



MICHIGAN COURTS NEWS RELEASE

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FOR IMMEDIATE RELEASE

Michigan Supreme Court to hear oral arguments March 10 and 11

LANSING, MI, March 2, 2015 – The Michigan Supreme Court will hear oral arguments on March 10 and 11 in cases involving jury instructions, contract and construction issues, effective assistance of counsel, and criminal appeals.

The Court will hear the appeals in its courtroom on the sixth floor of the Michigan Hall of Justice on March 10 and 11 starting at 9:30 a.m. each day. Oral arguments are open to the public.

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 hearing starts; audio will be muted until justices take the bench.

Summaries of the cases follow and are also available at this [link](#).

-MSC-



MICHIGAN SUPREME COURT

Office of Public Information

Michigan Supreme Court Oral Arguments Tuesday, March 10, 2015

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.

Morning Session

Docket No. 148907 & 148909

Aroma Wines and Equipment, Inc.,
Plaintiff/Counter-Defendant-
Appellant,

vs (Appeal from Ct of Appeals)
(Kent – Leiber, D.)

Columbian Distribution Services, Inc.,
Defendant/Counter-Plaintiff-
Appellee.

Donald R. Visser
Rebecca Jo Baker

Aroma Wines and Equipment, Inc.,
Plaintiff/Counter-Defendant-
Appellee/Cross-Appellant,

vs
Columbian Distribution Services, Inc.,
Defendant/Counter-Plaintiff-
Appellant/Cross-Appellee.

Jon M. Bylsma
Conor B. Dugan

Defendant Columbian Distribution Services operates warehouses in Michigan. Plaintiff Aroma Wines and Equipment is a wholesale wine importer and distributor. In 2006, Aroma entered into a contract to store a large quantity of its wine in a temperature-controlled space at Columbian's Grand Rapids warehouse. After Aroma fell behind in its rental payments, Columbian restricted access to the wines. According to Aroma, Columbian also removed its wines from the temperature-controlled space in order to rent out the space to other, better paying, clients. The two firms eventually sued each other under various theories of law.

Aroma alleged that Columbian was liable for statutory conversion under MCL 600.2919a, which provides that a person damaged as a result of "another person's stealing or embezzling property

or converting property to the other person's own use" can recover treble damages. The trial court granted a directed verdict in favor of Columbian on this claim, finding that what Columbian was alleged to have done could not constitute "converting property to the other person's own use," as provided in that statute. The Court of Appeals reversed in a published per curiam opinion, holding that the trial court erred in granting a directed verdict on the statutory conversion claim because Aroma presented sufficient evidence that Columbian converted the wine to its own use.

Both Aroma and Columbian filed appeals in the Supreme Court. In an order dated September 19, 2014, the Supreme Court granted leave to appeal, limited to the issue of the proper interpretation of "converting property to the other person's own use," as used in MCL 600.2919a.

Docket No. 149357

People of the State of Michigan,

Plaintiff-Appellee,

vs (Appeal from Ct of Appeals)

(Wayne – Allen, D.)

Ashly Drake Smith,

Defendant-Appellant.

Thomas M. Chambers

Christopher M. Smith

This appeal stems from a bench trial held in Wayne County Circuit Court. The prosecutor alleged that defendant Ashly Smith broke into the victim's home and robbed him at gunpoint. After hearing the evidence, the judge found Smith guilty of armed robbery, first-degree home invasion, larceny in a building, possession of a firearm by a felon, and felony-firearm. Smith was sentenced to 13 to 20 years for armed robbery, 13-20 years for first-degree home invasion, two to four years for larceny in a building, and three to five years for felon-in-possession. He was also sentenced to the mandatory two-year term for felony-firearm, to run consecutively to the other sentences.

Smith appealed, claiming ineffective assistance of counsel. For a defendant to establish a claim that he was denied his constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687 (1984). In this case, Smith alleged that his trial counsel failed to present an alibi defense, and failed to call several alibi witnesses who would have testified that he could not have committed the robbery. The Court of Appeals remanded the case to the trial court for an evidentiary hearing. At the conclusion of the hearing, the trial judge ruled that Smith's attorney made a reasonable strategic decision not to call the witnesses, and that their testimony would not have made a difference in the outcome of the trial. In a split, unpublished opinion, the Court of Appeals agreed that Smith's attorney did not provide ineffective assistance, and it upheld Smith's convictions. The dissent concluded that counsel performed ineffectively by failing to properly investigate Smith's alibi defense.

