

ORIGINAL

STATE OF MICHIGAN

IN THE SUPREME COURT

CHATAPURAM S. RAMANATHAN,

Supreme Court No. 133170

Plaintiff-Appellee,

COA No. 266238

vs.

L.C.C. No. 98-810999-NO

BOARD OF GOVERNORS OF WAYNE
STATE UNIVERSITY,

Defendant-Appellant.

133170 (79)

5/29

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**MOTION TO FILE AMICUS CURIAE BRIEF OF BLUE CROSS BLUE SHIELD
OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

PLUNKETT & COONEY, P.C.

FILED

MAY 25 2007

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**MOTION TO FILE AMICUS CURIAE BRIEF OF BLUE CROSS BLUE SHIELD
OF MICHIGAN SUPPORTING THE POSITION OF THE BOARD OF
GOVERNORS OF WAYNE STATE UNIVERSITY**

Blue Cross Blue Shield of Michigan (BCBSM) moves for an Order permitting it to file an Amicus Curae Brief supporting the position of the Board of Governors of Wayne State University. In support of its Motion, BCBSM states:

1. BCBSM is an employer within the meaning of MCL 37.2201(a). As an employer which has been in the past and may be in the future a defendant in employment-based lawsuits alleging discrimination and retaliation, BCBSM is interested in ensuring that the holding of this Court in *Garg v Macomb County Mental Health Serv*, 472 Mich 263; 696 NW2d 646 (2005), *amended on denial of reh'g*, 473 Mich 1205 (2005), that a plaintiff may not introduce evidence of alleged discrimination or retaliation occurring more than three years prior to the date of filing the Complaint, is consistently and uniformly applied by the trial courts of this state and by the Court of Appeals.

2. The Court of Appeals' reading of this Court's decision in *Garg, supra*, as standing for the proposition that evidence of acts occurring more than three years prior to the filing of a Complaint may be admitted as "relevant background evidence" in the discretion of the trial court is incorrect and jeopardizes the protection against stale claims afforded employers by the decision in *Garg*.

3. The Amicus Curae Brief will assist the Court by demonstrating the error in the Court of Appeals' interpretation of *Garg, supra*. Furthermore, the Brief highlights why a bright line rule prohibiting the introduction of evidence of acts occurring more

than three years prior to the filing of the Complaint is necessary to provide employers the protection of the statute of limitations to which they are entitled.

4. Defendant-Appellant, Board of Governors of Wayne State University, consented to the filing of a brief by BCBSM in this case.

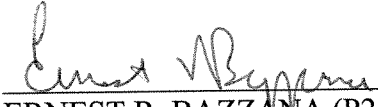
5. While mention of an Amicus Curae Brief appears only in the court rule relating to briefs in calendar cases, MCR 7.306(D), this Court has acknowledged that an Amicus Curae Brief is not only permitted at the application stage, but is encouraged.

WHEREFORE, Blue Cross Blue Shield of Michigan respectfully requests that the Court grant it leave to file as Amicus Curae in this case in support of Defendant-Appellant's Application for Leave to Appeal.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

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Ernest R. Bazzana, being first duly sworn, deposes and says that he caused to be served a copy of the attached Motion to File Amicus Curiae Brief of Blue Cross Blue Shield of Michigan Supporting the Position of The Board of Governors of Wayne State University, Amicus Curae Brief of Blue Cross Blue Shield of Michigan and this Proof of Service was served upon:

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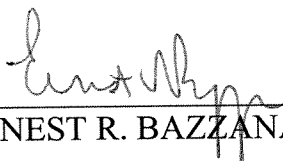
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by serving each of the attorneys of record herein at their respective addresses disclosed in
the pleadings on the 24th day of May, 2007, via the following:

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I declare my statements are true and accurate to the best of my knowledge, information
and belief.



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STATEMENT OF THE QUESTION PRESENTED

WHETHER A PLAINTIFF SHOULD BE PERMITTED TO
INTRODUCE EVIDENCE OF ALLEGED
DISCRIMINATION OR RETALIATION OCCURRING
MORE THAN THREE YEARS PRIOR TO THE DATE OF
FILING THE COMPLAINT?

Amicus Curiae, Blue Cross Blue Shield of Michigan answers,
“No.”

Defendant-Appellant answers, “No.”

Plaintiff-Appellee answers, “Yes.”

The Court of Appeals answered that the admissibility of such
evidence lies in the discretion of the trial judge.

STATEMENT OF FACTS

Blue Cross Blue Shield of Michigan adopts the recitation of facts set forth on pp. 1-14 of Defendant-Appellant's Application for Leave to Appeal dated February 12, 2007 under the heading entitled "Concise Statement of Material Proceedings and Facts."

