STATE OF MICHIGAN

IN THE COURT OF SUPREME COURT

MARY ELLEN MCDONALD,	Supreme Court No. 132218
Appellee-Appellee,	
v	Court of Appeals No. 259168
FARM BUREAU INSURANCE COMPANY,	Lower Ct. No. 03-76398-NF
A Michigan Corporation,	
Defendant-Appellant.	

APPELLANT FARM BUREAU INSURANCE COMPANY'S RESPONSE TO APPELLEE'S SUPPLEMENTAL BRIEF

Respectfully submitted,

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ARGUMENT

THIS COURT LACKS AUTHORITY TO ISSUE A PURELY PROSPECTIVE DECISION WHICH WOULD BE AN ADVISORY OPINION AND AN EXERCISE OF A LEGISLATIVE FUNCTION NOT SANCTIONED BY THE MICHIGAN CONSTITUTION.

On October 12, 2007, this Court issued an order allowing plaintiff to file a supplemental brief "addressing only the constitutionality of an appellate court's determination that a decision shall have prospective application." Plaintiff filed her supplemental brief on November 16, 2007. This is defendant's response to that supplemental brief.

I

Historically, judicial decisions have had both retroactive and prospective application. As Justice Holmes noted in his dissent in *Kuhn v Fairmont Company*, 215 US 349, 272 (1910), "I know of no authority in this Court to say that *** decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." See also, *United States v SEC Indust Bank*, 459 US 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA L Rev 201, 205 (1995) ("It is the common-law tradition that judicial precedents normally have retroactive as well as prospective effect"). As noted in Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 Harv J L & Public Policy 811 (Summer 2003) "Rules of law have traditionally been applied to the parties to

the case in which those rules were announced as well as in later cases, without regard to the date of the disputed events or the nature of the rule."[1]

II

Whether a court has authority to issue a purely prospective ruling (and when a decision should only be applied prospectively) has engendered much debate among Justices of the United States Supreme Court.

For example, in *Linkleter v Walker*, 381 US 618 (1965), the Court observed that "at common law there is no authority for the proposition that judicial decisions made law only for the future" [*Id*, at 622], but held that "in appropriate cases the court may in the interest of justice make the rule prospective". *Id*, at 628.

In *Chevron Oil Company v Hudson*, 404 US 97 (1971), the Court established a three part test to determine when a civil case holding should be non-retroactive.

In *United States v Johnson*, 457 US 537, 548 (1982), the Court noted that in the context of criminal cases, that "retroactivity must be re-thought."

In *Griffith v Kentucky*, 479 US 314 (1987), the Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates matters of constitutional adjudication" and, therefore, "a new rule for the conduct of criminal prosecution is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final" even where the new rule breaks with the past. *Id.* at 328.

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[1] Shannon traces this principle back to Chief Justice Marshall's opinion in *States v The Schooner Peggy*, 5 US (1 Cranch) 103 (1801). See Shannon, 26 Harv J L & Public Policy at 816-18.

In *American Trucking Association, Inc v Smith*, 496 US 167 (1990), various Justices questioned *Chevron Oil's* retroactivity analysis as applied in the civil context. For example, in his concurring opinion in *American Trucking*, Justice Scalia, 468 US at 201, stated:

> Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense. Either enforcement of the statute at issue in *Scheiner* (which occurred before the decision there) was unconstitutional, or it was not; if it was, then so is enforcement of all identical statutes in other States, whether occurring before or after our decision; and if it was not, then *Scheiner* was wrong, and the issue of whether to 'apply' that decision needs no further attention.

