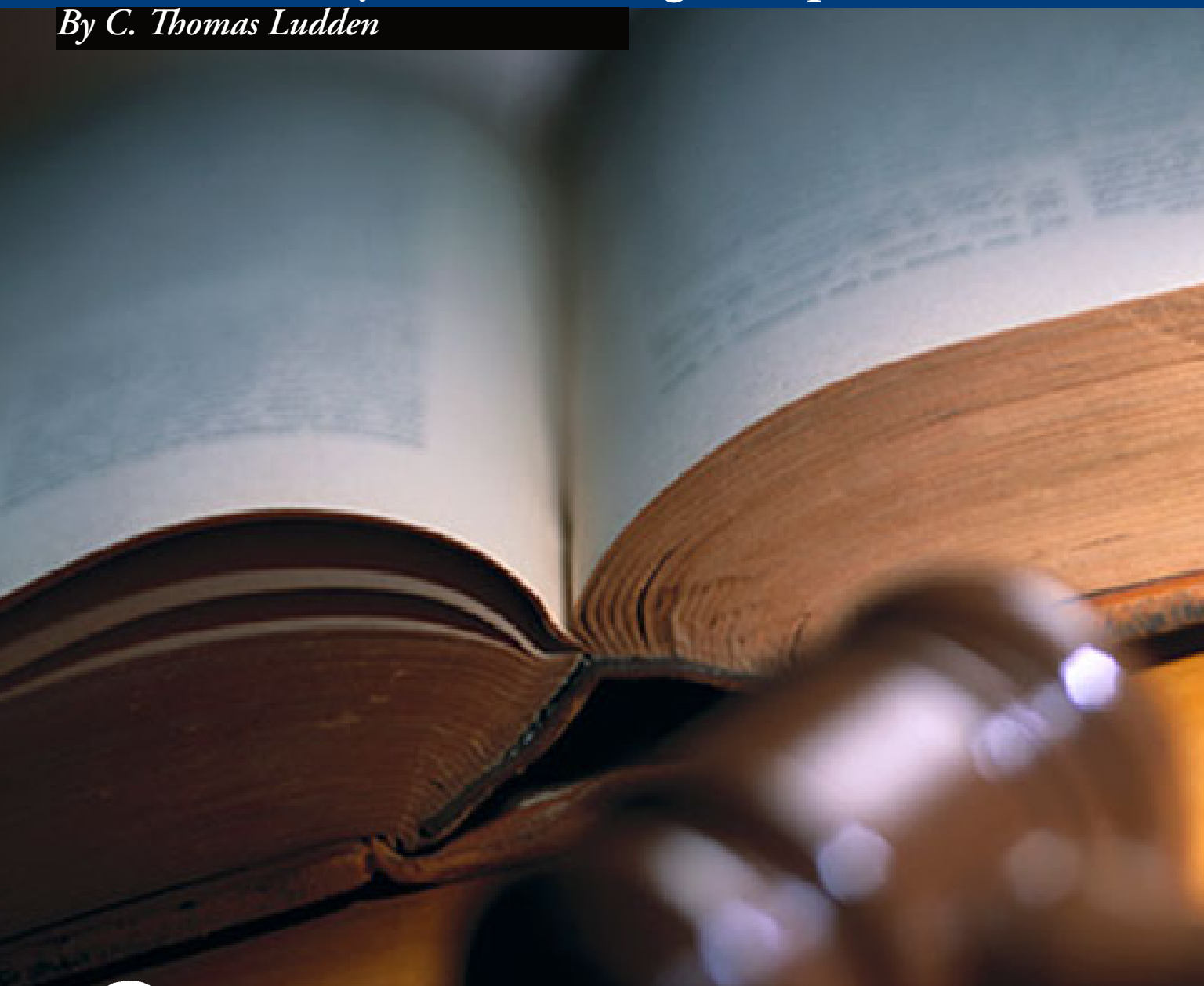
Recent History of the Michigan Supreme Court

By C. Thomas Ludden



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INTRODUCTION

In 2008, Chief Justice Cliff Taylor lost his bid for re-election to the Michigan Supreme Court to Justice Diane Marie Hathaway. The result of that election was of particular importance to the legal community and court watchers in Michigan because, as one Michigan newspaper put it, "Many of the most controversial recent decisions by the seven-member [Michigan Supreme] Court have been issued by a Taylor-led, four-vote conservative majority."[1] Some in Michigan assumed that his defeat could mean that, in closely-divided cases, the three justices who frequently joined with Taylor to form a majority—Maura D. Corrigan, Clifford W. Taylor and Robert P. Young, Jr.—would be the minority going forward. Court watchers and opinion leaders have observed the Michigan Supreme Court's trends since the 2008 election to determine whether the shift in judicial philosophy that many expected had indeed come to pass. To help shed further light on that question, this paper intends to analyze several areas of law that the Michigan Supreme Court has considered since Justice Hathaway took her seat, with special emphasis on areas of the law that have the potential of directly impacting Michigan's economy.

