

September/October 2020

BARBEAT

Genesee County Bar Association



US Supreme Court Associate Justice Ruth Bader Ginsburg (1933-2020)

A Lifetime of Learning the Law

GCBA Office Update

Probate Court Staff: Going Forward

American Inns of Court/Civility

Board Member Profile: Sandra K. Carlson

Law is the Family Business: Local Attorney Families

What's Coming Up in the Supreme Court?

Will COVID-19 be the End of the Civil Jury Trial?

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SCOTUS Says Title VII Bans LGBTQ Discrimination
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A Lifetime of Learning the Law

By Michael A. Tesner, President



Michael A. Tesner

“Education is the kindling of a flame, not the filling of a vessel.”

—Socrates

“We learn how to behave as lawyers, soldiers, merchants, or whatnot by being them. Life, not the parson, teaches conduct.”

—Oliver Wendell Holmes

In June, I had the opportunity to meet and speak with some of our newly-minted lawyers who passed the Michigan Bar and have some connection to Genesee County. In part, I emphasized to them the importance of continued learning to perfect their profession and the opportunities that exist through the GCBA. It made me reflect on my own journey through the law and how grateful I am to our local legal community for opportunity, support, and engagement.

I remember what a relief it was to pass the Bar, the most challenging exam that most of us will take in our lifetimes. Starting out as a federal law clerk, there was a lot to learn about the practical aspects of working in the court system and from observation of some of the best litigation attorneys.

But when I left that singular experience for the world of civil litigation and then criminal prosecution, it quickly became apparent that graduating law school and passing the bar was not the end of learning but merely the beginning of

a professional life in the study and practice of law. Practicing law is a condition of perpetual learning. And if you are not having to study further and adapt to changes, you are doing something wrong.

“Get the fundamentals down and the level of everything you do will rise.”

—Michael Jordan

“I wasn’t real quick, and I wasn’t real strong. * * * So I beat them with my mind and my fundamentals.”

—Larry Bird

As a litigator, there is no better cornerstone in one’s foundation than the court rules. So my advice to those young lawyers was to learn the court rules. Learn the rules of evidence. Keep up with the case law, which is constantly interpreting, defining, and altering the rules.

But beyond these fundamentals, one cannot practice law without becoming knowledgeable in their specialties and adapting to changes in the law. Fortunately, there are many opportunities to do this through the GCBA. The association provides invaluable resources: CLE opportunities; reimbursement of statewide CLE costs through the Neithercut Fund;

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- Paid millions in referral fees

and the shared experience from our brothers and sisters at the bar through our monthly meetings, networking, committee activities, and mentoring.

For example, the Criminal Law and Defender Committee meets periodically to present topics in "Mastering Criminal Defense." Most recently they discussed the effect of Zoom hearings on a defendant's constitutional and statutory rights, and strategies to deal with "other acts evidence."

Bi-monthly, the GCBA publishes substantive articles in *Bar Beat*. In July, this included: recent Supreme Court decisions affecting immigration rights: applying the Civil Rights Act of 1964 to persons in the LGBT community: and changes to Chapter 11 bankruptcy arising out of the CARES Act.

And, of course, there is the State Bar as well as other lawyer groups and associations more focused on particular fields of law. Most of these publish their own periodicals with legal updates and educational articles. And like our own GCBA, they provide opportunities to attend CLE seminars,

conferences, and -- most recently -- webinars and interactive video discussions and trainings.

We must all take advantage of these opportunities to grow. One may gain a great proficiency through practicing law. We each bring our own skills and abilities to the profession, but no one is an expert without continued learning and experience. It is one thing to become comfortable standing up in a courtroom or providing advice to a client. It is another thing altogether to become expert by applying the fundamentals while keeping up with changes in the law. We must strive for the latter.

"The law and medicine should be very serious professions to undertake, should they not? People's lives and fortunes depend on them."

—George Eliot

GCBA Office Update

By Tatilia "Tina" Burroughs, Executive Director

Friday, March 13, 2020, is a date that will be burned in my memory for a long time. I was awakened around 5:30 a.m. with a message from my children's school informing me that in accordance with Governor Whitmer's Executive Order school was canceled until April 5th due to the coronavirus outbreak. After making preparations for my children I began to get ready for work.

