MICHIGAN DEFENSE
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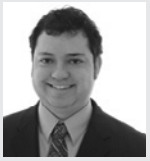

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All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is an association of lawyers who primarily practice on the defense side, the *Quarterly* always emphasizes analysis over advocacy and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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President's Corner

By: Hilary A. Ballentine, *Plunkett Cooney* P.C.

Hilary A. Ballentine is a member of Plunkett Cooney's Appellate Law Practice Group who concentrates her practice primarily on appeals related to litigation involving general liability, municipal liability, construction claims, constitutional and medical liability cases, among others. Ms. Ballentine is admitted to practice in Michigan's state and federal courts, as well as the Michigan Court of Appeals, the Michigan Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court.

Ms. Ballentine, who is a member of the firm's Bloomfield Hills office, has been selected as a "Rising Star" in appellate law by Michigan Super Lawyers magazine since 2011. She was also selected as an "Up and Coming" lawyer by Michigan Lawyer's Weekly in 2011.

President of the Michigan Defense Trial Counsel, Ms. Ballentine was named as MDTC's Volunteer of the Year in 2012. She is also an active member of the Michigan Appellate Bench Bar Planning Committee and the DRI – The Voice of the Defense Bar.

A magna cum laude graduate from the University of Detroit Mercy School of Law in 2006, Ms. Ballentine served as a barrister for the school's American Inns of Court program, which involves third- and fourth-year students. Ms. Ballentine currently mentors undergraduate students at the University of Michigan – Dearborn, where she received her undergraduate degree, with high distinction, in 2003

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Reflections and Resolutions

Well … that trip around the sun went by in a blink. It is hard to believe that we are already ushering in another new year – and the MDTC's 38th year in operation.

No new year is complete without some type of reflection. So please indulge me for a moment as I reflect upon some of the MDTC's highlights from 2016:

- I am delighted to report that we welcomed 40 new members to the organization, growing our total membership to nearly 500. Our membership reaches all corners of the State, from Monroe to Marquette and from Grosse Pointe to Grand Rapids.
- The MDTC leadership grew by leaps and bounds in 2016. We now have 66 members (that's right, 66!) serving in voluntary leadership roles.
- The MDTC filed six amicus briefs[1] with the Michigan Supreme Court. Thanks to the hard work of our amicus committee and volunteer brief writers, our Supreme Court is able to have the benefit of the defense bar's position when it is deciding key cases.

In addition, we held several successful seminars, gathering the top legal minds in key practice areas to educate membership on hot-button topics (reptilian trial tactics and the opioid crisis, to name a few) and providing forums for the bench and bar to converse outside the courtroom in an effort to improve the civil justice system.

While I am extremely proud of these accomplishments, I do not mention them solely to boast, but also to provide some context for 2017 resolutions. The organization is committed to increasing its membership and sponsorship, providing quality, affordable opportunities for continuing legal education, and advocating the position of its membership through amicus briefs and, when needed, legislative activity.

2017 is also a time for the MDTC to try something new. While we have always found it important to recognize outstanding attorneys and judges, we decided to "switch up" the manner in which we present these distinguished awards. And so we will be hosting our inaugural Legal Excellence Awards event on March 9, 2017 at the Detroit Historical Society Museum in downtown Detroit. Register now so you don't miss out! This fun, fresh event is the perfect forum to honor four individuals who have demonstrated exceptional standards of excellence in the legal profession. The Honorable Robert J. Colombo of the Wayne County Circuit Court and the Honorable Nanci J. Grant of the Oakland County Circuit Court will be presented with our Judicial Award. This award was established to recognize judges who have demonstrated the highest standards of judicial excellence in the pursuit of justice, while exemplifying courtesy, integrity, wisdom, and impartiality. If you have ever appeared before Judge Colombo or Judge Grant, you know that they embody these ideals, and the MDTC is proud to recognize them.

The MDTC is equally pleased to present the Excellence in Defense Award to Scott L. Mandel of Foster Swift Collins & Smith PC. The recipients of the Excellence in Defense Award are considered the most outstanding members of the defense bar, both inside and outside the courtroom. Throughout his career, Scott has demonstrated high standards of professionalism, civility, and advocacy on behalf of his clients.

I am delighted to report that we welcomed 40 new members to the organization, growing our total membership to nearly 500.

