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Michigan Supreme Court Announces Cases for March 2018 Oral Arguments

LANSING, MI, February 20, 2018—The Michigan Supreme Court announced that oral arguments in 10 cases will be heard March 6-7, 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.

Tuesday, March 6, 2018
Morning Session – 9:30 a.m.

#154622, Patricia Merchand v Richard L. Carpenter, MD
Plaintiff Patricia Merchand filed suit against defendant Richard L. Carpenter, M.D., alleging that he committed medical malpractice during a 2010 surgery, resulting in permanent injury. A jury returned a judgment of no cause of action in defendant's favor. The Court of Appeals reversed in a split unpublished per curiam decision, holding that the trial court had abused its discretion by not allowing one of plaintiff's experts to testify that medical records in other cases where defendant had been accused of malpractice were similar and that they purportedly did not accurately reflect his interactions with patients when surgeries resulted in serious complications. The Court of Appeals majority also affirmed the trial court's decision to instruct the jury on the doctrine of *res ipsa loquitur* (the thing speaks for itself). The dissenting judge would have held that the trial court properly excluded the evidence relating to defendant's other malpractice cases, and would have held that the trial court erred in giving the *res ipsa loquitur* instruction. The Supreme Court has directed oral argument on defendant's application for leave to appeal to

address whether the medical records and testimony sought to be admitted were admissible under MRE 404(b).

#155994, In re Williams, Minors

Respondent father of two minor children is a member of a federally recognized Indian Tribe. The children had been in foster care with the same family since 2012 and a petition to terminate respondent's parental rights was pending in Macomb Family Court when respondent voluntarily released his parental rights in 2015. The family court entered an order terminating respondent's parental rights. The foster family petitioned to adopt the children, but in 2016 the Oakland Family Court denied their petition. Within a month, respondent filed a notice with the Macomb Family Court purporting, under MCL 712B.13(3) of the Michigan Indian Family Preservation Act (MIFPA), to withdraw his consent to the termination of his parental rights. After a hearing, the family court held that respondent was not entitled to withdraw his release under § 13(3) because he had not released his children to a specific adoptive family. In a published per curiam opinion, the Court of Appeals affirmed on different grounds. The Court of Appeals held that respondent had never executed a "consent" under MCL 712B.13(1) and, therefore, he was not entitled to invoke the subsection of that statute permitting withdrawal of that consent. The Supreme Court has granted leave to appeal to address whether respondent was entitled under the MIFPA to withdraw his consent to the termination of his parental rights for the purpose of adoption at any time before entry of a final order of adoption. MCL 712B.13(3).

#154524, 26, South Dearborn Environmental Improvement Ass'n v DEQ

Beginning in 2005, the Department of Environmental Quality (DEQ) approved a series of permits for the rebuilding of a blast furnace and the installation of three air pollution control devices at a steel plant originally operated by Severstal Dearborn and later purchased by AK Steel. Each successive "permit to install" modified and replaced the preceding one. The DEQ issued the fourth of these permits on May 12, 2014. On July 10, 2014, 59 days after this permit renewal was issued, petitioners filed a claim of appeal in Wayne Circuit Court, seeking to have the permit vacated. Petitioners are environmental groups who object to the permit and allege that the DEQ lacked authority to issue the permit. After acquiring Severstal, AK Steel moved to dismiss petitioners' appeal for lack of jurisdiction, arguing that the claim was not timely filed under MCR 7.123(B)(1) and MCR 7.104(A). Appeals from agencies not governed by another court rule are governed by MCR 7.123, and subrule (B)(1) provides that the time requirements of MCR 7.104(A) apply. That subrule provides that an appeal of right shall be filed in the circuit court within 21 days of the decision being appealed. The circuit court denied AK Steel's motion, agreeing with petitioners that, pursuant to MCL 324.5506(14) of the Natural Resources and Environmental Protection Act (NREPA), they had 90 days after issuance of the permit to file their appeal, and therefore the filing was timely. In a published opinion, the Court of Appeals held that pursuant to MCR 7.119, which applies to agency decisions made under the Administrative Procedures Act (APA) and has a 60-day filing period, petitioners' appeal was timely filed. AK Steel and the DEQ have applied for leave to appeal. The Supreme Court has directed oral argument on the applications to address: (1) whether MCL 324.5505(8) and MCL 324.5506(14) prescribe the applicable time period for filing a petition for judicial review of the DEQ's issuance of the challenged permit; and (2) if not, whether the issuance of that permit was a decision of that agency subject to the contested case provisions of the APA, such that the time

period for filing a petition for judicial review set forth in MCR 7.119(B)(1) applies, rather than the time period established by MCR 7.123(B)(1) and MCR 7.104