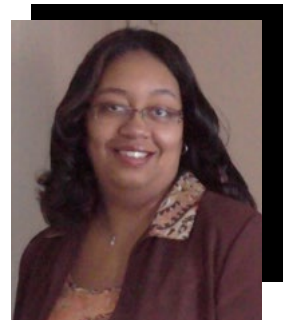
While preparing for work I received another phone call from one of our tenants that our building had water damage. Even though it was explained to me very thoroughly over the phone I was unprepared for what I saw. When I pulled into our parking lot I could see water rolling down the side of the building. We began immediately working on the clean-up of the water and assessing the damage.

Finally, on Monday, March 23, 2020, I was informed that

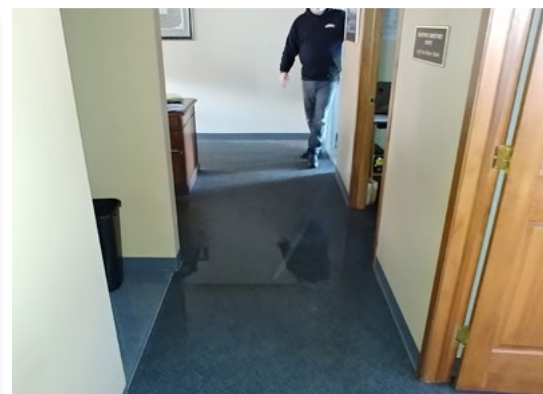
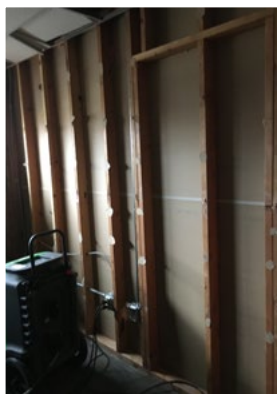
our office was dried out and our computers were being returned. I was at the office when Governor Whitmer issued Executive Order 2020-21 that closed more nonessential businesses. Although staff was able to work remotely, office repairs came to a halt.

Throughout the challenges we have experienced in 2020 your GCBA staff has continued to work diligently to serve our members, keep you updated with the many court notices, and operate our Lawyer Referral and Information Service.

We have finally been able to hire a contractor to repair our office but construction only began in mid-September. Please forgive me in advance if on **Friday, November 13, 2020** I don't answer my phone.



Tatilia Burroughs



Probate Court Staff: Going Forward

By Craig L. Wright



Craig L. Wright

When the courts closed in early March 2020, due to COVID-19, there were no handbooks I could consult on how to keep my law practice afloat. Each day more news of the dire consequences likely ahead of us reminded me of a science fiction novel predicting the end of civilization as we knew it. Like many of you, I had several matters pending in Probate Court scheduled over the next several months. How were the hearings to be scheduled? What was I to tell clients?

The Governor's Orders set general parameters for attorneys to follow. The State Bar of Michigan offered little guidance on how to survive the pandemic. Accordingly, I needed answers quickly. I immediately contacted the Genesee County Register of Probate, or as we know him, Sam Olson. Sam answered the telephone at Court and I felt relieved as I was no longer alone. I was impressed by the common-sense approach Sam was implementing to keep the Court moving ahead.

Through his many email releases and updates provided to the bar, I was informed about how filings, hearings, pending matters and administration in general were being handled. The on-going process was truly a work in progress that has, in my opinion, proven to be effective while affording the general public adequate access. To effectuate this monumental task, Mr. Olson has basically worked every day, often going to the

Court in the evenings to address new inquiries and dilemmas.

In person filings, typically done at the 5th Floor clerk's windows by court runners and individuals, now had to be done by regular mail or email. Sam has been required to follow the guidelines established by the Michigan Supreme Court regarding the four phases involved in reopening policy and procedures. Perhaps the most difficult task has been implementing a distancing policy for his staff which involved staggering the number of employees at work to ensure everyone's safety while still meeting the court's ever-increasing mail processing obligations.

The Court's implementation of Zoom hearings has been monumental and successful. This has proved to be a feasible alternative to physically attended court hearings. Most importantly during this time, Sam became a father for a second time.

Recognition is also due Judge Barkey, Ben, and the probate clerks, as they continue to give their best and through their efforts, the practice of law as we came to know it is preserved. All in all, like most practitioners, I was able to keep my practice alive and well in large part due to the tireless efforts of the Probate Court staff and Mr. Olson. For that, I thank you on behalf of the Genesee County practitioners.



