MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

FIRST AMENDMENT CHALLENGE TO MICHIGAN STATE UNIVERSITY ORDINANCE WILL BE ARGUED BEFORE SUPREME COURT NEXT WEEK

LANSING, MI, March 30, 2012 – A Michigan State University ordinance that makes it a crime to disrupt "the normal activity" of any MSU employee is at issue in an appeal that the Michigan Supreme Court will hear argued next week.

In *People v Rapp*, the defendant, an MSU law student, was charged with and convicted of violating MSU Ordinance 15.05, "Disruption or molestation of persons, firms, or agencies" after he confronted an MSU parking enforcement employee over a parking ticket. The university employee called police after the student, who had stopped his car in front of the employee's work vehicle, yelled at the employee and asked for his name. The student challenged his conviction, arguing that the ordinance violated his free speech rights under the First Amendment. The circuit court agreed and struck down the student's conviction, but the Court of Appeals reversed, holding that the ordinance was not unconstitutional on its face. The appellate court remanded the case to the trial court to determine whether the ordinance was unconstitutional as applied. The defendant argues in part that the ordinance is overly broad and vague, while the prosecution contends that the ordinance does not focus on speech, but on disruption of MSU employees at their work.

Another constitutional challenge is at issue in *People v Nunley*, in which the defendant was charged with driving with a suspended license, second offense. To establish that the offender was notified of the first suspension – an element of the offense – the prosecutor sought to introduce into evidence a Department of State certificate of mailing, which states that the defendant was notified by first-class mail the first time that his license was suspended. But the district court held that the certificate could not be admitted into evidence unless the person who prepared it appeared at trial to testify and to be subject to cross-examination. The circuit court agreed and the Court of Appeals affirmed in a 2-1 decision, with the majority finding that the defendant's rights under the Confrontation Clause would be violated if the certificate was admitted without witness testimony. The majority said that the certificate of mailing was proof of an element of the crime of driving with a suspended license and, therefore, it was "functionally identical to live, in-court testimony." The dissenting judge disagreed, saying that the certificate was non-testimonial in nature, adding "to hold that the certificate of mailing here is testimonial runs contrary to the purpose of the confrontation clause—to ensure the reliability of evidence through vigorous cross- examination—because cross-examination here would elicit little or nothing of value to ensure that reliability."

The Supreme Court will also hear *In re Estate of Mortimore*, a will dispute between the deceased's daughter and son and the woman who claims to be the father's second wife, although the marriage certificate she produced was not filed until six days after the father's death. The deceased's children maintain that the woman – who allegedly became their father's constant companion almost immediately after their mother's death – exercised undue influence over their father, causing him to make a new will in her favor. The probate court did not find undue influence, noting in part the testimony of the deceased's doctor, who asserted that the man retained his independence and made his own decisions. But the Court of Appeals reversed, holding that the probate court failed to recognize a mandatory presumption of undue influence, based on the woman's fiduciary relationship with the deceased. The evidence showed that the deceased entrusted his financial affairs to his companion, that she had the opportunity to influence his decisions, and that she benefitted from the new will, all giving rise to the presumption of undue influence, the Court of Appeals said. The Court of Appeals also determined, as a matter of law, that the woman failed to offer sufficient evidence to rebut the presumption of undue influence.

The five remaining cases the Court will hear involve criminal, governmental immunity, insurance, and professional malpractice law issues.

The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice on **April 4 and 5**, starting at **9:30 a.m**. each day. The Court's oral arguments are open to the public. The arguments will also be broadcast on Michigan Government Television (mgtv.org).

Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way that some or all of the Court's seven justices view the cases. The attorneys may also disagree about the facts, issues, procedural history, or significance of their cases. Briefs are online at http://www.courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For more details about these cases, please contact the attorneys.

