CIVIL PROCEDURE

SEAN P. MCNALLY[†]
DANIEL D. QUICK[‡]

Table of Contents

I. INTRODUCTION

During the 2007-2008 *Survey* period, May 23, 2007 to July 30, 2008, there were important opinions issued affecting the law of jurisdiction and standing and various aspects of statutes of limitations. In addition, noteworthy opinions were issued affecting the law regarding judgments, awards of attorneys fees and the role unpublished opinions should play with the lower courts.

---

† Commercial trial and appellate litigator with Kotz, Sangster, Wysocki and Berg, P.C. B.A., 2000, James Madison College at Michigan State University; J.D. and Trial Practice Certificate, 2003, *cum laude*, Michigan State University College of Law.

‡ Trial lawyer and partner with Dickinson Wright, PLLC in Bloomfield Hills, Michigan. B.A., 1990, *with honors*, University of Michigan; J.D., 1992, University of Michigan Law School.

II. JURISDICTION

The concept of standing, which requires that a party bringing a suit has an interest in the litigation distinct from that of the general public, has its federal roots in Article III, Sections I and II of the United States Constitution. Together, these Sections provide that the courts shall exercise only "judicial" power and shall exercise it only over "cases" and "controversies."[1] Article VI Section I and Article III Section II of the Michigan Constitution, which limit the courts' adjudication powers and expressly mandate a separation of powers, respectively, are Michigan's counterparts to these federal provisions. In both the state and federal context, such provisions support strict adherence to the doctrine of standing which, when applied, operates to prevent the judiciary from usurping the power of the legislative branch. While Michigan's recent standing jurisprudence is marked with divergent viewpoints and changing analysis, several cases decided within the last year have helped to explain the current state of the doctrine.

A. Standing to Challenge Use of State Funds

In *American Family Ass'n of Michigan v. Michigan State University Board of Trustees*,[2] the Michigan Court of Appeals held that the American Family Association of Michigan (American Family), a non-profit corporation, lacked standing to seek a permanent injunction against the Michigan State University Board of Trustees for the Board's use of public funds to confer benefits to same-sex partners of its employees.[3] American Family Association of Michigan argued that M.C.L. Section 600.2401 and M.C.R. Section 2.201(B) alone established standing.[4] They provide, in pertinent part, that "an action to prevent the illegal expenditure of state funds or to test the constitutionality of a statute relating thereto may be brought in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes."[5]

Rejecting the plaintiff's argument, the court noted that to establish standing, a plaintiff must comport not only with all requirements of any applicable statute authorizing the suit, but also with the constitutional minimum criteria for standing set forth in *Lujan v. Defenders of*

1. U.S. CONST. art. III, §§ 2, 3.
2. 276 Mich. App. 42, 739 N.W.2d 908 (2007).
3. *Id.* at 43, 739 N.W.2d at 908.
4. *Id.* at 44, 739 N.W.2d at 911.
5. *Id.* at 44 n.3, 739 N.W.2d at 911 n.5.

Wildlife,[6] and adopted by the Michigan Supreme Court in *Lee v. Macomb County Board of Commissioners*.[7] The court set forth the standing requirement below:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[8]

Applying this test to the facts before it, the court found the plaintiff could not establish a concrete and particularized injury when the harm it alleged was most accurately characterized as an affront to the general values the organization sought to promote.[9] Such an insult, the court reasoned, was not sufficiently different than the injury experienced by the citizenry at large to satisfy the requirement of a particularized injury suffered by American Family.[10] Accordingly, the court affirmed the trial courts' dismissal of the plaintiff's suit for lack of constitutional standing.[11]

Approximately one month after the Michigan Court of Appeals decided *American Family*, the Michigan Supreme Court confronted a similar standing issue in *Rohde v. Ann Arbor Public Schools*,[12] holding that even with a statutory basis to bring suit, the plaintiff taxpayer lacked standing to sue Ann Arbor Public Schools for alleged misappropriation of public funds used to confer benefits to same-sex partners of its employees.[13] As in *American Family*, the plaintiff in *Rohde* contended that standing was established after meeting the requirements of M.C.L. Section 129.61 which provides, in pertinent part, that

---

6. 504 U.S. 555 (1992).

7. 464 Mich. 726, 629 N.W.2d 900 (2001).

8. *Am. Family Ass'n of Mich.*, 276 Mich. App. at 51, 739 N.W.2d at 914 (quoting Nat'l Wildlife Fed'n v. Cleveland Cliff Iron Co., 471 Mich. 608, 628-29, 684 N.W.2d 800 (2004)).

9. *Id.* at 52-53, 739 N.W.2d at 915.

10. *Id.*

11. *Id.* at 54, 739 N.W.2d at 916.

12. 479 Mich. 336, 737 N.W.2d 158 (2007).

13. *Id.* at 340, 737 N.W.2d at 154.

> Any person . . . or resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision.[14]

The court disagreed, stating that:

> [Plaintiff's injury] is minute and generalized . . . not a concrete and particularized injury in fact. Indeed, any remedy they might obtain will not confer a financial benefit on them. Moreover, any potential benefit plaintiff[s] might obtain if they prevailed in this lawsuit would not be any different than that which would be obtained by everyone else in the state. Under such circumstances, they do not have constitutional standing.[15]

In so holding, the court recognized M.C.L. Section 129.61 as "unconstitutional to the extent that it purports to confer standing on taxpayers who have not satisfied the [three-part test for determining whether a party has constitutional standing]."[16]

While standing doctrines are designed to prevent the judiciary from usurping the power of the legislature, statutes that purportedly confer standing give the judiciary an opportunity to assess and/or limit the constitutionality of the legislature's acts. Both *American Family* and *Rohde* reflect this function, providing a forum for the courts to render statutes unconstitutional to the extent they authorize a plaintiff to bring suit irrespective of the plaintiff's establishment of constitutional standing.