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American Inns of Court / Civility

By B.D. "Chris" Christenson



B.D. "Chris" Christenson

As President of the local American Inns of Court, Centennial Chapter, I was asked to write about civility. It occurred to me however, that many attorneys may not be fully aware of the Inns of Court. The American Inns of Court is a nationwide group of attorneys, judges and law school students who come together throughout the fall and winter to meet in a social setting and promote ethics, civility, and professionalism. We have our own Inns chapter here in Genesee County. The vision of the Inns of Court is a legal profession dedicated to professionalism, ethics, civility, and excellence. The mission to implement the vision is to inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education and mentoring.

Why is civility important? The practice of law can be extremely stressful. In every type of practice, attorneys are responsible for life altering cases. The weight of that realization sometimes leads attorneys to forget civility matters. It is

my belief that discourteous practice of law makes everyone's job more stressful and less enjoyable. Our clients come looking for resolutions to issues they cannot address on their own. If we can help protect their interests and work to resolve their issues, we provide a great service to our community. However, the exact opposite is true when we are unavailable and make situations worse and more stressful for everyone involved.

Our kickoff social event was held outside at Brick Street on September 22. We discussed how to proceed for this year in the continuing shadow of an unrelenting pandemic. Our decisions will be communicated to the general membership in our other publications and on the GCBA web site at <http://gcbalaw.com>. We would like to invite you to our future events and value your feedback and input.

Holiday Dinner

Information about this year's holiday dinner was not available at the time of publication. Please watch our other communication modalities for updated information. Be assured, however, that we have not forgotten our commitment to the people of Flint.

Board Member Profile: Sandra K. Carlson

Name: Sandra K. Carlson

Family: Steven Carlson, Laura Carlson, and Denise Carlson, all grown

Undergraduate school, degree and grad year: Stephen F. Austin University, BS, Biology, 1982; and Texas A&M University, MS, Exercise Physiology, 1984

Law school and grad year: Wayne State University Law School, JD, May 2000, Cum Laude

Bar Association member since: 2000

Area(s) of practice: 7th Circuit Court Attorney Referee

Office location, phone number, and email address: Genesee County 7th Circuit Court, Attorney Referee Family Division, 900 S. Saginaw St., Flint, MI 48502

Past GCBA committees and activities: Genesee County Bar Association Nominating Committee Member

SBM involvement, if any: SBM Ethics Workshop Committee; SBA Representative Assembly Member for the 7th Circuit

Other involvement: Centennial American Inns of Court Member since 2000; Chapter President 2017-2019

Reasons you believe in service to the GCBA: We have an outstanding local legal community and I hope to serve the GCBA in the growth and support of its members, especially during these challenging times.



Sandra K. Carlson

Law is the Family Business: Local Attorney Families

By William J. Brickley



The GCBA has a rich history of members who come from a family of lawyers. Many of our attorney families accomplish as much as the “big name” attorneys, but they do not receive the same public recognition. In each edition we will highlight a couple of our local attorney families who work hard to serve the Genesee County community.

The Goldstein Family

Richard Goldstein was born in Lansing on the eve of the Great Depression, went on to attend Michigan State University, and then law school at Wayne State University, graduating in 1957. While in law school, he met his future wife, Natalie Newman. Richard and Natalie married and moved to Flint where he became an Assistant Genesee County Prosecuting Attorney in 1960. The County Prosecutor was Jerome O'Rourke, who left the prosecutor's office to start a private practice. Richard then became the Genesee County Prosecutor for a brief period of time before going into private practice with Jerry.

They had quite a diversified practice at the time with Jerry doing criminal defense work and representing newspapers, usually involving constitutional issues. Richard practiced in all areas of law, but eventually became a family law practitioner and, as a necessity, became well-versed in business law. Ultimately, the firm grew and became one of the largest firms in Genesee County, known as O'Rourke Goldstein Joseph and Kelly, P.C.

At one point, the firm had eleven attorneys and provided legal services from criminal defense representation to taxation issues. Richard continued to practice as a sole practitioner until the time of his death in 2004. Of the numerous awards he received he was very proud of being honored with the Hebert A. Milliken Jr. Civility Award.

