MICHIGAN SUPREME COURT

Office of Public Information

contact: Marcia McBrien | (517) 373-0129

FOR IMMEDIATE RELEASE

DEFENDANT IN CHILD SEX ABUSE CASE SEEKS TO OVERTURN CONVICTION; MICHIGAN SUPREME COURT TO HEAR ARGUMENTS IN CASE NEXT WEEK
Child witness testified behind a screen; defendant claims Confrontation Clause violation
Challenges to felony convictions for failure to pay child support also before Supreme Court; defendants allege they lacked ability to pay

LANSING, MI, September 28, 2011 – A man who was convicted of sexually abusing his wife's young sister asserts that his constitutional rights were violated when the girl was allowed to testify against him from behind a screen, in a case that the Michigan Supreme Court will hear argued on appeal next week.

In *People v Rose*, the trial court allowed the child to testify behind a screen after the girl's therapist testified that the child was fearful of seeing the defendant, and that seeing him could cause the girl to freeze up during her testimony or suffer a relapse in her therapy. While the screen kept the girl from seeing the defendant, he and others in the courtroom could see her. The defendant, who was convicted of four counts of first-degree criminal sexual conduct, argues that the screen violated his constitutional right to confront those who were testifying against him; moreover, the screen impaired the presumption of innocence by making it appear to the jury that he was a danger to the child, the defendant contends. But the Court of Appeals affirmed his convictions, stating in part that trial judges have latitude to protect young witnesses.

The Supreme Court will also hear three criminal cases involving non-payment of child support: *People v Likine*, *People v Parks*, and *People v Harris*. In all three cases, the defendants failed to pay child support as ordered by family court judges. Each defendant was convicted of non-payment of child support, a felony, in separate criminal proceedings. Although the defendants asserted that they lacked the ability to pay, the Court of Appeals allowed their convictions to stand; in *People v Adams*, 262 Mich App 89 (2004), the Michigan Court of Appeals held that evidence of inability to pay is not a valid defense to the strict liability crime of failing to pay child support. The Court of Appeals in *Likine* also said that allowing the defendant to claim inability to pay in the criminal proceeding would amount to an improper collateral attack on the family court's ruling.

Among the other cases the Court will hear is *In re Honorable James M. Justin*, in which the Judicial Tenure Commission recommends that the Michigan Supreme Court order the removal from office of a Jackson district court judge. The judge, while acknowledging some misconduct, contends that the recommended penalty is overly severe and overlooks his years of service.

The remaining nine cases the Court will hear include criminal, governmental immunity, insurance, medical malpractice, negligence, parental rights, and worker's compensation issues.

In keeping with a long-standing custom, the Court's seven Justices will hear the first case of October, *People v Evans*, in the Old Courtroom in the Capitol building. The Court will then adjourn and resume hearing oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice. Court will be held on **October 4, 5, and 6, beginning at 9:30 a.m.** each day. The Court's oral arguments are open to the public.

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, the issues, the procedural history, or the significance of their cases. Briefs are online at http://www.courts.michigan.gov/supremecourt/Clerk/MSC_orals.htm. For further details about the cases, please contact the attorneys.

Tuesday, October 4
Morning Session (9:30 a.m., Old Supreme Court courtroom, Capitol Building)

PEOPLE v EVANS (case no. 141381)
Prosecuting attorney: Timothy A. Baughman/(313) 224-5792
Attorney for defendant Lamar Evans: Jonathan B.D. Simon/(248) 433-1980
Trial Court: Wayne County Circuit Court
Court of Appeals case no. 290833
At issue: The defendant in this case argues that double jeopardy prevents him from being retried for arson. He was charged under a statute that applies to arson of "any building or other real property" other than a dwelling; the building he was accused of burning was a vacant house. After the prosecution presented its evidence, the trial judge dismissed the case on defense counsel's motion. The trial judge said that the prosecutor had failed to prove that the building was *not* a dwelling; therefore, defendant could not be convicted under the "any building" statute. On appeal, the parties agreed that the trial court had erred, but the defendant argued that any attempt to retry him on the arson charge would violate the double jeopardy clause, citing *People v Nix*, 453 Mich 619 (1996). In a published opinion, the Court of Appeals reversed and remanded for further proceedings, including a new trial. Is retrial barred under the double jeopardy clause where the trial court made an error of law and did not determine any actual element of the charged offense?
Background: On September 22, 2008, Detroit Police officers arrested Lamar Evans after they saw him running away from a burning house; he was carrying a gasoline can. An arson investigator determined that a flammable liquid had been used to ignite the fire. The investigator noted that the house was vacant and lacked gas, electricity or water service. The property owner told the police that he was in the process of purchasing the house, which needed repairs, and that he and his family had moved some belongings into the house.

Evans was charged with the burning of real property under MCL 750.73, which states, "Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next preceding section of this chapter, the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years." Another section of the statute applies to arson of a

"dwelling house," which is punishable by up to 20 years in prison. MCL 750.72.

At the close of the prosecution's proofs at trial, defense counsel moved for a directed verdict of acquittal, noting that MCL 750.73 pertained to the burning of real property other than a "dwelling house," and arguing that the prosecution had not established that the building at issue was not a dwelling. The trial court granted the motion, saying that "The testimony was this was a dwelling house" and that therefore, Evans could not be convicted under MCL 750.73.

The prosecutor appealed as of right to the Court of Appeals, arguing that the trial court erred in concluding that, to convict a defendant of arson of real property, the prosecution must prove that the building was not a dwelling. The prosecutor also contended that double jeopardy principles do not bar Evans' retrial. Evans conceded that the trial court erred, but asserted that retrial was barred under *People v Nix*, 453 Mich 619 (1996), in which the Michigan Supreme Court held that the correctness of the trial court's ruling is irrelevant for the purposes of double jeopardy analysis.

In a published opinion, the Court of Appeals reversed the trial court and remanded the case for retrial. The appellate court noted that, in *Nix*, a majority of the Supreme Court said that whether a trial court's decision constitutes a verdict of acquittal depends on '"whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."' But the *Nix* majority added that its interpretation of the phrase "correct or not" was dicta – observations that were not binding on future courts – because it was unclear whether the dismissal in that case was premised on the prosecution's failure to establish a nonelement of an offense. The Court of Appeals also took note of another Court of Appeals case, *People v Howard*, in which the majority criticized the *Nix* "correct or not" interpretation: "Thus a double jeopardy bar would prevent retrial of a defendant acquitted by a judge who concluded that the offense charged had as one of its elements that the moon is made of green cheese and that, the prosecutor having failed to prevent [sic] any evidence to that effect, a directed verdict was required. To state such a result is to show the deficiencies of the rule that would even arguably allow it." In Evans' case, the Court of Appeals concluded that double jeopardy does not bar retrial because a finding of no proof on a non-element of the offense is not an acquittal. Evans appeals.