#155413, Susan Blackwell v Dean Franchi and Debra Franchi

Plaintiff Susan Blackwell was invited to a holiday dinner party at the home of a work colleague, defendant Debra Franchi. She was told to put her purse in a room down a hallway. This room, identified as the home's "mud room," was connected to the garage and was not lit at the time. Plaintiff entered the unlit room, not noticing an 8-inch step down into the room. She lost her balance and fell. Plaintiff filed suit against defendants on a theory of premises liability. The trial court granted summary disposition in favor of defendants based on their argument that the allegedly dangerous condition was open and obvious. The Court of Appeals reversed in a split published opinion, holding that the alleged danger posed by the step must be evaluated in its unlit state, and that plaintiff had established a question of fact whether the danger posed by the step in the unlit room was open and obvious. The dissent concluded that the potential danger confronting plaintiff was not the step, but rather the darkness of the room, and it was this condition that was open and obvious. The Supreme Court has directed oral argument on defendants' application for leave to appeal to address whether they owed a duty to warn plaintiff of the condition on the premises, given the general rule that "[a] landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved," *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000).

Afternoon Session – Approximately 1:00 p.m.

#155380, Kerri Otto, Next Friend of Bailey Noble v Inn at Watervale

Plaintiff Kerri Hunter Otto's 10-year-old daughter Bailey Noble, and Bailey's friend Sophie and her parents, went to the private property of defendant The Inn at Watervale in August 2013 to enjoy the Lake Michigan beach. They laid towels on the beach and, while the two adults read books, the girls built sand castles and splashed around in the water. About an hour into the visit, Bailey stepped on hot coals, burning her foot. The hot coals apparently had been left by other unknown beachgoers who had covered them with sand. Plaintiff filed this negligence suit against defendant. Defendant moved for summary disposition under the Recreational Land Use Act (RUA), MCL 324.73301(1), which requires a plaintiff engaged in "fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use" of another's property to show that her injuries were caused by the "gross negligence or willful and wanton misconduct" of the property owner. The trial court granted summary disposition in favor of defendant, finding that the RUA barred plaintiff's complaint because the girls' beach activities constituted 'any other outdoor recreational use.'" The Court of Appeals reversed, holding that the girls' beach activities were not "outdoor recreational use" of defendant's property within the meaning of the RUA. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address whether the activities engaged in by plaintiff's daughter and her companions constituted "other outdoor recreational use" of the defendant's land under the RUA.

#153697, People of MI v Jose L. Garcia-Mandujano

Defendant Jose Garcia-Mandujano was convicted by a jury of first-degree criminal sexual conduct for engaging in a sexual act with a 12-year-old girl. Defendant moved for a new trial, arguing, among other claims, several grounds of ineffective assistance of trial counsel. In particular, defendant argued that his trial counsel was ineffective for failing to interview the physician's assistant who examined the complainant after she made the allegations against defendant. At trial, the physician's assistant had testified about her physical findings during examination of the complainant that were consistent with the allegations. However, those physical findings were not mentioned in the physician's assistant's written report. Following an evidentiary hearing, the trial court denied the motion for new trial. The Court of Appeals affirmed. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address whether he was denied the effective assistance of trial counsel where (1) counsel failed to interview the physician's assistant who examined the complainant prior to trial; and (2) counsel failed to impeach the physician's assistant's testimony.

Wednesday, March 7, 2018
Morning Session – 9:30 a.m.

#155398, TM v MZ

Petitioner TM obtained a modified personal protection order (PPO) against respondent MZ, prohibiting him from posting any messages through the use of any medium of communication, including the Internet. TM alleged that MZ had repeatedly posted disparaging things about her on public Internet forums and in private messages to various people. Both parties were involved in local politics, and MZ argued on appeal that the PPO was an attempt to restrict his First Amendment rights. The Court of Appeals dismissed the appeal as moot because the PPO had expired while the appeal was pending and there was no indication on the record that it had been renewed or extended. The Supreme Court has directed oral argument on respondent's application for leave to appeal to address whether an appeal from a PPO is necessarily rendered moot by the fact of its expiration.

#154556-7, Coloma Charter Twp v Berrien County

In 2005, Berrien County leased property in Coloma Charter Township to build a training facility and four outdoor shooting ranges, where Berrien County Sheriff's Department officers would receive firearms training. A number of residents sued the county, alleging that the county was not authorized to build the outdoor shooting ranges without first complying with the Township Zoning Act (TZA), MCL 125.271 *et seq.* [now repealed]. The county argued that the County Commissioners Act (CCA), MCL 46.1 *et seq.*, had priority over any conflicting provisions of the TZA. See MCL 46.11(b), (d). The lawsuit resulted in a Supreme Court decision holding that the county had authority under the CCA only to "site" and "erect" buildings and for any ancillary land use that is indispensable to the building's normal use. *Herman v Berrien Co*, 481 Mich 352 (2008). The Court concluded that the outdoor shooting ranges were not indispensable to the normal use of the classroom training facility and, therefore, the township's ordinances controlled. The case returned to the circuit court, which entered a permanent injunction in late 2008, enjoining the county from using the shooting ranges. Thereafter, the county began conducting law enforcement firearms training at a private gun club in the township. To accommodate the additional use, the gun club sought to construct six additional outdoor shooting

