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Michigan Supreme Court Announces Cases for January 2018 Oral Arguments

LANSING, MI, December 26, 2017—The Michigan Supreme Court announced that oral arguments in 14 cases will be heard January 10-11, 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, January 10, 2018
Morning Session – 9:30 a.m.

Alice M. Brown v City of Sault Ste Marie, #154851
On May 6, 2014, plaintiff Alice Brown sustained injuries when she fell head-first over the sheer edge of an excavation hole created by defendant City of Sault Ste. Marie and its workers. On July 23, 2014, plaintiff's attorney sent a letter to defendants for the purpose of providing the required statutory notice of plaintiff's intent to make a claim for injury and damage under the highway exception to governmental immunity. See MCL 691.1404(1), which requires the notice to "specify . . . the injury sustained . . . ." Plaintiff's notice stated only that she "suffered severe and permanent injuries," but it referenced certain documents that had been obtained from defendants through a Freedom of Information Act request and described plaintiff's injuries in more detail. The trial court granted summary disposition to defendants and denied plaintiff's motion for reconsideration. The Court of Appeals reversed and remanded for further proceedings, concluding that plaintiff's notice satisfied the statute. The Supreme Court has directed oral argument on defendants' application for leave to appeal to address whether the Court of Appeals properly applied MCL 691.1404(1) when it concluded that plaintiff's notice,

"when read as a whole," was adequate because the notice "referenced documents" that more fully described her injuries.

People of MI v Lonnie James Arnold, #154764

Defendant was convicted of indecent exposure as a sexually delinquent person. The trial court rejected defendant's request to be sentenced to serve one day to life under MCL 750.335a(2)(c) and instead sentenced him to serve a prison term of 25 to 70 years. In an unpublished opinion, the Court of Appeals remanded for the trial court to determine whether it would adhere to the sentencing guidelines rather than the § 335a(2)(c) alternative sentence given that the guidelines have been rendered advisory by *People v Lockridge*, 498 Mich 358 (2015). The appeals court later granted defendant's motion for reconsideration, because in *People v Campbell*, 316 Mich App 279, 300 (2016), a different panel held that "after the decision in *Lockridge*, trial courts must sentence a defendant convicted of indecent exposure as a sexually delinquent person consistent with the requirements of MCL 750.335a(2)(c)." Accordingly, in a second unpublished opinion on reconsideration, the Court of Appeals remanded for imposition of a mandatory sentence of one day to life. On appeal by the prosecuting attorney, the Supreme Court has granted leave to appeal to address: (1) whether MCL 750.335a(2)(c) requires the mandatory imposition of "imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life" for a person who commits the offense of indecent exposure by a sexually delinquent person, or whether the sentencing court may impose a sentence within the applicable guidelines range, see MCL 777.16q; (2) whether the answer to this question is affected by this Court's decision in *Lockridge*; and (3) whether *Campbell* was correctly decided.

Michael Martin v Milham Meadows 1 Ltd. Partnership, #154360

Plaintiff Michael Martin suffered serious injuries when he slipped and fell down the stairs leading to the basement of his rented townhouse. He claimed that he slipped on the top step, that he had slipped on the stairs before, as had his son and other guests, and that he had repeatedly complained about the slippery condition of the painted stairs to the management of the apartment complex, with no results. He filed suit against both the apartment complex lessor and its management company for premises liability and the "landlord's covenant," MCL 554.139(1), which requires that a landlord covenant with a tenant that the premises are "fit for the use intended" and kept "in reasonable repair." The trial court granted summary disposition to defendants on both claims. With regard to the statutory claim, the trial court found no question of fact whether the stairs, used on multiple occasions without incident, were unfit or not in reasonable repair, and the court found plaintiff's notice of the defect to be inadequate. The Court of Appeals affirmed the dismissal of the premises liability claim, holding that the hazardous condition was open and obvious, but the panel reversed as to the statutory claim, holding that plaintiff's notice was sufficient and concluding that reasonable minds could differ on whether the painted stairway was fit for everyday use. The Supreme Court has directed oral argument on defendants' application for leave to appeal to address whether genuine issues of material fact preclude summary disposition on plaintiff's claim that the stairs at issue were not "fit for the use intended by the parties" and that defendants did not keep the stairs in "reasonable repair." MCL 554.139(1)(a) and (b).

