick," "messed up," and "had to shoot somebody." There was no other evidence linking defendants to the shooting. Their convictions were affirmed on direct appeal. Over the years, defendant Johnson has unsuccessfully sought relief from judgment on the basis of "new evidence," including the recantation of the two key trial witnesses. The Michigan Innocence Clinic became involved and contacted Charmous Skinner, Jr., the victim's son, who said that he was never contacted by anyone after the murder, but believed he could identify the shooter. When shown a photo lineup with defendants' photos, he said that the shooter was not in the lineup. This testimony and other evidence were presented at an evidentiary hearing, after which the trial court denied Johnson's successive motion for relief from judgment and Scott's first motion, finding Skinner's testimony unreliable. The Court of Appeals affirmed in an unpublished opinion. The Supreme Court has granted leave to appeal in both cases and ordered that they be submitted together. The Court will address: (1) whether the trial court abused its discretion by declining to grant Johnson or Scott a new trial on grounds of newly discovered evidence, in light of Skinner's testimony at the evidentiary hearing; (2) whether, even if Johnson's previous claims of new evidence are barred under MCR 6.508(D)(2), the evidence on which those claims were based must still be considered in determining if the new evidence from Skinner makes a different result probable on retrial, see People v Cress, 468 Mich 678, 692 (2003); and (3) whether trial counsel for Johnson or Scott rendered constitutionally ineffective assistance by failing to interview Skinner or call him as a witness at trial.

Afternoon Session – Approximately 1:00 p.m.

155196, Michigan Gun Owners, Inc v Ann Arbor Public Schools
155204, Michigan Open Carry, Inc v Clio Area School District

The Ann Arbor Public Schools and the Clio Area School District enacted policies to restrict weapons on school grounds. Plaintiffs are gun advocacy organizations and individuals licensed to carry concealed firearms who filed separate lawsuits against the defendant school districts, arguing that the state has preempted the field of firearm regulation and that the school districts cannot adopt their own stricter policies. The school districts respond that there is no preemption because no state statute conflicts with their authority to enact regulations for the safety of their students. They acknowledge that MCL 123.1102 preempts local units of government from adopting firearm ordinances or regulations, but they argue that the statute does not apply to school districts. They also argue that the factors set forth in People v Llewellyn, 401 Mich 314 (1977), do not support a finding of field preemption. Plaintiffs rely on the Court of Appeals opinion in Capital Area Dist Library v Michigan Open Carry, Inc, 298 Mich App 220 (2012) (CADL) (holding that the district library could not enact a firearms ban). They argue that state law preempts local units of government—including school districts—from regulating firearms,

and that the Llewellyn factors favor a finding of field preemption. In the Ann Arbor case, the trial court granted summary disposition in favor of the school district, ruling that there was no express preemption under MCL 123.1102, no legislative history supporting preemption, no single body of law or cohesive scheme regulating guns such that preemption could be implied, and that the nature of firearms regulation did not demand exclusive state regulation. In the Clio case, the trial court denied the school district's motion for summary disposition and granted declaratory relief to plaintiffs, ruling that CADL was controlling, and that the Legislature completely occupied the field of firearms regulation. Both cases were appealed. In separate published opinions released on the same day, the Court of Appeals ruled in favor of the school districts. The Supreme Court has ordered separate oral arguments to be heard at the same session on plaintiffs' applications for leave to appeal to address: (1) whether, in light of MCL 123.1102, it is necessary to address the Llewellyn factors in order to determine whether the school districts' policies are preempted; and (2) if so, whether the Court of Appeals properly concluded that the Llewellyn factors did not favor preemption.

Thursday, April 12, 2018
Morning Session – 9:30 a.m.