Wednesday, April 4
Morning Session

DOUGLAS v ALLSTATE INSURANCE COMPANY (case no. 143503)
Court of Appeals case no. 295484
Trial Court: Washtenaw County Circuit Court
Attorney for plaintiff James Douglas: John H. Bredell/(734) 482-5000
Attorney for defendant Allstate Insurance Company: P. Kelly O'Dea/(248) 377-1700
Attorney for amicus curiae Coalition Protecting Auto No-Fault: Richard E. Hillary, II/(616) 831-1700
At issue: In 1996, the plaintiff sustained a traumatic brain injury when he was struck by a hit-and-run driver. He sued for no-fault benefits in 2005, claiming that the defendant insurance company failed to pay for attendant care that was provided by his wife. After a bench trial, the trial court entered a judgment in the plaintiff's favor. The Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings, finding in part that the trial court should have required more documentation before awarding attendant care benefits. Did the plaintiff present sufficient proofs to support the trial court's award of attendant care benefits? Did the

activities plaintiff's wife performed constitute attendant care under MCL 500.3107(1)(a), or replacement services under MCL 500.3107(1)(c)? Did the trial court err in awarding attendant care benefits at the rate of $40 per hour?

Background: James Douglas was riding a bicycle when he was struck by a hit-and-run driver; Douglas suffered a traumatic brain injury. Allstate Insurance Company was assigned to administer Douglas' claim for no-fault benefits. In 2005, Douglas sued Allstate, claiming that the insurer had failed to pay all personal protection insurance benefits that were due under the no-fault act. Under MCL 500.3107(1)(a), "allowable expenses" consist of "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." Under MCL 500.3107(1)(a), family members are entitled to reasonable compensation for healthcare services (referred to as "attendant care services") they provide at home to an injured person. Douglas argued in his lawsuit that he was entitled to recover benefits for attendant care services provided by his wife, Katherine Douglas. Katherine was employed full time at the Huron Valley Consultation Center as an executive assistant. Douglas contended that Katherine cares for him when she is at home on weekday evenings and weekends. According to Katherine, Douglas needs constant guidance and supervision.

Allstate filed several motions for partial summary disposition, arguing that Douglas was not entitled to benefits because Douglas' medical care providers had not authorized attendant care services for him. Moreover, Allstate contended, Katherine had not provided attendant care services. In response, Douglas provided the court with an affidavit from Dr. Thomas Rosenbaum, a licensed psychologist, who stated that Douglas needed care during all waking hours. Rosenbaum further opined that Katherine had been providing such care to her husband since the accident. The trial court denied Allstate's motions.

After a bench trial, the trial court determined that Douglas needed attendant care for all of his waking hours. Katherine was unable to provide such care, the judge ruled, because she worked full-time outside the home and because Allstate refused to pay an appropriate hourly rate. The trial court concluded that Douglas was entitled to attendant care benefits at the rate of $40 per hour. The trial court entered a judgment for $1,163,395.40, which included attorney fees, interest, and costs. The judgment reflects an award of attendant care benefits of $477,040 from May 31, 2004, to November 1, 2007, and $164,686 from November 1, 2007, to November 18, 2009.

Allstate appealed. In an unpublished per curiam opinion, the Court of Appeals affirmed in part, reversed in part, and remanded for further proceedings. The Court of Appeals held that there was no clear error in the trial judge's finding that attendant care was reasonably necessary, that Katherine was an appropriate person to provide the care, and that $40 per hour was a reasonable rate. The Court of Appeals went on to note, however, that an insurer has no obligation to pay any attendant care until it receives evidence that services were actually rendered with the expectation of payment. The appellate panel noted that the trial judge did not address the requirement that the caregiver reasonably expected payment when performing attendant care services. Moreover, held the panel, the evidence presented at trial did not reflect that Katherine maintained records of the attendant care she claimed to have provided for her husband. While Katherine testified at trial regarding the nature of her care for Douglas, her testimony only accounted for services provided through February 19, 2009, which was approximately nine months before the award period ended on November 18, 2009.

The Court of Appeals ultimately concluded that Allstate had no obligation to make payment until it was provided with documentation of Katherine's attendant care. Therefore, the Court of Appeals remanded the case to the trial court for further proceedings regarding the

amount of incurred expenses for attendant care from November 7, 2006, to November 18, 2009. The Court of Appeals directed the trial judge to determine whether Katherine reasonably expected compensation at the time of performance. On remand, explained the panel, the trial judge could take additional testimony, if necessary, and amend its findings, or make new findings and amend the judgment accordingly. Allstate appeals.

