MSC Order List: September 29, 2010

30. September 2010 By Madelaine Lane

On Wednesday, September 29, 2010, the Michigan Supreme Court denied four applications for leave to appeal and ordered oral argument on applications for leave to appeal in two cases. The Court ordered oral argument on the application filed by the State Appellate Defender Office in *People v. Peltola*, Case No. 140524. At oral argument, the parties will address whether scoring of the prior record variables is improper when the defendant's minimum and maximum sentences are doubled because it is their second or subsequent controlled substance offense pursuant to MCL 333.7413(2). The Court also ordered oral argument on the application for leave filed by the Plaintiff-Appellant in *Green v. Pierson*, Case No. 140808. At oral argument, the parties were directed to address whether MCL 600.2301, empowering the court to amend any process or pleading in a particular action, applies to cases initiated before the amendment of MCL 600.5856 in 2004 and whether the plaintiff in this case should have been permitted to amend his notice of intent.

The Court also took action in three criminal and seven civil cases which are discussed after the jump.

In *People v. Tironi*, Case No. 140465, in lieu of granting leave to appeal, the Court directed the Kalkaska County Circuit and the prosecutor to each submit a written explanation of the circumstances surrounding written communications between the trial judge and the prosecutor which were not served on the defendant and/or defense counsel.

The Court denied a motion to recuse Chief Justice Kelley in *Grievance Administrator v. Miller*, Case No. 140081. Justice Corrigan declined to participate in the decision based on her previously stated objections to the Court's new disqualification rule. Justice Young voluntarily recused himself from participation in this case because he was general counsel for AAA when a portion of the underlying litigation was pending. He declined to participate in the resolution of any disqualification motion addressed to a Justice, other than himself, consistent with his previously stated objections to the disqualification rule.

In lieu of granting leave to appeal, the Court reversed the judgment of the Court of Appeals in the case of *People v. Clark*, Case No. 141449, and reinstated the judgment of the Kent County Circuit Court for the reasons stated in the Court of Appeals dissenting opinion authored by Judge Michael Kelly. In *Clark*, the defendant was convicted of second-degree criminal sexual conduct following a jury trial and was sentenced to a term of five to 15 years in prison. On appeal, the defendant argued that he had been denied effective assistance of counsel because his trial counsel failed to properly investigate exculpatory evidence and subpoena witnesses who could have rebutted the prosecution's evidence. The Court of Appeals agreed and reversed defendant's conviction and sentence based on

trial counsel's ineffectiveness. In his dissenting opinion, Judge Kelly noted that even if trial counsel's performance failed to meet the prevailing professional norms, he failed to meet the second prong of *Strickland* test. Specifically, Judge Kelly opined that but for the trial counsel's deficient performance, there was not a reasonable probability that the outcome of defendant's trial would have been different.

The Court also reversed the Court of Appeals May 18, 2010 decision in the matter of *White v. Victor Automotive Products, Inc.*, Case No. 141310. The Court reinstated the summary disposition order of the Livingston Circuit Court for the reasons stated in the Court of Appeals dissenting opinion authored by Judge Kirsten Kelly. Justice Hathaway would have denied leave to appeal. In *White* the Court of Appeals considered whether defendants were required to warn plaintiff, a self-employed mechanic and handyman, that a danger of carbon monoxide poisoning existed if he ran a car in a closed garage. The trial court concluded that defendants did not have a duty to warn plaintiff of this danger. On appeal, the Court of Appeals disagreed and ruled that a question of fact exists whether the danger of carbon monoxide poisoning associated with running a car in a closed garage is obvious under MCL 600.2948(2). Judge Kelly concluded that the trial court's grant of summary disposition was not premature. She recognized that the harm the plaintiff-decedent suffered was a direct result of running the car's engine, and the related to the muffler wrap. She also agreed with the trial court's finding that the hazards associated with running a car in a closed garage are obvious to the reasonably prudent person, and even more so to the defendant who was an experienced mechanic.

In *People v. Johanson*, Case No. 141178, the Court remanded the case to the Livingston Circuit Court for correction of the Judgment of Sentence which places the defendant in the custody of the Michigan Department of Corrections for his misdemeanor convictions for marijuana possession and obscene conduct.