Smith appealed. On October 3, 2014, the Supreme Court ordered oral argument on whether to grant the application or take other action. The parties were instructed to address whether the defendant was deprived of his right to the effective assistance of trial counsel.

Docket No. 147727

Danny Epps and Joyce Epps,
Plaintiffs-Appellees/Cross-Appellants,
vs (Appeal from Ct of Appeals)
(Wayne – Sapala, M.)
4 Quarters Restoration, et al,
Defendants-Appellants/Cross-Appellees,
and
AM Adjusting & Appraisals, et al,
Defendants

Gerald F. Posner

Roger L. Premo

This case involves flood cleanup and home repair work that defendant Troy Willis and his companies, defendants 4 Quarters Restoration, LLC and Emergency Insurance Services, performed for plaintiffs Danny and Joyce Epps. Willis was not licensed as a residential builder and his companies were not licensed. He misrepresented this fact to the Epps, who in turned signed contracts valued at \$128,000 to retain Willis and his companies to perform repair work. The Epps also executed a limited power of attorney, giving Willis the authority to cash checks issued by the Epps' insurance companies as reimbursement for the work performed. The repair work was completed, and Willis used the limited power of attorney to cash checks provided by the Epps' insurance companies.

About three years later, Mr. and Mrs. Epps sued, seeking to recover all of the insurance money that the Willis defendants had received for their work. Mr. and Mrs. Epps asserted that the unlicensed status of the Willis defendants, and the fact that they were not aware of the unlicensed status, meant that the documents assigning the insurance proceeds to Willis' companies, and the power of attorney were invalid.

The trial court granted summary disposition to Mr. and Mrs. Epps. The court held that MCL 339.2412, which precludes an unlicensed contractor from bringing or maintaining a collection action, created a cause of action for the Epps.

Defendants appealed. In an unpublished opinion per curiam, the Court of Appeals ruled that the trial judge had erred in holding that MCL 339.2412 created a cause of action in favor of the Epps. However, the Court of Appeals held that should be affirmed on an alternate ground -- fraud. The misrepresentation to Epps that Willis was a licensed residential builder rendered the various contracts void and meant that the insurance power of attorney was never valid. Willis lacked authority to endorse the insurance checks on behalf of Mr. and Mrs. Epps, the Court of Appeals panel held, and all of the insurance proceeds had to be returned to them.

Both the Epps and the Willis defendants sought leave to appeal to the Supreme Court. On June 13, 2014, the Supreme Court ordered oral argument on whether to grant the application or take other action and instructed the parties to address whether the contracts and limited power of attorney at issue are void or merely voidable, and whether the plaintiffs are required to establish actual damages to recover on their breach of contract and fraud/misrepresentation claims.

Docket No. 150142 In re ARS, Minor.
Phillip Schnebelt and Pamela Schnebelt,
Petitioners-Appellants,
v (Appeal from Ct of Appeals)
(Shiawassee – Dignan, T.)
Derek Musall,
Respondent-Appellee,
and
Kayleigh Marie Schnebelt,
Respondent-Appellant.

Liisa R. Speaker

Vivek Sankaran

Kayleigh Schnebelt and Derek Musall were involved in an on-again, off-again relationship, resulting in the birth of a child that Kayleigh’s parents, Pamila and Phillip Schnebelt, adopted with the consent of both Kayleigh and Derek.

Kayleigh learned she was pregnant a second time and started proceedings for her parents to adopt the child in this case. Musall filed a paternity action after learning of the pending adoption proceeding. The trial court adjourned the adoption proceeding and then dismissed it after declaring Musall the legal father. Schnebelts appealed.

In an unpublished per curiam opinion, the Court of Appeals up held the trial court ruling. Observing that this case involves the interplay of the Adoption Code, MCL 710.21 *et seq.*, and the Paternity Act, MCL 722.711 *et seq.*, the panel held that the trial court had “appropriately adjourned the adoption proceedings in favor of the paternity action, and properly dismissed the adoption proceeding once it held respondent [Musall] to be the legal father.”

The Schnebelts and Kayleigh sought leave to appeal to the Supreme Court. In an order dated November 26, 2014, the Supreme Court scheduled argument on whether to grant the application or take other action. The parties were ordered to address: (1) whether the respondent father demonstrated adequate “good cause” under Section 25 of the Adoption Code, MCL 710.25(2), for the adjournment of the adoption proceeding; (2) whether the respondent adequately demonstrated that he had “provided substantial and regular support or care in accordance with [his] ability to provide such support or care for the mother during pregnancy or for either mother or child after the child’s birth during the 90 days before notice of the hearing was served upon him,” MCL 710.39(2); and (3) whether the trial court gave adequate consideration to the legislative mandate that all adoption proceedings “be considered to have the highest priority” MCL 710.25(1).