Afternoon Session (12:30 p.m., Hall of Justice)

PEOPLE v MORENO (case no. 141837)
Prosecuting attorney: Gregory J. Babbitt/(616) 846-8215
Attorney for defendant Angel Moreno, Jr.: Craig W. Haehnel/(616) 454-3834
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Attorney for amicus curiae Michigan Association for Justice: Racine M. Miller/(313) 415-2357
Trial Court: Ottawa County Circuit Court
Court of Appeals case no. 294840
At issue: Police officers looking for a subject of outstanding warrants smelled marijuana while speaking to the defendant's girlfriend at the door to his house. The officers decided to enter and secure the home. When told this, the defendant ordered the police off his porch and attempted to slam the door. An officer sought to prevent the door from closing and a struggle ensued. Police removed the defendant from the house and arrested him. He was charged with two counts of

resisting and obstructing a police officer under MCL 750.81d. The circuit court ruled that the police entry was unlawful, but refused to quash the charges against the defendant, and the Court of Appeals affirmed. Is it a violation of MCL 750.81d for a person to resist a police officer who unlawfully and forcibly enters the person's home? If so, is MCL 750.81d unconstitutional? Can a defendant prosecuted under the statute claim self-defense?

Background: While on patrol in the early morning of December 30, 2008, Holland police officer Troy DeWys observed an occupied car parked on the street; when he returned to issue a parking ticket, there was no one in the car. DeWys determined that the car was registered to Shane Adams, who had several outstanding warrants. DeWys saw a car pulling out of a driveway at a nearby home; the driver got out of his car and told DeWys that his girlfriend, and some minors, were inside drinking alcohol. Asked if Adams was in the house, the driver indicated that he was unsure.

DeWys called for backup; a second officer arrived. Both police officers were in full police uniform. They approached the home, and knocked on the front and back doors; DeWys identified himself as a police officer. Peering through windows, the officers saw about a dozen people running around and hiding. About 15 minutes later, Mandy McCarry opened the front door. McCarry admitted that under-age drinking was going on in the house and that she knew Shane Adams, but denied that he was in the home. She refused to allow the officers into the house without a warrant. At this point, the officers secured the back door to the home; when three other officers arrived at the scene, the house was surrounded. DeWys reported that, when standing at the open door, he smelled a strong odor of intoxicants and burnt marijuana.

When DeWys informed McCarry that officers were entering to secure the house while they obtained a search warrant, Angel Moreno, Jr., came to the door and refused to allow the officers to enter, demanding that they get a search warrant first. He told them to get off the porch and attempted to close the door. An officer placed his shoulder against the door to prevent it from being closed; a struggle ensued between Moreno and the officers. DeWys was injured in the struggle, but Moreno was eventually subdued, removed from the home, and arrested. Officers then entered to secure the house. After obtaining the search warrant, the officers discovered an ounce of marijuana and some pills.

Moreno was bound over for trial on one charge of resisting and obstructing a police officer, and one charge of resisting and obstructing a police officer, causing injury. MCL 750.81d. The statute states that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both."

Moreno filed a motion to quash based on the illegal entry of officers into the home. The trial court agreed that the officers' entry into the home was illegal, but denied his motion. Moreno sought reconsideration, arguing that he had the right to act in self-defense because the officers used excessive force. The trial court denied that motion.

The Court of Appeals granted leave to appeal, and affirmed the lower court in an unpublished per curiam opinion. Although the entry was illegal, Moreno had no right to resist or obstruct the police officers, the appellate court said: "[T]he legality of the officers' conduct in attempting to enter into the home does not serve to determine the applicability of MCL 750.81d." The statute precludes any claim of self-defense, even in the case of an unlawful entry, the court said. The Court of Appeals also rejected Moreno's claim that his due process rights had been violated by a lack of notice because, Moreno argued, no reasonable person would have been

aware that he could be charged under MCL 750.81d for defending his home against an aggressive police officer acting unlawfully and without a warrant. The statute clearly provides that a person cannot assault a police officer who is performing his duties; Moreno's attempt to hinder the officers is "precisely the type of conduct prohibited by the statute," the appellate court observed. As a result, the Court of Appeals held, MCL 750.81d "provided sufficient notice of the type of conduct it sought to preclude and cannot be construed as being void for vagueness when applied to defendant's conduct." Moreno appeals.

PROGRESSIVE MICHIGAN INSURANCE COMPANY v SMITH, et al. (case no. 141255)
Attorney for plaintiff Progressive Michigan Insurance Company: Daniel S. Saylor/(313) 446-5520
Attorney for defendants Scott Mihelsic and Andrea Mihelsic: Devin R. Day/(616) 451-8111
Trial Court: Kent County Circuit Court
Court of Appeals case no. 287505
At issue: The plaintiff insurance company issued a no-fault insurance policy with a named driver exclusion. The named excluded driver, William Smith caused an automobile accident that injured the defendants, who sued Smith. The insurance company sued Smith, seeking a court ruling that it had no duty to indemnify Smith. The trial court granted the insurance company's motion for summary disposition, but the Court of Appeals reversed in a published opinion, ruling that the insurance company failed to include a necessary notice in its policy. Did the Legislature intend to include the final sentence of MCL 500.3009(2) in the required notice provisions of the insurance documents described in that provision? If not, what effect, if any, does this have on this case?
Background: William Smith owned a pickup truck, but did not have a driver's license because he had too many points on his record; he could not obtain no-fault automobile insurance or license plates. Smith added his friend Sheri Harris to the truck's title as a co-owner, and she obtained insurance from Progressive Michigan Insurance Company. But, in order to do so, she signed a form listing Smith as an excluded driver under the insurance policy, as permitted under MCL 500.3009(2).

Some time later, Smith was driving the truck when he collided with a vehicle occupied by Scott and Andrea Mihelsic. The Mihelsics sued Smith; he failed to defend the lawsuit and the court entered a default against him. Progressive brought a declaratory judgment action, asking the court to rule that Progressive was not liable for any judgment that the Mihelsics obtained against Smith. Both Progressive and the Mihelsics brought motions for summary disposition, each side asserting that there was no real dispute about the facts and that the court should rule in their favor as a matter of law. Progressive argued that it had no duty to indemnify Smith because he was an "excluded person" under MCL 500.3009(2).