People of MI v Tremel Anderson, 155172

Defendant was charged with various felonies, including assault with intent to commit murder and weapons offenses, arising from an incident involving her ex-boyfriend. At the preliminary examination,

the prosecutor presented only the testimony of the ex-boyfriend. The district court found that the witness was not credible and refused to bind defendant over for trial. The prosecutor appealed to the circuit court, which refused to reinstate the charges. The Court of Appeals affirmed in a split unpublished opinion. The Supreme Court has directed oral argument on the prosecutor's application for leave to appeal to address: (1) the manner in which a magistrate judge may consider the credibility of witnesses at a preliminary examination when determining whether to bind over a defendant, in light of People v Yost, 468 Mich 122, 128 n 8 (2003), which instructs that a magistrate should not refuse to bind a defendant over when the evidence conflicts or raises reasonable doubt; and (2) whether the circuit court abused its discretion in dismissing the charges in this instance

Afternoon Session – Approximately 1:00 p.m.

People of MI v Carl Rene Bruner, II, #154779

Defendant Carl Bruner and codefendant Michael Lawson were charged for their participation in the shooting of two security guards outside a nightclub in Detroit. One guard, Marcel Jackson, was fatally shot, and the other, Wayne White, Jr., was shot in the back, but he was wearing a bulletproof vest and not injured. Defendant and Lawson were tried together before a single jury. Witnesses testified that after defendant was ejected from the nightclub for fighting, he continued to behave erratically and threatened to return. Witnesses saw defendant in the vicinity of the nightclub for approximately the next two hours. After the nightclub closed, defendant was seen in the passenger seat of a vehicle driven by Lawson, which circled the block. At a certain point, the passenger's seat was observed to be empty. Lawson was seen getting out of the driver's seat while talking on a phone. White testified that as he and Jackson looked for defendant, White heard the racking sound of a gun behind them and then gunfire. Lawson did not take the stand, but, over objection by defendant on various grounds, a portion of the preliminary examination testimony of Westley Webb was read to the jury. The trial court instructed the jury to consider that testimony only against Lawson. According to Webb, Lawson had made statements to him that on the day of the shootings he and "blank" (inserted in place of defendant's name when read to the jury) were riding around together, that "blank" got out of the car, and that Lawson heard gunshots a short time later. The jury convicted defendant of first-degree premeditated murder, assault with intent to commit murder, felon in possession of a firearm, and felony-firearm. Lawson was convicted of second-degree murder and assault with intent to commit murder. The Court of Appeals affirmed defendant's and Lawson's convictions; one judge concurred, but provided an additional statement as to the hearsay issue arising from admission of Webb's preliminary examination testimony. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address: (1) whether the admission of Webb's preliminary examination testimony at the joint trial violated defendant's constitutional right to confrontation, despite the trial court's redaction of that testimony and limiting instruction to the jury, see *Gray v Maryland*, 523 US 185 (1998); *Bruton v United States*, 391 US 123 (1968); and (2) if so, whether the error in admitting the testimony was harmless, see *People v Carines*, 460 Mich 750, 774 (1999).

Ally Financial, Inc v State Treasurer, #154668-70

Plaintiffs are lenders who provided financing for the purchase of motor vehicles from various dealerships. When a purchaser defaulted and the contract had an unpaid balance after repossession and resale, plaintiffs sought under MCL 205.54i of the General Sales Tax Act a refund of the sales tax paid on the installment sales that resulted in bad debts. The Michigan