Richard's son, **Robert** Goldstein, followed his father's legal path, graduating from Richard's alma mater Wayne State in 1985. Robert began his legal career with Garan Lucow Miller, P.C. in their Detroit office and eventually relocated with his family to Garan Lucow Miller, P.C.'s Grand Blanc office in 2000. He is currently a managing partner at the Grand Blanc office. Although working for different firms, Robert and Richard did handle cases together involving mutual clients. Robert has specialized in Appellate Practice, Intellectual Property, Business Litigation and all manner of personal injury and insurance claims and continues to hear accolades from other lawyers and judges regarding his father's outstanding legal career.

The McAra Family

Following World War II **Harry** McAra decided that a life in the law was the direction he needed to follow. Unfortunately, law schools were not located in or near Mio, Michigan so Harry literally hitched a ride to Detroit College of Law and began his dream. He settled in Flint and defended civil lawsuits in his own firm. He then took the wisdom he developed and was elected to the Genesee County Circuit Court in 1975. During his time on the bench he not only became Chief Judge but also President of the Michigan Judicial Association. Judge McAra died in 1986 while still an active and vibrant member of the bench.

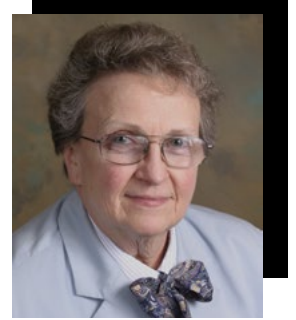
Two of his sons, Bernard and Michael, followed in his footsteps. **Bernard** went to Cornell University Law School, graduating in 1970 and then obtained his LLM in Tax Law from New York University in 1972. Despite numerous generous offers to practice in the hectic and face-paced world of the East Coast, Bernard came home to develop his business and estate planning practice, initially working with his father and then joining what is commonly known as Gault Davison. At 75 years old he is still actively practicing. **Michael** went to Notre Dame Law School, graduating in 1976 and after a successful legal career joined the 68th District Court in 1985. He worked tirelessly on the bench until his retirement in 2007 and now enjoys a wonderful life of travel and the Florida sunshine.

Bernard's son **Craig** was bitten by the legal bug as well and went to Emory University in Atlanta for his legal studies. He spent two years after graduation in the Fulton County Public Defender's office, loving the experience of the courtroom. While at Emory he met and married Heidi and they decided to come to Flint where, until 2018, Craig also worked at Gault Davison. Now Craig fine tunes his trial practice skills with Allstate, still working in Genesee County, litigating personal injury and insurance claims. **Heidi** put aside her stellar legal career to open several small businesses while holding a variety of positions including with the YWCA, and the Community Foundation of Greater Flint. While no longer married, she and Craig co-parent two future litigators and Heidi has applied to reinstate her legal license as she explores the financial services sector.

It is amazing what roads one can travel when you simply stick out your thumb.

What's Coming Up in the Supreme Court?

By Roberta J.F. Wray



Roberta J.F. Wray

The new term of the Supreme Court starts with arguments about a state's ability to regulate reimbursement rates for pharmacy benefit managers (*Rutledge v Pharmaceutical Care Management Association*) and a Delaware Constitutional provision that requires a division of judges based on "major political party affiliation." (*Carney v Adams*).

One of the potentially consequential cases of the new term, affecting the Affordable Care Act (ACA), is scheduled for argument on November 10. Each side has been granted ten extra minutes for argument. In response to requests from the House of Representatives and the Trump Administration, the Court is allowing them to participate in arguments. The added time has been allocated as follows: Defending the ACA, blue states led by California, 30 minutes; House, 10 minutes, and challenging the law, red states led by Texas, 20 minutes and the Solicitor General of the U.S., 20 minutes.

Now captioned as *Texas v California* and consolidated with *California v Texas*, the essential issues are 1) Whether the un-

constitutional individual mandate to purchase minimum essential coverage is severable from the remainder of the Patient Protection and Affordable Care Act; and 2) whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

The court will also decide whether an impeachment trial before a legislative body is a "judicial proceeding under Rule 6(e) (3)(E)(i) of the Federal Rules of Criminal Procedure (*Department of Justice v House Committee on the Judiciary*), and whether the Court's finding in *Ramos v Louisiana*, that a finding of guilt in a criminal trial must be by a unanimous jury, applies retroactively to cases on federal collateral review (*Edwards v Vannoy*).