INTRODUCTION

This case presents to this Court the question of whether discrimination and retaliation claims are truly and realistically subject to the three-year statute of limitations bar or whether that bar can be subtly, but nonetheless effectively, eroded by admitting evidence of acts which occurred outside the limitations period under the guise of “background evidence.” The objective of amicus curiae is to show the vital importance of a rule that renders inadmissible evidence of acts occurring outside the limitations period and preserves the integrity of the statute of limitations.

Absent formal guidelines and fundamental rules concerning “background evidence,” the question of admissibility becomes an area in which both courts and litigants are left to grope in the dark. The rule that pre three-year-prior-to-complaint evidence is not admissible for any purpose is a firm, bright line rule which provides certainty to this area of the law.

ARGUMENT

A PLAINTIFF SHOULD NOT BE PERMITTED TO INTRODUCE EVIDENCE OF ALLEGED DISCRIMINATION OR RETALIATION OCCURRING MORE THAN THREE YEARS PRIOR TO THE DATE OF FILING THE COMPLAINT.

1. What the Law Is.

This Court's decision in *Garg v Macomb County Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005) amended on denial of rehearing 473 Mich 1205 (2005) unambiguously¹ holds that evidence of acts occurring more than three years prior to the date the complaint was filed is not admissible and may not be considered in assessing the sufficiency of a plaintiff's evidence.

A reading of the *Garg* decision shows that removed footnote 14 was mere surplusage because this Court held, in the body of the decision, that evidence of acts occurring outside the limitations period may not be considered by the trier of fact.

¹ To simply say that language is ambiguous, or, as the Court of Appeals said in this case, "unclear", does not make it so. Ambiguity resides in a writing only when, after it is viewed objectively, more than one meaning may reasonably be ascribed to the language used. *Petovello v Murray*, 139 Mich App 639; 362 NW2d 857 (1984). A writing is ambiguous only when it is equally susceptible to more than one reasonable meaning. *City of Lansing Mayor v Michigan Public Serv Comm'n*, 470 Mich 154, 166; 680 NW2d 840 (2004); *Farm Bureau Mut'l Ins Co v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). Courts may not impose an ambiguity on clear language. *City of Grosse Pointe Park v Michigan Municipal Liab & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). The fact that more than one interpretation of a writing may be proposed does not make that writing ambiguous. The writing must be equally susceptible to more than a single meaning in order to be ambiguous. *Fluor Enterprises, Inc v Revenue Division, Dep't of Treasury*, ___ Mich ___; ___ NW2d ___; 2007 WL 1288337 (Docket No. 129149, *rel'd* May 2, 2007). Plaintiff's, and the Court of Appeals', interpretation of this Court's decision in *Garg* is not reasonable. That decision is not ambiguous.

Removed FN 14 merely provided an explanation underlying the Court's determination that evidence of acts occurring outside the limitations period may not be considered by the trier of fact.

Having overturned the "continuing violations" doctrine in Michigan, *Garg, supra*, at p. 284-285, this Court then evaluated the sufficiency of plaintiff's claims of discriminatory retaliation without considering the defendant's time-barred conduct. While the plaintiff claimed she had been subjected to continuing retaliatory conduct over a period of 11 years for having filed two grievances over promotions she had been denied, this Court refused to consider the alleged discriminatory conduct except to the extent that it occurred within the statutory period:

"[P]laintiff's claims of retaliatory discrimination arising from acts occurring before June 21, 1992, are untimely and cannot be maintained. Without these untimely acts, plaintiff's claim is limited to acts occurring [within the limitations period, *i.e.*,] five to eleven years after she filed her grievance. In light of this gap, there is insufficient evidence to allow a reasonable juror to find a causal link between the 1987 grievance and the discriminatory acts falling within the limitations period. *Garg, Id* at 286. (Underlining supplied.)

See also, Garg, supra at 278 ("absent evidence of these acts [occurring outside the limitations period], there is insufficient evidence to establish a causal link between the 1987 grievance and any retaliatory acts occurring within the limitations period.").

Nowhere in the *Garg* decision did this Court hold or even suggest that while it had overturned the continuing violations doctrine evidence of alleged discriminatory or retaliatory acts outside the statutory period would still be admissible to show alleged discrimination. This Court placed more than "some significance" as the Court of Appeals

believed on the fact that evidence related to time periods outside the statute of limitations period. It placed outcome – determinative significance by expressly declining to consider evidence of acts occurring outside the limitations period. That decision is clear and unambiguous in this regard and states what the law Michigan is.

