Michigan Supreme Court Review:

2023-2024 Term (October 1, 2023 – July 31, 2024)

"We are not final because we are infallible, but we are infallible only because we are final."
Brown v Allen, 344 US 443, 540 (1953) (Jackson, J, concurring)

Judge Christopher Yates
Michigan Court of Appeals
August 2024

Administrative Law

Pegasus Wind, LLC v Tuscola County, ___ Mich ___; ___ NW2d ___ (2024)

On review of the decision by an airport zoning board of appeals that variances would be contrary to the public interest, the Court of Appeals "effectively conducted a de novo review of the proceedings by reweighing the evidence and making its own findings about which pieces of evidence were more or less probative." In doing so, the Court of Appeals exceeded its authority to consider whether the zoning board of appeals "support[ed] its findings with 'competent, material and substantial evidence on the whole record.'" The Supreme Court conceded that "the substantial-evidence standard requires review of the record," but concluded that "the scope and nature of the Court of Appeals' evidentiary review exceeded that Court's appellate role." As the Supreme Court put it, "the necessary quantum under the substantial-evidence test is not high – more than a scintilla, but less than a preponderance."

Mich Farm Bureau v Dep't of EGLE, ___ Mich ___; ___ NW2d ___ (2024)

The plaintiffs filed an original action for declaratory judgment in the Court of Claims pursuant to MCL 24.264, "which allows a litigant to challenge the validity or applicability of an administrative agency 'rule.'" Specifically, the plaintiffs took the position that the "new conditions in a 2020 general permit issued by EGLE are 'rules'" and so those conditions "are invalid because EGLE did not process them in accordance with the rulemaking procedures in [the] Administrative Procedures Act (the APA), MCL 24.201 *et seq*." The Supreme Court, however, ruled that "neither the general permit nor the challenged conditions in it are 'rules' under the APA," so the Court of Claims "lacked subject-matter jurisdiction under MCL 24.264." That decision turned on the basic principle that "if the Legislature has not delegated to an agency the power to make rules, a statement of general applicability issued by the agency cannot be considered a 'rule' – either valid or invalid – under the Michigan APA." Simply put, "if an agency lacks rulemaking power, any statement of general applicability issued by the agency necessarily lacks the force and effect of law[.]"

Appeals

People v Scott, ___ Mich ___; ___ NW2d ___ (2024)

Citing MCR 7.305(C)(6)(a), the Supreme Court held that "the trial court was barred by our court rules from holding a trial during which evidence disputed in the pending interlocutory appeal was admitted." But the Supreme Court ruled that "the trial court's failure to adhere to the automatic stay mandated by MCR 7.305(C)(6)(a) was a procedural error that did not deprive the court of subject-matter jurisdiction." As the Supreme Court explained: "Interlocutory appeals, in contrast to appeals from final orders, do not divest a trial court of subject-matter jurisdiction over a case." In other words: "A trial court is divested of subject-matter jurisdiction upon entry of a final order. Until that time, the trial court retains general subject-matter jurisdiction over the case while an interlocutory appeal is pending." Consequently, the Supreme Court noted that evidence subject to challenge on interlocutory appeal was admitted at trial and described the admission of that evidence as an abuse of discretion "under these circumstances."

Civil Procedure

McLain v Roman Catholic Diocese, ___ Mich ___; ___ NW2d ___ (2024)

In 2018, the Legislature enacted MCL 600.5851b "to specifically address the circumstances under which individuals who are or were victims of criminal sexual conduct may sue for damages." Subsection (1)(b) of that statute "creates a discovery rule for tolling the accrual date of future claims," but it "does not apply retroactively to resuscitate lapsed claims premised on past acts of criminal sexual conduct." Here, "plaintiff's complaint allege[d] damages caused by sexual abuse that occurred nearly 30 years ago," so his negligence claim against his abuser's employers was barred by the applicable three-year statute of limitations. Although the Supreme Court found that Subsection (1)(b) "is an unmistakable statutory codification of a discovery rule" that "tolls the accrual date" by providing "that the claim accrues when the plaintiff 'discovers, or through the exercise of reasonable diligence should have discovered,' both the individual's injury and the causal relationship between the injury and the criminal sexual conduct[,]" the Supreme Court held that the plaintiff's claim accrued in 1999 and the limitations period expired under the then-existing statutes before the Legislature enacted MCL 600.5851b, which could not be applied retroactively to the plaintiff's negligence claim. In sum, the outcome of the case turned on the Supreme Court's refusal "to read the statute as reviving an expired limitations period" because the Court found no legislative intent to give the statute retroactive application.