ranges. In 2010, the township filed this action to enjoin the gun club's expansion of a nonconforming use. The circuit court granted summary disposition to the township and ordered the nuisance abated. In 2013, the county board of commissioners passed a resolution to construct a shooting range building near the training facility, which it claimed would be consistent with the "indispensable use" standard of *Herman*. The residents who had brought the earlier lawsuit moved to enforce the 2008 injunction and asked the circuit court to hold the county in civil and criminal contempt for violating the order. In addition, the township filed a new action, seeking to enjoin the county and the sheriff's department from discharging firearms at the site. The circuit court granted summary disposition to the county and sheriff's department, allowed the use of the building for firearms training, modified the permanent injunction to allow such use, and dismissed the township's civil contempt claim. The township and the residents filed separate appeals, which were consolidated. In a split published opinion, the Court of Appeals reversed, holding that the circuit court's orders were inconsistent with MCL 46.11(b) and (d), and with the *Herman* decision. The Court of Appeals remanded for entry of summary disposition in favor of the township and the residents, reversed the circuit court's modification of the injunction, and vacated and remanded on the issue of an award of attorney fees pursuant to MCL 600.1721. The Court of Appeals affirmed the dismissal of the criminal contempt claim. The Supreme Court has granted leave to appeal to address: (1) whether the gun range currently used by the Berrien County Sheriff's Department has priority under the CCA, MCL 46.11(b) and (d), over a conflicting township zoning ordinance, see *Herman v Berrien County*, 481 Mich 352 (2008); if so, (2) whether the Court of Appeals erred by reversing the circuit court's revision of the existing permanent injunction based on changed circumstances; and (3) whether the Court of Appeals properly vacated the circuit court's decision to deny the request for attorney fees pursuant to MCL 600.1721.

#155239, People of MI v Jonathan David Hewitt-El

Defendant Jonathan David Hewitt-El was convicted of armed robbery, assault, and weapons offenses in 2010. On direct appeal, defendant argued that his trial counsel rendered ineffective assistance by failing to investigate and present evidence of an alibi and by allowing the prosecution to impeach his testimony with his prior convictions. The Court of Appeals rejected these claims and affirmed defendant's convictions. In 2011, the Supreme Court denied defendant's application for leave to appeal. In 2012, defendant filed a motion for relief from judgment under MCR Subchapter 6.500, arguing that insufficient evidence was presented at trial to sustain his armed robbery conviction and that his trial counsel was ineffective for failing to investigate, develop, and present an alibi defense. The trial court denied the sufficiency of the evidence claim but ordered an evidentiary hearing on the ineffective assistance of counsel claim. Following the hearing, the trial court found that both trial and appellate counsel rendered ineffective assistance, and ordered a new trial for defendant. The prosecution appealed. The Court of Appeals peremptorily vacated the trial court's ruling on the basis that the trial court had not applied the standards for ruling on a motion for relief from judgment under MCR 6.508. The Supreme Court has directed oral argument on defendant's application for leave to appeal to address whether: (1) defendant's alleged grounds for relief were decided against him on direct appeal, MCR 6.508(D)(2); (2) the Court of Appeals failed to defer to the circuit court's credibility determinations; and (3) defendant has established entitlement to relief under MCR 6.508(D).

#156241, People of MI v Christopher Allen Oros

Defendant was charged with first-degree premeditated murder, felony murder, and other offenses for fatally stabbing Marie McMillan in her apartment and hours later returning to the apartment and setting it on fire. The police investigation led to defendant because on the day of the fire he had been knocking on the apartment doors of the victim's neighbors and using a fake story to solicit money. During police interrogation, defendant admitted trying to solicit money from the victim, but claimed that she attacked him and that he responded by stabbing her multiple times. At trial, the prosecutor argued that the number and type of knife wounds and other evidence surrounding the crime demonstrated that defendant had the opportunity to take a second look sufficient to establish premeditation and deliberation. The jury convicted defendant of both premeditated murder and felony murder. On appeal, in a published opinion, the Court of Appeals held that there was insufficient evidence of premeditation, reduced defendant's first-degree premeditated murder conviction to second-degree murder, and remanded for resentencing. The Court of Appeals also reversed defendant's felony murder conviction, holding that the instructions to the jury were flawed, and remanded for a new trial on that conviction. The prosecution appealed to the Supreme Court, challenging the Court of Appeals ruling that there was insufficient evidence of premeditation. The Supreme Court has directed oral argument on the prosecution's application for leave to appeal to address whether the Court of Appeals properly viewed the trial record for sufficient evidence of premeditation and deliberation in the light most favorable to the prosecution, including drawing all reasonable inferences in favor of the jury verdict, and whether the record evidence is sufficient to sustain defendant's first-degree premeditated murder conviction. See *People v Gonzalez*, 468 Mich 636, 640-641 (2003).

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