



|| Appellate Practice

Our reputation for being effective litigators extends to the state and federal appellate courts.

At the forefront of success on appeal is an experienced appellate advocate who understands the institutional roles of supreme and intermediate appellate courts, the differing decisional approaches, the governing standards of review and the legal regimes and philosophies. Understanding how appellate judges think and decide cases is critical when trying to persuade in court.

Justices and judges are generalists who may not have dealt with certain legal issues or know much about a particular industry or business. An experienced appellate attorney knows how to explain unfamiliar or complex legal issues and just as important, how to make a client's needs and interests compelling. The key skills necessary are developing sound strategies for leading the court to the right result, navigating the procedural mazes of appellate courts, crafting effective briefs on appeal and persuasively handling the challenges of oral argument.

Different skills and approaches are needed on appeal than at trial because appellate judges have a much different function than trial judges or juries. An experienced appellate attorney can bring an understanding of what judges are looking for on appeal, what issues and arguments will be important as well as what is needed to convince the appellate court to rule in the client's favor.

It is vitally important to have an attorney experienced in appellate practice who can combine thorough and imaginative research with compelling writing and skilled oral advocacy.

Many appellate justices and judges in both federal and state courts have expressed their preference for briefs and oral argument from attorneys who regularly and frequently handle appeals. One federal court of appeals judge commented, "appellate advocacy is specialized work." Another said, "the skills needed for effective appellate advocacy are not always found — indeed, perhaps, are rarely found — in good trial lawyers." Foster Swift is proud of the experience and reputation of its appellate attorneys as well as the successes achieved in many key cases before state and federal appellate courts. This includes the

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Michigan Supreme Court and Court of Appeals, numerous federal circuit courts of appeal and the United States Supreme Court.

The appellate attorneys at Foster Swift have an immensely valuable resources on hand — the substantive expertise of the firm’s attorneys in a broad range of legal areas and their extensive experience with many types of businesses, professionals and governmental bodies.

Our firm has also had countless successes with the many amicus briefs filed by our attorneys on behalf of industry, professional and trade associations whose interests will be affected by the outcome of appeals involving significant legal and policy issues. Additionally, our attorneys are active in professional associations of appellate counsel, including leadership roles at the state and national level with the State Bar of Michigan Appellate Practice Section, Michigan Defense Trial Counsel, American Bar Association Council of Appellate Lawyers and American Institute of Appellate Practice.

The following list of representative cases and recent amicus curiae briefs demonstrates the breadth of our attorneys’ experience in significant appellate matters.