But the Mihelsics contended, among other things, that Smith was not excluded from coverage because the notice of exclusion on the certificate of insurance did not use the exact language required under MCL 500.3009(2). That statute states, "If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: *Warning--when a named excluded person operates a vehicle all liability coverage is void--no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.*" [Italics added.] The declaration page of

Harris' insurance policy named Smith as an "excluded driver" and contained a notice using the exact language set forth in MCL 500.3009(2). The back side of the certificate of insurance issued by Progressive also named Smith as an excluded driver and contained the following notice: "**WARNING:** When a named excluded person operates a vehicle, all liability coverage is void – no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally *responsible*." [Italics added.]

The trial court denied the Mihelsics' motion for summary disposition, but granted Progressive's motion. According to the trial judge, the fact that the certificate of insurance used the word "responsible" instead of "liable" did not defeat the named driver exclusion. But in a split published decision, the Court of Appeals reversed the trial court, holding that Progressive's failure to use the exact language required under MCL 500.3009(2) invalidated the exclusion of coverage. The majority noted that the statute itself says that failure to follow its requirements results in the invalidity of the exclusion. According to the majority, the Legislature did not merely set forth the substance of the required warning, but required use of "the following notice" provided verbatim for insurers. Moreover, the statute says that if the required notice is not provided, the named person exclusion "shall not be valid"; the statute could not be clearer, the majority said.

The dissenting Court of Appeals judge would have affirmed the trial court in ruling that Progressive complied with the statutory requirement. She reasoned that the use of the word "responsible" instead of "liable" did not frustrate the Legislature's intent that insurers provide strong warnings about the impact of the named driver exclusion. It was fair to assume that the language used in Progressive's policy was approved by the Commissioner of Insurance, the dissenting judge noted. The judge said she would have ruled that the named driver exclusion remained fully effective and that there should be no insurance coverage under Progressive's policy. Progressive appeals.

FINDLEY v DAIMLERCHRYSLER CORPORATION (case no. 141858)
Attorney for plaintiff Torme C. Findley: Daryl C. Royal/(313) 730-0055
Attorney for defendant DaimlerChrysler Corporation: Gerald M. Marcinkoski/(248) 433-1414
Lower Tribunal: Workers' Compensation Appellate Commission
Court of Appeals case no. 291402
At issue: A worker's compensation magistrate denied the plaintiff's request for benefits, finding, among other things, that the plaintiff exaggerated her impairments from a work-related injury. The plaintiff appealed to the Workers' Compensation Appellate Commission, claiming that the magistrate's decision was not based on competent, material, and substantial evidence; she also asked the WCAC to remand the case to the magistrate to clarify a factual issue. But the WCAC majority affirmed the magistrate's decision, with one commissioner concurring in the result only. The dissenting commissioner would have remanded the case to the magistrate for an explanation of the factual issue. The plaintiff appealed to the Court of Appeals, claiming that the WCAC had failed to provide a true majority opinion. She also claimed that the WCAC abused its discretion in denying her motion to remand. The Court of Appeals granted leave and, in a published opinion, reversed and remanded the case to the WCAC, directing the commission to provide a majority opinion. Is the WCAC required to render a majority opinion to provide a final decision that is reviewable by the appellate courts?
Background: Torme Findley was employed by DaimlerChrysler Corporation as an assembly

line worker. On February 18, 2004, Findley fell from a motorized cart driven by her supervisor. Findley claims that, as a result of this work-related accident, she suffers from shoulder and back pain, a closed head injury, memory problems, depression and anxiety. After the accident, Findley was off work for about two months, returning to work in April 2004. She worked until August 2004, but said that she had problems doing her assigned jobs. She was then off work until August 2005 because there was no work available. When Findley returned to the job in 2005, she tripped over a cord and fell, and after that did not return to work. When DaimlerChrysler sent Findley a letter telling her to report for work, she did not respond; DaimlerChrysler terminated her employment in September 2005.

In October 2005, Findley filed a claim for worker's compensation benefits. A magistrate conducted a three-day trial, where Findley and her daughter testified that, since the accident, Findley has been incapacitated both physically and mentally. Medical experts also testified. The magistrate identified inconsistencies in Findley's statements to the various medical experts, and found that Findley was not credible – for example, while Findley claimed that her memory had been seriously impaired, she said she was certain that she had never received her employer's letter directing her to return to work. Because Findley's medical experts relied on her discredited descriptions of the accident and symptoms, the magistrate rejected their testimony, instead relying on DaimlerChrysler's experts. The magistrate concluded that Findley did not suffer a work-related injury, and that Findley unreasonably refused an offer of reasonable employment.

Findley appealed the magistrate's decision to the Workers' Compensation Appellate Commission claiming that the magistrate's conclusions were not supported by competent, material, and substantial evidence on the whole record. While her appeal was pending, Findley moved for remand of the case to the magistrate for additional proofs, claiming that a statement that the magistrate made in her opinion – that Findley used a walker during trial – was not correct. The WCAC denied the motion, with one commissioner dissenting. The WCAC then issued an opinion and order affirming the magistrate's ruling. The controlling opinion was authored by one commissioner, who found no reason to alter the magistrate's findings, noting that the magistrate performed the necessary fact-finding functions with detail and clarity. The commissioner deferred to the magistrate's assessment of Findley's credibility and the rejection of Findley's experts, which flowed from the credibility determination. A second commissioner concurred in the result only. The third commissioner dissented, noting that he would remand the case to the magistrate for an explanation of the alleged factual discrepancy while retaining jurisdiction.

Findley appealed to the Court of Appeals, now arguing that the WCAC had not rendered a valid opinion because only one commissioner signed the opinion and the concurring commissioner gave no reasons for affirming the magistrate. She also claimed that the denial of her motion to remand was an abuse of discretion. In a published per curiam opinion, the Court of Appeals reversed and remanded the case to the WCAC for a true majority opinion and further analysis. The Court of Appeals held that the WCAC had not abused its discretion in denying Findley's motion to remand, but noted that if the WCAC deems it necessary on remand, it could remand the case to the magistrate. DaimlerChrysler appeals.