Last but certainly not least, the MDTC will present John C.W. Hohmeier of Scarfone & Green PC with its Young Lawyers – Golden Gavel Award. This award is presented to an attorney who has been practicing for ten years or less and who has shown significant achievement within his practice area.

Our new Legal Excellence Awards event is just a sneak peak of what's on tap for 2017. Stay tuned for announcements about our other upcoming seminars and social events. Cheers!

Endnotes

1 The cases in which the MDTC has filed amicus briefs in the Michigan Supreme Court in 2016 are: *Spectrum Health Hospitals v Westfield Insurance Company* (Case No. 151419); *Nexteer Automotive Corporation v Mando America Corporation* (Case No. 153413); *Lowery v Enbridge Energy Limited Partnership* (Case No. 151600); *Simpson v Pickens Jr and Associates MD PC* (Case No. 152036); and *Covenant Medical Center Inc v State Farm Mutual Automobile Ins Co* (Case No. 152758).

The Disfavoring of Non-Compete Agreements For Low-Income Wage Earners

By Kathleen Gatti & Deborah Brouwer

Executive Summary
Millions of employees across the United States are covered by non-compete agreements. Due to the trend of subjecting low-income or low-skill workers to non-compete agreements, the federal government and many states have taken the position of restricting the validity of these agreements. Employers should be judicious in utilizing non-compete agreements, limiting their application only to those employees whose positions allow them access to sensitive company information.

Kathleen M. Gatti graduated from Wayne State University School of Law in 1991. While in law school she served as an Assistant Editor and Associate Editor for the Wayne Law Review. Prior to entering law school, Ms. Gatti earned a Bachelor of Arts degree in English Literature and History from the University of Michigan.

Ms. Brouwer has been an attorney since 1980, Ms. Brouwer practices exclusively in labor and employment law, with particular experience in the defense of lawsuits against employers, including claims of race, age, religion, national origin, gender and disability discrimination, harassment and retaliation, as well as FLSA, FMLA and non-competition suits. She also provides harassment training and conducts discrimination and harassment investigations for employers. She has extensive experience in appearing before administrative agencies, including the EEOC, MDCR, MIOSHA, OSHA and the NLRB. She also appears frequently before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals. Her email address is dbrouwer@nemethlawpc.com.

As demand for highly skilled and trained workers in certain professions becomes more competitive, employers increasingly seek to require newly hired employees to sign non-competition agreements ("non-competes"). These agreements typically limit the employee's ability to work in the same industry, within a defined geographic area and for a defined period of time, after the employee is terminated (voluntarily or otherwise) from her current employment. Several rationales have been advanced for these agreements, including encouraging innovation by preventing employees who possess trade secrets from transferring that information to competitors, and encouraging employers to invest in worker training and skill development. Historically, non-competes were limited to high level managers, technical personnel and other key employees who could be expected to acquire proprietary information in the course of their employment. However, as the economy recovered from the Great Recession and employee turnover rose, employers turned to these agreements to gain a competitive edge. As a result, non-competes have spread to occupations viewed as "low-skilled," in comparison to the executive management and technical positions to which these agreements traditionally were limited.

Today, 18 percent, or approximately 30 million employees, are covered by non-compete agreements.[1] These employees are not limited to senior management and those highly compensated. For example, approximately 15 percent of employees without a college degree are subject to non-compete agreements, as are 14 percent of employees earning less than $40,000 per year.[2] Recent media reports are beginning to raise public awareness of the spread of such agreements to employees such as fast-food workers, warehouse employees and even employees of a chain of doggy daycare centers. Perhaps the employer receiving the most public scrutiny over its use of non-compete agreements, however, is the franchised sandwich chain, Jimmy John's.

Jimmy John's and Non-Competes

In 2014, two Jimmy John's sandwich makers filed suit in federal court in Illinois seeking a declaration that a non-compete agreement they signed was unenforceable. The agreement prohibited former employees of the company from working at any food service establishment within two miles of any Jimmy John's store that derived more than 10% of its revenue from the sale of sandwiches, submarines or wraps, for two years after leaving the company. The agreements applied to employees whose main tasks were to take food orders, and make and deliver sandwiches. In support of its motion to dismiss, Jimmy John's submitted affidavits declaring that it had no intention of enforcing the non-compete agreements in the future. Reasoning that there was no cognizable injury because there was no reasonable apprehension of

litigation on the part of Jimmy John's, the court dismissed the plaintiffs' claims for injunctive and declaratory relief.[3]