B. Standing to Sue in Environmental Cases

On July 25, 2007, the Michigan Supreme Court decided *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*,[17] a highly publicized environmental case arising out of Nestlé Waters' commencement of pumping operations at Osprey Lake in the Tri-Lakes

14. *Id.* at 343, 737 N.W.2d at 161.
15. *Id.* at 354-55, 737 N.W.2d at 167.
16. *Id.* at 355, 737 N.W.2d at 167.
17. 479 Mich. 280, 737 N.W.2d 447 (2007).

region of Mecosta County.[18] Plaintiff, the domestic non-profit corporation Michigan Citizens for Water Conservation (MCWC), brought a Michigan Environmental Protection Act (MEPA) claim against Nestlé, which acquired groundwater rights to 139 acres of the northern shore of Osprey Lake and thereafter began withdrawing water from the lake at a maximum rate of 400 gallons per minute.[19] Relying on an interconnectedness theory, MCWC's suit alleged harm to numerous bodies of water including Osprey Lake, Thompson Lake, the Dead Stream and various wetlands.[20] The Court of Appeals found that:

> [P]laintiffs [had] standing because of the complex, reciprocal nature of the ecosystem that encompasses the pertinent natural resources above and because of the hydrologic interaction, connection or interrelationship between these natural resources, the springs, the aquifer, and defendant Nestlé's pumping activities, whereby impact on one particular resource caused by Nestlé's pumping necessarily affects other resources in the surrounding area. Therefore, although there was no evidence that plaintiffs actually used or physically participated in activities on the Osprey Lake impoundment and wetlands 112, 115 and 301, environmental injuries to those natural resources play a role in any harm caused to the Dead Steam, the Dead Stream's wetlands, and Thompson Lake, which are used by and adjacent to property owned by plaintiffs and not the subject of a standing challenge.[21]

The court noted, and defendant conceded, that plaintiffs had standing to bring claims regarding Thompson Lake and the Dead Stream since such claims were brought on behalf of residents of the Tri-Lakes region whose recreational, aesthetic, or other interests were allegedly impaired by Nestlé's pumping of Osprey Lake.[22] But while the court of appeals held that plaintiffs had standing to pursue its other MEPA claims, the Supreme Court reversed, holding that the "flaw in th[e] 'interconnectedness theory' of standing is that it permits plaintiffs to evade their burden to establish an injury in fact . . . the relevant inquiry in

18. *Id.* at 285-86, 737 N.W.2d at 450.
19. *Id.* at 286-88, 737 N.W.2d at 450-51.
20. *Id.* at 285-88, 737 N.W.2d at 450-51.
21. *Id.* at 289-90, 737 N.W.2d at 452 (citing Mich. Citizens for Water Conservation v. Nestle Waters N. Am., 269 Mich. App. 25, 709 N.W.2d 174 (2005)).
22. *Id.* at 298, 737 N.W.2d at 456-57.

standing analysis is not whether the environment suffered injury, but whether the plaintiff suffered injury."[23]

With respect to Osprey Lake and Wetlands 112, 115 and 301, the court stated that:

> [T]he record below does not indicate that plaintiffs used or had access to these [other lake] areas or that they enjoyed a recreational, aesthetic, or economic interest in them. Plaintiffs failed to establish that they have a substantial interest in these areas, detrimentally affected by Nestlé's conduct, that is distinct from the interest of the general public. The absence of a concrete, particularized injury in fact is fatal to plaintiffs' standing to bring a MEPA claim with respect to [these areas].[24]

Responding to Justice Weaver's dissenting opinion suggesting that the court's decision stripped Michigan citizens and the Michigan Legislature of its power to preserve the State's natural resources, the court clarified that its opinion should be construed only to

> [R]ecognize an established constitutional line on our judicial authority to adjudicate what would otherwise be public policy-oriented lawsuits brought by persons who have no immediate stake in the controversy.
>
> Environmental laws, such as MEPA (or any statutory law for that matter), may be vindicated by persons who have suffered a real injury in fact and thus have a stake in the controversy. Such is the case here with respect to plaintiffs' MEPA claim to protect the Dead Stream and Thompson Lake.[25]

Shortly after the Michigan Supreme Court issued its decision in *Nestlé*, the Michigan Court of Appeals decided *Township of Coldsprings v. Kalkaska County Zoning Board of Appeals*.[26] In this case, the court resolved an issue of first impression by holding that a municipality lacks standing to sue on behalf of its residents affected by a zoning variance.[27] While recognizing *Nestlé's* holding that a non-profit corporation may sue

23. *Nestle*, 479 Mich. at 298, 737 N.W.2d at 456-57.
24. *Id.* at 297, 737 N.W.2d at 456.
25. *Id.* at 309, 737 N.W.2d at 462-63.
26. 279 Mich. App. 25, 755 N.W.2d 553 (2008).
27. *Id.* at 26, 755 N.W.2d at 554.

on behalf of its members who possess riparian rights, the court declined to extend this right to municipalities because municipalities lack members whose voluntary association reflects an implicit grant of permission to the larger body to protect its common interests.[28] Citing to *Nestlé*, the court of appeals explained the burden to establish standing in an environmental case is no different than a case in any other context, and that the mere fact that an interest is affected by a zoning ordinance is not enough to confer standing.[29] The court held that to establish standing, the "petitioner must show that it, and not merely certain residents, is detrimentally affected by respondent's approval of the zoning variance in a manner distinct from the interest of the general public."[30] Finding the petitioner alleged nothing other than a general interest in the protection of the health, safety, and welfare of its citizens, the court found that it lacked standing to pursue its claim.[31]

Both *Nestlé* and *Kalkaska* support the maintenance and evolution of the standing doctrine in Michigan jurisprudence. Together, they ensure that any plaintiff bringing suit has a sufficient, particular interest in the outcome of the litigation to satisfy the constitutional demand that Michigan courts function only to adjudicate real disputes.[32] While these cases sanction representative standing, they allow it only in situations that ensure proper advocacy of the interest(s) involved, such as those situations wherein voluntary members of an association are assumed to have an aligned interest with that association so the members, if bringing suit independently, would have constitutional standing.[33]

III. STATUTE OF LIMITATIONS

A. Minority Tolling

Most modern insurance contracts contain a limitation period, which sets forth the period in which the insured can bring a claim against the insurer for benefits under the policy.[34] Contractual limitations provisions have been the subject of several recent and significant decisions in Michigan. This *Survey* period was no exception, as this area of law

28. *Id.* at 29, 755 N.W.2d at 555.
29. *Id.* at 29-30, 755 N.W.2d at 556.
30. *Id.*
31. *Id.* at 30, 755 N.W.2d at 556.
32. *See* discussion, *supra* Part II.
33. *See id.*
34. *See* discussion, *infra* Part III.

continues to develop in the wake of the Michigan Supreme Court's landmark decision in *Rory v. Continental Insurance Company*.[35]

In *Klida v. Braman*,[36] the Michigan Court of Appeals limited the application of the decision in *Rory* by holding the minority tolling provision contained in M.C.L. Section 600.5851(1) tolls a one-year contractual limitations period in an underinsured motorist (UIM) policy until the insured reaches the age of majority.[37]

Katie Klida sustained injuries in a motor vehicle accident involving her mother's vehicle when she was 15 years old, and, at the time, was an insured under a UIM insurance policy issued by Farm Bureau General Insurance Company (Farm Bureau).[38] The policy contained the following limitations provision: "No action can be brought against the company, unless there has been full compliance with all the policy provisions. No claimant may bring a legal action against the company more than one year after the date of the accident."[39] Shortly after turning 18 and more than one year after the date of the accident, Ms. Klida filed a breach of contract action seeking benefits under the UIM policy.[40] Farm Bureau moved to dismiss the action under MCR 2.116(C)(10), arguing that "the plain language of the contract barred the action."[41] In response, Ms. Klida argued that M.C.L. Section 600.5851(1)—M.C.L. Section 600.101's minority tolling provision—permitted her to avoid the policy limitation.[42] The trial court agreed with Ms. Klida and denied Farm Bureau's motion.[43] Specifically, the trial court held that the minority tolling provision of M.C.L. Section 600.5851(1) applied to Ms. Klida's breach of contract action that fell under the RJA and that "a minor claimant has one year after attaining the age of majority to bring a breach of contract claim."[44]