Carter v DTN Mgt Co, ___ Mich ___; ___ NW2d ___ (2024)

In 2020, the Supreme Court issued Administrative Order 2020-3, extending filing deadlines during the state of emergency declared in response to the COVID-19 pandemic. The plaintiff filed a negligence claim after the expiration of the three-year statute of limitations, but within the three-year period extended by operation of Administrative Order 2020-3. Thus, the timeliness of the plaintiff's initiation of the case turned on whether the Supreme Court had the authority to extend the statute of limitations by administrative order. The Supreme Court observed that it has "general superintending control" over Michigan courts by dint of Const 1963, art 6, § 4, and the authority to "establish, modify, amend and simplify" practice and procedure in Michigan courts under Const 1963, art 6, § 5. Reasoning that Administrative Order 2020-3 "did not toll statutes of limitations, but instead" it "affected the counting of the relevant time period for purposes of MCR 1.108(1)[,]" the Supreme Court stated that "[a]ffecting the computation of days by administrative order is well within the judicial power because it falls within our authority to modify, amend and simplify the practice and procedure in all courts of this state." Thus, Administrative Order 2020-3 was a valid exercise of reserved powers under Const 1963, art 6, §§ 4 and 5.

Civil Rights

Miller v Dep't of Corrections, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court ruled that "a so-called third-party retaliation claim, i.e., where one person claims that they were subjected to retaliation as an indirect attack against someone else who engaged in protected activity," is viable under the Elliott-Larsen Civil Rights Act, MCL 37.2701(a), because that statute "makes no distinction between direct and third-party retaliation claims[.]" In this case, two employees of the Michigan Department of Corrections (MDOC) filed claims against MDOC based on allegations of "a racially hostile work environment" and retaliation. Two other MDOC employees subsequently filed third-party retaliation claims alleging that they were fired by MDOC because they were close friends with a plaintiff in the original action. On review under MCR 2.116(C)(8), the Supreme Court permitted the claim for third-party retaliation to proceed under MCL 37.2701(a), which forbids anyone, either acting alone or in a conspiracy, to "[r]etaliate or discriminate against a person because the person has made a charge a charge, filed a complaint, testified, assisted, or participate in an investigation, proceeding, or hearing under" the Elliot-Larsen Civil Rights Act. Thus, a plaintiff simply must allege that (1) the defendant took an adverse action against the plaintiff and "(2) there is a causal link between the adverse action and a protected act."

Doe v Alpena Pub Sch Dist, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court decided that the Elliott-Larsen Civil Rights Act does not "provide[ ] a cause of action against an educational institution for student-on-student sexual harassment." After years of being subjected to sexually inappropriate actions by another student, the plaintiff filed a complaint against the school district alleging a hostile environment because, although the school district made efforts to stop the ongoing harassment of the plaintiff, the harassment continued for years. Under the Elliott-Larsen Civil Rights Act, in the workplace, the question is "whether it can be fairly said that the employer committed the violation – either directly or through an agent." Similarly, "with a hostile-educational-environment claim, . . . we start from the premise that a plaintiff is required to establish respondeat superior." In this case, the plaintiff's harasser was a fellow student, and "a student is not an employee of the school." Recognizing that problem, the plaintiff urged the Supreme Court to "adopt another common-law doctrine, *in loco parentis*[,]" but the Supreme Court rejected the theory "that having some degree of control over a student is sufficient to impute ELCRA liability for a hostile-educational-environment-harassment claim involving student-on-student conduct." The Court could "see no indication that the Legislature intended to incorporate the doctrine of *in loco parentis*" into the ELCRA.

Criminal Law and Procedure

People v Butler, 513 Mich 24; ___ NW2d ___ (2024)

In a case involving criminal sexual conduct charges and a defense of consent, the trial court ruled prior to trial that the defense could introduce evidence that the complainant had made a false allegation of rape in the past despite the prosecutor's objection based on the rape-shield statute, MCL 750.520j. The Supreme Court held that, although the defendant had provided a sufficient offer of proof "to require an *in camera* hearing under [*People v*] *Hackett*," 421 Mich 338; 365 NW2d 120 (1984), "the trial court erred by failing to conduct an *in camera* evidentiary hearing before granting admission of the evidence . . . ." As the Supreme Court explained, "[o]nce a sufficient offer of proof is made, the *in camera* evidentiary hearing is not optional." In other words, "defendant's offer of proof was sufficient, but an evidentiary hearing is required under *Hackett* before the trial court may admit the evidence."

People v Burkman, ___ Mich ___; ___ NW2d ___ (2024)

The defendants created and disseminated robocalls in the Detroit area that had the effect of discouraging mail-in voting through false statements. The defendants were charged under MCL 168.932(a) with attempting to influence, deter, or interrupt electors. Rejecting the defendants' request to quash the bindover based on statutory and constitutional arguments, the Supreme Court ruled that the defendants' conduct did not "constitute a 'menace'" under the statute, but the conduct did "constitute[ ] an 'other corrupt means or device' by which defendants attempted, 'either directly or indirectly, to influence an elector in giving his or her vote, or to deter the elector from, or interrupt the elector in giving his or her vote at any election held in this state.'" To avoid a facial constitutional defect under the First Amendment, however, the Supreme Court interpreted the statute narrowly by ruling "that when the charged conduct is *solely* speech and does not fall under any exceptions to constitutional free-speech protections, MCL 168.932(a)'s catchall phrase operates to proscribe that speech only if it is intentionally false speech that is related to voting requirements or procedures and is made in an attempt to deter or influence an elector's vote."

