

THE UNIVERSITY OF MICHIGAN  
REGENTS COMMUNICATION  
ITEM FOR INFORMATION

Subject: Litigation

December 2012

NEW CASES

Yvonne Beach, a Protected Person, by and through her duly appointed Guardian, Brad Beach, and Andersen Beach, a minor, by his Next Friend, Brad Beach v Board of Regents of the University of Michigan. Michigan Court of Claims (Judge Clinton Canady III) (Served November, 9, 2012)

Plaintiff, Yvonne Beach, alleges she was a passenger on a motorcycle when a collision occurred between the motorcycle and a University owned vehicle operated by a University student intern. Plaintiff claims the vehicle was negligently operated and that she sustained serious impairment of a bodily function and permanent/serious disfigurement as a result of the collision. As a result, Plaintiff claims she will incur economic losses in excess of three (3) years. Plaintiff, Andersen Beach, a minor, claims loss of services by his mother, Yvonne Beach. Plaintiffs seek damages, with interest, costs and attorney fees.

Verna DeMartin v Regents of the University of Michigan d/b/a University of Michigan Dental School. Michigan Court of Claims (Judge William Collette) (Served November 5, 2012)

Plaintiff, Verna DeMartin, claims she was injured on April 20, 2012, when she was struck by an automatic door while leaving the University of Michigan Dental School. Plaintiff alleges that the University was negligent and grossly negligent for having a defective and improperly maintained door in use. Plaintiff seeks damages in excess of \$25,000, with interest, costs and attorney fees.

Champions Press, L.L.C. v University of Michigan and It's [sic] Athletic Department. Michigan Court of Claims (Served November 15, 2012)

Plaintiff, Champions Press, claims it entered into a written agreement with the University in March 2011 contemplating the joint sale and marketing of a new book publication titled "I Wore 21: The Legend of Desmond Howard." Plaintiff asserts the alleged agreement imposed obligations of the University to "either sell 12 sponsorship advertising pages for inclusion in the book, or provide a list of 'preferred' contacts for CP to approach." Plaintiff alleges that the University did not meet these obligations, resulting in alleged damages of over \$145,000. In addition, Plaintiff claims the University breached its obligation to market or sell the book. Plaintiff seeks damages, with interest, costs and attorney fees.

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**CASE UPDATES**

**The Authors Guild, Inc., et. al. v HathiTrust, Regents of The University of Michigan, et al.,** United States District Court, Southern District of New York. (Judge Harold Baer) (Served October 14, 2011)

Plaintiffs claim Defendants are violating, or will violate, Plaintiffs' alleged copyrights through Defendants' efforts to: digitize the works in their libraries, create a shared repository through the HathiTrust, and participate in the HathiTrust's Orphan Works Project. Plaintiffs seek injunctive and declaratory relief as well as attorneys' fees and costs. The University, along with its co-defendants, filed a motion for judgment on the pleadings. The motion addresses some, but not all, of the allegations against the University in the case. On August 6, 2012, oral argument was heard by the court on the motions for summary judgment that were filed by all three parties (plaintiffs, the Library Defendants, and the intervening National Federation for the Blind). On October 10, 2012, Judge Baer ruled in favor of the Library Defendants, stating in a written opinion that the HathiTrust was an example of fair use and did not infringe upon copyright laws. Judge Baer also declared that the University of Michigan is an "authorized entity" under the Chaffee Amendment, which gives the University the ability to provide unprecedented access to library patrons who have disabilities. On November 8, 2012, Plaintiffs filed their notice of appeal to the 2nd Circuit Court of Appeals.

**Catherine Wilkerson v Kevin Warner, Janet Conners, Michael Matthews, Mark West, Dean Lloyd, Dr. Robert Domeier and Huron Valley Ambulance, Inc.** U.S. District Court, Eastern District of Michigan. (Judge Lawrence P. Zatkoff) (Filed November 20, 2009).

On November 30, 2006, Plaintiff, along with others, protested an invited speaker at the Michigan League. Dr. Wilkerson claims that, during the protest, she was assaulted, falsely arrested and detained by University of Michigan police officers, and that she was subsequently charged with attempted resisting and obstructing. A jury trial was held and Plaintiff was found not guilty of those charges in December 2007. Plaintiff claims that she suffered damages including loss of earnings, medical expenses, pain and suffering, and attorney's fees. Her counts include violations of First and Fourth Amendment rights, conspiracy, assault and battery, false imprisonment, and malicious prosecution. She seeks damages, attorney's fees, interest and costs. Plaintiff filed a motion to amend complaint to add a claim for conspiracy against Defendant Mathews on June 3, 2011. A Motion for Summary Judgment was filed on behalf of Defendants Mathews, West and Conners on June 17, 2011. All motions were briefed and oral argument was requested by the parties. Oral argument was denied and Judge Zatkoff ruled on the motions as briefed on March 29, 2012. Judge Zatkoff granted the defendants' motions for summary judgment and the case was dismissed, with prejudice, in its entirety. Plaintiff filed an appeal to the Sixth Circuit Court of Appeals. Briefs have been filed with the Court of Appeals and the matter is scheduled for oral argument on January 15, 2013.

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**Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al. v Jennifer Granholm, Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University and Trustees of any other public college or university, community college, or school district.** United States District Court, Eastern Division of Michigan. (Judge David M. Lawson) (Filed November 8, 2006).