JOHNSON v RECCA (case no. 143088)
Court of Appeals case no. 294363
Trial Court: Osceola County Circuit Court
Attorney for plaintiff Penny Jo Johnson: Joseph F. Lucas/(313) 961-0425
Attorney for defendant John Recca: Daniel S. Saylor/(313) 446-5520
Attorney for amicus curiae Insurance Institute of Michigan: Kimberlee A. Hillock/(517) 351-6200
At issue: After she was injured in a car accident, the plaintiff sued the defendant driver and his insurance company. Among other things, she sought to be compensated for replacement services – household services that someone performs for an injured person when her injuries prevent her from caring for herself. The trial court held that the plaintiff could not recover replacement services from the defendant driver, because replacement services are not "allowable expenses" under MCL 500.3135(3)(c). The Court of Appeals reversed, holding that replacement services are a subset of "allowable expenses." Does MCL 500.3135(3)(c), which permits an injured person to recover excess damages for allowable expenses, work loss, and survivor's loss in third-party actions, include the cost of replacement services?
Background: In 2004, Penny Jo Johnson, a pedestrian, was hit by a pickup truck driven by John Recca. At the time, Johnson lived with her ex-mother-in-law, Harrietta Johnson. According to Johnson, she suffered serious injuries to her brain and spine, making it necessary for her ex-mother-in-law to help her with personal care and take over household chores. Neither woman owned a vehicle; Recca had a no-fault insurance policy with Allstate Property and Casualty Insurance Company.

Johnson sued Allstate and Recca. In her first-party claim against Allstate, Johnson alleged that Allstate had failed to pay personal protection insurance benefits, including expenses for attendant care and replacement services that, Johnson claimed, her ex-mother-in-law had provided for three years. Under the no-fault act, replacement services recoverable from an insurer are limited to three years from the date of the accident. In the third-party claim against Recca, Johnson claimed that she had suffered a serious impairment of body function and that Recca is liable to pay for replacement services that Harrietta provided more than three years after the date of the accident. The third-party claim against Recca is at stake in this appeal.

While the no-fault act abolished most tort liability for drivers, an injured person may recover certain limited damages from a negligent driver. MCL 500.3135 provides, for example, that a negligent driver may be liable to pay damages for noneconomic loss where the injured person died, suffered permanent serious disfigurement, or sustained a serious impairment of body function. MCL 500.3135(c) permits "[d]amages for allowable expenses, work loss, and survivor's loss as defined in [MCL 500.3107 to MCL 500.3110] in excess of the daily, monthly, and 3-year limitations contained in those sections." MCL 500.3107(1)(a) defines "allowable expenses" as those "consisting of all reasonable charges incurred for reasonably necessary products, services and accommodation for an injured person's care, recovery, or rehabilitation." Replacement services expenses are covered in MCL 500.3107(1)(c).

The trial court dismissed Johnson's claims against Recca, holding that expenses for replacement services are not recoverable "allowable expenses" under MCL 500.3135(3)(c); the court reasoned that "allowable expenses" is defined in MCL 500.3107(1)(a), while expenses for replacement services are covered in a separate subsection, MCL 500.3107(1)(c). But in a published opinion, the Court of Appeals reversed. The panel explained, "Because replacement services are services for the 'care' of an injured person, we conclude that replacement services expenses are not separate and distinct from 'allowable expenses'; rather, they are merely one category of 'allowable expenses.' " Recca appeals.

PEOPLE v RAPP (case nos. 143343-4)
Court of Appeals case nos. 294630, 295834
Trial Court: Ingham County Circuit Court
Prosecuting attorney: Joseph B. Finnerty/(517) 483-6108
Attorney for defendant Jared Rapp: J. Nicholas Bostic/(517) 706-0132
Attorney for amicus curiae Michigan State University: Michael J. Kiley/(517) 353-3530
At issue: After confronting a Michigan State University employee about a parking ticket, the defendant was charged and convicted under a university ordinance that makes it a crime to disrupt "the normal activity . . . of any person . . . carrying out . . . service, activity or agreement for or with the University." The defendant argued that the ordinance was unconstitutional, but the Court of Appeals upheld his conviction, holding that the ordinance was not unconstitutional on its face; the appellate court remanded the case to the trial court to determine whether the ordinance was unconstitutional as applied. Is Michigan State University Ordinance 15.05 facially unconstitutional under *City of Houston v Hill*, 482 US 451 (1987)? Does MCR 7.101(O) allow taxation of costs in criminal cases appealed in the circuit court?
Background: Jared Scott Rapp, a Michigan State University law student, found a parking ticket on his car, which was parked on the MSU campus. Ricardo Rego, an MSU parking enforcement employee, was in the area, having another vehicle towed, when Rapp drove up, stopped his car in front of Rego's vehicle, and got out, walking quickly toward Rego. Rapp yelled at Rego, asked if he was the one who gave Rapp the ticket, and demanded to know Rego's name. Rego attempted to speak with Rapp, then got into his vehicle; following standard procedure, Rego called for a police officer. During the 10 to 15 minutes it took for a police officer to arrive, Rapp remained outside Rego's vehicle, taking photos of Rego with his cell phone. Rego, meanwhile, sat in his truck and filled out paperwork. Rapp was charged with violating Michigan State University Ordinance 15.05, "Disruption or molestation of persons, firms, or agencies." That ordinance states, "No person shall disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University."