People v Prude, ___ Mich ___; ___ NW2d ___ (2024)

Reversing for insufficient evidence a defendant's convictions for fleeing and eluding and assaulting, resisting, or obstructing a police officer, the Supreme Court ruled that the police had not acted lawfully in detaining the defendant "on the basis of a reasonable suspicion that he was trespassing" by sitting in a parked car "in an apartment-complex parking lot known for frequent criminal activity." The Supreme Court explained: "Without more, there is nothing suspicious about a citizen sitting in a parked car in an apartment-complex parking lot while visiting a resident of that complex[,] a citizen's mere presence in an area of frequent criminal activity does not provide particularized suspicion that they were engaged any criminal activity, and an officer may not detain a citizen simply because they decline a request to identify themselves."

People v Neilly, ___ Mich ___; ___ NW2d ___ (2024)

Because "restitution imposed under the current statutes does not constitute punishment," a trial court did not violate "constitutional prohibitions on ex post facto laws when, during defendant's resentencing proceedings, it ordered defendant to pay restitution pursuant to the current restitution statutes rather than the statutes in effect at the time of defendant's crimes." The defendant was convicted for a 1993 murder, but he was resentenced decades later as a juvenile lifer entitled to relief under *Miller v Alabama*. Along with a new prison term of 35 to 60 years' imprisonment, the trial court ordered the defendant to pay $14,895.78 to compensate the victim's family for funeral expenses. The Supreme Court rejected defendant's ex post facto challenge to the restitution award, stating the trial court could rely on new restitution statutes because restitution is not punishment for the purpose of ex post facto analysis.

People v Warner, ___ Mich ___; ___ NW2d ___ (2024)

In a criminal sexual conduct case, the defendant moved for funding to retain an expert witness on false confessions "to explain 'why somebody could be coerced into making a confession when they were worn down[,]'" but the trial court denied the motion. The Supreme Court ruled that the trial court erred in denying funds for an expert witness because the "defendant established a reasonable probability that his requested expert would aid his defense and that, without such assistance, his trial would be rendered fundamentally unfair." The Supreme Court noted that there is no "categorical ban on all false-confession testimony[.]"

Criminal Law and Procedure (continued)

People v Samuels, ___ Mich ___; ___ NW2d ___ (2024)

Addressing "a package-deal plea offer where the prosecutor require[d] that *multiple* defendants all agree to the plea offer in order for any *single* defendant to receive the benefit of the plea[,]" the Supreme Court ruled "that where the record raises a question of fact about the voluntariness of such a plea, a trial court must hold an evidentiary hearing to consider the totality of the circumstances in determining whether a defendant's plea was involuntary." The Supreme Court further explained that "[a] defendant's plea is involuntary if, under the totality of the circumstances, their will was overborne such that the decision to plead was not the product of free will." Here, twin brothers were charged with serious crimes arising from a fight at a restaurant. The prosecutor offered a significant plea bargain to both brothers, but only if both brothers accepted the offer. One brother objected to the package offer, but subsequently accepted the offer when he learned that his brother wanted to take the deal. At the sentencing hearing, both brothers objected to the package deal and moved to withdraw their pleas, but the trial court summarily denied their motions to withdraw their pleas. The Court of Appeals affirmed, but the Supreme Court ruled that the trial court abused its discretion in refusing to conduct an evidentiary hearing.

People v Loew, ___ Mich ___; ___ NW2d ___ (2024)

In a fractured ruling in which no opinion commanded four votes, five justices broadly agreed that the trial judge engaged in unethical behavior by exchanging ex parte e-mail communications with the elected county prosecutor about a criminal trial occurring before the judge, but the Supreme Court could not muster a majority on the question of how to address that transgression. Writing for a plurality of three, Chief Justice Clement stated that the trial judge should have recused, but the failure to do so "did not result in a miscarriage of justice." In addition, the "defendant was not deprived of any constitutional rights," so the defendant was not entitled to a new trial. In a separate opinion concurring in part and dissenting in part, Justice Bolden provided the fourth vote to affirm the decision of the Court of Appeals that the defendant was not entitled to a new trial, but Justice Bolden departed from the lead opinion because she did "not conclude through these proceedings that the trial judge violated the Michigan Code of Judicial Conduct." Two other separate opinions also departed from the analysis of the lead opinion in several respects, ultimately finding that the case should be remanded for further consideration, but the suggestion that a remand should occur did not garner a fourth vote.

Criminal Law and Procedure (continued)

People v Butka, ___ Mich ___; ___ NW2d ___ (2024)

A criminal conviction may be set aside (or, more colloquially, expunged) if, *inter alia*, "setting aside the conviction . . . is consistent with the public welfare[.]" The defendant here was charged with second-degree criminal sexual conduct, but he pleaded no-contest to third-degree child abuse, served a jail term, completed his term of probation, and then thrice moved to set aside his conviction. The trial court denied each of the motions based on objections from the two victims, reasoning that setting aside the conviction "would not be consistent with the public welfare." The Court of Appeals affirmed, but the Supreme Court reversed, concluding that the trial court abused its discretion when it denied the motion to set aside the conviction because the victims' "objections are insufficient to support the trial court's conclusion that granting defendant's application to set aside his conviction was not consistent with the public welfare." The Supreme Court commented that "the assertion that these two victims make up the public disregards the legal term of art, which expressly disavows an interpretation that allows the public welfare to be determined by the interests of such a limited class of individuals." Consequently, the Supreme Court remanded the case to the trial court "for entry of an order setting aside defendant's 2003 conviction for third-degree child abuse."