The minority tolling provision of the RJA found in section 600.5851(1) provides:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring *an action under this act* is under 18 years of age or insane at the time the claim

35. 473 Mich. 457, 703 N.W.2d 23 (2005).
36. 278 Mich. App. 60, 748 N.W.2d 244 (2008).
37. *Id.* at 63, 798 N.W.2d at 247.
38. *Id.* at 61, 798 N.W.2d at 246.
39. *Id.*
40. *Id.* at 61-62, 748 N.W.2d at 246.
41. *Id.* at 62, 748 N.W.2d at 246.
42. *Klida*, 278 Mich. App. at 62, 748 N.W.2d at 246.
43. *Id.*
44. *Id.*

> accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.[45]

On appeal, Farm Bureau, citing *Rory,* argued: "the unambiguous contract limitation must be enforced as written;" and "MCL 600.5851(1) does not apply by its plain language because, consistent with this Court's holding in *Cameron v. Auto Club Insurance Association,*[46] this action is not an action under the RJA and this contractual limitation is not a period of limitations provided for by the RJA."[47] In response, Ms. Klida argued the minority tolling provision of section 600.5851(1) excepted her claim from the one-year limitation because "her breach of contract lawsuit is such 'an action under this act' because the RJA governs all civil actions."[48]

Our Supreme Court, in the landmark case of *Rory v. Continental Ins. Co.* held:

> A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written.* Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. This Court has previously noted that "[t]he general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. . . ."
>
> Accordingly, *we hold that an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy.* A mere judicial assessment of "reasonableness" is

45. *Id.* at 63, 748 N.W.2d at 247.

46. 263 Mich. App. 95, 687 N.W.2d 354 (2004). The Michigan Supreme Court vacated the holding in *Cameron I,* holding the broader issue of "whether the legislative amendments in 1993 PA 78 limit the applicability of the minority/insanity tolling provision to causes of action for which the applicable statute of limitations is set forth in the RJA" was unnecessarily addressed. *Klida,* 278 Mich. App. at 64 n.3, 748 N.W.2d at 247 (quoting Cameron v. Auto Club Ins. Ass'n, 476 Mich. 55, 64, 718 N.W.2d 784, 789 (2006) (*Cameron II*)).

47. *Klida,* 278 Mich. App. at 64, 748 N.W.2d at 247 (quotation and citations omitted).

48. *Id.* at 63, 748 N.W.2d at 247.

> an invalid basis upon which to refuse to enforce contractual provisions. Only recognized traditional contract defenses may be used to avoid the enforcement of the contract provision.[49]

In light of this holding, the outcome of *Klida* solely depended on whether the RJA (specifically the minority tolling provision) applies to all civil actions, including this breach of contract claim.[50] Specifically, "[a]t issue here is the phrase 'entitled to . . . bring an action under this act.'"[51] Of critical importance is the meaning of the phrase "under this act." Clearly, "this act" refers to the RJA. Thus, the court "consider[ed] what the Legislature meant by the term 'under' as relates to actions brought 'under' the RJA."[52]

After concluding this language of the minority tolling provision is ambiguous, the court of appeals observed three possible interpretations of the phrase "under this act."[53] First, all civil actions are brought "under" the RJA.[54] Justice Cavanagh, in his dissent in *Cameron II*, noted:

> The RJA prescribes the jurisdiction of the courts, the basis of jurisdiction, and various other procedural guidelines within our civil justice system. It also prescribes a method for disputes to be resolved through the filing of a civil action. Specifically, at MCL 600.1901, the RJA states "a civil action is commenced by filing a complaint with the court." Therefore, it is basic civil procedure that all lawsuits filed are brought "under this act," i.e., the RJA.[55]

Second, the phrase "under this act" could also be construed to limit the minority tolling provision applicability to only causes of action arising out of a violation of a specific statutory provision contained within the RJA.[56] The court of appeals in *Cameron I* adopted this

---

49. 473 Mich. 457, 468-69, 703 N.W.2d 23, 30-31 (2005) (alteration in original) (second emphasis added).

50. *Klida*, 278 Mich. App. at 65, 748 N.W.2d at 247-48.

51. *Id.* at 64, 748 N.W.2d at 247.

52. *Id.* at 65, 748 N.W.2d at 248 (citation omitted).

53. *Id.* at 66-70, 748 N.W.2d at 248-51.

54. *Id.* at 66, 748 N.W.2d at 248.

55. *Id.* at 67, 748 N.W.2d at 249 (quoting *Cameron II*, 476 Mich. at 91 n.5, 718 N.W.2d at 804 n.5 (Cavanagh, J., dissenting)).

56. *Klida*, 278 Mich. App. at 67, 748 N.W.2d at 249.

interpretation;[57] however, the supreme court vacated that portion of the holding as outside the scope of review.[58]

The third possible interpretation is that the "minority tolling provision may apply only to causes of action for which the applicable statute of limitations is set forth in the RJA; these cases would be brought 'under' the RJA."[59] It could be inferred that the Michigan Supreme Court implied this construction when it concluded that it was "unnecessary in [*Cameron II*] to reach the broader question whether the legislative amendments in 1993 PA 78 limit the applicability of the minority/insanity tolling provision to causes of action for which the applicable statute of limitations is set forth in the RJA."[60]

After considering these three possible interpretations, the court of appeals held:

> We conclude that a reasonable construction of the phrase "under this act" contained within the minority tolling provision, MCL 600.5851(1), that best accomplishes the statute's purpose is that all civil actions are brought "under" the RJA, including plaintiff's breach of contract action. We discern no persuasive reason to ascribe a legislative intent to limit the application of MCL 600.5851(1) to causes of action arising from a purported violation of a specific statutory provision contained within the RJA or to causes of action for which the applicable statute of limitations is provided by the RJA.[61]

In affirming the trial court, the court of appeals identified several well reasoned justifications for applying the minority tolling provision to except Ms. Klida's claim from the one-year contractual limitation. First, the court of appeals correctly observed that the Legislature directed that the RJA "is remedial in character, and shall be liberally construed to effectuate the intents and purposes thereof."[62] The entire purpose of the minority tolling provision "is to allow protected classes of persons an

---

57. *Id.*

58. *Id.* at 67-68, 748 N.W.2d at 249 (citing *Cameron II*, 476 Mich. at 64, 718 N.W.2d at 789).