153980-1, In re Estate of James Erwin, Sr

In 2012, James Erwin, Sr., died intestate, survived by his spouse, Maggie Erwin, six children from his first marriage, and four children from his marriage to Maggie. A dispute arose among potential beneficiaries of the estate whether, pursuant to the Estates and Protected Individuals Code (EPIC), 700.1101 *et seq*., Maggie is entitled to a share of the decedent's intestate estate as a "surviving spouse" because she had not physically lived with James for many years before his death. According to MCL 700.2801(2)(e)(i), a surviving spouse does not include an individual who was "willfully absent from the decedent spouse" for "1 year or more before the death of the deceased person." James and Maggie were married in 1968, purchased a house as tenants by the entireties in 1973, and separated in 1976. James and Maggie did not live together again after 1976. But they did maintain a relationship as evidenced by Maggie's petition for support for herself and their four children, James' lawsuit in 2010 against his employer to keep Maggie covered by his health insurance plan, and James' decision to name Maggie as the beneficiary of his life insurance policy. The probate court held that, because James and Maggie had ongoing contact and maintained a relationship through the years, Maggie had not willfully abandoned James. The Court of Appeals affirmed, relying on In re Harris Estate, 151 Mich App 780 (1986), which held that MCL 700.2801(2)(e)(i) requires proof of an intent to abandon one's marital rights before a widow or widower is disqualified from being a "surviving spouse." But a subsequent panel of the Court of Appeals, In re Peterson Estate, 315 Mich App 423 (2016), disagreed with the holding in Harris. The Supreme Court granted leave to appeal to address: (1) whether the "willfully absent" provision in MCL 700.2801(2)(e)(i) is defined exclusively by physical separation, or whether it includes consideration of the emotional bonds and connections between spouses; and (2) whether MCL 700.2801(2)(e)(i) requires proof that a spouse intends to abandon his or her marital rights.

155498, North American Brokers v Howell Public Schools

Plaintiffs, a real estate agent and real estate broker, filed suit against defendant Howell Public Schools, alleging that they had engaged a buyer to purchase property owned by the school district but received no broker commission for the sale. The school district moved for summary disposition, arguing that the statute of frauds barred plaintiffs' claims. Plaintiffs responded by relying on the promise conveyed by the "broker protected" sign on the property and oral communications with defendants. The trial court granted summary disposition to the school district on grounds that the statute of frauds barred plaintiffs' claims. In an unpublished opinion, the Court of Appeals reversed, holding that promissory estoppel remains an exception to the statute of frauds and remanding for further proceedings. The Court of Appeals explained that it was compelled to reach this result by binding precedent, opined that it was the wrong result, and urged the Supreme Court to grant leave to appeal to address the issue. The Supreme Court has ordered oral argument on the school district's application for leave to appeal to address whether promissory estoppel is an exception to the statute of frauds. MCL 566.132.

153829, McQueer v Perfect Fence Co

Plaintiff, an employee of defendant Perfect Fence Company, was injured while installing a fence when he was struck in the head by a Bobcat that was being used to drive a fence post into the ground. The operator of the Bobcat was plaintiff's nominal supervisor, who had allegedly, just a day or two earlier, been instructed by defendant's owner not to employ the Bobcat in that manner because it was too dangerous. After plaintiff brought this negligence suit, defendant moved for summary disposition, arguing that plaintiff was an employee receiving worker's compensation benefits, and that the exclusive remedy provision of the worker's compensation act barred the suit. The trial court agreed, rejecting plaintiff's argument that he could maintain his suit pursuant to MCL 418.171(4), which provides that statutory employers who try to circumvent the insurance requirements of the act may be held liable in tort. The trial court also refused to allow plaintiff to amend his complaint to add an intentional tort claim, because there was no evidence of any intent to injure, or to add a breach of contract claim, because the amount involved was jurisdictionally inadequate. In an unpublished opinion, the Court of Appeals reversed, holding that plaintiff had done enough to maintain or further develop his claims under MCL 418.171(4) and the intentional tort exception to the worker's compensation exclusive remedy. The Supreme Court has ordered oral argument on the defendant's application for leave to appeal to address: (1) whether the statutory employer provision of MCL 418.171(4) is applicable to plaintiff's claims; and (2) if so, whether plaintiff has established a genuine issue of material fact sufficient to avoid summary disposition; and (3) whether the Court of Appeals erred by reversing the trial court's order denying, on the basis of futility, plaintiff's motion to amend his complaint to add an intentional tort claim.

156057-8, Denishio Johnson v Curt VanderKooi

Law enforcement officers in Grand Rapids, with the knowledge and approval of the City, occasionally photograph and fingerprint individuals who are questioned in public and are without identification. This practice, called "P&P," occurs even when the individuals photographed and fingerprinted are not arrested and no evidence of criminal activity is found. The photograph/fingerprint cards are collected and maintained by the City. Plaintiffs are two teenaged individuals who were subject to the P&P procedure, and, represented by the American Civil Liberties Union of Michigan, filed suit against the City and the officers who conducted the

P&P. The ACLU challenged the practice on various constitutional and statutory bases. The trial court granted summary disposition to defendants, holding that the officers were entitled to qualified immunity and that the City was entitled to dismissal for lack of a showing of an official municipal policy or custom violating plaintiffs' constitutional rights. The Court of Appeals affirmed, issuing two separate opinions, one published. The Supreme Court has ordered oral argument on plaintiffs' application for leave to appeal to address whether the police department's actions were a policy or custom.

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