Other cases which have been granted certiorari involve voter citizenship, union organizing, political donations, gun rights, the emoluments clause, and more. It stands to be another suspenseful and interesting term.

Will COVID-19 be the End of the Civil Jury Trial?

By William J. Brickley



William J. Brickley

The use of the civil jury trial as a method for resolving cases has been on a slow and consistent decline for years. Because of concerns over cost, the time commitment, the risks inherent with leaving your case in the hands of normal citizens who may not fully understand the issues, the chance of endless appeals, and other various reasons there has been much pressure to avoid the civil jury trial, shall I say, "at all cost."

Add to this a pandemic that requires us to avoid sitting close to one another, which limits contact between individuals, and when we are in contact with others we must mask our faces which has the effect of making us unable to gauge a person's expressions, and we are left with the last nail in the coffin of the civil jury trial. I propose that we must resist the temptation to use the COVID-19 pandemic as reason to kill off the civil jury trial and instead finds ways to protect, preserve and enhance the use of the civil jury trial.

We as lawyers pride ourselves in our unique role in helping to preserve the Constitutional rights which our founding fathers established for us over 200 years ago. We fight to

protect our freedoms of speech, religion, and to be free of unreasonable searches and seizures. Yet when the process which affords us the framework to fight for these freedoms is being eroded, not by systematic and deliberate attacks, but instead by efficiency, complacency and risk aversion, will we stand and fight to preserve this right?

James Madison wrote in 1789, "Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the preexistent rights of nature." It was this wisdom that led to the 7th amendment in our Constitution forever securing, as one of our basic human rights, the right to a jury trial in civil cases.

Unfortunately, today when a case goes to trial it is seen as a failure, the result of the parties being inflexible, of reason taking a back seat to emotion, and inflated egos seeking to be fed.

Continued on the next page

Those demanding their “day in court” are an irritant and are just making life difficult for everyone else.

This article is not meant to suggest that the hurdles to a civil jury trial are not real or complex. They are also not insurmountable. While it is impossible to set forth a cookie cutter list of recommendations that would apply to every case, there are no doubt means and methods that can be used to allow the parties to participate in a jury trial and limit the hardships that come with it.

Enforcing the rules on thorough Initial Disclosures so as to avoid the need for excessive discovery, limiting the number of expert witnesses, streamlining the evidentiary issues present, and severing issues to be tried to focus on where the real disputes lie are just some proposals to consider. Even in a pandemic it is not impossible to try a civil case. The American Board of Trial Advocates (ABOTA) recently put out a white paper titled *Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic*. This can be found on the ABOTA web site, <http://abota.org>, and presents an excellent discussion and practical solutions for trying a case in these difficult times.

The ABOTA taskforce went through each phase of the civil case and made practical and workable recommendations that can and should be used, not only in a pandemic but likely for years to come. To do so though we must be open to change. We do not try a case in 2020 the way we did in 1950. We cannot expect to try a case in 2021 the same way we did in 2010. Clearly this will involve technology just as we have used technology to allow us to continue other aspects of our legal practice.

Some things to consider would be the increased use of written questions to potential jurors, a virtual *voir dire*, the increased use of pre-recorded video depositions of witnesses, the ability to have live witnesses appear virtually, and presenting exhibits electronically that are delivered to jurors on secure tablets.

While it may be difficult, we must not simply abandon the civil jury trial because it is hard to accomplish. It has and must continue to be a vital part of the liberties we cherish.

Lawyers and Judges Assistance Program Offers Assistance on a Broad Range of Concerns

By Tish Vincent, LMSW, Esq., (retired) LJAP Program Director

Proactive, expansive, and confidential are all words that describe a very important State Bar member service. The Lawyers and Judges Assistance Program (LJAP), one of the oldest Lawyers' Assistance Programs in the country, employs a total wellness approach in assisting individuals who are faced with issues related to depression, gambling, substance use disorders, stress, marriage and family issues, career transition, life stage adjustment, and other general wellness issues. Since 1979, the program has been a confidential source of guidance and support to attorneys, judges, and law students throughout the State of Michigan.

Through LJAP's confidential toll-free Helpline lawyers, or those concerned about them, can receive information about ways to address substance abuse and other mental health issues impacting a lawyer's ability to ethically practice law. Information given can include referral information and/or the opportunity to schedule an in person conversation that may lead to assessment and treatment recommendations.