Department of Treasury rejected the claimed refunds on the grounds that the repossessed property is excluded under the act, that plaintiffs failed to submit the proper documentation, and that plaintiff Ally Financial's election forms were insufficient to determine whether Ally or the dealerships were entitled to the refunds. Plaintiffs filed suit in the Court of Claims, which granted summary disposition to the Department on several grounds: (1) accounts in which the property was repossessed are not "bad debts" under MCL 205.54i, regardless whether a balance remained after the repossessed property was sold; (2) the Department could require plaintiffs to submit RD-108 forms to support their claims; and (3) plaintiff Ally's election forms only covered "currently existing" and future accounts, and accounts that had already been written off for tax purposes were not "currently existing." The Court of Appeals affirmed in a published opinion, agreeing with the Department on all issues. The Supreme Court has directed oral argument on plaintiffs' applications for leave to appeal to address: (1) whether MCL 205.54i prohibits partial or full tax refunds on bad debt accounts that include repossessed property; (2) whether the Court of Appeals erred in giving the Department's interpretation of MCL 205.54i respectful consideration in light of MCL 24.232(5); (3) how the Supreme Court should review the Department's decision to require RD-108 forms pursuant to MCL 205.54i(4) and, under that standard, whether the decision was appropriate; and (4) whether the Court of Appeals erred in holding that Ally Financial's election forms did not apply to accounts written off prior to the retailers' execution of the forms.

Pontiac Bd of Trustees v City of Pontiac, #154745

Plaintiff Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (the Trust) was organized to pay the healthcare benefits of Pontiac fire and police department retirees who retired on or after August 22, 1996. Under the terms of the trust agreement, defendant City of Pontiac was required to make annual contributions to the trust fund in an amount necessary to provide health plan benefits. In 2012, Pontiac came under the control of an Emergency Manager (EM), and did not make its $3.47M contribution to the trust fund for fiscal year (FY) 2011-2012. Instead, the EM issued Executive Order No. 225 (EO 225), which amended the trust agreement to remove the city's obligation "to continue to make contributions" to the trust fund. The Trust sued, but the trial court granted summary disposition to the city and dismissed the case, finding that the EM had properly modified the city's obligation to contribute to the trust fund for FY 2011-2012 and that the Trust's constitutional claim was without merit. The Court of Appeals, in a published opinion, agreed that the Trust's challenges to the EM's authority lacked merit, but reversed, holding that the language of the EO—"to continue to make contributions"—did not encompass the already accrued contribution for FY 2011-2012. The Supreme Court, in a peremptory order, reversed the part of the Court of Appeals decision that interpreted EO 225, vacated the part that discussed the Trust's breach of contract claim, and remanded the case to the Court of Appeals to consider certain questions. On remand, the Court of Appeals, in a second published decision, held: (1) the retroactivity analysis in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), applies to EO 225; (2) the retroactive application of EO 225 to extinguish the city's accrued but unpaid contribution to the trust for FY 2011-2012 was impermissible under *LaFontaine*; and (3) it was unnecessary to address otherwise applicable methods of assessing retroactivity. The case returned to the Supreme Court, which has directed oral argument on the city's application for leave to appeal to address: (1) whether the Court of Appeals correctly concluded that the principles of *LaFontaine* apply to the analysis of EO 225; and that (2) the retroactive application of EO 225 to extinguish

the city's accrued but unpaid contribution to the trust for the FY 2011-2012 was impermissible under *LaFontaine*; and (3) if not, whether EO 225 constitutes an impermissible retroactive modification of the FY 2011-2012 contribution under Const 1963, art 9, § 24.

Thursday, January 11, 2018
Morning Session – 9:30 a.m.

Harmony Montessori Center v City of Oak Park, #154819
Petitioner Harmony Montessori Center is a private, nonprofit preschool and kindergarten. In 2009, respondent City of Oak Park assessed ad valorem property taxes against the school. Harmony protested the assessment, contending that it was entitled to the exemptions in the General Property Tax Act as an educational institution and charitable institution. The Michigan Tax Tribunal determined that Harmony was entitled to neither exemption because it did not substantially alleviate the state's educational burden and because it charged tuition to the vast majority of its students and offered reduced pricing to only a few. In 2012, the Court of Appeals reversed the tribunal and remanded the case, finding errors of law in the tribunal's conclusions regarding both exemptions. The Supreme Court denied the city's application for leave to appeal. In 2015, the tax tribunal again determined that Harmony was not entitled to claim either exemption. In 2016, a different panel of the Court of Appeals affirmed in a split unpublished opinion. The Supreme Court has directed oral argument on Harmony's application for leave to appeal to address whether Ladies Literary Club v Grand Rapids, 409 Mich 748 (1980), and David Walcott Kendall Memorial School v Grand Rapids, 11 Mich App 231 (1968), continue to provide the appropriate test of what constitutes a "nonprofit . . . educational . . . institution[]" under MCL 211.7n.