RECENT HISTORY OF THE MICHIGAN SUPREME COURT

To place the differences between the Taylor majority and the Hathaway majority in context, it is useful to consider the recent history of the Michigan Supreme Court. In 1970, the Michigan Democratic Party nominated two former governors, G. Mennen "Soapy" Williams and John B. Swainson, to run for the Supreme Court; each won seats without difficulty.

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At approximately the same time that Justices Williams and Swainson joined the bench, the Michigan Supreme Court began overruling long-standing court decisions in areas of the law that were politically controversial and followed closely by the media and opinion leaders. Among the major areas affected were (1) criminal procedure, including the rules regarding when the state government could initiate successive prosecutions and governing dual prosecutions by the state and federal government; (2) tort reform, by modifying the rules regarding proximate causation and the recovery of damages; (3) governmental immunity; and (4) the interpretation of contracts.[2]

Conservatives critics of the Court perceived this as "judicial activism," in which the Michigan Supreme Court was replacing the language of statutes and the agreements of private parties with their own policy preferences. In short, they believed that the Michigan Supreme Court was making policy, instead of applying statutes, the common law, and the agreements of parties to resolve the disputes before them. In 1991, Governor John Engler took office and, using the Court's recent decisions as a backdrop, stated that one of his goals was to restore the Michigan Supreme Court to its proper role of interpreting the law and allowing the other branches of government to make the law.[3]

In late 1999, in his effort to achieve that stated goal, Governor Engler appointed Stephen J. Markman to the Michigan Supreme Court.[4] Justice Markman joined three other Michigan Supreme Court justices[5]—Maura D. Corrigan, Clifford W. Taylor and Robert P. Young, Jr.—whom Governor Engler had either appointed to the Michigan Supreme Court or supported politically. In a broad range of cases, this majority explicitly stated that it sought to resolve disputes by following the language of the Michigan Constitution, Michigan statutes, the Michigan Court Rules and Rules of Evidence, and the agreements reached by private parties.[6] In addition, the majority sought to elevate the importance of respecting the other branches of government.

In the eight years following Justice Markman's appointment, the Taylor majority substantially reformed Michigan law in a variety of areas, including (1) the rules governing criminal procedure, (2) tort reform, (3) governmental immunity, (4) contact interpretation,

(5) standing to bring litigation, (6) voter identification laws, (7) statutory and constitutional interpretation, and (8) property rights.[7]

The Court's rationale and rulings in these cases earned the majority the praise from conservatives who viewed the majority's jurisprudential approach as a return to the rule of law. For example, six months after Justice Markman's appointment, the *Wall Street Journal* featured an update on the Michigan Supreme Court that commended the Court's majority as "unusually thoughtful, sophisticated, and articulate."[8] In 2003, the Michigan Chamber of Commerce released a report entitled *Judicial Conservatism at Work: A Look at the Michigan Supreme Court 1999-2003*. In October 2005, a *Wall Street Journal* column referred to the Court as "The Finest Court in the Nation."[9] More recently, in November 2007, *Human Events* labeled the majority "the gold standard" for state judges.[10]

On the other hand, others criticized the Michigan Supreme Court for overturning long-standing judicial doctrines that, in their view, should have been upheld. *The Detroit Free Press* chided the Michigan Supreme Court for abandoning the "absurd result" doctrine, which "discouraged [judges] from enforcing laws adopted by the Legislature if to do so would produce an 'absurd result.'"[11] The two Supreme Court justices most likely to dissent, Michael F. Cavanagh and Marilyn Kelly, frequently criticized the majority for not following the doctrine of stare decisis.[12] In addition, they also raised the accusation that the Taylor majority was being activist.[13]

In the November 2008 election, critics of the Taylor majority seemed to get their way when Chief Justice Taylor was defeated by Justice Diane Marie Hathaway, a Michigan trial court judge. The section that follows will analyze and attempt to identify trends that are evident from the Hathaway majority's decisions.