Jimmy John's Non-Competes in New York

That same year, New York Attorney General Eric Schneiderman began an investigation into Jimmy John's use of non-competes. Except in limited circumstances, such as the protection of trade secrets or employees with special skills, New York law prohibits such agreements. This investigation revealed that some, though not all, Jimmy John's franchisees in the state used the non-competes that were distributed to them by franchisor Jimmy John's. In June 2016, Jimmy John's entered into a settlement with the New York Attorney General, resolving the inquiry. As part of the settlement, Jimmy John's agreed that, as a franchisor, the chain would not support franchisee enforcement of non-compete agreements against employees. Jimmy John's also agreed to inform its New York franchisees that non-compete agreements are disfavored by New York law and that franchisees in that state should void any such agreements. Additionally, New York franchisees that did implement non-compete agreements agreed to void them and discontinue their usage.[4]

Jimmy John's Non-Competes in Illinois

The same month in which New York ended its inquiry into Jimmy John's non-competes, Illinois filed suit against the sandwich chain. That lawsuit alleged that the non-compete agreements were illegal under Illinois law, which provides that non-compete agreements must be premised on a legitimate business interest and narrowly tailored as to time, activity, and place. In announcing the lawsuit, the Illinois Attorney General stated that "[p]reventing employees from seeking employment with a competitor is unfair to Illinois workers and bad for Illinois businesses. By locking low-wage workers into their jobs and prohibiting them from seeking better paying jobs elsewhere, the companies have no reason to increase their wages or benefits."[5]

The lawsuit sought a declaratory judgment that the agreements were unenforceable, void and rescinded. Although Jimmy John's initially told the Attorney General that the chain had stopped using the agreements in April 2015, following the district court's dismissal of the plaintiffs' claims for declaratory and injunctive relief in *Brunner*, Jimmy John's later admitted that this policy change actually had not been implemented, nor had it been communicated to corporate-owned sandwich shops, employees, or franchisees.[6]

In December 2016, Jimmy John's settled with the Illinois Attorney General's office, agreeing to pay $100,000 to be used to educate the public about the enforcement of non-compete agreements. It also agreed to (1) notify all current and former employees that their non-competes would not be enforced, (2) remove the non-competes from materials to be signed by new hires, and (3) notify franchisees to void any non-competes modeled after the Jimmy John's corporate version. Finally, Jimmy John's agreed that, in the future, all non-compete agreements would comply with Illinois law. [7] Effective January 1, 2017, the Illinois Freedom to Work Act banned non-compete agreements for employees earning less than $13.00 an hour.[8]

Federal Government's Stance on Non-Competes

Illinois policy makers are not alone in their efforts to curb or ban non-compete agreements for lower-wage workers. On the federal level, legislation was introduced in the Senate in 2015 in direct response to reports that Jimmy John's and other retailers were requiring lower-wage employees to sign non-compete agreements. The bill, called the Mobility and Opportunity for Vulnerable Employees (MOVE) Act, would have amended the Fair Labor Standards Act, the federal law that established a minimum wage and the right to overtime pay. The MOVE Act would have prohibited the use of non-compete agreements for employees earning less than $15.00 an hour, $31,200 per year, or the minimum wage applicable in the worker's municipality, and would have required companies to inform job seekers in advance if they would be asked to sign one.[9] The bill, however, failed to make it out of committee.

The Obama Administration also voiced support for measures at the state level to curb or ban the use of non-compete agreements for low-wage employees. In May 2016, the White House released a report outlining the potential negative impacts of non-compete agreements for low-wage workers.[10] According to the report, several states have taken measures limiting non-compete agreements. For example, in 2016, Hawaii banned the use of non-compete agreements in the technology sector, while New Mexico banned them for healthcare jobs.[11] Oregon law now bans non-compete agreements longer than 18 months, and Utah has banned agreements longer than one year.[12] State legislatures in Washington and Idaho are considering bills that would limit non-compete agreements to certain designated "key employees," who are more likely to have knowledge of sensitive corporate information.[13]

The White House followed its May 2016 report in October 2016, with what it termed a "call to action" to the states, encouraging states to enact laws banning non-competes for workers falling below certain wage thresholds, or who are unlikely to possess trade secrets.[14] Several state officials voiced support for the initiative, including New York

Attorney General Schneiderman, who announced that he intends to introduce comprehensive legislation in 2017 curbing the use of non-compete agreements.[15]