Wednesday, October 5
Morning Session

PEOPLE v ROSE (case no. 141659)

Prosecuting attorney: Judy Hughes Astle/(269) 673-0280
Attorney for defendant Ronald Carl Rose: Scott A. Grabel/(800) 342-7896
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/(517) 543-4801
Attorney for amicus curiae University of Michigan Family Assessment Clinic, Dr. Jim Henry, PhD, and Michigan Court Appointed Special Advocates: Frank E. Vandervort/(734) 763-5000
Attorney for amicus curiae Attorney General Bill Schuette: Joel D. McGormley/(517) 373-4875
Trial Court: Allegan County Circuit Court
Court of Appeals case no. 290936
At issue: The defendant was charged with sexually abusing a child and with showing pornography to her and her brother. At trial, the judge ruled that the prosecutor could place a screen between the eight-year-old complainant and the defendant so that the child would not have to see him when she testified. The defendant complained that this violated his rights under the Confrontation Clause, that the use of a screen denied him the presumption of innocence because it appeared that he was a danger to the witness, and that the judge did not follow the necessary steps before permitting the prosecutor to use a screen. A jury convicted the defendant of first-degree criminal sexual conduct and distributing pornography to minors; the Court of Appeals affirmed the defendant's convictions. Does the use of a screen to shield a child complainant from the defendant violate the Confrontation Clause or prejudice the defendant by impinging on the presumption of innocence?
Background: Ronald Rose was charged with repeatedly sexually abusing his wife's young sister, and with showing pornographic movies and magazines to the girl and her brother. On the first day of trial, the prosecutor, noting that the eight-year-old complainant was fearful about seeing Rose, asked for the court's permission to let the girl testify behind a screen. The trial judge decided to allow this after considering testimony from the girl's psychologist, who stated that seeing Rose in the courtroom might cause the girl to freeze up during her testimony or suffer a relapse in her therapy. While the screen prevented the girl from seeing Rose, others in the courtroom, including Rose, could see the girl while she testified. The jurors deliberated for about two hours before finding Rose guilty of four counts of first-degree criminal sexual conduct and two counts of distributing obscene material to minors. Rose was sentenced to 25 to 50 years in prison on each count of first-degree criminal sexual conduct; he received concurrent sentences of one year, four months to two years for the pornography counts.

Rose appealed by right to the Court of Appeals, arguing that the court erred in permitting the prosecutor to place a screen between him and the complainant. Rose asserted, among other matters, that the screen violated his constitutional right to confront those who were testifying against him. But the Court of Appeals affirmed Rose's convictions. The trial court complied with the requirements of MCL 600.2163a, which sets forth protections that may be implemented in certain instances involving a young or disabled witness, the appellate court observed. While that statute does not expressly address using screens, the Court of Appeals determined that the use of a screen fell within the judge's authority to control the mode and order by which witnesses are interrogated under Michigan Rule of Evidence 611(a). The Court of Appeals rejected Rose's claim that his rights under the Confrontation Clause were violated, ruling that the right to confrontation may give way to case-specific findings of necessity aimed at furthering an important public policy, such as protecting child witnesses. Finally, the Court of Appeals ruled

that the use of a screen did not deprive Rose of his due process rights. Rose appeals.

MILLER v CITIZENS INSURANCE COMPANY, et al. (case no. 141747)
Attorney for plaintiff Gail Miller, Guardian and Conservator for Ryan Scott Miller, a Mentally and Physically Incapacitated Person: Cynthia M. Filipovich/(313) 965-8300
Attorney for appellant Detroit Medical Center: Charles N. Raimi/(313) 966-2226
Attorney for amicus curiae Michigan Health & Hospital Association: Richard E. Hillary, II/(616) 831-1700
Attorney for amicus curiae Michigan Association of Ambulance Services: L. Page Graves/(231) 946-0700
Trial Court: Macomb County Circuit Court
Court of Appeals case no. 290522
At issue: The plaintiff hired an attorney after her no-fault insurer denied claims arising from an accident that left her son injured. The attorney contacted the defendant hospital where plaintiff's son was being treated, but he sued the insurer before the hospital billed for its services. The lawsuit settled within a month, with the insurer agreeing to pay benefits and the plaintiff agreeing to forego attorney fees or penalty interest. Days before the case settled, the attorney notified the hospital in writing that he was pursuing a no-fault claim against the insurer in court. The hospital did not reply before the case settled. The circuit court determined that one-third of the payment the insurer owed to the hospital must go as a fee to the plaintiff's attorney. The Court of Appeals affirmed. May a medical care provider that is not a party to a fee agreement with plaintiff's counsel be liable for all or a portion of counsel's fee? What is the basis for such liability, if any? How shall the extent of any liability be determined?
Background: Gail Miller is the guardian and conservator for her son, Ryan, who suffered severe and permanent injuries in a vehicle rollover accident. The vehicle was owned by Ryan's father and insured by Citizens Insurance Company. After Citizens denied Ryan's application for no-fault benefits in November 2007, Miller hired an attorney. On December 13, 2007, the lawyer contacted Rehabilitation Institute of Michigan, where Ryan had recently begun inpatient treatment, to ask for billing information. RIM, which is owned by the Detroit Medical Center, did not prepare its bill until Ryan was discharged in January 2008; his treatment charges ultimately totaled about $150,000. DMC did not send a lien notice to Citizens in December 2007 and did not contact Citizens at that time.

On December 17, 2007, Miller sued Citizens. In a letter dated January 17, 2008, Miller's attorney advised DMC that he had filed suit on Ryan's behalf; he requested Ryan's medical bills and asked to discuss the matter. According to DMC, this was its first notice that Miller's attorney intended to assert a claim against Citizens for RIM's services to Ryan, assistance that DMC never requested from the attorney.

On January 22, 2008, the lawsuit was settled, with Citizens agreeing to pay all of Ryan's no-fault benefits; Miller agreed not to seek a penalty or attorney fees that were available under the no-fault act. The trial court ordered Miller to notify Ryan's health care providers of a conference on February 11, 2008, to settle attorney liens. On January 22, Miller's attorney talked with Jane Ruppman, RIM's director of patient business services. The attorney advised her that he secured insurance coverage from Citizens and that he wanted one-third of DMC's outstanding balance as a fee. Ruppman received the same information and fee request in a January 24 letter from Miller's attorneys. The letter also stated that RIM should appear in court on February 11 if it wished to contest the fee claim.

After Ryan was discharged in January 2008, RIM billed Citizens on February 2 or February 12; Citizens denied payment. At the February 11 conference, counsel for DMC argued that DMC did not receive notice of the litigation until after it was settled. The circuit judge ordered an evidentiary hearing in March regarding DMC's objection and ordered Citizens to pay all other providers subject to an attorney lien of one-third of their bills. In October 2008, the circuit judge ruled that DMC knew that Citizens had denied coverage, knew that Miller's attorneys were pursuing claims against Citizens, did not ask the attorneys to cease work on DMC's behalf, and did not bring in its own counsel or file a lien. Accordingly, the trial court ruled, Miller's attorneys were entitled to a fee out of the payment due from Citizens to DMC. The judge eventually directed Citizens to issue a check to DMC in the amount of $102,506.94 and to issue a check to Miller and her attorneys for $48,153.77.

DMC appealed to the Court of Appeals, arguing that Miller's attorneys were not entitled to a fee from DMC. If DMC was obligated to pay a fee, the amount should be based on hours worked and a reasonable rate, and not pursuant to a contingency fee agreement that DMC was not a party to, DMC contended. Miller cross-appealed, disputing the amount of payment that DMC received. The Court of Appeals affirmed in a published opinion. Among other things, the Court of Appeals held that the attorney fee was appropriate under the "common fund" exception to the American rule that parties are responsible for their own attorney fees, and that Miller's attorneys had a "charging lien" against the settlement proceeds obtained through their efforts. DMC appeals.