THE HATHAWAY MAJORITY

Civil Litigation

Since January 1, 2009, the Michigan Supreme Court has issued sixty-seven opinions.[14] Although this is a small sample, three trends seem to be emerging in civil litigation. First, the Hathaway majority immediately began reversing the decisions and the precedents of the Taylor majority and has continued to do so. Second, the justices of the Hathaway majority and the Taylor majority profess to follow the same philosophy of deference and restraint in the interpretation of statutes, yet the rulings of the two courts are inconsistent. Third, the decisions issued since January 1, 2009 have led some to argue that there is too much uncertainty about what the law is now and what it could be in the future.

The Hathaway majority began exerting its influence on the law immediately after Justice Hathaway took her seat. Like the United States Supreme Court, the Michigan Supreme Court begins its term each year in October. As a result, by the time the 2008 general election arrived in November, the Michigan Supreme Court had already heard oral argument on eleven cases, and oral argument was already scheduled for sixteen more cases before January. The Supreme Court decided to adjourn oral argument in four cases from December 2008 to January 2009, after Justice Hathaway had been sworn in.[15] The Supreme Court then resolved twenty-one of the twenty-seven cases on which argument had been heard by Chief Justice Taylor.[16]

In one of its final acts, on December 28, 2008, the Taylor majority of the Michigan Supreme Court issued its opinion in *United States Fidelity Insurance & Guaranty Co. v. Michigan Catastrophic Claims Ass'n*.[17] In its opinion, the majority ruled that the Michigan Catastrophic Claims Association had the authority to refuse to indemnify member insurers for unreasonable charges, overturning the Court of Appeals decision.[18] Michigan Court Rules allow a party to file a motion for rehearing within twenty-one days of the date on which the opinion was filed.[19] On January 20, 2009, after Justice Hathaway had taken her seat, a motion for rehearing was filed. On March 27, 2009, the Supreme Court granted the motion for rehearing, finding that the case should be "resubmitted for decision without further briefing or oral argument."[20] On July 21, 2009, the Hathaway majority issued its decision, which reversed the December 28, 2008 opinion of the Supreme Court and affirmed the decision by the Court of Appeals.[21] There were no substantial differences between the dissent in the December 28, 2008 opinion, and the majority opinion issued on rehearing on July

21, 2009.[22] The only significant difference was that Justice Hathaway had replaced Chief Justice Taylor.

Interpretation of Statutes

The Hathaway majority has already issued several decisions affecting the application of Michigan's No-Fault Automobile Insurance Act. Michigan is one of the few "no-fault" states and its no-fault system is unique because it "provides unlimited lifetime coverage for medical expenses which result from auto accidents."[23] The primary goal of the No-Fault Act is to ensure prompt and adequate compensation to those injured by their own insurance carriers.[24] In return for the guarantee of lifetime coverage for medical expenses arising from auto accidents, the Michigan Legislature abolished traditional tort liability arising out of auto accidents, subject to express, very limited, exceptions.[25] One of the most significant limitations under the law is that a plaintiff may only recover non-economic damages "if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."[26]

In 2004, the Taylor majority issued an opinion in this area of the law that generated controversy in the legal community, where intense debates over liability in civil cases had been taking place. In *Kreiner v. Fischer,*[27] the Taylor majority increased the standard required for a plaintiff to prevail in a claim against the driver whose negligence caused an automobile accident. *Kreiner* established a threshold test to determine the existence of a "serious impairment of body function" of Michigan's No-Fault Act. According to the Taylor majority, a showing that an important body function was injured, but not impaired, is insufficient. Rather, the *Kreiner* test required that a litigant show that the impairment is (1) an objectively manifested impairment (observable and identifiable), (2) of an important body function (a body function that the particular plaintiff deems valuable), (3) that affects the person's general ability to lead his normal life (influences most, but not necessarily all, of the particular plaintiff's capacity to lead his own unique pre-accident lifestyle).

In August 2010, the Michigan Supreme Court decided *McCormick v. Carrier*,[28] in which the Hathaway majority overruled *Kreiner* and essentially adopted the reasoning of the *Kreiner* dissent authored by Justice Michael F. Cavanagh. According to one Michigan personal injury lawyer's published description of the *McCormick* decision:

> As *McCormick* only requires an injured car accident victim to establish that the impairment affected or influenced "some" of the injured person's capacity to lead his normal life (slip opinion, p. 19); this new threshold test will be far easier than the requirement that a person have a completely altered life course or trajectory, as was required under *Kreiner*.[29]