In recent years LJAP has shifted its focus from merely reactive to preventative. By providing education and support for individuals, families, law schools, court officers, employers and others, LJAP can assist in circumventing trouble, and/or begin to assist program participants toward health through difficult times, minimizing harm to individuals, families, and the community.

Highly skilled professionals, experienced in dealing with substance use and mental health disorders, as well as general wellness issues, are working to ensure that bar members and students are supported, and the public is protected. The LJAP staff of Program Director Tish Vincent [now retired], Program Coordinator Jennifer Clark, and Clinical Case Managers Molly Ranns [new director], Jeff Zapor, and Tom Grden are devoted to helping individuals get back on track before they begin to experience formal consequences related to difficulties that they face.

Where formal consequences have come to fruition,

LJAP is ready to provide assistance via its Attorney Monitoring Program. MCR 9.114 (C) allows a lawyer who has been investigated for professional misconduct relative to a mental health and/or substance use disorder to enter into “contractual probation”, [sic] which is an agreement with the attorney in question that is implemented by the Attorney Grievance Commission and facilitated in cooperation with LJAP. Every attorney referred by the Attorney Grievance Commission to LJAP has an opportunity to address what may be the underlying cause of misconduct. For many, the probationary/monitoring experience results in lasting and positive transformation.

Similarly, law students sometimes incur legal infractions that may be related to substance use and/or mental health disorders. Some students get referred to LJAP as a result of reporting these infractions to their law schools. Others may be referred once they have begun the bar application process and learned that those offenses will impact their character and fitness evaluation. Because law students are the future of the legal profession, LJAP has sought to extend its preventative education to this population. By continuing to develop and deliver preventative educational programming for students, LJAP seeks to support the students’ strengths and help them to eliminate any budding difficulties before they can impact their abilities as lawyers representing clients.

LJAP is a service for State Bar members that is supported by member dues. The LJAP staff recognizes that the issues that bring lawyers, judges, and students to the program are deeply personal and must be handled with the utmost discretion. All inquiries and services are handled in accordance with applicable federal and state privacy guidelines. For more information about the LJAP program and its services, view our website at www.michbar.org/generalinfo/ljap/home or call our confidential helpline: (800) 996-5522.

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The Path to Lawyer Wellness

Dickie McCamey expands presence in Detroit office

The firm recently added Gregory I. Thomas and Michelle A. Thomas as Principals, and Kevin G. Thomas as an Associate



Gregory I. Thomas



Michelle A. Thomas



Kevin G. Thomas

“We are excited to have Greg, Michelle, and Kevin join the Michigan office of Dickie McCamey. With the diversification of practice areas the Thomas’ bring, Dickie McCamey Detroit is now better positioned than ever to solve our client’s problems,” said Timothy S. Groustra, shareholder and Managing Attorney of the Grosse Pointe Farms office.



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SCOTUS Says Title VII Bans LGBTQ Discrimination

By Alec S. Gibbs



Alec S. Gibbs

On June 15, 2020, the U.S. Supreme Court held that an employer who fires an individual based on their sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964. *Bostock v Clayton City, Georgia*, Nos 171618 et al, ___ US ___, ___ S Ct ___ (June 15, 2020) consolidated two other cases, including one from the Eastern District of Michigan. See *RG & GR Harris Funeral Homes, Inc v EEOC*, 884 F3d 560 (6th Cir 2018). The decision overturns Sixth Circuit precedent that held sexual orientation was not a protected status under Title VII, while affirming the *Harris Funeral Homes* decision that transgender status is protected.

Title VII of the Civil Rights Act of 1964 (42 USC 2000e2(a)(1)) makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” *Id.* (emphasis added). Justice Gorsuch, for the majority, reasoned that discriminating against an individual on the basis of their sexual orientation or gender identity necessarily requires a “but-for” consideration of the individual’s sex, violating Title VII. *Bostock*, slip op at 9–10. The reasoning of this decision extends protection under the anti-discrimination provisions of the Affordable Care Act, the Fair Housing Act, and other federal statutes and regulations that prohibit the consideration of sex in decision-making.