IN RE HONORABLE JAMES M. JUSTIN (case no. 142076)
Attorney for petitioner Judicial Tenure Commission: Paul J. Fischer/(313) 875-5110
Attorney for respondent 12th District Court Judge James M. Justin: Dennis C. Kolenda/(616) 458-1300
Lower tribunal: Judicial Tenure Commission
At issue: Did the Judicial Tenure Commission properly find that Judge James M. Justin, 12th District Court, committed judicial misconduct? Should the judge be removed from office? Is the Judicial Tenure Commission entitled to costs under Michigan Court Rule 9.205(B)?
Background: Judge James M. Justin, who has been a judge in Jackson since 1976, was suspended from office by the Michigan Supreme Court on July 19, 2010, following a preliminary investigation by the Judicial Tenure Commission. In November 2010, the JTC charged the judge with eight counts of judicial misconduct, alleging that the judge:

- improperly dismissed cases – including some traffic tickets against him and his wife – without the prosecution's authorization, and entered, or caused to be entered, false information in the court's Judicial Information System;
- removed valid Secretary of State abstracts, interfering with the Secretary of State's ability to collect driver responsibility fees and causing false information to be sent to the Secretary of State;
- engaged in ex parte communications with defendants (meetings where the prosecution was not present) and dismissed cases as a result of those communications;
- failed to follow plea agreements between the prosecutor and defendants, and dismissed or reduced charges without the prosecutor's consent;
- adjourned and delayed cases excessively and unreasonably;
- failed to follow the law in issuing peace bonds;

- interfered with a case assigned to another judge on behalf of a person to whom Justin had previously given favorable treatment; and
- made numerous misrepresentations to the Judicial Tenure Commission.

Following an evidentiary hearing lasting six and a half days, a special master appointed by the Michigan Supreme Court concluded that the evidence supported all but one count (failure to follow the law in issuing peace bonds). Justin filed objections to the special master's report, but the Judicial Tenure Commission agreed with the special master's findings. The commission recommends that the Supreme Court remove Justin from office. The Judicial Tenure Commission also recommends that the Supreme Court order the judge to pay the costs, fees, and expenses associated with the commission's proceedings against him, based on the finding that the judge intentionally tried to mislead the commission.

Justin has petitioned the Supreme Court to modify the Judicial Tenure Commission's recommendation of discipline. The judge acknowledges some misconduct and admits that he should be suspended. But he argues that removing him from the bench is too severe a punishment, particularly in light of his long record of public service and when compared to sanctions imposed on other judges for similar misconduct.

Afternoon Session

LAMEAU v CITY OF ROYAL OAK, et al. (case nos. 141559-60)
Attorney for plaintiff Thomas LaMeau, Personal Representative of the Estate of John M. Crnkovich, Deceased: Mark R. Granzotto/(248) 546-4649
Attorney for defendants City of Royal Oak, Elden Danielson, and Bryan Warju: Marcia L. Howe/(248) 489-4100
Attorney for amicus curiae Michigan Defense Trial Counsel: Michael J. Watza/(313) 965-7986
Attorney for amicus curiae Michigan Municipal League, Michigan Municipal League Liability & Property Pool, Public Corporation Law Section of the State Bar of Michigan (PCLS), and Michigan Townships Association (MTA): Mary Massaron Ross/(313) 983-4801
Trial Court: Oakland County Circuit Court
Court of Appeals case no. 290059
At issue: A man driving a motorized scooter on a sidewalk was killed when, at night and while intoxicated, he drove through a construction area and hit a guy wire stretched over an unfinished portion of the sidewalk. The city had barricaded the area, but others had removed the barricades. The man's estate sued the city and others. The city and its employees moved to dismiss the case, citing governmental immunity, but the trial court denied the motion and the Court of Appeals affirmed. Was the presence of the guy wire a breach of the city's duty to keep the sidewalk in "reasonable repair" under MCL 691.1402? If so, does the exclusion for "utility poles" at MCL 691.1401(e) remove the wire from the highway exception? Is it significant that the sidewalk was not open for public travel and was meant to be barricaded, and that the defendants knew that the barricades were regularly being removed? Were the individual defendants grossly negligent? Can their alleged conduct be considered "the" proximate cause of the decedent's injury, in light of the decedent's own conduct and his intoxication at the time?
Background: This case arises from a fatal accident that occurred at night on a Royal Oak city sidewalk that was under construction. A Detroit Edison Company utility wire, also called a guy wire, was anchored in the area of the Normandy Street sidewalk construction site. The city asked

Detroit Edison to move the wire but, when Detroit Edison did not do so, the city elected to proceed with construction. The city's construction project field manager, Bryan Warju, was warned by the cement contractor, Gaglio PR Cement Corporation, about the dangers posed by having the guy wire remain above the new sidewalk. Warju instructed the contractor to barricade the area; Gaglio agreed to do so, but warned Warju that the barricades would not completely stop the public from using the pathway. The contractor posted dozens of safety barricades in the area, including fencing, barrels, and cones. Caution tape was hung so people could not pass through. Flags were hung from the wire, which was already sheathed in a bright yellow covering. The barrels had safety lights that went on at night. Yet, the barricading was repeatedly removed. Gaglio's employees frequently checked on the barricades and put them back in place.

Despite the barricades, people continued to use the pathway. In April 2006, Detroit Edison dispatched a lineman to the site, following a report from city police that a bicyclist had struck the guy wire. The lineman asked Detroit Edison to have the wire relocated as soon as possible, stating in a note that the wire needed to be moved "to stop decapitating pedestrians." In May 2006, another bicyclist had an accident on the site.

On the night of May 24, 2006, after drinking and smoking marijuana with friends, John Crnkovich rode his motor scooter down the Normandy Street sidewalk, crashed into the guy wire, and was killed. A bicyclist who rode past Crnkovich in the other direction later testified that he believed Crnkovich was driving at a high rate of speed. An autopsy showed that Crnkovich had a blood alcohol level of .13 and that he also had marijuana by-products in his blood.

Thomas LaMeau, Crnkovich's personal representative, sued the city of Royal Oak, City Engineer Elden Danielson, Bryan Warju, Detroit Edison, and Gaglio PR Cement. Among other things, LaMeau alleged that the city breached its duty to maintain its sidewalk in reasonable repair. Under the governmental tort liability act, MCL 691.1401 *et seq*., a governmental agency is "immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." But the act also requires that every "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." MCL 691.1402(1). Under the highway exception, a person may recover for physical injuries or property damage caused by the government's failure to meet the requirements of MCL 691.1402(1). The act defines "highway" to include sidewalks. MCL 691.1401(e).