In district court, Rapp filed a pretrial motion, arguing that Ordinance 15.05 was unconstitutional on its face because it infringed on his First Amendment rights to engage in free speech and to petition the government for redress of grievances. The prosecution responded that the ordinance did not infringe on free speech content, but merely regulated the time, place and manner of speech. The district court denied Rapp's motion, and a jury found Rapp guilty as charged. After denying Rapp's post-judgment motion for entry of judgment in his favor, the court sentenced Rapp to 24 months of probation, 80 hours of community service, $873 in fines, costs, and fees, and mandatory participation in an assaultive behavior program.

Rapp appealed to the circuit court, which ruled that Ordinance 15.05 was facially unconstitutional because it was overbroad and vague, and unreasonably impinged on the First

Amendment right of free speech. The circuit court relied on the U.S. Supreme Court's decision in *City of Houston, Texas v Hill*, 482 US 451 (1987), and concluded that Ordinance 15.05 impermissibly criminalized an extremely broad range of speech. "Moreover," explained the circuit court, "just as in *Houston, supra*, there is nothing in the ordinance that tailors the rule to prohibit only disorderly conduct or fighting words. Thus, in this instance a demand for the name of the individual who was issuing the parking citations was sufficient to result in violation of the statute." Furthermore, held the circuit court, "the ordinance accords the police unconstitutional discretion in enforcement, because the question of what constitutes 'disrupting the normal activity' of someone associated with MSU is an extremely subjective determination. . . ." The circuit court reversed Rapp's conviction and dismissed the charge against him with prejudice. The court then granted Rapp's request for taxation of costs, awarding $833.65.

The prosecutor appealed. In a published opinion, the Court of Appeals reversed the circuit court. The panel concluded that the circuit court erred in relying on *Hill*, and that Rapp failed to meet his burden of showing that Ordinance 15.05 was facially unconstitutional. The Court of Appeals panel emphasized that Ordinance 15.05 barred disruption of MSU employees; it was not focused solely on speech. The Court of Appeals remanded the case to the circuit court with instructions to address the other issues Rapp raised on appeal – in particular, his argument that Ordinance 15.05 was unconstitutional as applied to the facts of this case. The Court of Appeals also vacated the circuit court's award of costs, concluding that the Michigan Court Rules did not give the circuit court he authority to do so. Rapp appeals.

Afternoon Session

PEOPLE v NUNLEY, et al. (case no. 144036)
Court of Appeals case no. 302181
Trial Court: Washtenaw County Circuit Court
Prosecuting attorney: Mark Kneisel/(734) 222-6620
Attorney for defendant Terry Nunley: James E. R. Fifelski/(734) 726-0225
Attorney for intervenor Attorney General Bill Schuette: B. Eric Restuccia/(517) 373-1124
At issue: The defendant was charged with driving with a suspended license (second offense), a violation of MCL 257.904(1). An element of that offense is that the offender was notified of the first suspension as required by the statute. The prosecutor sought to introduce into evidence a Department of State certificate of mailing, which states that the defendant was notified by first-class mail the first time that his license was suspended. The district court held that the certificate could not be admitted into evidence unless the person who prepared it appeared at trial to testify. Both the circuit court and the Court of Appeals affirmed the trial court's ruling. Did the Court of Appeals err when it held that the Department of State certificate of mailing is testimonial in nature and thus that its admission, without accompanying witness testimony, would violate the Confrontation Clause?
Background: On September 9, 2009, Terry Nunley was pulled over by police for failing to properly secure the load on his truck; he was later charged with driving with a suspended license, second offense. The elements of that crime are (1) that a defendant's license has been suspended, and (2) that he was notified of the first suspension as required by law. To establish these elements, the prosecutor obtained a copy of Nunley's certified driving record from the Michigan Department of State. That record included a "Certificate of Mailing of Orders and Rest[ricted] Lic[ense]," stating:

06/11/2009 CERTIFICATE OF MAILING OF ORDERS AND REST LICS (PRG/DR/2485)
MIC. NO X1627 FOR MDR RUN NO. 162 DATED 06/11/2009 PAGE 11

I CERTIFY THAT I AM EIGHTEEN YEARS OF AGE OR OLDER AND THAT ON THIS DATE NOTICE OF THE ORIGINAL ORDER OF SUSPENSION OR RESTRICTED LICENSE WAS GIVEN TO EACH OF THE PERSONS NAMED BELOW BY FIRST-CLASS UNITED STATES MAIL AT LANSING, MICHIGAN AS PROVIDED IN SECTION 212 OF MICHIGAN VEHICLE CODE (MCL 257.212).

DATE 6-22-09 [handwritten] OFFICER OR EMPLOYEE F. Bueter [typewritten]

Nunley's full name and driver's license number were listed below. The "Order of Suspension or Restricted License" referred to in the certificate is an "Order of Action" that stated in part that Nunley's driving privileges and license were being "denied and revoked from 06/27/2009 and to at least 06/26/2010," because of a June 2009 drunk driving conviction. The Order of Action refers to a "certified abstract of court record" attesting to Nunley's drunk driving conviction and stating that Nunley's record "contains 2 or more substance abuse convictions in 7 years."

The prosecutor filed a motion in limine, asking the district court to admit the certificate without requiring testimony from Fred Bueter, the Director of the Driver and Vehicle Records Division, or another Department of State employee. Nunley objected and asserted his right to cross-examine the issuer of the certificate. The district court denied the prosecutor's motion, reasoning that there was no other purpose for the certificate "except [for use] in litigation" and that thus, the Sixth Amendment required the person who prepared the certificate to appear at trial and be subject to cross-examination.

The prosecutor appealed to the circuit court, which affirmed the district court's ruling. In a split published decision, the Court of Appeals affirmed the lower courts' rulings that the Confrontation Clause would be violated if the certificate were admitted without witness testimony. The majority emphasized that the certificate of mailing was neither Nunley's driving record nor the notice of suspension itself; rather, it was proof of an element of the crime of driving with a suspended license and, therefore, it was "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " The majority noted that the certificate itself could not "be confronted on the when, where, or how the statutory obligation to provide notice of suspension of driving privileges was accomplished." The dissenting judge concluded that the certificate was non-testimonial in nature despite the fact that it supplies a necessary element of the offense. He reasoned in part that, at the time of the certificate's creation, it was impossible for Bueter, or any other objective witness, to reasonably believe that the certificate "would be available for use at a later trial." The prosecutor appeals.

Thursday, April 5
Morning Session Only

IN RE ESTATE OF MORTIMORE, DECEASED (case no. 143307)
Court of Appeals case no. 297280
Trial Court: Shiawassee County Probate Court

Attorney for appellees Renee Hanneman and Dean Mortimore: Douglas G. Chalgian/(517) 332-3800

Attorney for appellant Helen M. Fiser: Douglas A. Mielock/(517) 371-8100

At issue: This case involves a dispute over the validity of a will and allegations of undue influence. The children of the decedent claimed undue influence by the sole beneficiary, who became an integral part of their father's life at the time of their mother's death. The probate court ruled in favor of the beneficiary, and found that the will was not the product of her undue influence. The Court of Appeals reversed, holding that the probate court failed to recognize a mandatory presumption of undue influence, based on the beneficiary's fiduciary relationship with the deceased. What standards should apply and what factors should a court consider in determining whether a transaction was the product of undue influence where there is a fiduciary relationship between the parties?

Background: Arnold Mortimore's wife died; the couple had been married for 53 years. Helen Fiser, whose husband had died about five months earlier, helped with the funeral and was soon involved in every aspect of Mortimore's life; she managed his finances, paid his bills, and essentially ran his car repair business. Fiser suggested that he prepare a new will, and wanted him to add her name on deeds to his property. She assisted him in revoking a recently created trust, and contacted a notary public to attest to the documents.