The outcome of the *Kreiner* decision, and its subsequent overruling in *McCormick*, is clarified by a brief examination of the history of the law in this area. The standard for determining whether a plaintiff had suffered a "serious impairment of body function" has been the subject of a series of Michigan Supreme Court decisions and statutory amendments by the Michigan Legislature dating back to the 1970s. In a 1973 advisory opinion regarding the constitutionality of the No-Fault Act, the Michigan Supreme Court decided that whether the plaintiff has suffered a "serious impairment of body function" is "within the province of the trier of fact. . . ."[30] Nine years later, in *Cassidy v. McGovern*, after noting that an advisory opinion "'is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits,'"[31] the Michigan Supreme Court determined that the question of whether an injury was a "serious impairment of bodily function" could be decided as a matter of law.[32] Soon thereafter, however, in 1986, the Michigan Supreme Court shifted course again and overruled *Cassidy,* creating a more lenient standard for finding if there were questions of fact to be submitted to a jury in *DiFranco v. Pickard*.[33] In 1995,[34] the Michigan Legislature amended the Michigan No-Fault Act to define "'serious impairment of body function' [to] mean[] an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."[35]

Using this new statutory definition as the basis for its opinion, the Taylor majority decided in *Kreiner* that, through the text of the law, the Michigan legislature intended to create a difficult burden for plaintiffs to

meet to pursue non-economic damages. In *McCormick*, however, the Hathaway majority's opinion began by stating that "*Kreiner* was wrongly decided because it departed from the plain language of [the statute]."[36] The *McCormick* holding made two important changes to *Kreiner*. First, the Legislature had established that the trial court judge could determine whether a plaintiff had suffered a "severe impairment of body function"[37] if there was no material factual dispute regarding whether the plaintiff had suffered such an impairment.[38] *McCormick* determined that "the disputed fact does not need to be outcome determinative to be material. . ."[39] Second, *McCormick* rejected the multi-part test established by *Kreiner* for determining if a person had a serious impairment of body function and found that "the serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis."[40]

Under *McCormick*, then, as a procedural matter, trial court judges will be less involved in determining whether a plaintiff has met the statutory threshold for recovery of non-economic damages because disputes about facts that are not outcome determinative may now prevent summary dismissal of claims. As a matter of substantive law, the standard for determining whether there is a serious impairment of body function has been lowered, although that standard has not yet been defined. Therefore, some critics of the Hathaway majority believe that one result of *McCormick* is that more lawsuits seeking non-economic damages will be filed, and fewer of the lawsuits that are filed will be dismissed.

On the same day as it released *McCormick*, the Hathaway majority also released *Regents of the University of Michigan v. Titan Insurance Co.,*[41] a case that the Hathaway majority decided after the Taylor majority had originally denied leave to appeal on November 26, 2008.*[42]* *Regents* dealt with another aspect of Michigan No-Fault Act: the "one-year back rule" for claims by an injured person to recover unpaid personal injury protection ("PIP") benefits from their own insurance carrier.[43] In *Cameron v. Auto Club Insurance Ass'n.*, the Taylor majority had held that the insanity/minority tolling provisions[44] contained in the general statute of limitations did not apply to the one-year back rule established under Michigan's No-Fault Act.[45] *Cameron* reasoned that this general tolling provision dealt with tolling the deadline for filing a lawsuit, while the one-year back rule limits recovery of damages to a period of one year before the suit was filed.[46] Therefore, *Cameron* concluded that this tolling provision did not apply to the one-year back rule. In *Cameron*, the Taylor majority also stated that it was the role of the Michigan Legislature, not the courts, to fashion compromises between competing policy interests.[47] Rather than fashion its own compromise, *Cameron* relied upon the explicit compromise found in the clear language of the applicable statute.[48]

Regents considered another provision of the general statute of limitation, this one providing that there is no period of limitations for the State of Michigan and its political subdivisions to bring actions to recover the costs of medical care provided in its hospitals and other entities.[49] For reasons left unstated in the opinion, the University of Michigan Regents did not seek recovery of payment for medical expenses incurred in 2000 until 2006. The Court of Appeals found that the one-year back rule barred recovery of these medical expenses.[50] *Regents* reversed the Court of Appeals decision and overruled *Cameron*, essentially finding that the tolling provision must apply to the one-year back rule because otherwise the tolling provision would preserve the right to file suit without the right to recover any damages.[51] Justice Kelly, writing for the majority, argued that "what the Legislature intended as a provision to preserve plaintiff's claims, *Cameron* rendered largely meaningless."[52]