The city moved to dismiss LaMeau's claims, citing governmental immunity. The city argued that the highway exception did not apply because the guy wire and its anchor were part of the telephone pole, not the sidewalk.

LaMeau also claimed that the city employees were grossly negligent in planning and constructing the sidewalk. But the city employees asked the court to dismiss the claims against them. They contended in part that their actions could not be considered grossly negligent, and that their conduct could not be viewed as the proximate cause of Crnkovich's injuries. According to Danielson and Warju, the proximate cause of Crnkovich's death was his own negligence in racing down the sidewalk while drunk and high on drugs, without appropriate safety equipment.

The trial court denied the defendants' motions to dismiss; the defendants appealed. But in a split published opinion, the Court of Appeals affirmed the trial court. The majority held that the city could be held liable because the guy wire was part of the sidewalk itself, and that the sidewalk was not closed to the public, given the evidence showing that the barricades were routinely removed or stolen. A reasonable jury could conclude that the two city employees were

grossly negligent, given the repeated warnings they had received about the dangers posed by the guy wire, the majority said. Moreover, the majority stated, there was a genuine issue of material fact as to whether the employees' conduct constituted the one most immediate, efficient, and direct cause of Crnkovich's death. The dissenting judge would have held that the guy wire was not a defect in the sidewalk, and that no reasonable person could conclude that the actions of the city's employees were the proximate cause of Crnkovich's death. The defendants appeal.

ESTATE OF JILEK v STOCKSON, et al. (case no. 141727)
Attorney for plaintiff Estate of Daniel D. Jilek, by Joy A. Jilek, Personal Representative: Mark R. Granzotto/(248) 546-4649
Attorney for defendants Carlin C. Stockson, M.D. and EPMG of Michigan: Noreen L. Slank/(248) 355-4141
Attorney for amicus curiae Michigan Association for Justice: Richard D. Toth/(248) 355-0300
Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
Attorney for amicus curiae Michigan Academy of Family Physicians: Marcy R. Matson/(517) 853-2929
Attorney for amicus curiae Michigan Defense Trial Counsel: Beth A. Wittmann/(313) 965-7405
Attorneys for amicus curiae American Academy of Urgent Care Medicine: Alexandra Ritucci-Chinni/(407) 489-0859, Deborah A. Hebert/(248) 355-4141
Trial Court: Washtenaw County Circuit Court
Court of Appeals case no. 289488
At issue: This medical malpractice case concerns treatment rendered by a board-certified family practice physician working in an urgent-care clinic. At trial, the parties could not agree as to whether the relevant standard of care was that of an emergency room specialist or a family practice physician. Experts from both specialties testified, and the trial court eventually ruled that the relevant standard of care was that of a board-certified family practice physician working in an urgent care center. The jury returned a verdict of no cause of action. The plaintiff appealed, and the Court of Appeals reversed, ruling that the trial court erred in determining the applicable standard of care. Did the Court of Appeals correctly hold that the relevant standard of care is that of an emergency room physician? Did the Court of Appeals correctly hold that evidence of the defendants' internal policies and procedures should have been admitted at trial?
Background: On March 1, 2002, 48-year-old Daniel Jilek went to an urgent care center, where he was treated by Carlin Stockson, M.D., a board-certified family practice physician. In addition to complaining of persistent sinus pain, runny nose, earache, and cough, Jilek said that he had trouble breathing on exertion and that chest tightness was interfering with his ability to run. Stockson ordered a chest x-ray, which was normal. She diagnosed Jilek with sinusitis and bronchospasms, and gave him prescriptions for an antibiotic and Albuterol, a bronchodilator. The doctor discharged Jilek with instructions to follow up with an appointment in 10 days, or to go to the nearest hospital emergency room immediately if he felt worse.

Five days later, Jilek collapsed during his workout at a fitness club. He was rushed to the hospital, but was pronounced dead on arrival. The autopsy results indicated that Jilek died of a blood clot that formed in one of the main arteries of his heart hours before his death.

Joy Jilek, as personal representative Daniel Jilek's estate, sued Stockson and her

employer, Emergency Physicians Medical Group of Michigan, P.C., for medical malpractice. The lawsuit alleged, among other things, that Stockson breached the standard of care when she failed to follow up on Jilek's complaints of chest tightness. To prevail in a medical malpractice case, the plaintiff must establish that the defendant physician violated the standard of care, causing an injury to the patient. In this case, the parties disputed throughout the trial whether the relevant standard of care was that of an emergency room specialist or a family practice physician, and experts relating to both specialties testified. The trial court eventually instructed the jury that the relevant standard of care was that of a board-certified family practice physician working in an urgent care center. The trial court also ruled that Jilek would not be allowed to admit into evidence any written policies, procedures or guidelines in place at the urgent care center or adopted by other health organizations. The jury returned a verdict of no cause of action.

In a split published opinion, the Court of Appeals reversed and remanded for a new trial on the ground that the relevant specialty was emergency medicine, not family practice medicine. The majority also held that practice guidelines issued by professional associations and the defendant urgent care should have been admitted as evidence. The dissenting Court of Appeals judge would have affirmed the trial court's rulings. The defendants appeal.

Thursday, October 6
Morning Session

PEOPLE v LIKINE (case no. 141154)
Prosecuting attorney: Joel D. McGormley/(517) 373-4875
Attorney for defendant Selesa Arrosieur Likine: David A. Moran/(734) 763-9353
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Attorney for amicus curiae Michigan Criminal Law Professors: Eve Brensike Primus/(734) 615-6889
Attorney for amicus curiae Legal Services Association of Michigan: Vivek S. Sankaran/(734) 763-5000
Trial Court: Oakland County Circuit Court
Court of Appeals case no. 290218
At issue: After the defendant failed to pay court-ordered child support, she was charged with felony non-payment of child support. In the criminal trial, the trial court ruled that the defendant, who has been diagnosed with schizoaffective disorder, could not introduce any evidence about her income or her ability to pay. A jury found the defendant guilty as charged; she was sentenced to one year of probation. The Court of Appeals affirmed in a published decision, rejecting the defendant's arguments that it is unconstitutional to interpret MCL 750.165 as precluding evidence of the defendant's ability to pay. The Court of Appeals said that the defendant could have asked the family court to decrease the support amount, but did not do so. *People v Adams*, 262 Mich App 89 (2004), holds that inability to pay is not a defense to the crime of felony non-support, MCL 750.165. Is the *Adams* rule unconstitutional?
Background: At issue is whether the defendant in this case, Selesa Likine, should have been allowed to present evidence of her inability to pay when she was tried for failure to pay support for her three children. In her divorce case about three years earlier, the family court had initially ordered Likine to pay $54 per month in child support. But, after Likine's ex-husband moved for an increase, the court ultimately raised the amount to $1,131 a month, based on the court's

finding that Likine had imputed income of $5,000 per month. The court cited evidence that Likine had purchased a home worth $409,000 and had listed her income on the mortgage applications as $15,000 per month.