When Mortimore died on June 12, 2009, a neighbor called his daughter, Renee Hanneman, and told Hanneman that Fiser was moving everything out of Mortimore's house. Hanneman called the police, who agreed to investigate, but said that it appeared to be a civil matter and advised Hanneman to contact an attorney. When approached by a police officer, Fiser said that she had been living with Mortimore and that the address on her driver's license was not her place of residence. She produced a marriage certificate for the officer, but it had not been filed; Fiser filed it six days after Arnold died. The minister who allegedly performed the ceremony could not be found.

Hanneman was informed that her father had executed a new will naming Fiser as the sole beneficiary of his estate. The day after Fiser filed the marriage certificate, Hanneman filed a petition for appointment of a special personal representative. She disputed whether Mortimore was legally married to Fiser, and she challenged the validity of the will, asserting that Fiser was disposing of her father's property improperly. Hanneman requested that she be appointed personal representative to secure and preserve the estate's assets. Hanneman and her brother, Dean Mortimore, argued that Fiser exercised undue influence over their father. Fiser responded, asking that the will be declared valid, and that she be appointed personal representative. The judge appointed an interim representative to conserve the assets of the estate pending the outcome of a trial.

Following a three-day trial, the judge validated the will and appointed Fiser as personal representative of the estate, concluding that Mortimore's children had not proved that Fiser exercised undue influence over their father. The judge explained that his decision was dependent on the witnesses' credibility; he noted that Mortimore's doctor felt that he was able to make decisions of his own free will.

Arnold's children appealed, and the Court of Appeals reversed the trial court in an unpublished per curiam opinion. Using the three-factor test set forth in *In re Karmey Estate*, 468 Mich 68 (2003), the Court of Appeals explained that a presumption of undue influence arises when evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor (the person who makes a will) and a fiduciary; (2) that the fiduciary benefits from a transaction; and (3) that the fiduciary had an opportunity to influence the grantor's decision in

the transaction. In this case, held the Court of Appeals, "the record overwhelmingly supports that Helen [Fiser] was involved in every financial aspect of Arnold's life and that Arnold trusted Helen to act for his benefit with respect to financial and all other matters." Moreover, as sole beneficiary, Fiser clearly benefited from Arnold executing the will, and she had the opportunity to influence Arnold's decision, the appellate court observed. Accordingly, the evidence established a mandatory presumption of undue influence, and the trial court erred in failing to recognize this, the Court of Appeals said. The Court of Appeals also determined, as a matter of law, that Fiser failed to offer sufficient evidence to rebut the presumption of undue influence. The presumption therefore "remained unscathed," and the Court of Appeals held that the will was the product of Fiser's undue influence. Fiser appeals.

HANNA v MERLOS (case no. 142914)
Court of Appeals case no. 289513
Trial Court: Wayne County Circuit Court
Attorney for plaintiff Rodney Hanna: Richard D. Schenkel/(734) 525-3950
Attorney for defendant Dario Merlos, D.D.S.: Noreen L. Slank/(248) 355-4141
Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
At issue: After sending his dentist a letter complaining about the dental care that he received, the plaintiff sued the dentist for dental malpractice. The plaintiff apparently obtained an affidavit of merit to support his claim, but failed to file it with his lawsuit. The defendant moved for summary disposition, contending that the plaintiff failed to satisfy the pre-suit notice requirement of MCL 600.2912b, and failed to file an affidavit of merit with the complaint, as required by MCL 600.2912d. The trial court denied summary disposition and the Court of Appeals affirmed. The Court of Appeals held that the plaintiff's submission of a copy of the affidavit of merit to the trial court, as an exhibit to a brief, satisfied MCL 600.2912d, since it was filed before the statute of limitations expired. The panel also held that the plaintiff's letter qualified as a notice of intent under MCL 600.2912b(4) and that, although that letter failed to precisely state the proximate cause of the alleged injury, the defect should be disregarded in the interests of justice. See *Bush v Shabahang*, 484 Mich 156 (2009), and MCL 600.2301. Did the Court of Appeals correctly resolve this case?
Background: In this dental malpractice case, plaintiff Rodney Hanna alleges that his dentist, Dr. Dario Merlos, D.D.S., improperly diagnosed and treated Hanna's teeth in June 2006. On November 8, 2006, Hanna wrote Dr. Merlos a seven-page letter that outlined Hanna's claims of "poor diagnosis and treatment." At the end of the letter, Hanna summarized his injuries and stated that he expected Merlos to "take care of [his] dental expenses" and to pay him an additional $7,000, for a total of "$9,829.00 if paid immediately." Hanna's attorney sent a second letter to Merlos later that month. Hanna filed his lawsuit on December 13, 2007. There is no evidence that Hanna filed an affidavit of merit with his complaint, despite the requirement of MCL 600.2912d(1) that a "plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit" signed by an expert.