REPRESENTATIVE CASES

- *Self-Ins Inst of Am, Inc v Snyder*, __ F3d __; 2016 FED App. 0152P (CA6, 2016)(on remand from United States Supreme Court; Michigan’s tax on health care claims is not preempted by ERISA), and prior decision, 761 F3d 631 (CA 6, 2014) (Michigan’s Health Insurance Claims Assessment Act is upheld once again)
 - *Agema v City of Allegan*, __ F3d __ (CA 6, 2016)(affirming dismissal of First Amendment § 1983 claim brought by state representative and advocacy group against school district and township)
 - *Manitou North America, Inc. v McCormick International, LLC*, 2016 Mich App LEXIS 198 (2016) (affirming \$4 million antitrust award for farm equipment dealer) (Michigan Court of Appeals affirmed jury decision in favor of McCormick, February 4, 2016)
 - *Shammout v Jaycee*, 2016 Mich App LEXIS 633 (2016) (dismissal of lawsuit alleging failure to protect against harms caused by inclement weather affirmed on appeal)
 - *Holiday Park Realty v City of Lansing*, 2015 Mich App LEXIS 1364 (2015) (affirming dismissal of claim against city based on flooding)
 - *Ammori v Nafso*, 2014 Mich App LEXIS 166 (2014)(obtaining dismissal of \$14 million claim against credit card processing company)
 - *Shaft v Jackson Nat’l Life Ins Co*, 2014 Mich App LEXIS 1828 (2014)(obtaining dismissal of reverse discrimination employment claim)
 - *Libertarian Party of Mich v Johnson*, 714 F3d 929 (CA 6, 2013)(provision in Michigan election code is constitutional)
 - *Thursfield v Thursfield*, 2013 Mich App LEXIS 1566 (2013)(reversing multimillion dollar judgment against former auto company executive based on lack of subject matter jurisdiction)
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- *Pittsfield Investors, LLC v Pittsfield Township*, 2013 Mich App LEXIS 516 (affirming dismissal of constitutional equal protection and substantive due process claims)
- *Wasek v Arrow Energy Servs*, 682 F3d 463 (CA 6, 2012)(affirming dismissal of same-sex hostile environment employment discrimination claim)
- *Ouwinga v Benistar 419 Plan Servs*, 694 F3d 783 (CA 6, 2012)(insurance company, law firm, and agents can be sued for fraudulently inducing investors to participate in abusive tax shelter)
- *Remy & Assocs LLC v Whole Foods Mkts*, 460 F App'x 494 (CA 6, 2012)(affirming dismissal of claims by commercial landlord against grocery store tenant)
- *Dep't of Env'tl Quality v Brown*, 489 Mich 863; 795 NW2d 150 (2011)(reversing correction order entered against well drilling operator)
- *Anglers of Ausable, Inc v Department of Environmental Quality*, 489 Mich 884; 796 NW2d 240 (2011)(appeal from administrative and circuit court actions relating to riparian rights and environmental corrective action plan, vacating, 283 Mich App 115; 770 NW2d 359 (2009))
- *Realcomp II, Ltd v FTC*, 635 F3d 815 (CA 6, 2011)(antitrust claims involving real estate multiple listing services)
- *Perkins v Twp of Clayton*, 411 F App'x 810 (CA 6, 2011)(affirming dismissal of township supervisor's First Amendment retaliation claims against township)
- *Hendee v Putnam Township*, 486 Mich 556; 786 NW2d 521 (2010) (applying ripeness doctrine in favor of township client and dismissing lawsuit)
- *Burke v United Am Acquisitions & Mgmt*, 2010 Mich App LEXIS 1502 (2010)(reversing \$2.3 million judgment against investment firm)
- *Weishuhn v Catholic Diocese (After Remand)*, 287 Mich App 211; 787 NW2d 513 (2010)(civil rights and whistleblower protection claims barred by ministerial employee doctrine); and prior decision, 279 Mich App 150; 756 NW2d 483 (2008)(First Amendment protections applicable to employment decisions by religious institutions)
- *Scott v Ambani*, 577 F3d 642 (CA6 2009)(physician employed by the University of Michigan cannot be sued under 42 U.S.C. § 1983 based on treatment provided to prisoner at hospital)
- *McNeil v Charlevoix County*, 484 Mich 69; 772 NW2d 18 (2009)(local health department regulation of smoking in workplace)
- *Mich Am Fedn of State Co v Matrix Human Servs*, 589 F3d 851 (CA 6, 2009)(reversing denial of fees and costs incurred by employer who was improperly enjoined from ceasing payment for employee health insurance)
- *Brown v Milner*, 2009 Mich App LEXIS 1291 (2009)(affirming dismissal of medical malpractice action based on statute of limitations)
- *Cummins v Robinson Twp*, 283 Mich App 677; 770 NW2d 421 (2009)(township building inspectors not liable to homeowners for damage from floods or costs associated with rebuilding home to comply with flood-resistant building code requirements)