History of Michigan Law on Non-Competes

The legal validity of non-compete agreements in Michigan has moved back and forth over time, likely due to varying economic conditions. In the nineteenth century, Michigan common law provided that, while an agreement not to compete was a restraint on trade, the agreement could be lawful if it had been negotiated for a just and honest purpose and for the protection of legitimate interests of the party in whose favor it was imposed. The restraint also had to be reasonable as between the parties and could not be specifically injurious to the public.[16] In subsequent decisions, these factors became known as the "common law rule of reason."[17]

In 1905, however, the Michigan Legislature abrogated this common-law rule of reason through the enactment of MCL 445.761, which provided that "[a]ll agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited are hereby declared to be against public policy and illegal and void."[18] Thus, even if the parties had entered into a non-compete agreement that was reasonable, the agreement was still illegal and unenforceable.

The wind did not shift again for almost eight decades, until 1984, when the Michigan Antitrust Reform Act (MARA) repealed all previous statutory provisions regarding covenants not to compete.[19] While MARA proclaimed that contracts made "in restraint of, or to monopolize trade or commerce"[20] were unlawful, the Act also expressly stated that "[a]n employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business…."[21] In essence, this provision returned the "common law rule of reason" to the analysis of non-compete agreements in Michigan.[22]

In keeping with the nationwide examination of the use of non-compete agreements, the Michigan Legislature recently considered whether non-compete agreements should be made unenforceable by statute. In 2015, Michigan State Representative Peter Lucido introduced House Bill Number 4198, which would have amended MARA by making non-compete agreements enforceable only against business owners, principals or executives.[23] The bill failed to gain any co-sponsors and never made it out of committee.

Current Michigan Law on Non-Competes

As the law currently stands, Michigan courts will enforce non-compete agreements that are reasonable.[24] Determining what is reasonable requires an analysis of the circumstances of each particular case. In general, Michigan courts look at four factors: (1) the type of employment the employee is prohibited from engaging in; (2) geographical area; (3) duration of the agreement; and (4) the competitive business interest the agreement seeks to protect.[25] As to the first factor, an agreement prohibiting a former employee from working for a competitor in any type of job, even one different from the one the employee performed for the former employer, most likely would be found to be unreasonable. If, on the other hand, the agreement only prohibits the employee from working for a competitor in the same capacity for which she worked for her former employer, it may well be deemed reasonable.

As to geography, the agreement must not prohibit the employee from working in too broad of an area. For instance, an agreement prohibiting an employee from working anywhere in the state likely would not be reasonable, but one limiting the prohibited geographical area to a limited number of miles within the former employer may be reasonable.

The third factor looks to how long the employee is prohibited from working for a competitor. There is no hard and fast rule in Michigan for how long a duration is reasonable. Non-compete agreements between six months and three years in duration have been found reasonable.[26]

Finally, a court will examine what business interest the employer is trying to protect through the agreement. If the interest is something such as the employer's confidential information, including customer lists and/or trade secrets, special training or technical information, a court would likely find it reasonable.[27] Conversely, if the employer is merely trying to protect itself from a former employee's general knowledge or skill, it would likely not be deemed reasonable.[28]

Conclusion

The Jimmy John's case and its subsequent legislative backlash is a cautionary tale for employers who implement non-compete agreements for their workforce. The lesson to be gleaned is that employers should be judicious in utilizing them, limiting their application only to those employees whose positions allow them access to sensitive company information. Determining which employees fit that description likely will

require an analysis of the four factors outlined above to determine whether subjecting an employee to a non-compete agreement is reasonable in each case. This approach undoubtedly takes more time than the blanket approach used by Jimmy John's, but in the wake of that case and the ensuing heightened scrutiny it brought to non-compete agreements, it seems a wise investment of employer resources.

Endnotes

1 U.S. Department of the Treasury, Office of Economic Policy, *Non-Compete Contracts: Economic Effects and Policy Implications* (March 2016) p 3.

2 The White House, *Non-Compete Agreements: Analysis of the Usage, Potential issues, and State Responses*(May 2016) < https://www.whitehouse.gov/sites/default/files/non-competes_report_final2.pdf > (accessed on Jan 3, 2017).

3 *Brunner v Liautaud,*No. 14-C-5509, 2015 US ist LEXIS 46018 (ND Ill, April 8, 2015).