People v Washington, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court decided that the Confrontation Clause applies to evidence that *implies* the substance of a testimonial, out-of-court statement made by a witness who was unavailable to testify at trial. At the defendant's trial, an American customs agent testified that a Canadian customs agent handed him a bulletproof vest and, as a result, the American customs agent took possession of that body armor and took the defendant into custody. The Canadian customs agent did not testify at trial. His out-of-court statement that was provided to the jury by the American customs agent, however, implied "that defendant possessed the bulletproof vest when [the Canadian customs officer] encountered him." The Canadian customs officer's statement was "testimonial" because "[t]he context in which he made his statement would lead a reasonable person in his position to believe the statement would be available for use at a later trial." Additionally, "regardless of whether the statement was offered merely to establish the chain of custody or to establish the defendant possessed the bulletproof vest as an element of the charged offense, the statement would need to be offered for the truth of the matter asserted, i.e., that defendant actually possessed the bulletproof vest."

Evidence

People v Lemons, ___ Mich ___; ___ NW2d ___ (2024)

The defendant, who was convicted of first-degree felony murder on the theory of shaken baby syndrome, filed a successive motion for relief from the judgment on the basis of new evidence in the form of proposed expert testimony. The Supreme Court faulted the trial court for ruling the "defendant's testimony inadmissible under MRE 702" and explained that, if "this expert's testimony were presented as a retrial, we conclude that a different result would be probable." Hence, the Supreme Court reversed the defendant's conviction and remanded the case for a new trial. In doing so, the Court observed that "biomechanical-engineering testimony" is admissible "as it relates to" shaken baby syndrome, which is "a 'multidisciplinary diagnosis based on the theory that vigorously shaking an infant . . . creates . . . great rotational acceleration and deceleration forces that result in a constellation of symptoms that may not manifest externally" so the shaken baby syndrome "hypothesis is inherently 'grounded in biomechanical principles.'" In declaring such testimony inadmissible under MRE 702, "the trial court stepped beyond its role as gatekeeper of relevant and reliable information, and instead acted as the final arbiter of the correctness of [the expert]'s conclusions."

Family Law

Sabatine v Sabatine, ___ Mich ___; ___ NW2d ___ (2024)

Because the facts did not clearly preponderate against the trial court's findings "that the parenting-time provision in the judgment of divorce would not modify the children's established custodial environments with both parents," the Supreme Court upheld the trial court's determination. In doing so, the Supreme Court relied on two important principles: "(1) the question whether a parenting-time provision modifies a child's established custodial environment is to be answered on the basis of the circumstances that exist at the time the trial court renders its custody decision; and (2) appellate courts have a statutory obligation under MCL 722.28 to affirm trial court determinations unless they are based on findings of fact against the great weight of the evidence, a palpable abuse of discretion, or a clear legal error on a major issue." Thus, the parties' pre-separation child-rearing situation did not control the analysis of the children's established custodial environment because their mother took the children to a new location after the parents separated, which occurred before the trial court made its custody determination.

Forfeiture

In re Forfeiture of 2006 Saturn Ion, ___ Mich ___; ___ NW2d ___ (2024)

Reviewing the civil forfeiture of a car under the controlled substances act, the Supreme Court decided that, because the vehicle was not used or intended to be used for the transportation of controlled substances "for the purpose of sale or receipt," the "vehicle was not subject to forfeiture under MCL 333.7521(1)(d)." The Supreme Court explained that, for forfeiture of a vehicle under the controlled substances act, "there must be a conveyance [e.g., a car] used or intended to be used to transport [a controlled substance] that will be sold or received." Therefore, the forfeiture statute "requires more than mere possession of illicit substances . . . ." The only intended sale in this case "was concluded in front of the house" where a hand-to-hand sale of drugs took place while the vehicle was not in motion. Moreover, because the drugs "were for . . . personal use, there could be no further purpose of sale or receipt."

Guardianship

In re Malloy Guardianship, ___ Mich ___; ___ NW2d ___ (2024)

In a "billing dispute[ ] between a professional guardian and a no-fault insurer," the Supreme Court determined that "a professional guardian of an incapacitated individual must execute a power of attorney that complies with MCL 700.5103 to lawfully delegate to employees the authority to make any final decision to exercise a guardianship 'power' that is explicitly listed in MCL 700.5314 or to delegate any other final decision that would alter or impair an incapacitated individual's rights, duties, liabilities, or legal relations." In contrast, "a professional guardian need not comply with MCL 700.5103 to use employees to perform any other guardianship task or duty on the guardian's behalf." "Moreover, a professional guardian may use employees to *assist* in exercising a guardianship power or to *assist* in deciding how to exercise these powers without complying with MCL 700.5103." Significantly, however, a professional guardian "who lawfully uses employees nonetheless retains the ultimate legal responsibility for ensuring that all statutory and fiduciary duties owed to an incapacitated individual are fulfilled and that they receive proper care."