59. *Id.* at 68, 748 N.W.2d at 249-50.

60. *Id.* at 69, 748 N.W.2d at 250 (quoting *Cameron II*, 476 Mich. at 64, 718 N.W.2d at 789).

61. *Id.* at 74, 748 N.W.2d at 252-53.

62. *Klida*, 278 Mich. App. at 71, 748 N.W.2d at 251 (quoting MICH. COMP. LAWS ANN. § 600.102 (West 2002)).

opportunity to be made whole once their disabilities have been removed."[63]

Second, the court of appeals observed:

> A minor cannot sue on his or her own behalf. Thus, a minor's civil cause of action that accrues and expires during his or her disability must be brought in a representative capacity by, for example a next friend, or not at all. That is unless MCL 600.5851(1) operates to safeguard that right until the minor reaches the age of majority and can legally exercise his or her legal rights or choose not to do so.[64]

Third and most important, the court of appeals stated:

> But contracts may not grant a right and then burden that right with a condition that cannot be met. Under the contractual terms at issue here, minors whose right of action accrues and expires, without legal proceedings, while they are laboring under their disability are permanently precluded, through no fault of their own, from exercising their legal rights under the contract in violation of the clear public policy that such minors are to be protected.[65]

This decision signifies an important step towards the protection of minor rights and recognizes the sound public policy of protecting minors. As the court of appeals observed:

> And, considering the RJA's remedial character, the protective purpose of the minority tolling provision, as well as the harm it was designed to remedy—the deprivation of legal rights-we conclude that whether the cause of action arises by statute, common law, or contract, the minority tolling provision is applicable. To deny minors whose cause of action accrues during their disability the opportunity to pursue their otherwise unasserted legal rights would be the antithesis of the firmly—a rooted public policy that such minors are to be protected until one year after they reach the age of majority. Such persons

63. *Id.* (quoting *Cameron II*, 476 Mich. at 74, 718 N.W.2d at 785 (Markman, J., concurring)).

64. *Id.* at 71, 748 N.W.2d at 251 (citations omitted).

65. *Id.* at 73, 748 N.W.2d at 252.

would be denied their legal rights simply because they labored under a legal disability.[66]

This decision may also have broad application and pave the road for future decisions since the court of appeals specifically concluded the RJA applies to all civil actions. It also represents an important development in the State's jurisprudence, which may be reviewed by the Michigan Supreme Court. Farm Bureau filed an Application for Leave to Appeal, which the Supreme Court is currently considering.[67] In light of the trend of cases on this topic, the court's discussion of this issue in *Cameron II*, and jurisprudential significance of this case, it may be a likely candidate for supreme court review.

B. Abolition of Judicial Tolling

The Michigan Supreme Court decided a second case involving a contractual limitation period in an insurance policy during this *Survey* period. In *McDonald v. Farm Bureau Insurance Co.*,[68] our Supreme Court held that express contractual limitations periods contained in optional insurance policies are not automatically tolled as a matter of a law by the insured filing a claim under such policy.

The plaintiff in *McDonald* was injured in a motor vehicle accident on November 29, 2001.[69] The plaintiff's UIM policy contained an endorsement that provided: "No claimant may bring a legal action against the company more than one year after the date of the accident."[70] On May 10, 2002, the plaintiff's attorney notified the insurer in writing that plaintiff had a claim and acknowledged the limitation period in the contract.[71] On August 2, 2002, plaintiff's attorney sent another letter, "asking for a decision regarding consent to settle [an underlying third party automobile negligence claim arising out of the same accident] 'so that I can determine if I need to sue Farm Bureau or not.'"[72] Further communications were exchanged, but no action was taken by plaintiff prior to November 29, 2002.[73] Thereafter, the defendant sent a letter

66. *Id.* at 74-75, 748 N.W.2d at 253.
67. Supreme Court No. 136535.
68. 480 Mich. 191, 747 N.W.2d 811 (2008).
69. *Id.* at 194, 747 N.W.2d at 814.
70. *Id.*
71. *Id.*
72. *Id.* at 195, 747 N.W.2d at 814.
73. *Id.*, 747 N.W.2d at 815-16.

denying plaintiff's claim on the basis the one-year limitations period expired.[74]

On the basis of the denial, plaintiff filed suit.[75] The defendant moved for summary disposition under MCR 2.116(C)(8) and (10), and the trial court denied defendant's motion and granted plaintiff summary disposition.[76] Specifically, the trial court held: "the one-year period was unreasonable and thus unenforceable as a matter of law;" and that "pursuant to *Tom Thomas Organization, Inc. v. Reliance Insurance Co.*,[77] the limitations period was tolled by plaintiff's May 10, 2002, letter until defendant denied the claim."[78]

The Court of Appeals then held the application for leave in abeyance pending the supreme court's decision in *Rory*.[79] Subsequent to the *Rory* decision, the court of appeals affirmed the trial court holding that the May 10, 2002 letter tolled the contract limitations period until the insurer denied the claim.[80] In reaching this holding, the court of appeals relied upon *West v. Farm Bureau General Insurance. Co. of Michigan*,[81] which held that the Supreme Court's recent decisions limiting the doctrine of judicial tolling were inapplicable to insurance contracts and *Rory* should be applied prospectively only. Since that issue was dispositive, the court of appeals did not address other issues presented by the case.[82]

The primary and significant issue the supreme court considered was "whether a contractual limitations period in an insurance policy is tolled from the time a claim is made until the insurance company denies the claim and, if it is not, whether the limitations period may be avoided under the doctrines of waiver or estoppel."[83] The Supreme Court reversed the trial court and court of appeals and held: "We reiterate that *Rory* overruled *Tom Thomas* and its progeny and conclude that express limitations periods in optional insurance contracts are not automatically tolled as a matter of law by filing a claim."[84] The court further held that nothing in *Rory* or *Devillers v. Auto Club Insurance Association*[85]

74. *McDonald*, 480 Mich. at 195, 747 N.W.2d at 815.

75. *Id.*

76. *Id.*

77. 396 Mich. 588, 242 N.W.2d 396 (1976).

78. *McDonald*, 480 Mich. at 195-96, 747 N.W.2d at 815

79. *Id.* at 196, 747 N.W.2d at 815.

80. McDonald v. Farm Bureau Ins. Co., No. 259168, 2006 WL 2457692, at *2 (Mich. Ct. App. Aug. 24, 2006), *rev'd*, 480 Mich. 191, 747 N.W.2d 811 (2008).

81. *Id.* at *1 (citing 272 Mich. App. 58, 65-67, 723 N.W.2d 589, 593-94 (2006)).

82. *McDonald*, 480 Mich. at 196, 747 N.W.2d at 815. These issues included "reasonableness, contractual ambiguity, [and] estoppel." *Id.*

83. *Id.* at 193, 747 N.W.2d at 814.