In March 2008, Likine was charged with one count of failing to pay child support, a criminal felony. MCL 750.165. According to the evidence at Likine's trial, she paid no child support in 2006, $488.85 in 2007, and $100 during the first three months of 2008. Likine reported that she had been unemployed since September 2005, after a hospitalization; that she had never earned $5,000 per month and, at most, had earned $19,000 in a year; and that, after January 2006, she was subsisting on Social Security Administration disability payments of $603 per month. Likine also had a history of suffering from schizoaffective disorder and depression.

Before trial, the prosecutor filed a motion to exclude evidence of Likine's ability to pay, including evidence of her employment status and evidence supporting her claim that her income was less than the amounts used to calculate her support obligations. The prosecutor cited *People v Adams*, 262 Mich App 89 (2004), in which the Michigan Court of Appeals held that evidence of inability to pay is not a valid defense to the strict liability crime of failing to pay child support. Likine objected that such a ruling would deprive her of any defense to the charge, but the trial court granted the prosecutor's motion, based on *Adams*. Likine was convicted as charged of one count of felony non-payment of child support, and she was sentenced to one year probation and restitution in an amount to be determined by the family court.

Likine appealed to the Court of Appeals, which affirmed her conviction in a published per curiam opinion. Allowing a defendant who is being criminally prosecuted under MCL 750.165 to raise the issue of inability to pay would amount to an impermissible collateral attack on the family court child-support order, the appellate court said. The Court of Appeals also rejected Likine's claim of a due process violation, noting that she could have petitioned the family court to modify the support order, or requested a payment plan that would allow her to pay the arrearage, but did not do so. The Court of Appeals was not persuaded by Likine's argument that she had been denied her constitutional right to present a defense. The panel reviewed the elements of felony non-support, and concluded that "evidence of the inability to pay was not relevant to any fact at issue." Thus, there was no abuse of discretion in the trial court's decision not to admit such evidence, and the constitutional right to present a defense was not implicated, the Court of Appeals concluded. Likine appeals.

PEOPLE v PARKS (case no. 141181)
Prosecuting attorney: Joel D. McGormley/(517) 373-4875
Attorney for defendant Michael Joseph Parks: Douglas W. Baker/(313) 256-9833
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial Court: Ingham County Circuit Court
Court of Appeals case no. 291011
At issue: The defendant was convicted of violating MCL 750.165 for failing to pay his child support obligations. He asserted that he was unable to pay and that the child support order was based on an erroneous imputation of income. But the trial court found the defendant guilty and sentenced him to a year in jail; the judge also ordered the defendant to pay $234,444.83, the amount of his child support arrearage. The Court of Appeals affirmed. In *People v Adams*, 262 Mich App 89 (2004), the Michigan Court of Appeals held that inability to pay is not a defense to the crime of felony non-support under MCL 750.165. Is the *Adams* decision unconstitutional?

Background: Dr. Michael Parks and Diane Parks divorced in November 2000. Parks was a rural doctor with a solo practice, who sometimes took work as a contract physician. The family court initially ordered him to pay $230 per week in child support for the parties' three children, later increasing the amount to $761 per week.

After failing to pay child support from October 1, 2006 through July 15, 2008, Parks was charged with violating MCL 750.165, a felony charge. Evidence presented at trial established that, during that period, Parks made "several" requests for the family court to reduce his child support obligation, but did not provide documentation to support his claim that he could not afford to pay. In the criminal proceeding, Parks objected that his support payment was based on the assumption that he earned an income comparable to that of an urban physician working in a group practice, but that his income as a rural sole practitioner was significantly lower. He also testified that he was unable to pay, was disabled, and was receiving federal assistance. At the conclusion of the trial, the court found that Parks was guilty of violating MCL 750.165.

Parks appealed to the Court of Appeals, which affirmed his conviction in an unpublished per curiam opinion. The Court of Appeals cited *People v Adams*, 262 Mich App 89 (2004), for the proposition that MCL 750.165 is a strict liability statute for which inability to pay is no defense. Parks appeals.

PEOPLE v HARRIS (case no. 141513)
Prosecuting attorney: Charles F. Justian/(231) 724-6435
Attorney for defendant Scott Bennett Harris: Jacqueline J. McCann/(313) 256-9833
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial Court: Muskegon County Circuit Court
Court of Appeals case no. 297182
At issue: As part of the defendant's divorce proceeding, the family court ordered him to pay child support for two of his children. He paid sporadically, and was charged with felony non-support under MCL 750.165. The defendant pled guilty in exchange for a plea agreement in which he promised to pay $3,000 by a certain date, at which point sentencing would be adjourned to May 2009; the defendant would not be incarcerated if he paid an additional $5,000 by May 2009. The defendant was not able to pay the initial $3,000, and he was sentenced to 15 months to 15 years in prison. The court denied his motions to withdraw his plea or for resentencing and for rehearing. Is the rule of *People v Adams*, 262 Mich App 89 (2004), which holds that inability to pay is not a defense to the crime of felony non-support under MCL 750.165, unconstitutional? Did the trial court abuse its discretion when it denied the defendant's post-sentencing motion to withdraw his plea? Did the trial court err when it adopted the child support arrearage amount that had been determined by family court as the restitution to be imposed in this criminal case? Did the defendant waive that issue?
Background: Scott Harris was divorced from Lavonne Harris in November 2003. The family court ordered him to pay child support for two of his children. After failing to pay child support for about five years, Harris was criminally charged, under MCL 750.165 and as a fourth-felony habitual offender, with felony non-payment of child support. Harris entered a guilty plea in the criminal proceeding in exchange for a sentencing agreement pursuant to *People v Cobbs*, 443 Mich 276 (1993). The court agreed that sentencing would be delayed by two months, until December 8, 2008; if Harris paid $3,000 of the amount owed by that date, the court would further delay sentencing until May 2009. If Harris paid another $5,000 on the arrearage by May

2009, the court agreed that it would not sentence Harris to any type of incarceration. Harris would still be subject to the imposition of probation, fines, costs, or tether, however.