Labor Law

TPOAM v Renner, ___ Mich ___; ___ NW2d ___ (2024)

Reviewing "a pay-for-services fee policy" imposed by a union "that required bargaining unit employees who had opted not to pay union dues to pay a fee to the union before the union would review and process a matter through the collective bargaining agreement's grievance process," the Supreme Court concluded that, "[i]n the absence of legislative authorization, the fee policy at issue violates the union's duty of fair representation and is invalid regardless of whether it also violates MCL 423.209 or MCL 423.210[,]" which afford employees in Michigan the rights not to join a union, not to financially support a union, and not to be "restrained or coerced" in exercising those rights.

Batista v Office of Retirement Servs, ___ Mich ___; ___ NW2d ___ (2024)

According to the Public School Employees Retirement Act, MCL 38.1384(1), "pension payments to certain public school employees, including superintendents and administrators, are calculated using a formula that includes an employee's years of credited service and . . . their 'final average compensation.'" "[C]ompensation under the Retirement Act does not include: '[c]ompensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification.'" Thus, "for annual compensation increases to count toward the final average compensation, the increase must be provided for in a 'normal salary schedule.'" The term "normal salary schedule" is not defined in the Retirement Act, so the Supreme Court supplied the following definition of the concept: "a 'normal salary schedule' is a (1) written document (2) established by statute or approved by a reporting unit's governing body (3) that indicates the time and sequence of compensation and (4) conforms to a norm, rule, or principle – i.e., it applies to a generally applicable job classification rather than to a specific employee." In doing so, the Supreme Court rejected the argument "that 'normal salary schedule' is a term of art that refers *only* to employees operating under a" collective bargaining agreement. Accordingly, "public school employees may have a normal salary schedule *regardless* of whether they are employed under a [collective bargaining agreement] or a personal employment contract."

Medical Malpractice

Danhoff v Fahim, ___ Mich ___; ___ NW2d ___ (2024)

Analyzing "the question of whether an expert in a medical malpractice lawsuit can reliably support their opinion on the standard of care if the adverse event is so rare that published, peer-reviewed medical literature on the subject may not exist[,]" the Supreme Court ruled "that scientific literature is not always required to support an expert's standard-of-care opinion," but "scientific literature is one of the factors that a trial court should consider when determining whether the opinion is reliable." Hence, "[i]n some cases, a lack of supportive literature may be fatal to a plaintiff's expert's reliability" but, "[i]n others, a plaintiff's expert may demonstrate reliability without supportive literature, especially where a complication is rare and there is a dearth of supportive literature available to support the opinion." In any event, "the guidepost for admissibility is reliability, and trial courts must consider MRE 702 as well as the statutory reliability factors presented in MCL 600.2955" in determining whether an expert is reliable. Here, the trial court abused its discretion by failing to consider "all such applicable factors."

Stokes v Swofford, ___ Mich ___; ___ NW2d ___ (2024)

According to MCL 600.2169(1)(a), in a medical-malpractice action involving a "specialist," "a person shall not give expert testimony on the appropriate standard of practice or care unless the person . . . specializes at the same time as the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered." In that context, "the words 'specialist' and 'specialties' . . . are defined as the specialties recognized by the American Board of Medical Specialties . . . , the American Osteopathic Association . . . , the American Board of Physician Specialties . . . , or other similar nationally recognized umbrella-based physician certifying entities." In addition, the "'matching' requirement under MCL 600.2169 follows the listed general board certifications, which are the baseline 'specialties' recognized by such entities for certification purposes." Significantly, "[t]he statute does not require matching of *sub*specialties." In stating that principle, the Supreme Court overruled its decision in *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), to the extent that it held that "if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." See *id*. at 562.

Negligence

Marion v Grand Trunk Western Railroad Co, ___ Mich ___; ___ NW2d ___ (2024)

Addressing a negligence claim on behalf of a 14-year-old boy who was hit by a train, the Supreme Court noted that the boy was a trespasser on the railroad tracks, but nonetheless concluded that "train operators have a 'general duty to run the train with reasonable care and watchfulness.'" Applying those legal principles to the facts of the case, the Supreme Court held that "an engineer who sees a person on the track can presume that the person will move to safety until the engineer sees otherwise." Thus, a train operator has no duty to take steps to avoid a collision until "it becomes apparent that the person will not or cannot move off the tracks." Here, the engineer saw that the boy was unresponsive when the train was "18 or 19 seconds away" from him, but did not apply the emergency brake until "one second before the train hit" him. Therefore, questions of fact remained as to whether the engineer was negligent in waiting to apply the emergency brake and the "defendants' ability to stop the train had they braked as soon as duty required."