84. *Id* at 201, 747 N.W.2d at 817.

85. 473 Mich. 562, 702 N.W.2d 539 (2005).

displaces traditional contract doctrines such as waiver or estoppel.[86] However, the court concluded that there were insufficient facts to support either an argument of waiver or estoppel by plaintiff.[87]

This decision is consistent with the recent trend in limitations of actions and contract jurisprudence in that contracts are enforced as written. However, there has been concern expressed about the practical effect of this decision.[88] That concern was well stated by Justice Kelly in her dissent to the *McDonald* decision:

> The majority's decision to abolish the judicial tolling doctrine inserts insureds between Scylla and Charybdis. If they bring a claim too soon, the court may dismiss it as unripe. If they wait for the insurer to decide their claim, they risk a technical forfeiture under a limitation-of-suit provision.
>
> An insured should not be forced to choose between filing a premature lawsuit and trusting that the insurance company will consider the claim after the contractual limitations period has expired. Choosing the first option may unnecessarily poison the relationship between the parties. It may create unnecessary litigation that serves only to burden our overtaxed judicial system. Such a result has been accurately called both "anomalous and inefficient." Yet choosing the second option gives insurance companies the opportunity to avoid coverage on timeliness grounds.[89]

In essence, a plaintiff's attorney may be put in the position of filing a lawsuit to prevent being barred by a contractual limitations period prior to knowing whether his/her client has claim.[90]

A regulatory development, however, may bring some relief to this problem. The Office of Financial and Insurance Services (OFIS) issued a "Notice and Order of Prohibition on December 16, 2005 prohibiting uninsured motorist benefits policies with limitation periods of less than three years."[91] More generous limitation periods existing in polices moving forward should bring some relief to the dilemma created by the *McDonald* decision.

---

86. *McDonald*, 480 Mich. at 204, 747 N.W.2d at 819.
87. *Id.* at 204-05, 747 N.W.2d at 819-20.
88. *See, e.g., supra* notes 80-81 and accompanying text.
89. *McDonald*, 480 Mich. at 212, 747 N.W.2d at 823 (Kelly, J., dissenting).
90. *See id.*
91. *Id.* at 201, 747 N.W.2d at 817-18.

C. Abolition of Common-Law Discovery Rule

In arguably the most significant decision of the *Survey* period, the Michigan Supreme Court in *Trentadue v. Gorton*[92] held M.C.L. Section 600.5827[93] alone governs when a wrongful death claims accrues.[94] The Court declined to recognize a common-law "discovery rule" that would toll the statute of limitations when a plaintiff could not have reasonably discovered the elements of a cause of action within the limitation period.[95]

On November 9, 1986, Margarette F. Eby was brutally raped and murdered while at home in a cottage she was renting in Flint, Michigan.[96] This tragic crime remained unsolved until 2002 when DNA evidence established that Jeffrey Gorton, an employee of the sprinkler company that serviced the system on the property, had committed the rape and murder.[97] In 2002, Ms. Eby's personal representative filed suit against the owner of the property, Gorton, Gorton's parents, their sprinkler company, and its employees.[98]

In response, all defendants, except Gorton, moved for summary disposition, arguing that the claim accrues when the plaintiff is harmed[99] and an action for wrongful death must be commenced within three years after the claim first accrued.[100] The Genesee County Circuit Court granted the motions of the property owner and its management company, holding that claims for failure to provide adequate security accrued at the

92. 479 Mich. 378, 738 N.W.2d 664 (2007).
93. MICH. COMP. LAWS ANN. § 600.5827 (West 2000).
94. *Trentadue*, 479 Mich. at 393, 738 N.W.2d at 672.
95. *Id.*
96. *Id.* at 382, 738 N.W.2d at 667.
97. *Id.* at 383, 738 N.W.2d at 667.
98. *Id.*
99. M.C.L. Section 600.5827 provides:

> The period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

MICH. COMP. LAWS ANN. § 600.5827 (West 2000).

100. M.C.L. Section 600.5805(1) states, "[a] person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section." MICH. COMP. LAWS ANN. § 600.5805(1) (West 2000). Further, M.C.L. Section 600.5805(10) provides, "[t]he period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MICH. COMP. LAWS ANN. § 600.5805(10) (West 2000).

time of the killing.[101] The trial court denied summary disposition to the other defendants.[102]

On appeal, the court of appeals reversed the grant of summary disposition to the owner and the management company and remanded the case to the trial court for trial.[103] As a starting point, the court of appeals observed that a wrongful death claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results."[104] To avoid and toll the limitations period, the court of appeals applied the common-law "discovery rule."

A discovery rule has been applied to avoid unjust results that could occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim because of either the latent nature of the injury or the inability of the plaintiff to learn of or identify the causal connection between the injury and the breach of a duty owed by a defendant. Specifically:

> Where the discovery rule is found to be appropriate, a "plaintiff's claim accrues when the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered . . . (1) an injury, and (2) the causal connection between plaintiff's injury and the defendant's breach [of duty to the plaintiff]."[105]

The Supreme Court granted leave, reversed the court of appeals, and stated:

> Under a discovery-based analysis, a claim does not accrue until a plaintiff knows, or objectively should know, that he has a cause of action and can allege it in a proper complaint. Accordingly, here, plaintiff argues that her claims did not accrue until she discovered that Gorton was the killer because, before that time, she could not have known of and alleged each element of the claims. We reject this contention because the statutory scheme is exclusive and thus precludes this common-law practice of tolling

---

101. *Trentadue*, 479 Mich. at 385, 738 N.W.2d at 668.

102. *Id.*

103. *Trentadue*, 266 Mich. App. 297, 304-05, 701 N.W.2d 756, 761 (2005), *rev'd*, 479 Mich. 378, 738 N.W.2d 664 (2007).

104. *Id.* at 300, 701 N.W.2d at 758 (citing MICH. COMP. LAWS ANN. § 600.5827 (West 2000)).

105. *Id.* at 301, 701 N.W.2d at 759 (citation omitted).

> accrual based on discovery in cases where none of the statutory tolling provisions apply.[106]

In so holding, the Court reversed *Johnson v. Caldwell*[107] and its progeny, and abolished the common-law discovery rule.[108]

Justices Weaver, Cavanagh and Kelly dissented and sharply criticized the majority's holding and analysis.[109] Justice Kelly asserted that the majority's reasoning was flawed and stated:

> The common-law discovery rule has been a part of Michigan limitations law for many years and has been applied in a variety of contexts. And after this Court recognized the discovery rule, the Michigan Legislature twice passed statutes that expressly limit the operation of the rule.
>
> MCL 600.5838 and MCL 600.5838a describe how the limitations period operates in professional negligence cases. The Legislature added language to both of these statutes specifying that the period of limitations applies "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." This demonstrates that the Legislature recognizes the discovery rule and is aware of what it needs to do to prevent the rule from applying in particular cases.[110]

Justice Kelly concluded: "[g]iven that the actions of the Legislature strongly suggest its approval of most of this Court's prior decisions recognizing the common-law discovery rule, the rule should not be discarded."[111]

Justice Kelly also recognized the dangerous consequence of abolishing the common-law discovery rule:

> [T]he discovery rule, based on principles of fundamental fairness, "was formulated to avoid the harsh results produced by commencing the running of the statute of limitations before a claimant was aware of any basis for an action."