Whether the general "insanity tolling" provisions apply to first party claims is significant because many persons who are severely injured in automobile accidents have also suffered brain injuries, which would potentially trigger "insanity tolling." If the one-year back rule does not apply, then there may be no time limit for injured persons to bring suit to recover PIP benefits because these brain injuries may never heal. Moreover, PIP benefits may include claims for attendant care being provided by family members for the injured person.[53] Without the one-year back rule, a claim could be made contending that the sums previously paid for attendant care have been unreasonably low since the

date of the accident or soon thereafter. Since a brain injured person may require attendant care twenty-four hours per day and seven days per week, these claims can become substantial. Therefore, eliminating the application of the one-year back rule may dramatically increase the cost of providing PIP benefits. In his dissent in the *Regents* case, Justice Markman argued that the holding will increase the insurance premiums that all Michigan drivers are required to pay because all Michigan drivers must carry no-fault insurance.[54]

Contracts

A significant decision by the Hathaway majority in the area of Michigan contract law is *Zahn v. Kroger Co. of Michigan*,[55] on the issue of whether Michigan's abolition of joint and several liability in tort cases[56] affected indemnification claims arising out of contractual agreements.[57] All of the justices agreed that the contractual language was unambiguous and controlled the relations between the parties.[58] In reaching this conclusion in one of her first opinions, however, Justice Hathaway twice stated that the parties had "equal bargaining power."[59] Therefore, although Justices Young and Markman wrote opinions concurring in the result, both noted that limiting the rules regarding interpretation of contracts to cases in which the parties have equal bargaining power would create a great deal of uncertainty in the law.[60] Moreover, the concurring justices argued, because the Hathaway majority provided no guidance in answering the question of when parties have equal bargaining power, the end result will be more litigation and an "enhanced role for judges in resolving contract disputes."[61]

The predictions of Justices Young and Markman proved true when the Supreme Court issued *Shay v. Aldrich*.[62] In that case, the Hathaway majority reversed a Michigan Court of Appeals decision,[63] *Romska v. Opper*,[64] on the issue of whether an agreement to release "*all other parties, firms or corporations who are or might be liable* from all claims of any kind or character" also released claims against a non-party to that release.[65] *Romska* held that the clear and unambiguous language of the release included claims against non-parties.[66] In reaching its decision, the Court of Appeals also relied upon the parol evidence rule, finding that courts should not resort to parol evidence when the release language was unambiguous and the release contained an integration clause.[67] Though *Romska* may have generated controversy, lawyers settling claims knew for more than a decade that a release "of all persons" released all persons, whether or not they were parties to the release agreement.

In *Shay*, the Hathaway majority held that a court may properly use parol evidence to interpret the scope of a release when a party not named in the release "asserts third-party beneficiary rights based on the broad language included in a release from liability and an ambiguity exists with respect to the intended scope of the release."[68] Although the *Shay* release contained similar language to *Romska*, the Hathaway majority found that there were latent ambiguities[69] in the *Shay* release.[70] Therefore, *Shay* held that extrinsic evidence could be used to determine whether the intent of the releasing parties was different from the intent expressed within the release.[71] *Shay* concluded that the intent was different, limited the scope of the release, and reversed the dismissal of claims against some of the defendants.[72] The three justices remaining from the Taylor majority dissented, arguing that the language of the release was not ambiguous and that parol evidence should not have been considered to interpret it.[73]

Another turning point in contract law under the Hathaway majority is that now the relative strength of parties prior to entering into an agreement may affect how the clear and unambiguous language of an agreement is interpreted. Similarly, the potential expansion of the use of extrinsic evidence to determine if latent ambiguities exist creates additional room for judicial interpretation of contracts even those which are not ambiguous. If the unambiguous language is no longer the sole criterion for determining the rights and responsibilities of the parties to an agreement, some believe that more disputes regarding contracts will go to court because it is much harder to predict how the courts will resolve contractual disputes.

Standing

In *Lansing Schools Education Ass'n v. Lansing Board of Education*,[74] the new Court expressly overruled *Lee v. Macomb Co. Board of Commissioners*[75] and *National*

Wildlife Federation v. Cleveland Cliffs Iron Co.[76] In *Lee,* the Michigan Supreme Court adopted the test for determining whether a plaintiff had standing to bring suit established in *Lujan v. Defenders of Wildlife*,[77] a decision by the United States Supreme Court.[78] The result was that standing in Michigan was limited to plaintiffs who: (1) had suffered an "injury in fact," which must be both (a) concrete and (b) actual (as opposed to conjectural or hypothetical), (2) could show causation between the injury and the allegedly wrongful conduct, and (3) could show that their prevailing in the case is likely to remedy their actual injury.[79] Although they agreed that the Supreme Court should adopt the *Lujan* test, Justices Kelly and Cavanagh dissented.[80] The focus of their dissent was on the application of the *Lujan* test to the facts of *Lee*, and the dissenters concluded that the plaintiffs had standing to pursue their claims.[81]