4 New York, Office of the Attorney General, *A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets*, Press Release (June 2016) < http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements> (accessed Jan 3, 2017).

5 Illinois, Office of the Attorney General, *Madigan sues Jimmy John's For Imposing Unlawful Non-Compete Agreements On Sandwich Makers And Delivery Drivers*, Press Release (June 2016) < http://www.illinoisattorneygeneral.gov/pressroom/2016_06/20160608.html > (accessed Jan 3, 2017).

6 *Id.*

7 Illinois, Office of the Attorney general, *Madigan Announces Settlement With Jimmy John's For Imposing Unlawful Non-Compete Agreements*, Press Release (Dec 7, 2016) < http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html> (accessed Jan 3, 2017).

8 Illinois Freedom to Work Act, Public Act 099-0860.

9 Washington, Office of Senator Chris Murphy, *Murphy, Franken Introduce Bill To Ban Non-Compete Agreements for Low-Wage Workers MOVE Act would Enable Low-Wage Workers To Seek Better, Higher-Paying Jobs,* Press Release (June 2015) < https://www.murphy.senate.gov/newsroom/press-releases/murphy-franken-introduce-bill-to-ban-non-compete-agreements-for-low-wage-workers> (accessed Jan 3, 2017).

10 The White House, *supra* note 2.

11 *Id.* at 7.

12 *d.*

13 *Id.* at 8.

14 Obama Administration, State Call to Action on Non-Compete Agreements (Oct 25, 2016) <https://www.whitehouse.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf> (accessed Jan 3, 2017).

15 New York, Office of the Attorney General, *A.G. Schneiderman Proposes Nation's Most Comprehensive Bill To Curb Widespread Misuse Of Non-Compete Agreements*, Press Release (Oct 25, 2016) < http://www.ag.ny.gov/press-release/ag-schneiderman-proposes-nations-most-comprehensive-bill-curb-widespread-misuse-non> (accessed Jan 3, 2017).

16 *Hubbard v Miller*, 27 Mich 15, 16-17 (1873).

17 See, e.g., *Barrows v Grand Rapids Real Estate Bd*, 51 Mich App 75, 84-85; 214 NW2d 532, 536-537 (1974); *Kelley ex rel Slay v Michigan Nat'l Bank*, 377 Mich 481, 490-491; 141 NW2d 73 (1966).

18 MCL 445.761 (repealed by Michigan Antitrust Reform Act, 1984 PA 274, MCL 445.771 et seq.)

19 Michigan Antitrust Reform Act, MCL 445.771 *et seq.*

20 MCL 445.772.

21 MCL 445.774a. This provision was enacted more than two years after the initial Act had taken effect. It is applicable only to those contracts entered into after March 29, 1985.

22 *Bristol Window and Door, Inc. v Hoogenstyn*, 250 Mich App 478, 496; 650 NW2d 670 (2002); *St Clair Med, PC v Borgiel,* 270 Mich App 260; 715 NW2d 914 (2006) ("To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill.").

23 HB 4198, 2015 Leg 2015-2016 (Mich 2015); Michigan House Journal, 98th Leg Sess, 12 February 2015, 137.

24 *Coates v Bastian Bros, Inc,* 276 Mich App 498, 507; 741 NW2d 539 (2007).

25 *Bristol Window and Door, supra*; *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998).

26 *Lowry Computer Products, Inc v Head*, 984 F Supp 1111, 1116 (ED Mich 1997) (applying Michigan law).

27 *United Rentals, Inc v Keizer*, 355 F 3d 399 (CA 6, 2004), aff'g 202 F Supp 2d 727 (WD Mich 2002).

28 *Id.*

Expert Roles in Antitrust Litigation[1]

By: Patrick F. Murphy, Alex Z. Kattamis, Brian D'Andrade, and Shukri J. Souri

Executive Summary

Appropriate risk management is critical in any litigation. Antitrust litigation matters generally require the expert testimony of economists. Technology experts and advisors also can provide analysis and opinions regarding the technology, market, and product in question. Appropriate technological expertise can bolster the basis for economic models used in antitrust cases, leading to a more relevant and reliable economic analysis, reducing the likelihood of a successful challenge to economic expert testimony.