Ali Bazzi v Sentinel Insurance Co, #154442
Plaintiff Ali Bazzi was injured in an automobile accident while driving a vehicle owned by his mother, and insured under a no-fault automobile insurance policy issued by defendant Sentinel Insurance Company. Plaintiff filed suit against Sentinel seeking personal injury protection (PIP) benefits. Sentinel rescinded the policy, claiming that it was procured by fraud. Sentinel then filed a motion for summary disposition on the PIP claims asserted by plaintiff. The trial court denied the motion on the basis of the innocent third-party rule, which provides that an insurer may not rescind a no-fault insurance policy because of a material misrepresentation made in the application for insurance where there is a claim involving an innocent third party. Sentinel sought interlocutory appellate review, which the Court of Appeals denied. The Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. On remand, the Court of Appeals, in a published opinion, held that the innocent third-party rule did not survive the Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547 (2012). Therefore, the Court of Appeals reversed the ruling of the trial court and remanded for further proceedings. Plaintiff and two intervenors (healthcare providers that provided services to plaintiff) sought leave to appeal in the Supreme Court, which has granted leave to appeal to address whether the innocent third-party rule survived *Titan*.

People of MI v Darrell John Wilder, #154814
Two police officers claimed that as they drove toward a group of people standing near a car in a vacant lot, they saw defendant pull a handgun from his waistband and place it in the trunk of the

car. Defendant was charged with various weapon offenses. At trial, the defense called defendant's wife, Tameachi Wilder, as a witness. She testified on direct examination that she did not see defendant with a gun on the day of the offense, that they had no guns in their house, and that defendant did not own a gun. On cross-examination, the prosecutor asked whether she knew defendant to carry guns, and she responded no. The trial court, over objection by the defense, permitted the prosecutor to ask the witness whether she knew of defendant's prior weapons convictions, finding that defense counsel's questions on direct examination opened the door for the prosecutor's cross-examination. The jury acquitted defendant of carrying a concealed weapon, but convicted him of being a felon in possession of a firearm and felony-firearm. The Court of Appeals affirmed in an unpublished opinion, holding that the cross-examination was proper. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address (1) whether the trial court erred by allowing the prosecutor to cross-examine defendant's wife about defendant's prior weapons convictions, (2) whether the prosecutor improperly raised a collateral issue to admit evidence of defendant's prior felony convictions through impeachment, see *People v Stanaway*, 446 Mich 643 (1994), and (3) whether any error was harmless.

People of MI v Devaun Laroy Lopez, #154566

A jury convicted defendant of first-degree murder and other offenses. Prior to trial, the prosecutor was concerned that a key witness would offer testimony at trial that differed from his testimony at the preliminary examination, and warned the witness that he could be sent to prison for life if he lied on the stand. The witness refused to testify and the trial court allowed the prosecutor to admit the witness's preliminary examination testimony under MRE 804(b)(1) because the witness was unavailable under MRE 804(a)(1) or (2). On appeal, defendant argued that the prosecutor issued the warning to the witness, causing his unavailability, in order to introduce the witness's preliminary examination testimony at trial. In a published opinion, the Court of Appeals reversed defendant's convictions, agreeing with defendant's argument and further observing that the preliminary examination testimony would be inadmissible if the witness refused to testify on retrial. The Supreme Court has directed oral argument on the prosecutor's application for leave to appeal to address: (1) whether prior testimony is admissible under MRE 804(b)(1) where the proponent of the statement has caused the declarant to be unavailable under MRE 804(a), regardless of any intent by the proponent to cause unavailability; and, (2) if some form of intent is required, what standards should apply when determining whether the proponent's actions were intended to cause the declarant to be unavailable.

Afternoon Session – Approximately 1:00 p.m.