It is less certain how influential the decision will be guiding state courts in construing state-based anti-discrimination statutes, including Michigan’s Elliot Larsen Civil Rights Act (ELCRA). The ELCRA prohibits employers from using sex as a basis for employment decisions or conditions. See MCL 37.2202. The state statute closely parallels the comparable federal law, and federal precedent is often persuasive in actions brought under the ELCRA. Title VII also has certain limitations (i.e., coverage only extends to businesses with 15 or more employees) not found in state statutes. Harassment or discrimination based on a person’s sexual orientation is not explicitly proscribed by the ELCRA. See *Barbour v Department of Soc Servs*, 198 Mich App 183, 497 NW2d 216 (1993). However, the Michigan Civil Rights Commission announced that it will interpret the ELCRA to include protections from discrimination based on sexual orientation and gender identification, and the Ohio Court of Appeals has already held

that sexual orientation and gender identity discrimination claims are recognized under Ohio’s Title VII analogue. See *Nance v Lima Auto Mall, Inc*, ___ Ohio App 3d ___; 2020Ohio3419; 2020 Ohio App. LEXIS 2352 **; 2020 WL 3412268 (June 22, 2020).

By its terms, *Bostock* did not address First Amendment challenges to public accommodation statutes, as in the denial of same-sex wedding services by bakers or photographers. Nor did the decision address the cultural feud over gender identity and the use of public restrooms, or the cases where gay teachers and students were dismissed or expelled for their sexual orientation in religious schools. The Fourth Circuit found that restrictive bathroom policies requiring transgender students to use a bathroom corresponding to their biological sex violated Title VII. See *Grimm v Gloucester Co Sch Bd*, ___ F App’x ___; 2020 U.S. App. LEXIS 27234 (CA 4, Aug. 26, 2020). On the other hand, First Amendment challenges to anti-discrimination public accommodation statutes have succeeded at the preliminary stage in some courts within the Sixth Circuit, despite the decision’s broad reach. See *Chelsey Nelson Photography LLC v Louisville/Jefferson Co Metro Gov’t*, ___ F Supp 3d ___; 2020 U.S. Dist. LEXIS 146246 (WD Ky, Aug. 14, 2020) (ordinance prohibiting sexual orientation discrimination violated First Amendment as applied to wedding photographer with religious objection to same-sex marriage). Additionally, the Supreme Court limited *Bostock* to the extent that it exempted teachers at religious schools from the coverage of federal anti-discrimination laws in the case of *Our Lady of Guadalupe Sch v Morrissey-Berru*, ___ US ___; 140 S Ct 2049; 207 L Ed 2d 870 (2020). In *Morrissey-Berru*, the Court held that selection and supervision of religious school teachers was at the core of the school’s mission, at least where they taught some religious modules, and any judicial review of that function undermined a religious institution’s independence in violation of the First Amendment.

The full reach of *Bostock* remains to be seen. For now, all entities covered by anti-discrimination statutes that prohibit sex-based considerations in decision-making should assume that the logic of the Supreme Court’s decision applies in order to avoid any liability for discriminatory conduct.

Reproductive Rights and the US Supreme Court

By Shelley R. Spivack



Shelley R. Spivack

During its 2019-2020 term, the U.S. Supreme Court decided two cases that will profoundly impact women's reproductive rights: *June Medical Services v Russo*¹ and *Little Sisters of the Poor Saints Peter and Paul Home v Pennsylvania*.² *June*, which dealt with a Louisiana abortion regulation requiring physicians to have admitting privileges in a hospital within 30 miles of a clinic, garnered much attention as the retirement of Justice Kennedy and the appointment of Justice Kavanaugh could have meant the downfall of *Roe v Wade*. Although less attention was paid to the *Little Sisters* case, the Court's ruling upholding regulations limiting the availability of birth control under the Affordable Care Act, is the decision that ultimately will affect more women of childbearing age.

In *June*, the Court reviewed the Fifth Circuit's reversal of a District Court's injunction against a Louisiana statute that was virtually identical to the statute overturned by the Supreme Court in *Whole Women Health v Hellerstedt*.³ Justice Breyer, joined by Justices (the late) Ginsburg, Sotomayer, and Kagan, focused on the deference to be given a District Court's findings:

We start from the premise that a district court's findings of fact, "whether based on oral or other evidence, must not be set aside unless clearly erroneous." (slip op., at 17).