Several panels of the Court of Appeals and federal district courts have specifically held, since the decision in *Garg*, that trial courts properly exclude evidence of acts of alleged discrimination which are claimed to have taken place outside the three-year limitations period applicable to ELCRA suits. *See, Spink v MacSteel Michigan*, No. 263140, 2005 WL 3500954 (Mich. App. Dec. 22, 2005) (stating that *Garg* overruled the continuing violations doctrine under Michigan law and holding that, “[a]ccordingly, the trial court correctly ruled that any acts alleged by plaintiff to have occurred outside the three-year limitations period may not be considered.”); *Shepherd v General Motors*, No. 260171, 2005 WL 1750626 (Mich App July 26, 2005) (noting that in *Garg*, this Court overruled its prior recognition of the continuing violations doctrine and holding that “the trial court correctly rule that any part any acts alleged by plaintiff to have occurred outside the three-year limitations period may not be considered.”); *Hill v PBG Michigan LLC*, No. 268692, 2006 WL 2872581 (Mich App October 10, 2006) (“...The trial court correctly determined that any acts or events alleged by plaintiff to have occurred outside the three-year limitations period could not be considered.”); *Allen v Daimler Chrysler Corp*, No. 265427, 2006 WL 626239 (Mich App March 14, 2006); lv den 476 Mich 859; 718 NW2d 340 (2006); *Greenfield v Sears, Roebuck and Co*, 2006 WL 508655 (ED Mich March 2, 2006) (ELCRA age discrimination case citing *Garg* and holding that alleged

discriminatory acts occurring outside the period of limitation “will not be viewed when considering the motion” for summary judgment); *Isong v General Motors Corp*, 2006 WL 931950 (ED Mich April 10, 2006) (“...Any evidence of alleged of discriminatory conduct outside the three-year statute of limitations cannot be considered in a discrimination suit brought under the ELCRA.”); *Seldon-Wittaker v HCR Manor Care*, 2006 WL 2583249 (ED Mich September 7, 2006) (“... There is no basis that Michigan courts would be inclined to extend *Garg* to allow consideration of time-barred acts as further ‘relevant background evidence’ in support of claims brought within the statute of limitations....”) The fact that there is, in addition to the present case, an aberrational decision, *Conti v American Axle & Manufacturing, Inc.*, 2006 WL 3500632 (ED Mich December 4, 2006) which states that evidence occurring outside the statute of limitations may be considered as relevant background evidence only reinforces the need for this Court to grant leave for appeal to assist those litigants and courts who are unable to see the clarity and lack of ambiguity in this Court’s decision in *Garg*.

2. Why The Law Is As It Is.

The foregoing demonstrates, in our view, the correct current status of the law in Michigan and shows the error in the decision in this case. The following demonstrates why evidence of acts occurring outside the limitations period cannot be considered.

To allow proof of stale and time-barred acts to support a subsequent claim of discrimination or retaliation would seriously undermine the policy and purpose underlying statutes of limitations. If a plaintiff is permitted to rely upon time-barred

allegations of purported discrimination or retaliation, the effect would be to resuscitate “continuing violations” as a viable theory.

Periods of limitation are established in order to cut off rights that might otherwise be asserted. *Kabanagh v Noble*, 332 US 535; 92 L Ed 150; 68 S Ct 235 (1947). They are based upon sound reasoning and the recognition of the difficulty in obtaining proofs after the lapse of the designated period. One of the principal purposes sought to be achieved by establishing time limitations is that those having claims must assert them, if at all, while the defendant’s evidence can still be retrieved. *Guastello v Citizens Mut’l Ins Co*, 11 Mich App 120; 160 NW2d 725 (1968).

Statutes of limitation are designed to encourage the rapid recovery of damages, to penalize plaintiffs who have not been assiduous in pursuing their claims, to afford security against stale demands when the circumstances would be unfavorable to a just examination and decision, to relieve defendants of the prolonged threat of litigation, to prevent plaintiff from asserting fraudulent claims, and to remedy the general inconvenience resulting from delay in asserting a legal right that is practicable to assert. *Lemmerman v Fealk*, 449 Mich 56, 65; 534 NW2d 695 (1995); *Sills v Oakwood Gen’l Hosp*, 220 Mich App 303; 559 NW2d 348 (1996); *Lothian v Detroit*, 414 Mich 160, 166-167; 324 NW2d 9 (1982).

The very real danger in admitting evidence of acts occurring outside the limitations period is that the jury will not distinguish between the admission of such as evidence “for the purpose of relevant background evidence,” whatever that means – see the discussion in this regard *infra* – and for the purpose of determining liability and

assessing damages. A court must exclude evidence of time-barred acts because notwithstanding a jury instruction that the evidence may not be considered in determining whether the plaintiff suffered the adverse employment action at issue (i.e., that is not time-barred) because of discrimination or retaliation,² human nature is such that the jury will consider it for that improper purpose. Justice Jackson in *Krulewitch v United States*, 336 US 440; 69 S Ct 716; 93 L Ed 790 (1949) noted that all practicing lawyers know that it is a naïve assumption and unmitigated fiction to believe that the prejudicial effect of evidence can be overcome by instructions to the jury. The risk of allowing an employee to indirectly recover for untimely acts of discrimination is too great to allow the question of the admissibility of such evidence to lie within the discretion of the trial court judge. A bright line exclusionary rule is the only appropriate means by which to eliminate that risk.