In 2006, Plaintiffs, including BAMN, The Rainbow PUSH Coalition, a number of black high school students in Michigan, college and graduate school students in Michigan, the AFSCME labor organization, and others (collectively, "BAMN Plaintiffs"), filed suit against, among others, the Regents of the University of Michigan. That suit asserted that Proposal 2, which prohibits preferential treatment on the basis of race, gender, national origin, and ethnicity in public education, public employment, and public contracting, violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, is preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972, and violates the universities' First Amendment right to determine their academic standards and to determine the criteria for admission by prohibiting public universities from considering race in their admissions policies. This suit was later consolidated with another suit brought by students, prospective students, and faculty at the University of Michigan (collectively, "Cantrell Plaintiffs") against Governor Granholm – but *not* any state universities – that contended that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment.

On March 18, 2008, the Court issued a decision upholding Proposal 2 and dismissing the BAMN and Cantrell suits. The Court found that the plaintiffs had not shown that Proposal 2 was unconstitutional under any of their theories. The Court therefore granted summary judgment to the Attorney General, who had intervened in the case to argue that Proposal 2 was constitutional. The Court granted the Universities' motion to dismiss BAMN's claim that Proposal 2 violated First Amendment principles of academic freedom, agreeing that that right is for the Universities to assert (or not), but otherwise denied the Universities' motion to be dismissed from the case. According to the Court, the Universities were proper parties to the action because the allegations regarding them stemmed from the same basic facts as those asserted in the case generally and because university action would be required to obtain the relief sought by the plaintiffs.

The Court also, in a separate opinion likewise issued on March 18, 2008, found that Eric Russell (the law school applicant who had intervened in the case) no longer had a unique interest and dismissed him from the litigation. The Court likewise denied Jennifer Gratz's belated motion to intervene in the case. Finally, because the Court had granted summary judgment to the Attorney General, upholding Prop 2 against the plaintiffs' challenges, the Court denied the various pending discovery motions (such as those filed by Russell seeking additional discovery from the defendant Universities) and class certification motions as moot.

The Cantrell Plaintiffs filed a motion for reconsideration with the district court, but the district court ultimately denied that motion. Eric Russell filed a motion in the district court seeking attorneys' fees from the University; that motion was denied on June 17, 2010.

BAMN filed an appeal to the Sixth Circuit to challenge the Court's ruling upholding Proposal 2. The University defendants cross-appealed the Court's denial of their motion to be dismissed from

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the case. Both Eric Russell and Jennifer Gratz appealed the Court's rulings to the Sixth Circuit. Jennifer Gratz later filed a motion to withdraw as an appellant, which motion was granted on March 23, 2009, and the Sixth Circuit determined that Eric Russell could participate only as an amicus. The Sixth Circuit panel heard oral argument of the parties' appeals, including the Universities' cross-appeal seeking dismissal from the case, on November 17, 2009.

On July 1, 2011, the Sixth Circuit panel issued a decision that reversed the grant of summary judgment to the Attorney General, found Proposal 2 unconstitutional, and ordered the grant of summary judgment to the BAMN and Cantrell plaintiffs. The Sixth Circuit panel affirmed the decision to dismiss Eric Russell from the suit, and also affirmed the decision to keep the University defendants in the suit. On September 9, 2011, the Sixth Circuit Court of Appeals issued an order stating that the entire court would reconsider the July 1, 2011 decision of the three-judge panel; oral argument was heard in March 2012. On November 15, 2012 the Sixth Circuit en banc declared unconstitutional the provisions of Proposal 2-2006 as they relate to public education (specifically, public university admissions). The basis for the holding is that Proposal 2 creates, for minorities, a "comparative structural burden [that] undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change." Michigan's Attorney General has declared his intent to file a petition for certiorari seeking U.S. Supreme Court review, and has likewise petitioned the Sixth Circuit to stay its ruling in the meantime.

**Brian Daniels v University of Michigan.** Washtenaw County Circuit Court. (Judge Archie C. Brown) (Served November 30, 2011).

Plaintiff is employed in the Department of Public Safety. Daniels claims that, following an injury and subsequent surgery, he was assigned to restricted duty for 18 months after which time he was told by his department that, since he could no longer perform his duties as a police officer, he could look for another job or take a pay cut. Plaintiff states that he was reclassified as a parking enforcement officer at a reduction in pay. Plaintiff alleges that female employees were treated differently and seeks damages, lost wages, interest, costs and attorney fees. The University filed a Motion for Summary Disposition, which is currently pending before the court.

**Regents of the University of Michigan v St. Jude Medical, Inc.** United States District Court, Eastern District of Michigan. (Judge Avern Cohn/Magistrate Judge Laurie J. Michelson) (Filed July 2, 2012).

In 1997, the University licensed to St. Jude Medical, Inc. its rights to patents and other technology related to chemical compositions for treating bio-prosthetic tissues. St. Jude has been paying royalties to the University for a number of years, but last year stopped paying, claiming that the University patents and technology do not cover all of the St. Jude products and that therefore the company was entitled to a credit on amounts previously paid. The University filed this lawsuit in order to recover the \$5-7 million that is currently owed, and to protect the University's ability to receive the future royalties to which the University is entitled. Defendant St. Jude filed its Answer with the court, including a counterclaim that the University should have to repay all the royalties it has received from St. Jude since 1998. The University replied to Defendants counterclaim, denying liability because the claim, among other things, is barred by the Michigan Court of Claims Act. On


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November 9, 2012, St. Jude Medical filed a Petition for Inter Partes Review at the U.S. Patent Office, seeking reexamination of the patentability of the claims in one of the patents licensed to St. Jude.

Respectfully submitted,

A handwritten signature in blue ink that reads "Debra A. Kowich". The signature is written in a cursive, flowing style.

Debra A. Kowich  
Interim Vice President & General Counsel

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