Afternoon Session

Docket No. 148928-9

Douglas Latham,
Plaintiff-Appellee,
vs (Appeal from Ct of Appeals)
(Oakland -- Warren, M.)
Barton Malow Company,
Defendant-Appellant.

Daniel J. Harris

Anthony F. Caffrey III

Douglas Latham,
Plaintiff-Appellee,
vs (Appeal from Ct of Appeals)
(Oakland -- Warren, M.)
Barton Malow Company,
Defendant-Appellant.

Plaintiff Douglas Latham sought damages for an injury suffered while employed by B&H Construction on a school project for the Lake Orion School District. Lake Orion hired defendant Barton Malow Company as a construction manager. Latham, a skilled carpenter, was injured when he fell 13 to 17 feet while trying to access a mezzanine level at the school construction site.

Latham sued Barton-Malow, contending that it failed to provide him personal fall protection, and that it was liable under the common work area doctrine. In order to establish a claim under the common work area doctrine, a plaintiff must establish: (1) that a defendant general contractor failed to take reasonable steps within its supervisory and coordinating authority, (2) to guard against readily observable and avoidable dangers, (3) that created a high degree of risk to a significant number of workers, (3) in a common work area. A jury concluded that Barton Malow was 55% negligent in causing the accident that resulted in Latham's injuries. A judgment exceeding \$1.1 million was entered in Latham's favor.

Barton Malow appealed to the Court of Appeals arguing, as it had in the trial court, that it could not be liable for Latham's injuries under the common work area doctrine because it was the construction manager, not the general contractor. Barton Malow alternatively argued that Latham did not prove the elements of the common work area doctrine and that the court had improperly instructed the jury on these elements. Barton Malow also contested the trial court's award to Latham of interest on attorney fees and taxable costs.

The Court of Appeals affirmed the trial court in an unpublished per curiam opinion. The Court first held that the common work area doctrine was properly applied in this case because Barton Malow had supervisory and coordinating authority during the construction project. The appeals court next held that the jury instructions used by the trial court adequately informed the jury of the elements of the common work area doctrine. The Court of Appeals then concluded that the trial court had correctly denied Barton Malow's directed verdict motion because Latham had

produced sufficient evidence to prevail under the common work area doctrine. Finally, the court noted that Barton Malow raised claims concerning the interest on attorney fees and taxable costs only to preserve them in the event it prevailed in its appeal of the jury's verdict. Having affirmed the verdict, the Court declined to address these issues.

Barton Malow appealed, and on October 3, 2014, the Supreme Court ordered oral argument on whether to grant the application or take other action. The Court has directed the parties to address whether a significant number of workers were exposed to the high degree of risk identified in *Latham v Barton Malow Co*, 480 Mich 105, 114 (2008).

Docket No. 149479

People of the State of Michigan,
Plaintiff-Appellee,
vs (Appeal from Ct of Appeals)
(Calhoun – Kingsley, J.)
Leo Duwayne Ackley, a/k/a Leo Duane
Ackley, Jr., and Leo Duwayne Ackley II,
Defendant-Appellant.

Marc Crotteau

Andrew J. Rodenhouse

On April 18, 2012, a jury convicted Leo Ackley of felony murder and aggravated child abuse in the death of the 3 1/2 year old child of his live-in girlfriend. On May 7, 2012, he was sentenced to serve a term of life without the possibility of parole. Ackley appealed raising the issue of ineffective assistance of counsel. He argued that his attorney failed to obtain expert testimony regarding the child's injuries to support the theory that her death was accidental, and not the result of child abuse. The Court of Appeals remanded the case to the trial court for an evidentiary hearing. The Court of Appeals ordered the trial court to make rulings of fact, law, and determine whether Ackley was entitled to a new trial. The trial court held that defense counsel provided ineffective assistance of counsel, and granted Ackley's motion for a new trial. Specifically, the court found that defense counsel failed to contact two experts who defense counsel had been informed might support the defense theory that the child's injuries were caused by a short fall rather than by child abuse.

The prosecution appealed. In an unpublished per curiam opinion, the Court of Appeals held that the trial court abused its discretion when it granted Ackley a new trial. Defense counsel acted reasonably, held the panel, and it was not likely that the outcome would have been affected if a different expert had been consulted.