National Wildlife considered "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing."[82] The Taylor majority applied the *Lujan* test to determine that the National Wildlife Federation and the other non-profit organizations had standing to seek injunctive relief under the Michigan Environmental Protection Act[83] ("MEPA") to prevent the defendant from expanding its mine operations.[84] Because these organizations had standing under *Lee*, the majority opinion did not need to consider whether the standing provisions of MEPA were constitutional or not. [85] There were no dissents from the result in *National Wildlife*. Instead, three of the Justices issued their own concurrences. Justice Weaver repeated her rejection of *Lee* and found that the plaintiffs had standing under a provision of the Michigan Constitution.[86] Justice Cavanagh announced that he had rejected the adoption of the *Lujan* test even though he had originally advocated its adoption,[87] and Justice Kelly argued that the *Lee* ruling should not apply to cases arising under MEPA.[88]

In *Lansing Schools*, the Hathaway majority determined that "Michigan's standing jurisdiction should be restored to a limited, prudential approach that is consistent with Michigan's long-standing historical approach to standing."[89] *Lansing Schools* involved a lawsuit by teachers seeking a writ of mandamus and a declaratory judgment that a school board was required to expel certain students.[90] Before the teachers sued the school board seeking declaratory relief, these students would have been subject to a disciplinary process to determine if they had actually physically assaulted a teacher.[91] If they had done so, then Michigan law would have required their expulsion from school.[92] The school board, however, determined that the students had not committed the physical assault, and the students were suspended, not expelled. [93] After this decision was made, the lawsuit was filed, but the students whose expulsion was sought were not made parties.[94] The Hathaway majority relaxed the requirements of standing defined in *Lee*, holding that a litigant had standing (1) when there is a legal cause of action, (2) when a litigant seeking declaratory relief met the requirements of Michigan Court Rule 2.605, or (3) when the court, "in its discretion," finds the litigant has standing.[95] As a result, there is significantly less certainty regarding whether some plaintiffs have standing.

MICHIGAN SUPREME COURT JURISPRUDENCE AND THE FUTURE

In the areas of civil liability, statutory interpretation, contracts, and standing, the most recent shift in Court personnel has had an effect on Michigan law because previous decisions by the Taylor majority in these areas have been reversed. Some in Michigan expect that the Hathaway majority would continue to reverse precedent. Accordingly, the future direction of the Michigan Supreme Court is the subject of an ongoing public debate centered on the re-elections of Justice Young and recently-appointed Justice Alton Davis. That public debate provides citizens with a unique opportunity to engage in a thoughtful discussion about the proper role of courts in the public policy arena, the importance of precedent and text as guides in judicial decision-making, and the value of predictability in the law at a time when Michigan faces economic challenges like high unemployment.

Endnotes

1 Eartha Jane Melzer, *Fight for the Soul of Michigan's Highest Court*, Mich. Messenger, Sept. 8, 2008.

2 These decisions are described in more detail in Matthew

Schneider, Michigan's Big Four: An Analysis of the Modern Michigan Supreme Court 4-5 (2008).

3 John Engler, Address to the Michigan Supreme Court Historical Society Annual Membership Luncheon (Apr. 18, 2002), *available at* http://www.micourthistory.org/pdfs/speeches_vignettes/engler.pdf (last visited Oct. 9, 2010).

4 Vacancies on the Supreme Court are filled in two ways. First, in the case of a mid-term vacancy due to retirement or death, the governor would appoint a new justice until the next subsequent election. *Compare* Mich. Const. of 1850 art. VI, § 14 *with* Mich. Const. of 1963 art. VI, § 23. Justice Markman was appointed to replace Justice James H. Brickley, who has retired. Second, in the case of an end-of-term vacancy, candidates for the Court are nominated by partisan political conventions, and the candidates for the Supreme Court run in the general election on the non-partisan section of the ballot. Mich. Const. of 1963 art. VI, § 2 ("The supreme court shall consist of seven justices elected at non-partisan elections as provided by law."); Mich. Comp. Laws § 168.392 (authorizing "each political party [to] . . . nominate . . . candidates for the office of justice of the supreme court. . ."); Mich. Comp. Laws § 600.203 (providing for election of supreme court justices "in the manner provided by the constitution and the election laws of the state").