- *Superior Hotels, LLC v Mackinaw Twp.*, 282 Mich App 621; 765 NW2d 621 (2009)(property tax appeal)
- *Lawrence v Welch*, 531 F3d 364 (CA6 2008), cert den'd, 558 US 876; 130 S Ct 233 (2009)(representing State Bar of Michigan; members of character and fitness committee cannot be sued by applicant)(Members of the State Bar Character and Fitness Committee are Immune to Liability)
- *Behnke, Inc v State*, 278 Mich App 114; 748 NW2d 253 (2008)(requirement for states to recognize registration of interstate motor carriers by other states)
- *Alvan Motor Freight, Inc v Department of Treasury*, 281 Mich App 35; 761 NW2d 269 (2008)(use tax exemption)
- *Michigan Educ. Ass'n v Secretary of State*, 280 Mich App 477; 761 NW2d 234 (2008)(representing Michigan Chamber of Commerce; payroll deduction for union's political action committee prohibited under Michigan Campaign Finance Act, aff'd, 489 Mich 194; 801 NW2d 35 (2011))
- *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309; 760 NW2d 699 (2008)(affirming dismissal of medical malpractice complaint against nine physicians employed by University of Michigan), (vacated in part on other grds, 485 Mich 1072; 777 NW2d 147 (2010))
- *Braun v Ann Arbor Charter Tp.*, 519 F3d 564 (CA6), cert den'd, 129 S Ct 628 (2008)(affirming dismissal of developer's constitutional claims against township)
- *Behnke, Inc v State*, 278 Mich App 114; 748 NW2d 253 (2008)(affirming judgment requiring state to give reciprocity to registration of interstate trailers by other jurisdictions)
- *Goldstone v Bloomfield Tp. Public Library*, 479 Mich 554; 737 NW2d 476 (2007)(representing Michigan Library Association, Michigan Townships Association and Michigan Municipal League; public libraries not required to offer borrowing privileges to nonresidents)
- *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1; 740 NW2d 444 (2007)(representing Michigan Republican Party; upholding statute requiring voter to present photo identification)
- *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006)(representing University of Michigan; qualifications of expert witnesses in medical malpractice actions)
- *Lawrence v Chabot*, 182 Fed Appx 442 (CA6 2006)(representing State Bar of Michigan; process for evaluation character and fitness of applications to practice law is constitutional)(Michigan's Process for Evaluating the Character and Fitness of Applicants to Practice Law is Constitutional)
- *46th Circuit Trial Court v Crawford County*, 476 Mich 131; 719 NW2d 553 (2006)(amicus curiae for Michigan Association of Counties and Michigan Townships Association; county funding of courts)
- *Felder v Greater Media*, 2006 Mich App LEXIS 2353 (2006)(affirming dismissal of defamation and related tort claims by professional athlete against newspapers)
- *McQueen v Beecher Community Schools*, 433 F3d 460 (CA6 2006)(dismissing claim against teacher brought by parents of student fatally shot by another student)
- *North Country Agency, Inc v Frankenmuth Mut. Ins. Co*, 269 Mich App 685 (2005)(affirming dismissal of claim based on termination of insurance agency contract)

- *United States v Michigan*, 424 F3d 438 (CA6 2005)(declaratory action regarding Native American rights to hunt and fish on inland lands and waters under 1832 treaty)
- *United States ex re. Schell v Battle Creek Health System*, 419 F3d 535 (CA6 2005)(qui tam action under federal false claims act)
- *Old Line Life Ins. Co of America v Garcia*, 411 F3d 605 (CA6 2005)(rescission of insurance policy based on misrepresentation)
- *Township of Casco v Secretary of State*, 472 Mich 566; 701 NW2d 102 (2005)(single petition and single vote on detachment of property from city and attachment to multiple townships violated home rule city act)
- *Advocacy Organization for Patients & Providers v Auto Club Ins. Ass'n*, 472 Mich 91; 693 NW2d 358 (2005)(standards for payment of medical expenses under no-fault act)
- *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487; 688 NW2d 538 (2004)(mandamus compelling Board of State Canvassers to certify petition to amend state constitution)
- *Inverness Mobile Home Community, Ltd. v Bedford Tp.*, 263 Mich App 241; 687 NW2d 869 (2004)(invalidating consent judgment binding future township board action)
- *Craig ex rel. Craig v Oakwood Hosp.*, 471 Mich 67; 684 NW2d 296 (2004)(amicus curiae for Michigan Defense Trial Counsel; requirements for admission of expert testimony on causation)
- *Howell Township v Roto Corporation*, 463 Mich 347; 617 NW2d 533 (2000), (preemption of township ordinance by state environmental act)
- *Westlake Transp., Inc v Public Service Com'n*, 255 Mich App 589; 662 NW2d 784 (2003)(validity of state authority to assess an application fee and annual fee in interstate trucking companies)
- *Carson City Hosp. v Department of Community Health*, 253 Mich App 444; 656 NW2d 366 (2002)(Medicaid reimbursement for surgical services at rural health clinics)
- *Skousen v Brighton High School*, 305 F3d 520 (CA6 2002)(immunity for state trooper)
- *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002)(Freedom of Information Act exemption for law enforcement agency's personnel records)
- *In re Apportionment of Wayne County--2001*, 250 Mich App 61; 650 NW2d 92 (2002)(invalidation of county apportionment commission's plan)
- *In re Certified Question from US District Court for Eastern District of Michigan*, 465 Mich 537; 638 NW2d 409 (2002)(right of Attorney General to settle claims against numerous tobacco companies for damages incurred in providing health care services to smokers)
- *In re Investigation of March 1999 Riots in East Lansing*, 463 Mich 378; 617 NW2d 310 (2000)(media organizations were not subject to prosecutor's investigative subpoena)
- *People v Hudson*, 241 Mich App 268; 615 NW2d 784 (2000)(requirements for prosecution of health care professional under vulnerable adult abuse act)