Introduction

Antitrust litigation matters often involve highly complex technological issues from product design and manufacturing to how products function and are put into use by consumers in the marketplace. Economists have historically been key expert witnesses in antitrust matters.[2] In fact, former Deputy Assistant Attorney General in the Antitrust Division of the US Department of Justice, William J. Kolasky, has noted that "[b]ecause expert economic testimony is critical to most antitrust disputes, the admissibility of that testimony under *Daubert* has become a key battleground in many antitrust trials."[3] In such litigation, economists generally construct economic and financial models as they perform their analyses, which may require assumptions about the technology, market, and product in question.

Patrick F. Murphy, Ph.D., P.E. is a Senior Managing Engineer in the Electrical Engineering & Computer Science Practice at Exponent. Dr. Murphy's background is in electrical and electronic engineering, including electronic and optoelectronic devices, circuits, and networks. His project experience includes investigations regarding the condition, structure, and function of electronic components and systems. Dr. Murphy received his Ph.D. and M.A. degrees in Electrical Engineering at Princeton University in 2009 and 2004 respectively. He received his B.S. degree in Electrical Engineering from Boston University in 2002.

Alex Z. Kattamis, Ph.D., P.E. is a Senior Managing Engineer in the Electrical Engineering & Computer Science Practice at Exponent. Dr. Kattamis has expertise in the design, fabrication, and failure analysis of semiconductor devices including: thin-film electronics, large-area flexible electronics, memories, LEDs, LCDs, AMOLEDs, integrated circuits, and printed circuit boards. He also has expertise in power systems, transmission, distribution, and protection. Dr. Kattamis received his Ph.D. and M.A. degrees in Electrical Engineering at Princeton University in 2007 and 2004 respectively. He received his B.S. degree in Electrical Engineering from the University of Connecticut in 2002.

Brian D'Andrade, Ph.D., PMP, CISSP, P.E. is a licensed professional electrical and computer engineer with 17 years of experience in a variety of engineering fields including electrical, electronic, computer, software, network, semiconductor and optical. His expertise is used in a variety of litigation matters including intellectual property, antitrust, commercial and product liability. Additionally, he conducts and manages insurance related investigations of flood, fire and natural disasters throughout the world. Dr. D'Andrade received his Ph.D. and M.A. degrees in Electrical Engineering at Princeton University in 2004 and 2001 respectively. He received his B.S.E.E. degree in Electrical Engineering from Pennsylvania State University in 1999.

Shukri J. Souri, Ph.D. is a Corporate Vice President & Practice Director at Exponent and is a Principal in the Electrical Engineering & Computer Science Practice. Dr. Souri's expertise is in microelectronics and computing systems. His professional activities involve advising industrial and legal clients as well as government entities on science and technology matters addressing issues related to intellectual property, product reliability, and failure analysis. He has led complex investigations involving electronics, computer communications, and software controls for safety-critical applications in the medical device, automotive, aviation and process controls industries. Dr. Souri received his Ph.D. and M.S. degrees in Electrical Engineering from Stanford University in 2003 and 1994 respectively. He received his B.A. degree in Engineering Science at the University of Oxford, UK, in 1992.

Guidance from technology experts and advisors can provide valuable support and a strong basis for economic analysis. The recent federal suits and civil multi-district litigation brought against manufacturers of LCD flat panel displays offer an informative example of the role of technology experts. A number of manufacturers were accused of conspiring to raise and fix the prices of TFT-LCD panels and certain products containing those panels for over a decade. A central issue in these cases was estimating the alleged overcharge collected by the various defendants.[4] The testimony of technology experts regarding the assumptions and analyses of economic expert witnesses was influential to the outcome of several trials in these cases.

Background on Antitrust Law

Antitrust laws "prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for products and services."[5] Notable federal antitrust statutes are found in the Sherman Act and the Clayton Act. The Sherman Act, for example, states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" and that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[6]

Certain restraints on trade are known as "Horizontal Restraints." These include: pricing (agreement among competitors to fix prices), allocation or division of markets between competitors, and refusal to deal to entities outside of the cartel.[7] Other forms of restraints are known as "Vertical Restraints" and include: resale price floor/ceiling, customer/territorial restraints, limiting channel of distribution, exclusive dealing or distributor arrangements, and arrangements tying purchase of products.[8]

Expert Roles and *Daubert* Challenges

Technology experts and economic experts tend to be assigned distinct roles in antitrust cases.[9] Economics experts may assist in defining a relevant market, identifying and weighing procompetitive and anticompetitive effects of the challenged conduct, and quantifying economic impact and damages. Economics experts may rely on market research, transactional data that may be produced during discovery, and economic modeling.