On December 8, 2008, Harris appeared before the court for sentencing, but without making the $3,000 payment; his attorney argued that Harris was indigent. The court sentenced Harris to 15 months to 15 years in prison. The court also ordered costs and restitution in the amount of $12,781.39 – the amount of the family court arrearage. Harris filed a motion to withdraw his plea or for resentencing, but the court denied his motion. Under *People v Adams*, 262 Mich App 89 (2004), felony non-payment of support is a strict liability crime, and Harris' claimed inability to pay was not relevant, the trial court stated. The court further ruled that Harris was bound by the sentence agreement, and that it was not improper for the court to adopt the restitution amount set by the family court. Harris sought leave to appeal to the Court of Appeals, which denied Harris's application for lack of merit. Harris appeals.

Afternoon Session

IN RE MAYS, MINORS (case nos. 142566, 142568)
Attorney for petitioner Department of Human Services: Jennifer L. Gordon/(313) 833-3777
Attorney for respondent Ursula Mays: Elizabeth Warner/(517) 788-6004
Attorney for respondent Wali Phillips: Vivek S. Sankaran/(734) 763-5000
Attorney for minor children lawyer guardian ad litem: William Ladd/(734) 281-1900
Attorney for amicus curiae Legal Services Association of Michigan and the Michigan State Planning Body for the Delivery of Legal Services to the Poor: Jill M. Przybylski/(313) 465-7000
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Terrence E. Dean/(231) 724-6435
Attorney for amicus curiae Center for Individual Rights: Kerry L. Morgan/(734) 281-7100
Attorney for amicus curiae National Association of Counsel for Children: Brock A. Swartzle/(313) 465-7564
Attorney for amicus curiae American Civil Liberties Union Fund of Michigan: Amy L. Sankaran/(734) 764-7787
Attorney for amicus curiae State Bar of Michigan Family Law Section: Trish O. Haas/(313) 417-2200
Trial Court: Wayne County Circuit Court Family Division
Court of Appeals case nos. 297446, 297447
At issue: In these parental rights termination cases, the mother, who had custody of her nine-year-old and seven-year-old daughters, left the children alone at home for several hours. The mother entered a plea to the allegations in the neglect petition. Both parents were ordered to comply with a treatment plan; when they failed to substantially comply, their parental rights were terminated. The Court of Appeals affirmed in an unpublished per curiam opinion. Did the trial court err in ordering the father to comply with a treatment plan in the absence of an adjudication of his lack of fitness? Should the "one parent" doctrine, adopted in *In re CR*, 250 Mich App 185 (2001), be upheld? Did the father's challenge to the trial court's assumption of jurisdiction constitute an improper collateral attack, where the father had an opportunity to bring a direct appeal from the trial court's initial dispositional order, but did not do so? Did the trial court commit plain error in failing to hold a permanency planning hearing before directing the petitioner to file a supplemental petition seeking termination? Did the trial court clearly err in

finding that clear and convincing evidence was presented to support termination? Did the trial court clearly err in finding that termination was in the children's best interests, without determining whether the children were old enough to give their views regarding termination, and without considering whether termination was appropriate given that the children were being cared for by a relative?

Background: In March 2009, Ursula Mays left her daughters, aged seven and nine, alone at home at about 7:00 p.m.; she did not tell the girls where she was going or how to reach her. Around midnight, Mays' former boyfriend stopped by the house and found the girls alone; just after 1:00 a.m., he took them to the police station. Children's Protective Services worker James Taylor interviewed the girls, who reported that this was not the first time that their mother had left them alone at home. Taylor asked the court to take temporary jurisdiction of the children and to authorize their removal from Mays' home. The court agreed, and the children were placed with their maternal grandmother. In April, Mays appeared in court and entered a plea to the allegations in the petition.

Based on Mays' plea, the family court ordered Mays and the girls' father, Wali Phillips, to comply with a treatment plan. Mays' plan required her to attend individual counseling and parenting classes, attend an evaluation, maintain suitable housing, and obtain a legal source of income. Mays was also to be referred for domestic violence counseling and substance abuse services. Phillips' treatment plan required him to attend individual counseling and parenting classes, obtain suitable housing, and obtain a legal source of income. Both parents were allowed to visit the children at the maternal grandmother's home.

After several months, the Department of Human Services advised the family court that neither parent was complying with the treatment plan. The court ordered DHS to file a supplemental petition seeking termination of both parents' parental rights.

At the termination trial, a foster care worker testified that Mays did not substantially comply with the treatment plan. Among other things, Mays admitted drinking and using marijuana, but did not follow through with drug screens; she was unemployed, failed to maintain suitable housing, and missed parenting classes and therapy sessions, the social worker said. Mays testified that she was able to care for her children, explaining that her attendance at business school affected her ability to complete the treatment plan. The maternal grandmother testified that Mays visited the children at her home about once a week.

As for Phillips, the foster care worker testified that he eventually received a certificate of completion for parenting classes, but that she did not believe that Phillips had benefited from the classes. Phillips attended a few counseling sessions, but did not appear to benefit from those either, the worker said. Phillips provided some financial support to the children but, according to the foster care worker, was not able to provide the children with a home. Phillips testified that he had nothing to do with the incident in March 2009 when Mays left the children home alone. He stated that he and Mays had been separated for about eight years, but he maintained regular contact with the children. Whenever Mays asked him to provide financial support for the children, he did so, Phillips asserted. Phillips testified that he was aware he needed to complete the treatment plan in order to avoid having his parental rights terminated. He admitted that he did not attend individual counseling and had missed some court hearings, but attributed these lapses to work and scheduling errors. Phillips explained that he never visited the children at the maternal grandmother's home because of his work and transportation concerns, and also because he thought the grandmother did not like him. He said that Mays' sister would usually bring the children to Mays' house so that he and Mays could visit with them; he had last seen the children

two weeks earlier at Mays' house.

DHS argued that clear and convincing evidence supported terminating Mays' and Phillips' parental rights. DHA asserted that Mays had placed her own needs and desires above those of the children and had also shown poor judgment that placed her children at risk. As for Phillips, he had merely gone through the motions and not benefited from any of the services provided to him, DHS contended. A juvenile court referee agreed, adding "it is in the best interests of the children that the parents' rights be terminated, and another plan, other than reunification, be sought." The family court judge agreed, and terminated both Mays' and Phillips' parental rights.

Mays and Phillips appealed, but the Court of Appeals affirmed in an unpublished per curiam opinion. The trial court did not clearly err in finding that petitioner had established by clear and convincing evidence sufficient grounds for termination of both parents' parental rights, the Court of Appeals said; both parents failed to comply with the treatment plan. The Court of Appeals also held that the trial court did not clearly err in finding that termination of both parents' parental rights was in the children's best interests. Both parents were aware that the only way toward reunification was to comply with the terms of the treatment plan, yet neither did so, the appellate court stated. The trial court reasonably concluded that the children had been in care for a year and were entitled to permanence and stability, the Court of Appeals concluded. Mays and Phillips appeal.

-- MSC --