In his dissenting opinion in *American Trucking,* Justice Stevens, 496 US at 182-183, stated:

> [W]hen the legal rights of the parties have not been finally determined by a court of law, 'simple justice,' 452 U.S., at 401, requires that a rule of law, even a 'new' rule, be evenhandedly applied. As JUSTICE BLACKMUN explained in *Griffith v Kentucky*, 479 U.S. 314 (1987), when we endorsed Justice Harlan's views on the subject of retroactivity:
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> * * *
>
>> [I]t is settled principle that this Court adjudicates only 'cases' and 'controversies.' See U.S. Const. Art. III, § 2. Unlike a legislature, we do not promulgate new rules of constitutional criminal procedure on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule. But after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar caes pending on direct review. Justice Harlan observed:
>>
>> 'If we do not resolve all cases before us on direct review in light of our best understanding of

> governing constitutional principles, it is difficult to see why we should so adjudicate any caes at all. . .. In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.' *Mackey v United States*, 401 U.S., at 679 (opinion concurring in judgment).'

> The Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.

In *James B Beam Distilling Company v Georgia*, 501 US 529 (1991), the debate continued, resulting in a variety of opinions by the Justices.[2] For example, in Justice Scalia's concurring opinion, 501 US at 549, he stated that "[i]f the division of federal power [between the separate branches of government] central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted." In this regard, the understanding of "judicial power" was that "understood by our common law tradition." Justice Scalia opined that courts only have the power to say "what the law is", "not the power to change it" and "[f]or this reason, and not reasons of equity, I would find both 'selective prospectivity' and 'pure prospectivity' beyond our power." *Id.* at 549.

In *Harper v Virginia Department of Taxation*, 509 US 86 (1993), a majority of the United States Supreme Court finally held that, in the context of civil litigation, that Court's "application of a rule of federal law to the parties before the Court requires every court to

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[2] The *Beam* Court ultimately held that the decision in *Baccus Imports, Ltd v Dias*, 468 US 263 (1984) should be applied retroactively.

give retroactive effect to that decision." *Harper*, 509 US at 90. The *Harper* court, relying on *James B Beam Distilling Co, supra*, and *Griffith v Kentucky, supra*, stated:

> *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of Justices in *Beam*: When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open or direct review and as to all events, regardless of whether such events pre-date or post-date our announcement of the rule. This rule extends *Griffith's* ban against 'selective application of new rules.' 479 U.S. at 323. Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, *id*, at 322, we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases. In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam, supra*, at 543 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that 'the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.' *American Trucking, supra*, at 214 (STEVENS, J., dissenting).
>
> *Id.* at 97.

In a footnote, the *Harper* court added:

> *** our decision today makes it clear that 'the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case' and that the federal law applicable to a particular case does not turn on 'whether [litigants] actually relied on [an] old rule [or] how they would suffer from retroactive application' of a new one.
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> *Id.* at 95 fn 9. (Citations omitted).

In his concurring opinion, Justice Scalia noted:

> Prospective decision making is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a 'technique of judicial law making' in general, and more

> specifically as a means of making it easier to overrule prior precedent. * * * Thus, the dissent is saying, in effect, that *stare decisis* demands the preservation of methods of destroying *stare decisis* recently invented in violation of *stare decisis.*
>
> *Id.* at 105-106. (Citations omitted).

For a sampling of law review articles analyzing the appropriateness of prospective decision making by courts, see Shannon, *supra*; Beytagh, *Ten Years of Non-Retroactivity: A Critique in a Proposal*, 61 Va L Rev 157 (1975); Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731 (1991); Schaefer, *Prospective Rulings: Two Prospectives*, 1982 S Ct Rev 1; Schaefer, *The Control of "Sunbursts"; Techniques of Prospective Overruling,* 42 NYU L Rev 631 (October, 1967); Mishkin, *Forward: The High Court, the Great Writ, and the Due Process of Common Law*, 79 Harv L Rev 56 (1965).