---

106. *Trentadue*, 479 Mich. at 389, 738 N.W.2d at 670 (citations omitted).
107. 371 Mich. 368, 123 N.W.2d 785 (1963).
108. *Id.* at 391-93, 738 N.W.2d at 672.
109. *Trentadue*, 479 Mich. at 407-51, 738 N.W.2d at 680-703.
110. *Id.* at 439-40, 738 N.W.2d at 697-98 (Kelly, J., dissenting).
111. *Id.* at 441, 738 N.W.2d at 698 (Kelly, J., dissenting).

> Elimination of the common-law discovery rule will have a drastic, adverse effect on plaintiffs' rights in Michigan. Cutting off plaintiffs' actions before plaintiffs even know they have a cause of action is the very definition of a "practical real-world dislocation." And people will lose confidence in the courts when they learn that the courts deny them compensation for their injuries simply because it took too long to discover their causes of action.[112]

In essence, "a person's legal claim dies before it is born."[113]

There are two possible solutions to the problem Justice Kelly described as "practical real-world dislocation."[114] First, the court could revisit the common-discovery rule and reverse its decision in *Trentadue.* Second, and more likely, the Legislature, through amendment to the RJA, could codify the common-law discovery rule and more clearly indicate that the RJA was not enacted in derogation to the rule.

D. A Defective Affidavit of Merit Tolls the Statute of Limitations in a Medical Malpractice Claim until Successfully Challenged

Picking up where it left off in *Scarsella v. Pollak,*[115] the Michigan Supreme Court in *Kirkaldy v. Rim*[116] held the period of limitations for a medical malpractice action is tolled by the filing of a defective affidavit of merit until the affidavit is successfully challenged in a "subsequent judicial proceeding."[117]

In *Scarsella,* the Court held that "[u]nder MCL 600.5856(a) and MCL 600.2912d, the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant."[118] *Scarsella* concerned "the tolling effect of a medical malpractice complaint filed without an affidavit of merit."[119] The *Scarsella* court did not reach the issue of when "a court subsequently determines that a timely filed affidavit is inadequate or defective."[120] The court of appeals has twice

---

112. *Id.* at 442-43, 738 N.W.2d at 699 (citation omitted) (Kelly, J., dissenting).
113. *Id.* (Kelly, J., dissenting).
114. *Id.* at 443, 738 N.W.2d at 699 (citation omitted) (Kelly, J., dissenting).
115. 461 Mich. 547, 607 N.W.2d 711 (2000).
116. 478 Mich. 581, 585-86, 734 N.W.2d 201, 203 (2007).
117. *Id.*
118. *Id.* at 585, 734 N.W.2d at 203 (citing *Scarsella*, 461 Mich. at 549, 734 N.W.2d at 713).
119. *Id.*
120. *Scarsella*, 461 Mich. at 553, 607 N.W.2d at 715.

addressed this issue.[121] However, the *Kirkaldy* court finally answered the question and overruled the Court of Appeals' decisions in *Mouradian* and *Geralds*.

As a starting point, the Court noted "when an affidavit is filed, it is presumed valid."[122] From that, the Court held:

> In this case, as in *Geralds* and *Mouradian,* plaintiff filed and served a complaint and affidavit of merit. Thus, the period of limitations was tolled on that date. Recently, this Court held that "when an affidavit is filed, it is presumed valid. It is only in subsequent judicial proceedings that the presumption can be rebutted." Therefore, a complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in "subsequent judicial proceedings." Only a successful challenge will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running.[123]

The Court further instructed if the defendants believe the affidavit is defective, they must challenge it.[124] If successful, the case would be dismissed without prejudice and the statute of limitations would begin to run again.[125]

In light of this decision, it is incumbent on the plaintiffs' bar to ensure that an affidavit complies with the statutory requirements. A probable defense strategy will be to wait for the statute of limitations to expire and then challenge the affidavit if the case schedule permits. Courts have criticized this practice, but nevertheless, it is a viable strategy.[126]

---

121. Mouradian v. Goldberg, 256 Mich. App. 566, 664 N.W.2d 805 (2003), *overruled by Kirkaldy*, 478 Mich. 581, 784 N.W.2d 201 (2007) (holding a grossly non-conforming affidavit of merit is not an affidavit within the meaning of the statute sufficient to toll the statute of limitations); Geralds v. Munson Healthcare, 259 Mich. App. 225, 673 N.W.2d 792 (2003) (holding any non-conforming affidavit is insufficient to toll the statute of limitations contained in M.C.L. § 600.2912d(1)).

122. *Kirkaldy*, 478 Mich. at 586, 734 N.W.2d at 203 (citing Saffian v. Simmons, 47 Mich. 8, 727 N.W.2d 132, 136 (2007)).

123. *Id.* (citations omitted).

124. *Id.*

125. *Id.*

126. *See, e.g.*, Ward v. Rooney-Gandy, 265 Mich. App. 515, 526, 696 N.W.2d 64, 71-72 (2005) (O'Connell, J., dissenting).

IV. JUDGMENT

A. Res Judicata Effect of a Circuit Court Appeal on a Zoning Board of Appeals' Decision

In taking preemptory action in lieu of granting an application for leave to appeal, the Michigan Supreme Court held a circuit court's disposition of an appeal from a zoning board of appeals' denial of a use variance was not res judicata on the plaintiff's related civil claims for constitutional violations.[127] In so holding, the Court recognized:

> The zoning board of appeals did not have jurisdiction to decide the plaintiff's substantive due process and takings claims. Under MCL 125.585(11), the circuit court's review is confined to the record and decision of the zoning board of appeals. Therefore, the circuit court could not rule on takings issues in the plaintiff's appeal.[128]

Justice Corrigan dissented and, with Justice Taylor joining, he criticized this holding by stating:

> [T]he majority has failed to adequately explain why res judicata does not bar plaintiff's taking claim in its civil suit. Because plaintiff's subsequent civil suit involves the same transaction as its ZBA appeal in the circuit court, plaintiff's second suit is barred. By allowing plaintiff to file a second action alleging an unconstitutional taking, the Court authorizes splitting these actions in all future cases. This is exactly what the doctrine of res judicata was designed to prevent. As noted by this Court in *A. Krolik & Co. v. Ossowski,* 213 Mich. 1, 7, 180 N.W. 499 (1920): "The law abhors multiplicity of suits. Attempts to split a claim into separate causes of action have often met with disfavor." Therefore, I would deny leave to appeal.[129]

In recognition of the important policy behind the doctrine of res judicata, Justice Corrigan pointed out the practical result of this decision.

