



MICHIGAN COURTS NEWS RELEASE

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FOR IMMEDIATE RELEASE

Michigan Supreme Court Announces Cases for December 2017 Oral Arguments

LANSING, MI, November 22, 2017—The Michigan Supreme Court announced that oral arguments in 7 cases will be heard December 6, 2017. 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, December 6, 2017
Morning Session – 9:30 a.m.**

[154494, People v Gary Michael Traver](#)

Defendant was charged with felonious assault and weapons offenses arising out of a dispute with his neighbor. At trial, rather than read aloud the jury instructions on the elements of those crimes, the trial judge gave the jurors a written copy of the elements. With regard to the crime of possession of a firearm during commission of a felony (felony-firearm), the written packet contained the elements of felony-firearm and set forth the definition of possession. At defense counsel's request, the judge supplemented the written packet with verbal instructions on felony-firearm, which were still inaccurate. Nonetheless, defense counsel expressed satisfaction with the instructions. The Court of Appeals reversed in a split published opinion, holding that the trial judge's failure to read all of the jury instructions aloud constituted plain error affecting defendant's substantial rights. The majority also remanded for an evidentiary hearing on defendant's claim of ineffective assistance of counsel due to counsel's alleged failure to advise defendant properly about whether to withdraw his guilty plea and proceed to trial. The dissenting

judge reasoned that defendant waived any instructional error and that defendant had failed to establish the factual predicate for his claim of ineffective assistance of counsel. The Supreme Court has directed oral argument on the prosecuting attorney's application for leave to appeal to address: (1) whether the trial court erred by providing written instructions to the jury on the elements of the charged offenses but not reading those instructions aloud to the jury; (2) whether the trial court's instructions on the charge of felony-firearm fairly presented the issues to be tried and adequately protected the defendant's rights; (3) whether the defendant waived any instructional errors when his attorney expressed satisfaction with the instructions as given, see *People v Kowalski*, 489 Mich 488 (2011); (4) what standard of review this Court should employ in reviewing the Court of Appeals decision to order an evidentiary hearing on the ineffective assistance of counsel claim; and (5) whether the Court of Appeals erred under the applicable standard when it ordered an evidentiary hearing for defendant to establish the factual predicate for his claim that his trial counsel was ineffective for failing to properly advise him of the potential consequences of withdrawing his guilty plea. See MCR 7.211(C)(1)(a)(ii) and *People v Ginther*, 390 Mich 436, 445 (1973).

[152655, In re Mardigian Estate](#)

Appellee Mark Papazian, a lawyer, prepared the will and trust documents that left the bulk of decedent Robert D. Mardigian's estate to Papazian and his children. Appellants are the decedent's relatives, who challenged the will and trust. The probate court granted summary disposition to appellants, finding that the testamentary documents drafted by appellee that benefitted appellee and his children violated the Michigan Rules of Professional Conduct (MRPC) 1.8(c) and would not be enforced. Appellee appealed and the Court of Appeals reversed in a split published opinion. The majority applied *In re Powers Estate*, 375 Mich 150 (1965), holding that the drafter of a will or trust is not disqualified from inheriting under the instrument, but there is a presumption of undue influence. The majority remanded the case to the probate court for further proceedings under that standard. The dissent would have affirmed on the basis that *In re Powers* has been superseded by MRPC 1.8(c), which expressly prohibits a lawyer from preparing an instrument for a client that gives the lawyer or an immediate relative of the lawyer any substantial testamentary gift. Appellants sought leave to appeal in this Court. Following oral argument on the application for leave to appeal, the Supreme Court granted leave to appeal to address: (1) whether the rebuttable presumption of undue influence set forth in *In re Powers*, when used as a means to determine the testator's intent, is a workable rule that sufficiently protects the testator when the testator's lawyer violates MRPC 1.8(c); (2) whether this Court's adoption of MRPC 1.8(c) warrants overruling *In re Powers*; and (3) if *In re Powers* is overruled, whether a violation of MRPC 1.8(c) should bear on the validity of the gift provided to the testator's lawyer under the testamentary instrument; and if so, how?

[154565, People v Lavere Douglas-Le Bryant](#)

A jury convicted defendant of two counts of first-degree premeditated murder and other offenses. The convictions arose from the robbery of a Family Dollar store and the shooting deaths of two store employees, Brenna Machus and Joseph Orlando. Defendant had been fired from his employment with Family Dollar approximately two months before the murders. At trial, pursuant to MRE 404(b), the prosecution presented the testimony of twelve current and former employees of Family Dollar regarding acts of sexual harassment committed by defendant. The prosecution also presented evidence that defendant was a convicted sex offender and that he had failed to

register as a sex offender. In addition, three police officers testified that they identified defendant in a surveillance video. Defendant testified, denying that he was fired because of sexual harassment, and denying that he committed the murders. The Court of Appeals, in an unpublished opinion, vacated defendant's convictions and remanded for a new trial, holding that the trial court abused its discretion in admitting the "other acts" evidence because its probative value was substantially outweighed by unfair prejudice, MRE 403. The Court of Appeals further held that the trial court erred in allowing the lay opinion testimony of three police officers, but it did not grant a new trial on that basis. The Supreme Court has directed oral argument on the prosecutor's application for leave to appeal to address: (1) whether the trial court abused its discretion in admitting "other acts" evidence; (2) if so, whether the error was harmless; and (3) whether the testimony of three police officers invaded the province of the jury when they testified about their observations in viewing the video evidence.