Merlos filed a motion for summary disposition, asking the trial court to dismiss the case, but the trial court denied the motion, accepting Hanna's assertion that he had filed an affidavit of merit. Merlos filed two more motions for summary disposition, arguing that the court file contained no evidence that an affidavit of merit had ever been filed. Moreover, Merlos contended, Hanna's notice of intent did not satisfy the requirements listed in MCL 600.2912b. The trial court acknowledged that it did not appear that an affidavit of merit was filed with the

complaint, but characterized the omission as a "minor kind of technicality," and refused to dismiss the lawsuit. As for the notice of intent, the trial court noted that there was no required format, and concluded that Hanna's first letter to Merlos covered the elements required by MCL 600.2912b, although in a "barely adequate" way.

The Court of Appeals upheld the trial court's rulings in an unpublished per curiam opinion. The panel noted that Hanna submitted his affidavit of merit as an exhibit to a brief that he filed in the trial court, which "serendipitously" satisfied the requirement of MCL 600.2912d, because the affidavit of merit was filed before the statute of limitations expired. The Court of Appeals also agreed with the trial court that Hanna's November 8, 2006 letter qualified as a notice of intent under MCL 600.2912b(4). Although that letter failed to precisely state the proximate cause of Hanna's injury, the Court of Appeals explained, the defect should be disregarded in the interests of justice, consistent with the Michigan Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156 (2009), and MCL 600.2301. Merlos appeals.

PALETTA v OAKLAND COUNTY ROAD COMMISSION, et al. (case no. 143663)
Court of Appeals case no. 298238
Trial Court: Oakland County Circuit Court
Attorney for plaintiffs Joseph Paletta and Shelly Paletta: Glenn H. Oliver/(248) 353-5595
Attorney for defendant Oakland County Road Commission: Rick J. Patterson/(248) 377-1700
Attorney for amicus curiae County Road Association of Michigan: Michael C. Levine/(517) 853-2501
Attorney for amicus curiae Michigan County Road Commission Self-Insurance Pool: William L. Henn/(616) 774-8000
At issue: The plaintiff was injured when his motorcycle struck a patch of gravel on a paved road. He sued the county road commission under the highway exception to governmental immunity, claiming that the hazardous road surface was caused by improper grading and that the defendant knew about the defect. The road commission moved for summary disposition, claiming that it did not have notice of the alleged defect, and that the gravel on the road was not a defect within the meaning of the highway exception. The trial court denied the motion, and the Court of Appeals affirmed. Was the accumulation of gravel on the roadway actionable under the highway exception to the governmental tort liability act, MCL 691.1402? Does such an accumulation of gravel implicate the defendant's duty to maintain the highway in "reasonable repair" within the meaning of MCL 691.1402(1)?
Background: Joseph Paletta lost control of his motorcycle while riding on Union Lake Road, a paved road in Oakland County, and crashed. Paletta, who sustained numerous injuries, believed that the crash was caused by gravel on the traveled portion of the paved road surface. A nearby resident who witnessed the accident agreed. According to this witness, he had seen other drivers have problems with gravel on the roadway over the years, and he had complained several times to the Oakland County Road Commission.

Paletta sued the road commission under the highway exception to the governmental tort liability act, claiming that the roadway was defective due to the road commission's improper maintenance, and that it was unsafe for travel. MCL 691.1402(1) states that "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." A governmental agency, including a county road commission, is liable for injuries arising from a road defect only if the agency knew

or should have known of the defect, and had a reasonable amount of time to repair it. MCL 691.1403.