Ackley sought leave to appeal to the Supreme Court. On November 26, 2014, the Supreme Court ordered oral argument on whether to grant the application or take other action. The parties were instructed to address whether the defendant was denied the effective assistance of counsel based on the trial counsel's failure to adequately investigate the possibility of obtaining expert testimony in support of the defense.



MICHIGAN SUPREME COURT

Office of Public Information

Michigan Supreme Court Oral Arguments **Wednesday, March 11, 2015**

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.

Morning Session

[Docket No. 149259](#)

People of the State of Michigan,
Plaintiff-Appellant,

vs (Appeal from Ct of Appeals)
(Wayne – Evans, V.)

Brandon Lewis Cain,
Defendant-Appellee.

Thomas M. Chambers

Kristina Larson Dunne

Defendant Brandon Cain was charged in the Wayne County Circuit Court with multiple crimes arising out of the murders of Ashley Conaway and Abreeya Brown. After the jury was selected, but before the trial began, the judge directed the court clerk to administer an oath to the jury. At this point in the proceedings, the jurors must affirm that they will decide the case justly, and render a true verdict on the evidence introduced at trial and in accord with the court's jury instructions. Instead of reciting the proper oath, however, the court clerk recited the oath that is read to the potential jurors before jury selection begins. As a result, the jurors in this case were asked to "solemnly swear or affirm that you will true answers make to such questions as may be put to you touching upon your qualifications to serve as jurors in the cause now pending before the Court" Neither defense counsel nor the prosecutor objected. The trial proceeded, and the jury returned a guilty verdict against Cain.

Cain argued on appeal that the jury was not properly sworn. In an order, the Court of Appeals granted Cain's motion for peremptory reversal. The Court of Appeals panel held that the failure to properly swear the jury was a structural error requiring a new trial, and it remanded the case for a new trial before a properly sworn jury.

The prosecution filed an application for leave to appeal. In an order dated September 17, 2014, the Supreme Court granted leave to appeal and directed the parties to address whether the Court of Appeals erred in determining that the failure to properly swear the jury, even in the absence of a timely objection, was a structural error requiring a new trial.

Docket No. 149150

Michigan Association of Home
Builders, Associated Builders and
Contractors of Michigan, and
Michigan Plumbing and Mechanical
Contractor Association,

Plaintiffs-Appellants,
vs (Appeal from Court of Appeals)
(Oakland – Kumar, S.)

City of Troy,
Defendant-Appellee.

Gregory L. McClelland

Allan T. Motzny

On July 1, 2010, the City of Troy privatized its building department by hiring Safe Built, which performs the functions formerly performed by the city's building department. Under the terms of the contract, Troy paid Safe Built 80 percent of the building department fees associated with Safe Built's services, and Troy retained the remaining 20 percent of the fees. The plaintiff associations brought suit and moved for summary disposition claiming that Troy's building department fees violated the State Construction Code Act and the Headlee Amendment. The plaintiffs contended that Troy's contract with Safe Built generated a revenue surplus that Troy was depositing in its general fund and that constituted an unlawful tax increase under the Headlee Amendment. Troy asserted that the trial court lacked jurisdiction because the plaintiffs had not exhausted their administrative remedies before filing the complaint.

The Oakland County Circuit Court determined that it lacked subject-matter jurisdiction and dismissed the plaintiffs' complaint. The plaintiffs appealed.

The Court of Appeals affirmed the decision of the Circuit Court in an unpublished per curiam opinion. The panel held that, because the Construction Code Act provided for a grievance procedure in which the plaintiffs could have complained about excessive fees, the plaintiffs were bound to exhaust this administrative remedy before raising their claims in circuit court. Where such claims are intermingled with constitutional claims (such as the plaintiff's Headlee Amendment claims in this case), the parties are still obligated to exhaust their administrative remedies.

The plaintiffs filed an application for leave to appeal with the Supreme Court. On September 17, 2014, the Court ordered oral argument on whether to grant the application or take other action.

Docket No. 149380

People of the State of Michigan,
Plaintiff-Appellee,

vs (Appeal from Ct of Appeals)
(Jackson – McBain, J.)

Adam Benjamin Stevens,
Defendant-Appellant.