[154717, Kerry Jendrusina v Shyam Mishra, MD](#)

On September 17, 2013, plaintiff Kerry Jendrusina filed a medical malpractice complaint against defendants Dr. Shyam Mishra and Dr. Mishra's professional corporation. Plaintiff alleged that over the course of several years Dr. Mishra was his primary care physician and failed to properly manage his deteriorating kidney health. Defendants moved for summary disposition, arguing that plaintiff's lawsuit was time-barred under the discovery rule, MCL 600.5838a(2), which provides that a plaintiff has six months to bring a medical malpractice suit after he "discovers or should have discovered the existence of the claim." The trial court granted the motion, holding that plaintiff should have discovered the claim by January 3, 2011, when plaintiff was treated in a hospital emergency room and diagnosed with end-stage renal failure. The Court of Appeals reversed in a split published decision. The majority held that the proper inquiry under MCL 600.5838a is whether it was "probable that a reasonable lay person would have discovered the existence of the claim," and it concluded that plaintiff's claim was discoverable in September 2012, when plaintiff was told by his treating nephrologist that Dr. Mishra should have referred plaintiff to a specialist in 2008 and that plaintiff's kidneys could have been saved. The dissenting judge would have affirmed under *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997). The Supreme Court has directed oral argument on defendants' application for leave to appeal to address whether plaintiff's complaint was timely filed under MCL 600.5838a(2) and *Solowy*.

Afternoon Session – Approximately 1:00 p.m.

[154445, People v Johnny Ray Kennedy](#)

In 1993, the body of Tanya Harris was discovered in an abandoned building in Detroit. The police were initially unable to develop any reliable leads to solve the murder. In 2011, new DNA testing of samples taken from Harris' body revealed a link to defendant Johnny Kennedy, who was already serving a prison sentence for the 1995 murder of a similarly situated victim. A jury convicted defendant of first-degree premeditated murder, based almost entirely on the DNA evidence and evidence of his commission of the earlier murder. On appeal, defendant raised a number of challenges to the trial proceedings but, in a split unpublished opinion, the Court of Appeals majority affirmed defendant's conviction. The dissenting judge concluded that the trial court's refusal to appoint a DNA expert to consult with the defense deprived defendant of his constitutional right to present a defense. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address whether the trial court abused its discretion

under MCL 775.15 and/or violated defendant's constitutional right to present a defense when it denied his request to appoint a DNA expert. See *People v Tanner*, 469 Mich 437 (2003); *Ake v Oklahoma*, 470 US 68, 74; 105 S Ct 1087 (1985); *Moore v State*, 390 Md 343, 364; 889 A2d 325 (2005).

[154476, Audrey Trowell v Providence Hosp & Med Ctrs, Inc](#)

Plaintiff Audrey Trowell filed a complaint for "medical negligence," claiming that when she was a patient in defendant Providence Hospital ICU a nurse dropped her twice while assisting her to the bathroom. Defendant moved for summary disposition under MCR 2.119(C)(7) and (C)(8), arguing that the factual allegations in the complaint made out a claim of medical malpractice, and that plaintiff failed to comply with the necessary procedural requirements. In response, plaintiff argued that her claim was one for ordinary negligence. The trial court ruled that the complaint was one for medical malpractice and granted defendant's motion. The trial court later denied plaintiff's motion to amend the complaint and motion for reconsideration. In a published opinion, the Court of Appeals considered *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422 (2004), which held that in determining whether the nature of a claim is ordinary negligence or medical malpractice, a court must answer two fundamental questions: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." The panel characterized plaintiff's complaint as "fairly vague" but held that it could envision a situation in which plaintiff's allegations did not raise questions of medical judgment and, therefore, the claim was one for ordinary negligence. The panel reversed the grant of summary disposition to defendant and remanded for further factual development. The Supreme Court has directed oral argument on the application for leave to appeal to address whether plaintiff's complaint alleged a claim of ordinary negligence or medical malpractice under *Bryant*.

[154489, Teri Walters v Donald S Falik](#)

Defendant Donald S. Falik, DDS, conceded that he provided plaintiff Teri Walters with the wrong solution for whitening her teeth. Instead of the usual hydrogen peroxide solution, plaintiff was given a phosphoric acid solution used for etching teeth. A few months later, she was diagnosed with Wegener's granulomatosis (WG), an autoimmune disease. Plaintiff's proposed expert, M. Eric Gershwin, MD, an epidemiologist, opined that the disease was "triggered" by the exposure to phosphoric acid. Dr. Gershwin admitted that there was no scientific literature to support his conclusion that phosphoric acid causes WG; instead, the scientific literature stated that WG is a disease of unknown etiology. The trial court granted defendant's motion to exclude Dr. Gershwin's testimony, noting in part that none of the scientific articles presented by the parties referred to phosphoric acid or any kind of acid exposure as a cause of WG. In a split unpublished opinion, the Court of Appeals reversed and remanded for further proceedings. The majority relied on the *Sir Bradford Hill* criteria adopted by the Court of Appeals in *Chapin v A&L Parts, Inc*, 274 Mich App 122 (2007), for the proposition that a plaintiff need not "definitively establish a causal link between the exposure and WG," and the appeals panel noted that "there is no indication that there exist any studies showing that phosphoric acid does not cause WG." The dissenting judge concluded that, in view of the complete absence of support for Dr. Gershwin's opinion, the trial court had not abused its discretion by granting the motion in limine. The Supreme Court has directed oral argument on the application for leave to appeal to

address: (1) whether the Court of Appeals erred in its interpretation of MCL 600.2955(1) and MRE 702; and (2) whether the trial court erred in its application of those evidentiary standards or abused its discretion in granting the motion in limine to exclude the testimony of plaintiff's experts and the motion for summary disposition.

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