III

Whether or not prospective-only decision making is appropriate (and, if so, under what circumstances it should be applied) has engendered much debate in this Court. See, for example, *Karaczewski v Farbman Stein & Company*, 478 Mich 28, 45 (2007) (Weaver, J., concurring in part and dissenting in part); *Rowland v County Road Commission*, 477 Mich 197, 220-223 (2007); *Collins v Comerica Bank*, 469 Mich 1238 (2001); *Trentadude v Gorton*, 479 Mich 378 (2007); *Devillers v* ACIA, 473 Mich 562 (2005); Pohutski *v City of Farmington Hills,* 465 Mich 675 (2002); and *Wayne County v Hathcock*, 471 Mich 445 (2004). This Court's recent jurisprudence has consistently recognized that this Court's decisions are typically given retroactive effect "'applying to pending cases in which a. . .challenge has been raised and preserved'". *Devillers, supra*, at 473 Mich at 586. Prospective-only application of decisions has been described as "a departure from this

usual rule [of retroactive effect]" which is only appropriate in "exigent circumstances" "warranting the 'extreme measure' of prospective-only application."[3] *Id.* Further, prospective-only application of decisions is generally "'limited to decisions which overrule *clear and uncontradicted* case law.'" *Id.* at 587. (Emphasis in original).

IV

The constitutional problem with decisions that are *only* prospective (i.e., they announce a rule but do *not* apply that rule to the parties before the Court or pending cases where a challenge has been preserved) is that such decisions are extra-judicial, allowing the Court to act as a legislative body declaring what the law "should be" in the future.

This Court succinctly stated the constitutional problem with prospective-only decisions in *Devillers,* 473 Mich at 587 n 57, where the Court stated:

> As we explained in *Hathcock, supra*, [471 Mich 445], at 484 n 97, to accord a holding only prospective application is, essentially, an exercise of the legislative power to determine what the law shall be for all *future* cases, rather than an exercise of the judicial power to determine what the existing law is and apply it to *the case at hand.* Const. 1963, art 3, § 2 prohibits this Court from exercising powers properly belonging to another branch of government except when expressly authorized by the Constitution. As we further explained in *Hathcock, supra*, at 484 n 98, prospective opinions are, in essence, advisory opinions, and our only constitutional authorization to issue advisory opinions is found in Const. 1963, art 3, § 8, which does not apply in this case. (Emphasis in original).[4]

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[3] An example of the extreme, exigent circumstances under which this Court has applied prospective-only application to a decision is *Pohutski, supra.*

[4] See also, *Michigan Chiropractic Council v Commissioner of the Office of Financial and Insurance Services*, 475 Mich 363, 577 (2006) (Markham J., concurring in part and dissenting in part), where Justice Markham pointed out that "advisory opinions" are outside the scope of "the traditional 'judicial power'" because there is no case or controversy, but noting that the "traditional judicial power" has been constitutionally expanded as to those advisory opinions authorized by Const. 1963, art. 3, § 8.

Purely prospective rule making does not comport with this Court's constitutionally assigned "judicial power" as described in *Michigan Chiropractic Council v Commissioner of the Office of Financial and Insurance Services*, 475 Mich 363, 370 (2006), where this Court described "judicial power" in the context of justicibility doctrines and stated:

> The powers of each branch are outlined in the Michigan Constitution, which assigns to the Legislature the task of exercising the 'legislative power,' the Governor the task of exercising the 'executive power', and the judiciary the task of exercising the 'judicial power'.
>
> In *Nat'l Wildlife*, this Court described and defined the Court's constitutionally assigned 'judicial power':
>
>> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any state of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making. [471 Mich 614-615].[5]

The incompatibility of prospective-only decisions with the judicial adjudicative function was recently summarized by one commentator as follows:

> Ordinarily, the duty to decide litigated issues is considered only positively -- i.e., for the purpose of ensuring that those issues are, in fact, decided. But this duty to decide litigated issues

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[5] See *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312 (2002) (where, in the context of statutory construction, the Court declared "the proper role of the judiciary is to interpret not write the law").

also has a negative aspect that comes to the fore in the retroactivity/prospectivity context. Courts *must* confine their inquiry to what is before them; they *cannot* consider issues external to a particular dispute. In other words, courts cannot determine the outcome of *future* cases prior to their adjudication. As stated by one prominent legal scholar more than 100 years ago: 'The court making the decision is under a duty to decide the very case presented and has no authority to decide any other.'