People of MI v Samer Shami, #155273

Defendant is charged with violating the Tobacco Products Tax Act (TPTA), MCL 205.421 *et seq*., by possessing tobacco products without proper invoices and manufacturing tobacco products without a license. Defendant, who managed the day-to-day operations of a licensed "secondary wholesaler" and "unclassified acquirer" of tobacco under the TPTA, did not have a license as a "manufacturer." He admitted that he mixed different flavors of hookah tobacco to create a new blend, and that he repackaged hookah tobacco under his own label. The TPTA defines "manufacturer" as "[a] person who manufactures or produces a tobacco product," MCL 205.422(m), but does not define the term "manufacture." The trial court granted defendant's

motion to dismiss the charges, holding that defendant's activities did not constitute "manufacturing." The Court of Appeals reversed in a published opinion, holding that defendant manufactured a new tobacco product by mixing different flavors to create a new blend. The panel also reinstated the charge of possessing tobacco without proper invoices. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address: (1) whether defendant's activities of mixing different flavors of tobacco to create different flavor combinations to offer customers and repackaging tobacco under his own label rendered him a "manufacturer" of tobacco under MCL 205.422(m); and, if so, (2) whether the TPTA's definition of "manufacturer" satisfied due process by putting defendant on fair notice of the conduct that would subject him to punishment. See *People v Hall*, 499 Mich 446, 461 (2016).

People of MI v Virgil Smith, #156353

In May 2015, State Senator Virgil Smith was charged with domestic violence, malicious destruction of personal property, felonious assault, and felony-firearm. The Wayne County Prosecutor entered into a plea agreement with Smith that required him to resign from office and not hold elective or appointed office during a five-year probationary term. The circuit court accepted the plea and sentenced Smith to serve five years of probation with the first ten months in jail, but then struck the provisions that barred Smith from holding elective or appointed office as violating the state constitution's separation of powers clause. See Const 1963, art 3, § 2. The circuit court also denied the prosecutor's motion to vacate the plea. The Court of Appeals dismissed the prosecutor's appeal as moot because Smith had since resigned his Senate seat, and the panel presumed that Smith would not run for office. When Smith chose to run for the Detroit City Council, the prosecutor moved for reconsideration, which the Court of Appeals denied. In the August 2017 primary election, Smith finished in second place and advanced to the November general election. The prosecutor filed an application for leave to appeal in the Supreme Court, asserting the need for an immediate decision to timely prepare the ballots. The Supreme Court ordered the case remanded to the Court of Appeals for expedited consideration as on reconsideration granted. On remand, in a split published opinion, the Court of Appeals majority upheld the circuit court's invalidation of the plea agreement provisions that required Smith to resign from office and to forgo holding public office during his probationary term. The dissenting judge asserted that elected officials may voluntarily resign from office as a result of a plea agreement without implicating separation of powers. The Supreme Court has denied the motion for immediate consideration, and directed oral argument on the prosecutor's application for leave to appeal to address: (1) whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers, see Const 1963, art 3, § 2; see also *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), or is void as against public policy, *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390, 1392-1393 (CA 9, 1991); (2) whether the validity of the provision requiring defendant to resign from public office was properly before the Court of Appeals because defendant resigned from the Senate after the circuit court struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy; and (3) whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement, see *People v Siebert*, 450 Mich 500, 504 (1995).

People of MI v Ryan Lashawn Chatman, #155184

Defendant was charged with assault with intent to murder and various weapons offenses arising from an incident in which Kevin Lawless was shot at the house of a mutual friend. At trial, Lawless testified that the shooting was preceded by an argument that started because defendant was playing around with a handgun and refused Lawless' request to put the gun away. Lawless explained that, although he and defendant were arguing 10 feet apart, defendant slapped him. He testified that defendant then pointed the gun at him and fired. Defendant did not dispute that he shot Lawless, but he testified that Lawless was angry at him after defendant refused to lend him money. Defendant said that they had a heated argument and that when Lawless grabbed a chair and charged at him, he fired his gun in self-defense or accidentally. In front of the jury, the trial judge questioned three prosecution witnesses—Lawless, a witness who was present at the scene, and a police detective. The defense did not object to the questioning. The jury convicted defendant as charged. In a split unpublished opinion, the Court of Appeals majority held that the trial judge's questioning pierced the veil of judicial impartiality warranting reversal of defendant's convictions and a new trial before a new judge. The Supreme Court has directed oral argument on the prosecutor's application for leave to appeal to address whether the trial judge's questioning of witnesses improperly influenced the jury by creating the appearance of advocacy or partiality against a party. See *People v Stevens*, 498 Mich 162 (2015)

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