- *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626; 502 NW2d 638 (1993)(city lacks authority to condemn easement for use by franchised cable provider); and following remand, 224 Mich App 235; 568 NW2d 159 (increasing award of \$800,000 in attorney fees to client)

RECENT EXAMPLES OF AMICUS CURIAE BRIEFS

- *Schuette v Coalition to Defend Affirmative Action*, 134 S Ct 1623 (2014)(representing the Michigan Republican Party before the United States Supreme Court; question was whether Michigan's constitutional provision governing affirmative action in public employment, education and contracting violated the federal equal protection clause)
- *Self-Insurance Institute of America v Snyder*, 761 F3d 631 (CA 6, 2014), on remand, __ F3d __; 2016 FED App. 0152P (CA6, 2016)(representing a number of associations affected by Michigan's tax on health care claims in the Sixth Circuit Court of Appeals, including the Small Business Association of Michigan, Michigan Health and Hospital Association, Michigan State Medical Society, and the Michigan Osteopathic Association; question was whether Michigan Health Insurance Claims Act is preempted by ERISA).(Michigan's Tax on Paid Health Care Claims is Upheld; Michigan's Health Insurance Claims Assessment Act is Upheld Once Again)
- *Innovative Ventures LLC v Liquid Manufacturing, LLC*, __ Mich __ ; __NW3d__ ; 2016 Mich. LEXIS 1405 (July 14, 2016)(representing Michigan Chamber of Commerce; question is whether a non-compete provision in a manufacturing contract became unenforceable when a party exercised its right to terminate the agreement)
- *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251; 865 NW2d 908 (2015)(representing University of Michigan Health System; question involved the scope of Michigan's peer review statutes, which is an important question affecting how hospitals and health facilities review and improve the quality of patient care).(Peer Review Protections Apply to Objective Facts in Incident Reports)
- *Rock v Crocker*, __ Mich __ ; __ NW3d __ ; 2016 Mich. LEXIS 1096 (June 6, 2016)(representing University of Michigan; question involved admissibility of evidence of unrelated acts of negligence in medical malpractice actions)
- *Miller v Allstate Ins. Co*, 481 Mich 601; 751 NW2d 463 (2008)(representing the Michigan Physical Therapy Association; question involved corporate formation requirements for professional services corporations) (Michigan Supreme Court Holds that a No-Fault Insurer Cannot Challenge the Corporate Status of a Provider formed under the Business Corporations Act)

PUBLICATIONS & ALERTS

Carbon Sequestration Wells: A New Land Use to Consider in Zoning Ordinances, *Foster Swift Municipal Law News*, September 19, 2023

Michigan Appeals Court Rules Invalid New Environmental Regulations, *Foster Swift Agricultural Law News*, September 5, 2023

Dead Pigs Win in the Michigan Court of Appeals, *Foster Swift Agricultural Law News*, May 11, 2021

Appeals Court: J-1 Visa Employee at MSU Ineligible for Workers' Compensation, *Foster Swift Workers' Compensation Update*, February 22, 2020

Recent Court Decisions Make Clear that Municipalities Must Identify Specific Litigation to be Discussed During Closed Meeting, *Foster Swift Municipal Law News*, August 14, 2018

NEWS

Foster Swift Wins Major Victory for County Treasurers, *Foster Swift Municipal Law News E-blast*, October 26, 2023

Real Estate Attorney Roragen Joins Lansing Firm, *Ingham County Legal News*, July 10, 2023

City of East Lansing Prevails in Electric Franchise Fee Appeal, April 14, 2023

Litigator Joins Foster Swift Law Firm in Southfield, *Detroit Legal News*, April 12, 2023

Kraus Inducted in Michigan Lawyers Weekly Hall of Fame, *Michigan Lawyers Weekly*, February 16, 2023

Grand Rapids Law Firm Welcomes Two Associates, *Grand Rapids Legal News*, November 14, 2022

Foster Swift Listed in "Best Law Firms" 2023, *Best Lawyers "Best Law Firms"*, November 3, 2022

MBN Introduces New Senior Attorney Alexander Rusek, *Michigan Business Network*, October 12, 2022

What You Need to Know About Trauma-Informed Lawyering, *State Bar of Michigan - On Balance Podcast*, September 26, 2022