5 For a period of time, Justice Elizabeth Weaver joined the majority's conclusion, but did not join their reasoning. *See, e.g.*, Taylor v. Smithkline Beecham Corp., 658 N.W.2d 127, 137 (Mich. 2003); Adams Outdoor Advertising, Inc. v. City of Holland, 625 N.W.2d 377, 383 (Mich. 2001). In 2004, Justice Weaver began joining Justice Thomas F. Cavanagh and Justice Marilyn Kelly in dissenting from the opinions issued by the then-majority of the Michigan Supreme Court.

6 In October 2008, the Federalist Society published a White Paper authored by Matthew Schneider, entitled *Michigan's Big Four: An Analysis of the Modern Michigan Supreme Court*, which detailed the major decisions by this majority between 1999 and 2008.

7 These decisions are all described in more detail in Schneider, Michigan's Big Four 6-12.

8 Abigail Thernstrom, *Trial Lawyers Target Three Michigan Judges Up for Election*, Wall St. J., May 8, 2000.

9 Patrick J. Wright, *The Finest Court in the Nation: Hurray for Michigan Justice*, Wall St. J., Oct. 13, 2005.

10 John Gizzi, *Here Comes the Judge (Campaign)*, Human Events, Oct. 26, 2007.

11 Brian Dickerson, *Adultery, Life and Engler's High Court*, Detroit Free Press, Jan. 17, 2007.

12 McDonald v. Farm Bureau Ins. Co., 747 N.W.2d 811, 826 (Mich. 2008) (Justice Kelly criticizing majority for new explanation of why stare decisis did not apply); Trentadue v. Buckler Lawn Sprinkler, 738 N.W.2d 664, 696 n.5 (Mich. 2007) (contending that the prior majority had never relied upon stare decisis to uphold a prior decision of the Michigan Supreme Court); Rowland v. Washtenaw County Road Comm'n, 731 N.W.2d 41, 70 (Mich. 2007) (contending that the majority's decision "exhibits disrespect for stare decisis"); Devillers v. Auto Club Ins. Ass'n, 702 N.W.2d 539, 558 (Mich. 2005) (Justice Cavanagh finding that the "majority has not established a persuasive reason for disregarding twenty years of stare decisis").

13 Mack v. City of Detroit, 649 N.W.2d 47, 67 n.9 (Mich. 2002) (Justice Cavanagh concluding that the "majority frequently engages in at least three distinct types of activist behavior. . . .").

14 The Michigan Court of Appeals website provides access to all opinions issued by the Michigan Supreme Court and Michigan Court of Appeals. *See* http://coa.courts.mi.gov/resources/opinions.htm.

15 *See* http://coa.courts.mi.gov/documents/sct/public/orders/20081114_s134967_72_order.pdf (last visited Oct. 9, 2010).

16 *See generally* http://courts.michigan.gov/supremecourt/Clerk/msc_orals-2008-2009-session.htm (last visited Oct. 8, 2010) (listing dates of oral argument and the orders or opinions resolving matters on which oral argument was held, with links to those orders and opinions).

17 759 N.W.2d 154 (Mich. 2008).

18 731 N.W.2d 481 (Mich. Ct. App. 2007).

19 Mich. Ct. Rules 7.313(D).

20 762 N.W.2d 911 (Mich. 2009).

21 484 Mich. 1 (2009).

22 *Compare* 759 N.W.2d at 168-178 (December 2008 dissent) *with* 484 Mich. at 1 (July 2009 majority opinion).

23 http://michigancatastrophic.com/ (last visited October 2, 2010).

24 Shavers v. Kelley, 267 N.W.2d 72, 77(Mich. 1978).

25 Mich. Comp. Laws § 500.3135(3).

26 Mich. Comp. Laws § 500.3135(1) .

27 683 N.W.2d 611 (Mich. 2004).

28 2010 WL 3063150 (Mich. July 31, 2010).

29 http://bit.ly/blYUQ4.

30 Advisory Opinion re Constitutionality of 1972 PA. 294, 208 N.W.2d 469 (Mich. 1973).

31 330 N.W.2d 22, 26 (Mich. 1982).

32 *Id.* at 29.

33 398 N.W.2d 896 (Mich. 1986).

34 *See* 1995 Mich. Pub. Acts No. 222, § 1, Eff. March 28, 1996, as reported in the Historical and Statutory Notes of Mich. Comp. Laws Ann. § 500.3135.