El-Jamaly v Kirco Manix Constr, LLC, ___ Mich ___; ___ NW2d ___ (2024)

The plaintiff was electrocuted and injured when a tool he was carrying came in contact with a low-hanging high-voltage power line on a job site, so he filed suit claiming negligence by both the general contractor and DTE Energy, which owned the power line. The Supreme Court ruled that the general contractor was not entitled to summary disposition pursuant to MCR 2.116(C)(10) because the plaintiff could proceed under "the common work area doctrine," which requires evidence that (1) the general contractor "failed to take reasonable steps within its supervising 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 workmen (4) in a common work area." The Supreme Court further concluded that the plaintiff could proceed against DTE because there were "genuine issues of material fact regarding the height of the power lines" and, "if the power lines were improperly maintained, then the height of the lines coupled with the pre-injury communications and other evidence in the record demonstrates that plaintiff's injury was foreseeable." In the course of its analysis of the negligence claim against DTE, the Supreme Court noted that "[d]isputed facts, even when related to duty, must be resolved by the jury." Only when "there are no facts in dispute as to duty" is the analysis "a matter of law."

No-Fault Act

Childers v Progressive Marathon Ins Co, ___ Mich ___; ___ NW2d ___ (2024)

Plaintiff was seriously injured in a motor-vehicle collision and obtained PIP benefits from his own insurer until that insurer became insolvent. Plaintiff then filed suit against the next-highest-priority insurer, which invoked the statute of limitations in moving for summary disposition. The Michigan Property and Casualty Guaranty Association thereafter intervened and took the plaintiff's side. The Supreme Court, however, determined that "the one-year limitations period in MCL 500.3145(1) for commencing an action for personal protection insurance (PIP) benefits under the no-fault act . . . applies to an action for PIP benefits against a lower priority insurer after a higher priority insurer becomes insolvent." Consequently, the Supreme Court held that the statute of limitations prevented both the plaintiff and the Michigan Property and Casualty Guaranty Association from seeking PIP benefits from the next-highest-priority insurer.

Williamson v AAA of Mich, ___ Mich ___; ___ NW2d ___ (2024)

Rejecting a categorical approach of the Court of Appeals, the Supreme Court concluded that PIP claims can be defeated by fraud either before or during litigation. Under MCL 500.3173a(4), any claim by the Michigan Assigned Claims Plan "that contains or is supported by a fraudulent insurance act" is "ineligible for payment of [PIP] benefits." The Court of Appeals interpreted that statute to apply only to fraud in prelitigation statements, as opposed to misrepresentations made during discovery. The Supreme Court declared that categorical rule "overly broad" and decided instead that false statements made in answers to interrogatories during litigation could result in ineligibility for PIP benefits.

Open Meetings Act

Pinebrook Warren, LLC v City of Warren, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court ruled that "a local marijuana review committee is a public body subject to the Open Meetings Act (the OMA), MCL 15.261 *et seq*." The local marijuana review committee, consisting of five members – three of whom were part of the seven-member city council, rated all applications for provisioning centers "on a scale of zero to ten based on . . . subjective and objective factors." Then the local marijuana review committee forwarded the scores and the applications "to the city council with recommendations." But under the city ordinance: "The issuance of any provisioning center license shall be approved by the city council." After receiving 65 applications, the review committee met 16 times. Their "meetings were not open to the public, and no minutes were taken." Then, as a result of litigation and a ruling by the trial court ordering compliance with the OMA, "the last few meetings of the Review Committee were held in public." Nevertheless, the trial court decided that the violation of the OMA required invalidation of the city council's decision to issue licenses. The Supreme Court determined that the review committee was subject to the OMA because it "was a 'governing body' that was empowered by . . . ordinance . . . to . . . perform a governmental . . . function" and it "made the de facto decision who would receive licenses[.]"

Preemption

Stegall v Resource Technology Corp, ___ Mich ___; ___ NW2d ___ (2024)

The plaintiff was discharged after he made complaints to his employer "about possible asbestos in the workplace." Plaintiff filed suit against his former employer "claiming retaliatory termination under the [Whistleblowers' Protection Act (WPA)] and termination in violation of public policy." The trial court ruled "that plaintiff's public policy claim was preempted by the WPA because the remedies provided in the act were exclusive and not cumulative." Additionally, the trial court decided that "a public-policy claim could not be maintained on the basis of internal complaints." The Supreme Court rejected both of those positions. First, the Supreme Court noted that, in a prior order in this case, it had already decided that the "plaintiff's internal report sufficiently alleged a public-policy cause of action." Second, the Court ruled that "a public-policy cause of action may be asserted even though an applicable statute has an antiretaliation provision and associated remedies[,]" so the preemption theory failed. Only when "the remedies of the underlying statute are exclusive" can preemption be invoked. "But if the remedies are cumulative, the public-policy claim may proceed." Moreover, even if "the remedies provided in the statute are presumed exclusive[,]" preemption is inappropriate if "the remedies are plainly inadequate or there is a clear contrary intent."