Technology experts and advisors, on the other hand, may assist in defining relevant products, assessing liability, and explaining technical similarities and differences among products and evaluating technical assumptions related to economic models and damages calculations. Technology experts and advisors may rely on scientific and engineering calculations and models, experiments, and detailed comparisons of technical attributes of products, or other techniques.

A well-known risk related to expert testimony is the exclusion of expert testimony under *Daubert* or Federal Rule of Evidence (FRE) 702. For an expert to survive a *Daubert* challenge, the Court must find that: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.[10]

A study of *Daubert* and FRE 702 challenges to economic expert testimony in cases across a broad range of areas of law indicates that 45% of these challenges were successful, in whole, or in part, as shown in Figure 1.[11] For the antitrust litigations studied, 39% of challenges to economic expert testimony were successful.[12] According to the authors of this study, challenges in these antitrust cases mainly targeted the methodology employed by the economist expert and the data that formed the basis of their opinions.

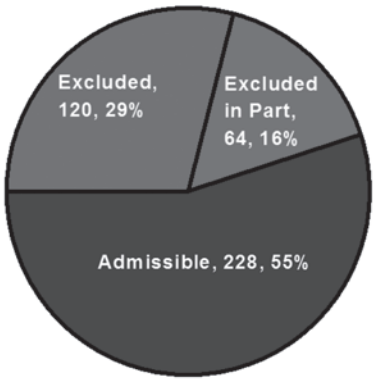

Figure 1. Chart indicating the challenges to economics experts across a broad range of areas of law.[13]

As antitrust laws are applied to increasingly technologically complex products and services, e.g., software, biology, chemistry, or electronics, it is a reasonable conclusion that risks related to understanding and effectively explaining technological issues in antitrust cases will tend to increase.

An expert in the technology at issue can assist in the formation of opinions in antitrust cases to provide a stronger basis for economic analysis as well as assist in the aggregation and analysis of appropriate data. The following three case studies highlight the importance of testimony from technology experts in antitrust cases.

Case Studies

Case Study 1: In re US v Microsoft Corp

The need of technology experts in antitrust cases is clear when the products and technology at issue are highly complex, such as for software. One such instance is the case brought in 1994 by the United States Department of Justice (DOJ) along with 20 states against the Microsoft Corporation under the Sherman Act.[14] Analysis and testimony from technology experts were major components to the litigation strategy on both sides, where a key issue in the case was whether or not the bundling of Microsoft's Internet Explorer (IE) browser with the Microsoft Windows operation system constituted illegal tying of multiple products. Microsoft asserted that its IE browser was not a separate product from the operating system, but was an integrated feature that could not be removed.[15]

In order to show that Microsoft's IE "browser product" could in fact be removed from Windows, the DOJ relied on the expert analysis and testimony from a noted computer scientist. The DOJ's expert developed a computer program to remove the IE browser from Windows, without any degradation of the software performance, and demonstrated this finding at trial. In addition, the DOJ's expert accused Microsoft of altering Windows via an update that occurred midway through the case in order to make it incompatible with the tools he had developed. The cross examination of this "assertive" and "combative" expert was described in the media as "apparently fruitless" due to the fact that the expert "gave not an inch" to the lawyer for Microsoft.[16]

The tying claim against Microsoft was eventually dropped after the Court of Appeals ruled that the DOJ had failed to establish "a precise definition of browsers" and "a careful definition of the tied good market" at trial.[17] The first issue pertains directly to the technological definition of a "software product" verses "software code" and, according to some observers, the DOJ's tying claims ultimately failed because the DOJ and the courts did not give sufficient weight to the role of technology (i.e., computer science and software) as compared to the role of economic theory. Observers also have noted that a "disconnect" between trial attorneys and technology experts is not uncommon.[18]

Case Study 2: In re US Gov v AUO

This case study and case study 3 offer contrasting scenarios on how experts have been used in antitrust litigations related to the same products and technologies. Since 2001, there have been a series of criminal and civil litigations involving the manufacturers of thin-film transistor liquid crystal display (TFT-LCD) panels. Such panels are in products such as televisions, computer monitors and mobile devices. In 2010, the DOJ alleged price fixing on TFT-LCD panels, which lead to a number of plea agreements and $900 million in fines. The Taiwanese manufacturer AU Optronics (AUO) was subsequently found guilty by a federal jury, leading to a $500 million fine.[19]