After discovery, the road commission moved for summary disposition, arguing that there was no evidence that it had received adequate notice under the highway exception, and that there was no evidence that the gravel on the roadway was a "defect" that created an unreasonably dangerous condition. The trial court denied the motion, ruling that there were genuine issues of material fact regarding notice and whether the gravel created a hazard to safe travel within the meaning of the highway exception. The court held that Paletta's testimony, along with that of the nearby resident, was sufficient to create an issue of fact regarding notice. Moreover, held the trial court, an affidavit provided by Paletta's expert witness, a civil engineer and roadway expert, created a question of fact as to whether the gravel was an unreasonable threat to safe travel.

The road commission appealed to the Court of Appeals, arguing that Paletta had failed to create a genuine issue of material fact regarding either issue, and claiming that, as a matter of law, the accumulation of gravel on the road could not constitute a "defect" in the highway. But in an unpublished per curiam opinion, the Court of Appeals affirmed the trial court's denial of summary disposition. The Court of Appeals agreed with the trial court that Paletta's evidence created genuine issues of material fact regarding notice and the hazard posed by the gravel on the road. The appeals court also rejected to the road commission's argument that an object – in this case, gravel – was not a "defect" in the actual roadway; the cases the commission cited in support of this argument, involved precipitation, the panel noted, not gravel. The panel said it was declining the road commission's invitation to "expand existing case law by extending the reasoning of the precipitation cases to other objects and materials lying on the surface of the roadbed." The road commission appeals.

PEOPLE v BROWN (case no. 143733)
Court of Appeals case no. 305047
Trial Court: Kalamazoo County Circuit Court
Prosecuting attorney: Heather S. Bergmann/(269) 383-8900
Attorney for defendant Shawn Thomas Brown: Anne M. Yantus/(313) 256-9833
At issue: The defendant pled guilty to second-degree home invasion as a second habitual offender in exchange for dismissal of other charges. At the plea hearing, the defendant was informed that his maximum potential sentence was 15 years, which is the statutory maximum sentence for second-degree home invasion *without* the sentence enhancement for second habitual offenders. At sentencing, the trial court imposed the enhanced maximum sentence of 22.5 years. The defendant filed a motion to withdraw his plea, arguing that he had been misinformed of the maximum possible sentence. The motion was denied by the trial court, relying on *People v Boatman*, 273 Mich App 405 (2006). What relief, if any, is available to the defendant?
Background: Shawn Brown was arrested on charges of second-degree home invasion, larceny of firearms, felon in possession of a firearm, and larceny in a building, as a second habitual offender. Brown pled guilty, as a second habitual offender, to second-degree home invasion, in exchange for dismissal of the other charges. At sentencing, the trial court described the plea and maximum sentence to Brown: "You would plead guilty to the offense known as second-degree home invasion. That is a felony; it is punishable by up to fifteen years in the state prison. Do you understand?" Brown answered "Yes," and entered a guilty plea. He was later sentenced to a prison term of six years, four months to 22.5 years. The maximum sentence increased from 15 years to 22.5 years because Brown pled guilty as a second-habitual offender.

Brown filed a motion to withdraw his plea or for resentencing. Brown contended that his plea was not knowing and voluntary because the trial court failed to inform him that, as an habitual offender, Brown could serve up to 22.5 years. Brown argued that his plea did not comply with MCR 6.302(B)(2), which requires the trial court to inform a defendant of the "maximum possible sentence required by law." The trial court denied the motion on the authority of *People v Boatman*, 273 Mich App 405 (2006). In *Boatman*, the Court of Appeals held that a trial court does not have to inform a defendant of the *enhanced* maximum sentence in order to comply with MCR 6.302(B)(2). The *Boatman* panel explained that "the language of the court rule does not encompass a specific requirement to inform a habitual offender regarding the effect this status has on sentencing." The Court of Appeals opined that the absence of such a requirement is "at odds with the intent of the law, which is to assure an informed decision by a defendant in accepting or entering into a plea agreement by requiring that the most significant repercussion of that agreement, by actual duration of the sentence to be imposed, be known and understood in advance." But, the *Boatman* panel concluded, "any expansion of the scope or language of MCR 6.302 . . . must be initiated by the Supreme Court rather than through this Court's broadened interpretation of the existing language."

Brown filed an application for leave to appeal to the Court of Appeals, raising the plea issue, but the Court of Appeals denied his application. Brown appeals.

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