Premises Liability

Janini v London Townhouse Condo Ass'n, ___ Mich ___; ___ NW2d ___ (2024)

A condominium co-owner is not precluded from asserting a premises-liability claim against a condominium association for an injury that occurred as the co-owner was using a common element of the property. "The proper inquiry when considering the duty owed in a premises-liability action is who has possession and control over the land where a person was injured, not merely who owns the land." Thus, "when the master deed and bylaws governing a condominium complex provide that the condominium association is responsible for maintaining the common areas and the condominium's co-owners lack possession and control over those common areas, a condominium co-owner [who is] using the condominium complex's common areas and elements is an invitee." In those circumstances, the "condominium association owes a condominium co-owner a common-law duty to exercise reasonable care to protect them from dangerous conditions in the common areas."

Property

Milne v Robinson, 513 Mich 1; ___ NW2d ___ (2024)

The Recreational Land Use Act (RUA), MCL 324.73301(1), establishes that "a landowner, in certain circumstances, is only liable for injuries to a person engaged in recreational activity on their property if that injury was caused by the landowner's gross negligence or willful and wanton misconduct." Here, a child died while riding on an off-road vehicle, which led to a lawsuit against the landowner seeking recovery for her death. The Supreme Court first rejected "plaintiff's argument that the RUA only limits a landowner's potential common-law premises liability." Next, the Court decided "that the Legislature intended the RUA to limit owner liability under MCL 257.401(1) because owner liability was longstanding when the RUA was enacted, the RUA is a detailed provision yet has no exception for owner liability, and this reading gives optimal effect to both statutes." Thus, the RUA applied "to plaintiff's proposed owner-liability claim and require[d] her to demonstrate that defendant was grossly negligent or engaged in willful and wanton conduct to prevail."

Schafer v Kent County, ___ Mich ___; ___ NW2d ___ (2024)

Building on its ruling in *Rafaeli, LLC v Oakland County*, 505 Mich 429; 952 NW2d 434 (2020), that the retention of surplus proceeds obtained in tax-foreclosure proceedings violates the Takings Clause of the Michigan Constitution, the Supreme Court rendered the following directives: (1) "*Rafaeli* applies retroactively to claims not yet final on July 17, 2020, the date the opinion was issued" (2) "MCL 211.78t, which establishes a procedure for processing claims made under *Rafaeli*, applies retroactively to claims arising prior to its enactment" (3) "The new limitations period in MCL 211.78*l* applies prospectively only to claims arising from tax-foreclosure sales that occurred after December 22, 2020 (the effective date of 2020 PA 256)" (4) "In order to be treated as constitutional, MCL 211.78t in conjunction with applicable statutes of limitations cannot apply retroactively to cut off claims for relief." As a result, "if filed within a 'reasonable time' of [this] decision, claims that arose before December 22, 2020, the date of 2020 PA 256's enactment, but expired between the date of enactment and the date of [this] decision must be allowed to proceed, while still respecting the applicable statutes of limitations." Therefore, "a claimant seeking surplus proceeds may pursue a claim if filed within the balance of time remaining under the applicable statutes of limitations as of December 22, 2020, running from the date of this opinion."

Sanctions

Bradley v Frye-Chaiken, ___ Mich ___; ___ NW2d ___ (2024)

In this civil action, the trial court concluded that the defendant's counterclaims and defenses were frivolous, so the trial court awarded sanctions to the plaintiffs in the form of reasonable attorney fees incurred in contending with those counterclaims and defenses. The trial court imposed the sanctions against the defendant and every attorney who had represented the defendant at any stage of the litigation. Reversing the imposition of sanctions against an attorney who did not appear in the case until after the order for sanctions was issued, the Supreme Court noted "the relevant court rule, MCR 1.109(E), and statute, MCL 600.2591(1), do not require that all attorneys who represent a sanctioned party during the civil action be held jointly responsible for frivolous conduct, let alone jointly and severally responsible for that conduct." "If an attorney substitutes into a case and does not participate in a frivolous claim or defense, the sanctionable conduct does not arise out of that attorney's representation, and therefore a sanction is not permitted."

Search and Seizure

Long Lake Twp v Maxon, ___ Mich ___; ___ NW2d ___ (2024)

A township used "an unmanned drone to take aerial photographs and video of defendants' property" and then presented that evidence in a civil nuisance abatement proceeding. The Supreme Court ruled that "the exclusionary rule does not apply to this civil proceeding to enforce zoning and nuisance ordinances," so the Court chose not "to address whether the use of an aerial drone under the circumstances presented here is an unreasonable search in violation of" the federal or Michigan Constitution. The Court made clear that "the exclusionary rule . . . is not a constitutional right, and it is not intended to vindicate a defendant's constitutional rights." "The exclusionary rule is a jurisprudential creation rather than a constitutional rule of law[,]" and it has the purpose of "deterring wrongful law enforcement conduct" rather than vindicating constitutional rights. Therefore, courts have "repeatedly declined to extend the rule to proceedings other than criminal trials with very limited exceptions," such as civil asset-forfeiture cases, which are actually "quasi-criminal proceedings."