---

127. Houdini Properties, LLC v. City of Romulus, 480 Mich. 1022, 1022, 743 N.W.2d 198, 198 (2008).

128. *Id.* at 1022-23, 743 N.W.2d at 198-99.

129. *Id.* at 1031, 743 N.W.2d at 205 (Corrigan, J., dissenting).

> The majority's decision encourages gamesmanship by allowing a person appealing a ZBA decision a second bite at the apple by filing a civil suit. If a plaintiff's constitutional arguments are unsuccessful in the ZBA appeal in the circuit court, the separate civil action allows another trip on the same issue.[130]

As it stands now, plaintiffs have the option to either join related civil claims with an administrative appeal or bring a separate lawsuit.[131] However, to reduce litigation costs and serve judicial economy, more litigants may opt to join their claims instead of engaging in the gamesmanship that Justice Corrigan warns against.

V. ATTORNEY FEES

In Michigan, there are numerous statutes that allow successful claimants to collect court costs and attorney fees. One example is the Michigan Open Meetings Act (OMA) which requires "certain meetings of certain public bodies to be open to the public."[132] The OMA includes a provision which mandates that successful litigants "recover court costs and actual attorney fees for the action." [133]

In an early case, the Michigan Supreme Court determined the intent of the OMA was to promote government accountability.[134] When first enacted in 1968, the OMA was largely ineffective as it "failed to impose an enforcement mechanism and penalties to deter noncompliance."[135] In order to correct this, the Michigan Legislature revised the bill and introduced, among other things, a provision[136] mandating the claimant receive court costs and actual attorney fees if successful.[137] The award of court costs and attorney fees not only enables any person, regardless of economic status, to bring a claim under the OMA, but also discourages noncompliance.

During the *Survey* period, there was one notable case concerning attorney fees under the OMA. In this case the plaintiff, Torger Omdahl,

---

130. *Id.* at 1029, 743 N.W.2d at 203 (Corrigan, J., dissenting).

131. *See, e.g., supra* section IV and accompanying footnotes.

132. Open Meeting Act of 1976 *codified at* MICH. COMP. LAWS ANN. § 15.261 (West 2004).

133. Open Meeting Act of 1976 *codified at* MICH. COMP. LAWS ANN. § 15.271(4) (West 2004).

134. Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents, 444 Mich. 211, 222, 507 N.W.2d 422, 427 (1993).

135. *Id.* at 221, 507 N.W.2d at 427.

136. MICH. COMP. LAWS ANN. § 15.271(4) (West 2004).

137. Omdahl v. W. Iron County Bd. of Educ., 478 Mich. 423, 733 N.W.2d 380 (2007).

an attorney appearing *in propria persona*, sued defendant West Iron County Board of Education for a violation of the OMA.[138] Omdahl alleged that the Board violated the OMA when it held two closed meetings and did not record any minutes from those meetings.[139] The trial court held the defendant violated the OMA by failing to keep minutes of closed meetings, but did not award attorney fees.[140] The Court of appeals reversed the denial of attorney fees and entered an award of attorney fees and costs to Omdahl.[141] The defendant appealed to the Michigan Supreme Court and Omdahl was subsequently denied attorney fees.[142]

The Michigan Supreme Court determined that the language of the attorney fee provision, particularly the three words "actual attorney fees," was "central to the resolution of this case."[143] Although the Court asserted that the whole phrase "actual attorney fees" was the focus of the case,[144] the majority opinion only analyzed the word "attorney."[145] After quickly defining "actual" as "existing in act, fact, or reality; real" and "fee" as "a sum charged or paid, as for professional services or for a privilege,"[146] it spent the remainder of the opinion analyzing the proper definition of "attorney."[147] Webster's Dictionary, the Court indicated, defines "attorney" as "a person whose profession is to *represent clients* in a court of law or *to advise or act for them* in other legal matters" or "an officer of the court authorized to appear before it as a *representative of a party* to a legal controversy."[148] The court reasoned that an attorney is defined by his relationship to his client.[149] Without a client, an attorney appearing *in propria persona* does not meet the agency requirement of an attorney and thus, is the equivalent of any non-attorney *pro se* litigant.[150]

---

138. *Id.* at 434, 733 N.W.2d at 382.
139. *Id.* at 424-25, 733 N.W.2d at 382.
140. *Id.* at 425, 733 N.W.2d at 382.
141. *Id.*
142. *Id.* at 432, 733 N.W.2d at 386.
143. *Omdahl*, 478 Mich. at 428, 733 N.W.2d at 383.
144. *Id.*
145. *Id.* at 428-32, 733 N.W.2d at 383-86.
146. *Id.* (citing RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1997) and (2001)).
147. *Id.* at 428-32, 733 N.W.2d at 383-86.
148. *See id.* at 428, 733 N.W.2d at 383-84 (citing RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2001)) (defining the term "attorney" as a "lawyer" or an "attorney-at-law" and subsequently defining each as quoted above.)
149. *Omdahl*, 478 Mich. at 428, 733 N.W.2d at 384.
150. *Id.* at 432, 733 N.W.2d at 386.

In coming to this definition of attorney, the court relied on four earlier cases.[151] In a Sixth Circuit Court of Appeals case, the court concluded that to allow *pro se* plaintiffs who happen to be attorneys to collect attorney fees would provide them a windfall as they never actually incurred any fees.[152] Similarly, the Michigan Court of Appeals case denied an award of attorney fees for a successful *pro se* attorney litigant under the Michigan Freedom of Information Act (FOIA).[153] In reaching this decision, the court found persuasive a dissent from the Eleventh Circuit Court of Appeals which relied on the definition of *pro se*: "an individual acting 'in his own behalf, in person.'"[154] In contrast to *pro se*, the word "attorney" requires an agency relationship, implying the involvement of more than one person.[155] Lastly, in a United States Supreme Court case, the Court accepted the circuit court's analysis that 42 U.S.C. Section 1988[156] assumed a "paying relationship between an attorney and a client" and thus an attorney representing himself *in propria persona* was not entitled to recover attorney fees.[157] Additionally, the Court determined that as the word "attorney" assumed an agency relationship, it was likely "that Congress intended to predicate an award under § 1988 on the existence of an attorney-client relationship."[158]

With this authority, the Michigan Supreme Court in *Omdahl* concluded that the statute requires that an attorney represent an individual other than himself in order to recover attorney fees.[159]

In contrast to the majority's focus on the word "attorney," the dissent focused its analysis on the word "actual."[160] "Actual," the dissent stated, "should not be construed so far as to require an exchange of a fee from one entity to another, but rather to require that the attorney fee is calculable."[161] All of the cases cited by the majority were claims under statutes that required an award of "*reasonable* attorney fees" not "*actual*

151. *Id.* at 430-32, 733 N.W.2d at 385-86 (citing Kay v. Ehrler, 499 U.S. 432 (1991); Falcone v. IRS, 714 F.2d 646 (6th Cir. 1983); Laracey v. Fin. Inst. Bureau, 163 Mich. App. 437, 414 N.W.2d 909 (1987); Duncan v. Poythrest, 777 F.2d 1508 (11th Cir. 1985).