Litigators Rusek and Thomas Join Foster Swift, *Ingham County Legal News*, September 13, 2022

Foster Swift Attorneys Named 2023 Best Lawyers in America®, *Best Lawyers in America*, August 18, 2022

21 Attorneys Selected to 2022 Michigan Super Lawyers and "Rising Stars", *Michigan Super Lawyers*, August 12, 2022

Meagher Elected to American Board of Trial Advocates, November 8, 2021

Foster Swift Listed in "Best Law Firms" 2022, *Best Lawyers in America*, November 5, 2021

Foster Swift Welcomes Litigation Attorney to Southfield, November 2, 2021

Foster Swift Attorneys Named to 2022 Best Lawyers in America®, August 19, 2021

16 Attorneys Selected to 2021 Michigan Super Lawyers and "Rising Stars", *Michigan Super Lawyers*, August 13, 2021

18 Attorneys Selected to 2020 Michigan Super Lawyers and "Rising Stars", September 18, 2020

Foster Swift Attorneys Named to 2021 Best Lawyers in America®, August 20, 2020

Julie Fershtman is an Advocate for Women in Law, *Detroit Jewish News*, October 9, 2019

Collins and Smith Named to SBM Ag Law Council, *Foster Swift Agricultural Law News*, October 4, 2019

23 Attorneys Selected to 2019 Michigan Super Lawyers and "Rising Stars", *Automation Alley*, September 3, 2019

Collins, DeLuca Named to ICBA's Top 5 under 35 Attorneys, *Lansing Regional Chamber*, March 22, 2019



Artificial Intelligence Invades Appellate Practice: The Here, The Near, and The Oh My Dear, *American Bar Association*, February 5, 2019

Kraus Reelected to ABA Council of Appellate Lawyers Executive Committee, November 19, 2018

Fershtman Earns Highest Honor from State Bar of Michigan, *Lansing Regional Chamber*, September 25, 2018

31 Foster Swift Attorneys Selected to 2018 Michigan Super Lawyers and "Rising Stars" Lists, September 10, 2018

Michigan Court of Appeals Reverses and Remands for Entry of Summary Disposition in Favor of Defendant School District Employee Based on Gross Negligence, May 15, 2018

Meagher Inducted as an ABF Fellow, *Detroit Legal News*, April 24, 2018

Foster Swift Secures Victory for Coloma Charter Township after Long Running Battle over Gun Range, March 30, 2018

Foster Swift Ag Law Attorney Receives Honorary Membership in the MAAE, November 14, 2017

30 Foster Swift Attorneys Selected to 2017 Michigan Super Lawyers and Rising Stars Lists, September 8, 2017

46 Foster Swift Attorneys Named to 2018 Best Lawyers in America®, August 21, 2017

Charles E. Barbieri Awarded the Leo A. Farhat Outstanding Attorney Award, December 8, 2015

44 Foster Swift Attorneys Named to 2016 Best Lawyers in America® Roster, August 21, 2015

Attorney Richard Kraus elected to American Bar Association Council of Appellate Lawyers Executive Committee, November 20, 2014

Foster Swift Attorney Liza Moore selected as one of Michigan Lawyers Weekly's "2013 Up & Coming Lawyers", November 18, 2013

Kraus Certified as "Appellate Specialist" by American Institute of Appellate Practice, January 3, 2013

Richard Kraus Elected Chair of American Institute of Appellate Practice, November 2, 2012

State Bar President-Elect Julie I. Fershtman Joins Foster Swift, October 25, 2010

EVENTS

Independent Medical Exams: Strategies for Imposing or Preventing Conditions and Limitations, *Strafford Webinars*, January 4, 2023

Collateral Consequence of Criminal Behavior: Professional & Occupational Licenses, *State Bar of Michigan (SBM): Criminal Law Section's Mid-Winter Conference*, February 16, 2020

District Court Civil Law Update, *Michigan Judicial Institute: Regional Judicial Seminar*, January 14, 2020

Examinations Under Oath and Fraudulent Claims Investigations in the New World of Technology, *American Bar Association Section of Litigation Insurance Coverage Litigation CLE Seminar*, February 27, 2019

ICLE Niche Practices Seminar, *Institute of Continuing Legal Education (ICLE)*, August 8, 2018

Zoning and land uses: Regulation of small houses, Airbnb rentals, vacation rentals, backyard chickens and drones, *MTA-UP North Summit*, July 31, 2018