People v Duff, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court ruled that "a police encounter constituted a seizure under the Fourth Amendment when the police partially blocked in defendant's vehicle in an empty parking lot at night, pointed their spotlight and headlights at his car, and then approached defendant's vehicle with at least one officer shining his flashlight into the vehicle." The Supreme Court concluded that, "because a reasonable person would not have felt free to leave or discontinue the encounter, defendant was seized at the point, which triggers Fourth Amendment scrutiny." In reaching that decision, the Supreme Court "reverse[d] *People v Anthony*, 327 Mich App 24; 932 NW2d 202 (2019), to the extent that the opinion held that a defendant is only seized when the police have completely blocked in a parked vehicle." The Supreme Court remanded the case for an analysis of whether the police "had reasonable suspicion of criminal conduct when defendant was initially seized."

Sex Offenders Registration Act

People v Lymon, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court held that the application of the Sex Offenders Registration Act (SORA) "to non-sexual offenders like defendant is cruel or unusual punishment in violation of the Michigan Constitution." The defendant was convicted of torture, unlawful imprisonment, felonious assault, and felony-firearm for holding his family at gunpoint after accusing his wife of having an affair. The defendant's crimes were violent and terrifying, but there was no sexual component to any of the crimes. But "[b]ecause two of the three unlawful-imprisonment convictions involved minors, the trial court . . . required defendant to register as a Tier I sex offender under SORA." First, the Supreme Court "conclude[d] that the 2021 SORA constitutes punishment as applied to non-sexual offenders." Next, the Supreme Court "conclude[d] that the punishment of SORA registration for non-sexual offenders like defendant is grossly disproportionate and accordingly constitutes cruel or unusual punishment under the Michigan Constitution." Hence, the "defendant and other offenders whose crimes lacked a sexual component are entitled to removal from the sex-offender registry."

Voter Initiatives

Mothering Justice v Attorney General, ___ Mich ___; ___ NW2d ___ (2024)

The Legislature received initiative petitions that proposed raising the state's minimum wage, "allowing for compensatory time in lieu of overtime, and providing paid sick leave to employees." The Legislature chose "to adopt [the proposals] into law[,]" thereby dispensing with a statewide vote on the proposals. But following the ensuing general election that year, "the lame duck Legislature voted to amend the laws in a manner that dramatically altered and virtually eliminated changes voters sought through the initiative process." The Supreme Court ruled "that this decision to adopt the initiatives and then later amend them in the same legislative session . . . violated the people's constitutionally guaranteed right to propose and enact laws through the initiative process" prescribed by Const 1963, art 2, § 9. As a remedy for "the Legislature's constitutional mischief[,]" the Supreme Court ruled that the Wage Act and the Earned Sick Time Act as the original initiatives "remain in place" and "go back into effect 205 days after this opinion's publication date." In contrast, the Supreme Court decreed that, with regard to the increased minimum wage, "a gradual phase-in mirroring the structure of the original Wage Act is most consistent with the Wage Act's intent[,]" so the Supreme Court prescribed a method for phasing in the increase over a period of years.

Wrongful Death

Daher v Prime Healthcare Services, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court ruled that the wrongful death act (WDA), MCL 600.2922, does not permit "recovery of damages for lost future earnings absent a showing that a beneficiary is entitled to those earnings as financial support." Reaffirming its own ruling in *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948), the Court stated that, "like the earlier version of the WDA, the current version does not allow for recovery of lost future earnings." After their 13-year-old son died of bacterial meningitis, the parents sued as co-personal representatives of his estate, seeking millions of dollars in lost future earnings. Prior to the Legislature's enactment of a new wrongful death act in 1939, "an estate could recover for future earnings under the survival act but was limited to a beneficiary's loss of support under the death act." "Questions very quickly arose concerning the scope of damages available under the newly combined WDA." In *Baker*, the Supreme Court rejected the argument that recovery could "be had for loss of probable future earnings" under the new WDA. Amendments to the WDA in 1971 and 1985 expanded available recovery, but the Supreme Court ruled that those expansions did not allow recovery of future earnings except insofar as the future earnings represent "loss of financial support." Therefore, *Baker* still dictates the analysis and prohibits the recovery of "lost-earning-capacity damages" under the WDA.

Zoning

Jostock v Mayfield Twp, ___ Mich ___; ___ NW2d ___ (2024)

The Supreme Court addressed conditional zoning (where "the conditions are voluntarily offered by the property owner in writing") and ruled that "a conditional rezoning is invalid under MCL 125.3405(1) if the proposed use is not a permitted use – either by right or after special approval – within the proposed zoning district." The new owner of the Lapeer International Dragway, which operated for many years "as a lawful nonconforming use with limited hours," "filed a conditional-rezoning agreement with the Township, seeking to have the property rezoned as C-2 (General Commercial District), subject to limitations on the dragway's hours and operations." The township board thereafter "voted to approve the conditional-rezoning agreement and conditionally rezone the property to C-2 subject to the terms of the conditional-rezoning agreement." Plaintiffs, who live near the dragway, filed suit in an effort to rescind the conditional-rezoning agreement. Stating that "in order to be valid under MCL 125.3405(1), the proposed use must be a permitted use within the proposed zoning district – either by right or after special approval[,]" the Supreme Court noted that "the issue of whether a dragway is a permitted use in the C-2 district was not specifically addressed by the parties in the proceedings below." Thus, the Supreme Court vacated the lower-court judgments and remanded the case for consideration of that issue.