Jerrold Schrottenboer

Daniel D. Bremer

On March 22, 2012, Adam Stevens was convicted of second-degree child abuse and second-degree murder. Stevens raised multiple issues on appeal, including a claim that he was denied a fair trial and unfairly prejudiced by the trial court's questioning of defendant and his expert witness. Stevens argued that there was a pattern to the question posed by the judge that told the jury that the judge thought Stevens was lying and that his expert witness was not qualified. Stevens argues that, because his and his expert's credibility were critical to the defense, the judge's questions deprived him of a fair trial.

The Court of Appeals affirmed in a split, unpublished opinion. The majority explained that a trial judge may interrogate witnesses, MRE 614(b), but must be careful to frame his questions so as not to pierce the veil of judicial impartiality. In this case, held the majority, the trial judge's questions did not unduly influence the jury. The majority also noted that the judge instructed the jury that his questions were not evidence, and were not intended to reflect his opinion of the evidence. The dissenting judge would have reversed. She concluded that the judge's questions of Stevens and his expert unquestionably evidenced partiality that most likely influenced the jury to Stevens' detriment, denying him a fair trial. She also disagreed with the majority that the judge's jury instructions would have cured any error, given the extent to which the judge's conduct tainted the trial.

Stevens appealed. On November 21, 2014, the Supreme Court ordered oral argument on whether to grant the application or take other action. The Court directed the parties to address the appropriate standard for determining whether a trial court's questioning of witnesses requires a new trial, and whether that standard was met in this case.

Docket No. 149222

Jose A. Rodriguez,
Plaintiff-Appellee,
vs (Appeal from Ct of Appeals)
(Wayne – Ziolkowski, R.)
FedEx Freight East, Inc., Rodney
Adkinson, Laura Brodeur, Matthew
Disbrow, William D. Sargent, and
Honigman Miller Schwartz and Cohn, LLP,
Defendants-Appellants.

Dewey Rick Martin

Todd R. Mendel

In 2003, plaintiff Jose Rodriguez sued FedEx for discrimination in Wayne Circuit Court, alleging claims of wrongful discharge, retaliation, hostile work environment, and failure to promote in violation of the Elliott Larsen Civil Rights Act. Shortly after, the lawsuit was removed to federal district court. Rodriguez later filed a Chapter 7 bankruptcy petition, and the employment litigation became property of the bankruptcy estate. FedEx moved for summary judgment, supported by an affidavit from its human resources manager. The copy of the affidavit filed with the motion was signed, but not notarized. When plaintiff's counsel objected to the lack of notarization at the hearing on the motion for summary judgment, FedEx's attorney stated that the affidavit was notarized, and that an unnotarized version was filed by mistake. The court directed FedEx's attorney to provide the notarized affidavit to Rodriguez's attorney and to file it with the court. FedEx's counsel did provide a notarized affidavit to plaintiff's counsel, but that version of

the affidavit is not contained in the court file. Eventually, Rodriguez's employment claims were found to lack merit, and were dismissed.

In 2009, Rodriguez himself filed suit in the Wayne Circuit Court against FedEx and its attorneys, alleging that defendants abused the judicial process and defrauded Rodriguez, his attorneys, and the courts by filing a false and unnotarized affidavit in the 2003 litigation. Defendants removed the case to federal district court, where plaintiff filed a complaint under federal law asserting a claim for "fraud on the courts." The district court granted defendants' motion to dismiss for failure to state a claim under FRCP 12(b)(6), but also granted plaintiff's motion to remand his state-law abuse of process and fraud claims to the Wayne Circuit Court.

The case then returned to the Wayne Circuit Court, where Rodriguez filed an amended complaint alleging malicious abuse of process, fraud, and fraudulent misrepresentation based on the filing of the unnotarized affidavit in the 2003 litigation. Defendants moved for summary disposition on the basis of res judicata and collateral estoppel, arguing that plaintiff's claims were decided against him in the federal litigation. The trial court granted the motion.

Rodriguez appealed as of right, and in an unpublished per curiam opinion, the Court of Appeals affirmed in part, and reversed in part. The panel affirmed the circuit court's decision to the extent that it barred Rodriguez from relitigating the fraud-on-the-court issue in the state law action, but reversed the lower court's holding that his abuse-of-process and fraud-based claims were barred on grounds of res judicata and collateral estoppel.

FedEx sought leave to appeal. On October 3, 2014, the Supreme Court ordered oral argument on whether to grant the application or take other action, and directing the parties to address the relevance to this case, if any, of this Court's decision in *Daoud v De Leau*, 455 Mich 181 (1997) ("a second suit for fraud, based on perjury ('intrinsic fraud'), may not be filed against a person involved in a first suit, if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court and asking for relief there).