* * *

Generally speaking, courts do not decide cases based on what is perceived to be the former law, nor do they decide cases on the basis of what might become the law in the future. Rather, the usual rule is that 'a court is to apply the law in effect at the time it renders its decision.' For 'the province of the judiciary is to say what the law is, not what it was,' and 'one can maintain a priori that it is the duty of judges to decide cases based on their best understanding of the law.' There is, of course, nothing unusual about such 'retroactive' applications of current law; in fact, they occur in the vast majority of cases without discussion or even thought.

* * *

[W]hat is often referred to as the retroactive application of judicial decisions is simply the norm. By contrast, prospectivity-based approaches are quite inconsistent with this basic understanding of the nature of the adjudicative function. For one thing, prospectivity (at least in its pure form) is inconsistent in that what is purported to be 'the law' is not applied to the issues before the court. Instead, the issues before the court are decided on the basis of what was formerly 'the law'. Second, by announcing rules of law that are to be applied only prospectively, pure prospectivity is inconsistent with the adjudicative function in that the decisional court, in a very real sense, purports to decide issues other than those before it (i.e., those arising in certain future cases).

* * *

[T]he burden of justifying prospectivity should be upon the proponents of such approaches. Any such justification must include arguments for simultaneously applying and not applying "the law" in essentially indistinguishable cases, as well as courts purporting to decide the law applicable in future

cases even where such law has not yet served as the basis for any decision.[6]

Shannon, *supra*, 26 Harv J L & Public Policy at 839-842 (footnotes and citations omitted).

V

As noted by this Court in *Devillers* and *Hathcock*, prospective-only decisions are nothing more than "advisory opinions".[7] See also *In Re Grand Jury Subpoena Duces Tecum*, 112 F3d 910, 925 (CA 8, 1997) ("a purely prospective decision is little more -- perhaps nothing more -- then an advisory opinion.").

While our state constitution grants this Court authority to issue advisory opinions under specific, limited circumstances, that authority does not apply to cases such as the one before this Court. Rather, the advisory opinion authority of this Court can only be exercised upon the request of either house of the legislature or the governor. And, it is

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[6] One purported justification for prospective-only decisions is that they allow a court to take into consideration "reliance" (either real or fictional) on pre-existing interpretation of the law. However, "reliance" on pre-existing decisions is already part of the decision making process under the doctrine of *stare decisis.* See, e.g., *Devillers*, 473 Mich at 584, (one of the factors courts consider under the doctrine of *stare decis*is is "whether reliance interests would work an undue hardship if the decision were overruled.")

As noted in Shannon, 26 Harv J L & Public Policy at 855, prospective-only decisions inappropriately "divorce" the adjudicative function of common law courts from the "precedent setting function" and thereby improperly excise from the adjudicative analysis "many of the factors (such as reliance interests) that ordinarily inform the law-changing decision* * *. [P]roper adherence to the doctrine of *stare decisis* requires that factors such as reliance, to the extent considered at all, must be factors in the law-changing decision *itself.* They cannot be deferred to a later 'law-applying' portion of the precedent-setting court's opinion, nor to a later case similarly involving pre-decision conduct or events."

[7] Prospective-only decisions have been characterized as nothing more then dicta masquerading as a "holding". See Shannon, *supra*, 26 Harv J L & Public Policy at 845-851, for a discussion of dicta and prospective-only decisions.

applied only to the construction of legislation that has been enacted but has not yet gone into effect. Const. 1963, art. 3, Sec. 8.

VI

In summary, prospective-only decisions elevate what is really mere dicta to the status of an "advisory opinion" that binds all future cases. Such decisions are essentially legislative, declaring what the law "shall be" in the future. There is no foundation in our constitution for prospective-only decisions. In fact, such decisions run afoul of our constitution's prohibition against the judicial branch exercising "power belonging to another branch except as expressly provided in the constitution." Const. 1963, art. 3, § 2.

CONCLUSION

Issuance of a prospective-only decision in the context of the present case would violate the Michigan Constitution because it would be an advisory opinion and beyond the constitutionally based power of this Court.

Respectfully submitted,

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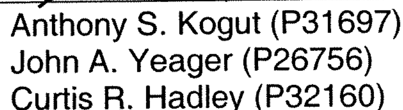

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