Meticulously reviewing the District Court's findings, Justice Breyer ultimately upheld the District Court's conclusion that:

Louisiana's law poses a "substantial obstacle" to women seeking an abortion; its determination that the law offers no significant health-related benefits; and its determination that the law consequently imposes an "undue burden" on a woman's constitutional right to choose to have an abortion. (slip op., at 38).

Chief Justice Roberts, concurring in the Judgment but writing a separate opinion, surprised many by providing the essential fifth vote overturning the Fifth Circuit ruling. However, many court observers were not surprised by the Chief Justice's vote as it was based, not on a change in his philosophy regarding abortion, but his adherence to precedent:

I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided.

The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case. See *Moore v. Texas*, 586 U. S. ___, ___ (2019) (ROBERTS, C. J., concurring) (slip op., at 1).

The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents. ROBERTS, C. J., concurring) (slip op., at 2)

In *Little Sisters*, Justice Thomas, who in his dissent in *June* stated "[Roe's] core holding—that the Constitution protects a woman's right to abort her unborn child—finds no support in the text of the Fourteenth Amendment" authored the 7-2 decision limiting the availability of birth control under the Affordable Care Act.

The Court in *Little Sisters* was faced with numerous challenges to the 2018 Regulations implementing the ACA's contraception mandate. (A prior case, *Hobby Lobby*, involved a corporation's challenge to regulations adopted during the Obama administration.)⁴ With the change in administrations, new regulations were adopted carving out broad exemptions for employers claiming religious or moral objections to birth control. Pennsylvania and several other states challenged the regulations.

The central issue addressed by the Court was whether the word "as provided for" in the ACA gave the agency the authority to create exemptions, or whether the words merely allowed them to define the parameters of coverage.

Justice Thomas, stating "[o]ur analysis begins and ends with the text," upheld the regulations finding the agency had "virtually unbridled discretion" to both define coverage as well as to create exemptions.⁵

In her vigorous dissent, the late Justice Ginsburg, joined by Justice Sotomayer, stressed that the 2018 regulations would cause up to 126,400 women to immediately lose access to

Continued on the next page

Reproductive Rights ...

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no-cost contraception. Looking to Congress's intent in including the Women's Health Amendment in the ACA the late Justice Ginsburg stated:

First and foremost, §300gg-13(a)(4) is directed at eradicating gender-based disparities in access to preventive care.

Ready access to contraceptives and other preventive measures...both safeguards women's health and enables *women to chart their own life's course. GINSBURG dissenting (slip op., at 4-5)

Endnotes

- 1 591 US ____ (6/29/2020)
- 2 No, 19-431 (U.S. 7/8/20)
- 3 579 US ____ (2016)
- 4 *Burwell v Hobby Lobby*, 573 US 682 (2014)
- 5 Slip Op at 19

In Memoriam

As this issue goes to press, we mourn the loss of US Supreme Court Justice Ruth Bader-Ginsberg (1933-2020) and acknowledge her 27 years of service on the Supreme Court and a lifetime of service to the cause of Equal Justice Under Law. The next issue will contain an article in her honor.

GCBA Helpers During the Pandemic

By Hon. Jessica J. Hammon, Community Action Committee Chair

Like all areas of our life, the current pandemic has affected our ability to physically help those in need. Many area charities have limited their volunteer opportunities to attempt to keep both volunteers and those served safe. As Chair of the Community Action Committee I continue to seek out volunteer opportunities, though the task has proven to be more difficult this year. We are still uncertain as to the status of our annual Barristers' Ball and hope that we can help facilitate the Holiday Dinner. Having said that, I am proud to have put together some feasible opportunities for us to help our community. As the year goes by, and we hopefully start to move forward into our new normal, I will continue to seek out ways that we can give to those in need. Thank you in advance to the entire membership for your continued support in our efforts to be a meaningful part of our greater community.

GCBA Community Service Opportunities: South End Soup Kitchen

– 2nd Saturday of each month, beginning October, 2020. Three volunteers are needed each month to help the Soup Kitchen pass out pre-packaged lunches.

Clothing Drive – The GCBA will host a clothing drive November 16th – 20th to assist families in staying warm this winter. Donations will be given to the Center for Hope.

Diaper Drive – Our last diaper drive was a huge success! In the spring of 2021 we will hold another drive and hope to build from our last event. Donations will be given to the Food Bank of Eastern Michigan Diaper Bank.



Hon. Jessica Hammon

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