35 Mich. Comp. Laws §500.3151(7).

36 McCormick v. Carrier, 2010 WL 3063150, at *1 (Mich. July 31, 2010).

37 While this test also applies to whether there is a permanent serious disfigurement, there are far fewer disputes regarding this question because scars are clearly permanent disfigurements and they are either visible or not.

38 Mich. Comp. Laws § 500.3135(2)(a).

39 *McCormick*, 2010 WL 3063150, at *5.

40 *Id.* at *14.

41 2010 WL 3037798 (July 31, 2010).

42 The Michigan Supreme Court had granted a motion for reconsideration of the November 26, 2008 decision denying leave to appeal *Regents* on July 31, 2009. 769 N.W.2d 646 (Mich. 2009).

43 Mich. Comp. Laws § 500.3145(1).

44 Mich. Comp. Laws § 600.5851. The Michigan Legislature has consolidated many of the statutes of limitation within a single section of the Revised Judicature Act, Mich. Comp. Laws § 600.5801 et seq.

45 718 N.W.2d 784, 786 (Mich. 2006).

46 *Id.* at 788-789.

47 *Id.* at 789–791.

48 *Id.* at 790-791.

49 Mich. Comp. Laws § 600.5821(4).

50 2008 WL 2313101 (Mich. Ct. App. 2008).

51 Regents of the Univ. of Mich. v. Titan Ins. Co., 2010 WL 3037798, at *3-5 (July 31, 2010)..

52 *Id.*, slip op. at 6.

53 *See generally* Bonkowski v. Allstate Ins. Co., 761 N.W.2d 784 (Mich. Ct. App. 2008) (denying a motion to set aside a judgment of $1,730,723.67 for care provided by a father for his son, who had suffered a spinal cord injury)..

54 *See Regents*, 2010 WL 3037798, at *21-22 (Markman, J., dissenting).

55 764 N.W.2d 207 (Mich. 2009).

56 Mich. Comp. Laws § 600.2956. Because joint and several liability is eliminated, there was no longer any need for the statutorily created claims by joint tortfeasors for contribution and indemnity from other tortfeasors, and these claims were eliminated with the elimination of joint and several liability. 1995 Mich. Public Acts No. 161.

57 764 N.W.2d at 208. *Zahn* also considered the interaction of the Worker's Disability Compensation Act, Mich. Comp. Laws §418.131(1).

58 764 N.W.2d at 209.

59 *Id.*; *id.* at 210 n.8.

60 *Id.* at 212 (Young, J., concurring); *id.* (Markman, J., concurring) (joined by Justice Young and Justice Corrigan).

61 *Id.* at 213.

62 2010 WL 3326673 (Aug. 23, 2010).

63 Published Michigan Court of Appeals decisions have precedential effect. Mich. Ct. Rules 7.215(C)(2).

64 594 N.W.2d 853 (Mich. Ct. App. 1999).

65 *Id.* at 856 (emphasis in original).

66 *Id.* at 856.

67 *Id.* at 857.

68 Shay v. Aldrich, 2010 WL 3326673, at *1 (Aug. 23, 2010).

69 A patent ambiguity is one evident from the document itself while a latent ambiguity is one revealed by reviewing of information outside the document. In contract law, the most famous example of a latent ambiguity is the one that arose from the multiple ships Peerless. Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (L.R. Exch.).

70 *Shay*, 2010 WL 3326673, at *11-12.

71 *Id.*

72 *Id.*

73 *Id.* at *16 (dissenting opinion).

74 2010 WL 3037733 (July 31, 2010).

75 629 N.W.2d 900 (Mich. 2001).

76 684 N.W.2d 800 (Mich. 2004).

77 504 U.S. 555 (1992).

78 629 N.W.2d at 907-908.

79 *Id.* at 907 (relying upon *Lujan*, 504 U.S. at 561).

80 *Id*. at 913.

81 *Id.* at 913-914.

82 Nat'l Wildlife Fed'n v. Cleveland Cliffs Iron Co., 684 N.W.2d 800, 805 (Mich. 2004).

83 Mich. Comp. Laws § 324.1701 et seq.

84 684 N.W.2d at 814-815.

85 *Id.* at 815-816.

86 *Id.* at 826 et seq.

87 *Id.* at 839. *See also* Detroit Fire Fighters Ass'n v. City of Detroit, 537 N.W.2d 436, 445-446 (Mich. 1995) (Cavanagh partially dissented and applied the *Lujan* test to determine that the plaintiffs had standing.).

88 684 N.W.2d at 839 et seq.

89 Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ. 2010 WL

3037733, at *1 (July 31, 2010).

90 *Id.* at *8.

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

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