In *Maher v. Maher*, in lieu of granting leave to appeal, the Court reversed the portion of the Court of Appeals opinion holding that the appreciation realized from the Smith Barney investment account during the marriage was defendant's separate property. The Court held that the appreciation of an actively managed investment account during the parties' marriage is martial property. The case was remanded to the Saginaw Circuit court for consideration of whether the Smith Barney investment account was actively managed during the marriage.

The Court granted the application for leave to appeal in *People v. Huston*, Case No. 141312. On appeal, the Court will consider whether "vulnerability" of a victim, for purposes of scoring Offense Variable 10, includes consideration of the victim's surrounding circumstances at the time of the crime or is strictly limited to the victim's personal characteristics. Our blog post discussing the Court of Appeals' opinion in Huston is available here. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan were invited to file briefs amicus curiae.

In *Loweke v. Ann Arbor Ceiling & Partition Co.*, Case No. 141168, the granted leave to appeal the April 22, 2010 Court of Appeals decision. In this personal injury case, the court will consider whether defendant, a subcontractor for carpentry and dry wall at a construction site, may be held liable for negligently stacking cement boards and creating a hazard which lead to the injury of an employee of the electrical subcontractor. The trial court granted defendant's motion for summary disposition holding that, pursuant to its contract with the general contractor, defendant could only be held liable for injuries resulting from a duty to plaintiff that is "separate and distinct" from its contractual obligations. The Court of Appeals affirmed.

In *Krohn v. Home-Owners Insurance Company*, Case No. 140945, the Court granted leave to appeal to address: 1) whether plaintiff's experimental surgery in Portugal was a reasonably necessary allowable expense under the no-fault act, MCL 500.3107(1)(a); 2) whether the procedure was lawfully rendered as required under MCL 500.3157, since it is not approved by the FDA; 3) whether the Court of Appeals erred in sua sponte raising the issue of whether the trial court failed to properly exercise its gatekeeping function under MRE 702 by not excluding the testimony of plaintiff's expert witness regarding the experimental surgery; 4) whether the Court of Appeals properly relied on *SPECT Imaging, Inc. v. Allstate Ins. Co.*, 246 Mich. App. 568, 578-579 (2001) in holding that a no-fault insurer is only liable for scientifically proven medical tests and procedures; and, 5) whether the trier of fact may consider the success of an experimental procedure or any degree of improvement of the plaintiff's condition in determining whether the procedure was a reasonable necessity, as required under MCL 500.3107(1)(a). The Michigan Association for Justice and the Michigan Defense Trial Counsel, Inc. were each invited to file briefs amicus curiae.

The Court also granted leave to appeal in *Wolf v. City of Detroit*, Case No. 140679. On appeal, the Court will consider whether the Court of Appeals erred in holding that the challenged solid waste inspection fee is a valid user fee and not a tax that violated the Headlee Amendment, whether it erred in its assessment of the significance of the defendant's replacement of a tax with the fee, the defendant's inclusion of the fee on the property tax bills, the defendant's authorization of the placement of a lien on an owner's property for nonpayment of the fee, and whether the court abused its discretion when it denied the plaintiff's motion for sanctions.. In particular, the Court directed the parties to address: 1) whether the challenged fee serves a regulatory, rather than a revenue-raising, purpose; 2) whether the fee is proportionate to the necessary costs of the inspection service; and, 3) whether the fee is voluntary as defined in *Bolt v. City of Lansing*, 459 Mich. 152 (1998). The Michigan Municipal League was invited to file a brief amicus curiae.

Finally, the Court granted leave to appeal in *Miller-Davis Company v. Ahrens Construction, Inc.*, Case No. 139666. The Court directed the parties to address the following issues in their briefing: 1) whether MCL 600.5839, the statute of repose for any action against architects, engineers, or contractors, governs a general contractor's suit for a subcontractor's breach of contract; 2) whether this case constitutes "any action to recover damages for any

injury to property…" where the claim arises out of the defective and unsafe condition of an improvement to real property; 3) whether a claim for breach of a construction contract "accrues", for purposes of MCL 600.5807(8), on the date of "substantial completion", the date the party in breach physically ceases work, the date the breaching party certifies it has completed work, or some other date; and, 4) whether, the "occupancy of the completed improvement, use, or acceptance of the improvement", under MCL 600.5839, is limited to occupancy, use or acceptance by the owner of the property. The Associated General Contractors of Michigan's motion to file a brief amicus curiae was granted.