Plaintiff asserts that this Court's decision in *Garg* permits the admission of evidence for purposes of proving discriminatory and/or retaliatory intent, notwithstanding the fact that the evidence relates to periods outside of the statute of limitations period.

Plaintiff's opposition to application for leave to appeal dated March 30, 2007, p. 2. At

² In order to successfully carry the ultimate burden in a discrimination or retaliation case, the plaintiff must prove that the protected trait or protected activity was a significant and determining factor in the employer's decision. In order to successfully carry the ultimate burden in a discrimination or retaliation case, the plaintiff must prove that the protected trait or protected activity was a significant and determining factor in the employer's decision. *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986). *Taylor v Modern Engineering, Inc*, 252 Mich App 655; 653 NW2d 625 (2002), citing, *Hazle v Ford Motor Co*, 464 Mich 456, 465; 628 NW2d 515 (2001) in turn quoting *Lytle v Malady (on reh'g)* 458 Mich 153, 176; 579 NW2d 906 (1998). *Shalla v Catholic Social Services of Wayne County*, 455 Mich 604, 617; 566 NW2d 571 (1997); *West v General Motors*, 469 Mich 177; 665 NW2d 468 (2003).

bottom, Plaintiff argues that the admissibility of evidence for purposes of proving discrimination/retaliation is not affected by the statute of limitations bar. Plaintiff's opposition to application for leave to appeal dated March 30, 2007, pp. 3, 14.

Then, at p. 24, Plaintiff argues that when "relevant background evidence" is offered for the purpose of proving discriminatory and/or retaliatory intent (which, of course, is the bottom line requirement of any discrimination or retaliation claim³) that is somehow different than offering that evidence for the purpose of establishing the "claim" or "cause of action" itself.

Let's try to understand this. Plaintiff acknowledges that pre-three years prior to complaint evidence is not admissible for the purpose of establishing the claim itself but argues that such evidence is admissible as "relevant background evidence." What is the difference? What is the purpose of admitting "relevant background evidence" if not to prove a fact that is of consequence to the determination of the action? The evidence addresses the "why" element of the discrimination and retaliation causes of action, *i.e.*, because of the protected trait or activity, not the "what" element, *i.e.*, the adverse employment action which, in this case, rests solely on the denial of tenure. Nonetheless, both are elements of the Plaintiff's claim or cause of action. The evidence, of necessity, is admitted for the purpose of establishing the "claim" or "cause of action" itself. Blue Cross Blue Shield contends that there is no difference in purpose and that the common purpose is to establish that the Defendant unlawfully discriminated or retaliated against

³ *Dubey v Stroh Brewery Company*, 185 Mich App 561; 462 NW2d 758 (1990) applying the "determinative factor" analysis set forth in *Matras v Amoco Oil Co*, *supra*.

the Plaintiff. True “background evidence” such as, for example, the weather conditions that existed in the fourth year preceding the filing of a complaint is not relevant⁴ and not admissible because it does not tend to prove any fact that is of consequence to the determination of the action. Evidence which may have that tendency -- and which Plaintiff concedes is not admissible for the purpose of establishing the “claim” or “cause of action” itself -- cannot be saved from inadmissibility by characterizing it as “background evidence.”

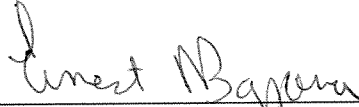
⁴ This Court has stated that logical relevance is the foundation for the admissibility of evidence. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002).

CONCLUSION

For the foregoing reasons, amicus curiae Blue Cross Blue Shield of Michigan, contends that this Court should grant the application for leave to appeal filed by Defendant-Appellant Board of Governors of Wayne State University and thereafter reverse the Court of Appeals' determination that a plaintiff is permitted to introduce evidence of alleged discrimination or retaliation occurring more than three years prior to the date of filing the Complaint.

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Dated: May 24, 2007

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by serving each of the attorneys of record herein at their respective addresses disclosed in
the pleadings on the 24th day of May, 2007, via the following:

U.S. MAIL
 HAND DELIVERED
 FEDERAL EXPRESS

FAX
 OVERNIGHT EXPRESS
 OTHER

I declare my statements are true and accurate to the best of my knowledge, information
and belief.



ERNEST R. BAZZANA