152. *Falcone*, 714 F.2d at 647-49.

153. *Laracey*, 163 Mich. App. at 446, 414 N.W.2d at 913 (discussing MICH. COMP. LAWS ANN. § 15.240(4) (West 2004)).

154. *Duncan*, 777 F.2d at 1518 (Roney, J., dissenting).

155. *Id.*

156. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976).

157. *Kay*, 499 U.S. at 435.

158. *Id.* at 435-36.

159. *Omdahl*, 478 Mich. at 432, 733 N.W.2d at 386.

160. *Id.* at 436, 733 N.W.2d at 388 (Weaver, J., dissenting).

161. *Id.* (quotations omitted).

attorney fees."[162] They argued the cases cited by the majority were deciding issues under the Freedom of Information Act where the award of attorney fees is discretionary; thus, any reliance on cases interpreting the FOIA was misplaced as the award scheme is fundamentally different.[163]

Furthermore, the dissent dismissed the agency relationship requirement as the text of the OMA does not explicitly state that such a relationship is required.[164] By stating the OMA required an agency relationship for attorney fees to be generated, the dissent claimed that the majority was delving into public policy and usurping the Legislature's role and authority.[165] The reasons the majority provided for its decision included: relieving the burden of legal costs; not providing *pro se* attorney litigants a windfall; and encouraging plaintiffs to obtain third-party objective legal advice are public policy considerations, not an exercise in statutory interpretation.[166]

There are, arguably, important distinctions between the purposes of OMA, on one hand, and FOIA, on the other, that could motivate different interpretations. As originally enacted, the OMA did not impose any penalties on violators and thus the OMA had little deterrent effect.[167] The addition of the award provision was intended, in part, as a penalty to deter violations of the OMA.[168] On the other hand, the FOIA award provision was "intended to relieve plaintiffs with legitimate claims of the burden of legal costs; it was not intended as a reward for successful claimants or as a penalty against the government."[169] Similarly, the majority relies on *Kay* where the *pro se* attorney litigant was denied attorney fees in a civil rights claim.[170] The Supreme Court determined the award provision was enacted to address concerns specific to civil rights claims:

> Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [this bill] is designed to give such persons effective access

162. *See id.* at 439-40, 733 N.W.2d at 390.
163. *Id.*
164. *Id.* at 437-38, 733 N.W.2d at 389.
165. *Omdahl*, 478 Mich. at 441, 733 N.W.2d at 390-91.
166. *Id.*
167. *Booth Newspapers, Inc.*, 444 Mich. at 221, 507 N.W.2d at 427.
168. *Omdahl*, 478 Mich. at 427, 733 N.W.2d at 383.
169. *Falcone*, 714 F.2d at 647 (citation omitted).
170. *Kay*, 499 U.S. at 433.

> to the judicial process where their grievances can be resolved according to law.[171]

If the Court had interpreted the award provision in the OMA as punitive in nature, much of the majority's reasoning would be undermined.

Even though the holding of *Omdahl* is narrow—a *pro se* attorney litigant cannot recover attorney fees under the OMA—the Court's reasoning opens the door for an expansive application of *Omdahl*'s holding. Due to the fact the Court did not differentiate between an award provision that is punitive in nature versus one that is compensatory, the legislature's intent behind each award provision is nullified. If an award of attorney fees is intended to punish a defendant, the effect of the provision will not be fulfilled if an attorney represents himself in an action against the defendant.

Due to the ambiguity of the Court's decision, it remains to be seen how broadly lower courts will construe the holding in *Omdahl*. If broadly construed, *pro se* attorney litigants will be foreclosed from receiving statutorily mandated attorney fees regardless of the intended purpose of the award.

VI. UNPUBLISHED OPINIONS

In Michigan, unpublished opinions are not binding legal precedent. Even though unpublished opinions are not binding authority, courts are "free to find the reasoning of an unpublished case persuasive."[173] By way of example, the court of appeals has looked to an unpublished opinion with a similar factual scenario in upholding a trial court's grant of summary disposition.[174] Similarly, in another court of appeals case, the court agreed with the trial court that the facts of the unpublished case were "indistinguishable from the present case" and thus found the case persuasive.[175]

A recent order might raise some questions about whether even reliance upon the reasoning of an unpublished case is appropriate. In *Houdini Properties, LLC v. City of Romulus*, the Supreme Court heard oral argument on an application for leave, and the reversed the court of

---

171. *Id.* (citing S. REP. No. 9-1011, at 2 (1976)).

173. Steele v. Dep't of Corr., 215 Mich. App. 710, 715, 532 N.W.2d 725, 728 n.2 (1996) (citing Jackhill Oil Co. v. Powell Prod., Inc., 210 Mich. App. 114, 118, 532 N.W.2d 866, 868 (1995)).

174. *Jackhill Oil Co.*, 210 Mich. App. at 868, 532 N.W.2d at 118.

175. *Steele*, 215 Mich. App. at 715, 532 N.W.2d at 728.

appeals in lieu of granting leave.[176] The stated basis of the order was that the "Court of Appeals and the Wayne Circuit Court erred in relying on the rationale of the unpublished decision in *Sammut v. City of Birmingham.*"[172] Prior to this decision, the Court of Appeals reviewed the trial court's reliance on the unpublished *Sammut*, and concluded that due to the fact that the trial court also reviewed the pleadings and court rules in addition to the unpublished opinion, it was free to use an unpublished case as persuasive authority.[173] It is unclear from the Supreme Court's short statement regarding the reliance on the unpublished opinion whether the error was that lower courts relied on an unpublished opinion or because the factual scenario was not applicable to the case at hand. However, the phrasing used by the court—"erred in relying on the rationale"[179]—could give rise to future arguments by aggressive litigants that any mention of an unpublished opinion might give rise to appellate issues.

176. 480 Mich. at 1022, 743 N.W.2d at 198.

172. No. 250322, 2005 WL 17844 (Mich. Ct. App. Jan. 4, 2005); *Houdini Properties, LLC.*, 480 Mich. at 1023, 743 N.W.2d at 199.

173. *Houdini Properties*, 2006 WL 1626643, at *2, *rev'd*, 480 Mich. 1022, 743 N.W.2d 198 (2008).

179. *Houdini Properties*, 480 Mich. at 1023, 743 N.W.2d at 199.