Though the Sherman Act carries a $100 million statutory maximum fine, the alternative fines provision of 18 USC 3571(d) allows for penalties of up to "twice the gross gain or twice the gross loss" associated with the violation. Based on this provision, the DOJ alleged that the AUO's gains were in excess of $500 million, and sought twice that figure as a penalty. To succeed, the government had to prove those "overcharges" to the jury **beyond a reasonable doubt**.[20]

The U.S. relied on the economics expert testimony from Dr. Keith Leffler to prove that AUO's gains were in excess of $500 million. According to Dr. Leffler, to receive $500 million in gains, AUO would have had to apply an overcharge of 2.1 percent, or approximately $4.30 per TFT-LCD panel. Dr. Leffler's analysis showed that cartel-related overcharges tend to be 15 percent or greater; that margins were actually $53 per panel or higher during the cartel period than in the post-cartel period; and that AUO's actual total gains were likely greater than $2 billion.[21] AUO's expert economist, on the other hand, did not find a measurable overcharge attributable to AUO.[22] The cross examination of Dr. Leffler focused on the errors he had admitted to in previous matters,[23] including as an expert witness in a class action antitrust case against Microsoft.[24]

While the jury's verdict and sentence were affirmed by the U.S. Court of Appeals for the Ninth Circuit, AUO could have challenged the technological bases relied on by Dr. Leffler. For example, the Ninth Circuit's decision noted that Dr. Leffler's testimony "created some ambiguity" regarding how TFT-LCD panels that are manufactured by AUO in Taiwan, are then incorporated into finished consumer goods sold in the United States.[25] A technology expert well-versed in the manufacturing processes and requirements for consumer goods could have provided testimony to clarify this issue or could have gathered data via a representative sample to determine the rate at which TFT-LCD panels manufactured by AUO were found in such goods.

Case Study 3: In re TFT LCD (Flat Panel) Antitrust MDL

Following the DOJ cases against the TFT-LCD panel manufacturers, a series of class action cases were filed on behalf of direct purchasers such as Best Buy, Costco, and others. The defendants,

including Toshiba and HannStar, among others, formed a joint-defense group consisting of TFT-LCD panel manufacturers. The technology and products at issue were largely the same as in *US v AU Optronics Corp*, discussed above. Both sides in this litigation relied on economics experts and technology experts.

The plaintiffs relied on an economics expert to calculate the "overcharge" gained by the defendants. The economic analysis was based in part on the producer price index (PPI), an economic statistic collected by the U.S. Bureau of Labor Statistics that measures the average change over time in the selling prices received by domestic producers of goods and services. While there is no PPI for TFT-LCDs panels, economic experts for the plaintiffs relied on the PPI for microprocessors. The plaintiffs' experts later relied on economic arguments to opine that such TFT-LCD panels were substitutable both in manufacturing and in end-use and therefore suitable for price-fixing conspiracy. The plaintiffs' economics experts also relied on testimony by a technology expert to support their assumptions. The technology expert opined that TFT-LCD panels were all basically the same and therefore substitutable,[26] and also that microprocessors are similar to TFT-LCD panels.[27]

The defense relied on analysis and testimony by an economics expert who selected several other electronics-based PPIs to calculate a far lower "overcharge" result. The defendants' economics expert also relied on testimony of a technology expert, who described the variety of technologies and application-specific designs across TFT-LCD panels, and explained how microprocessors and TFT-LCD products are, in fact, not similar in manufacturing and use.

The jury in this case found that plaintiffs did not show that Toshiba participated in a conspiracy to fix the prices of TFT-LCD, but found that plaintiffs did show that HannStar had participated in such a conspiracy (several defendants settled before trial). The jury award was much closer to the amount calculated by the defense's economic experts and was less than one tenth of the $770 million overcharge calculated by the economics expert witnesses for plaintiffs.[28] The overall models employed by the economists on both sides were essentially similar, even according to economists involved in this case, with a key difference being the selection of an appropriate PPI.[29] Testimony from technology expert Dr. Shukri Souri of Exponent was highlighted in the closing arguments for the defense and played a role in the jury's rejection of the microprocessor PPI as an appropriate proxy for TFT-LCD panel costs.[30]

Conclusion

Appropriate risk management is critical in any litigation. It is particularly more so in antitrust matters or derivative class action lawsuits. Overall, the risks of expert disqualification are disproportionate in antitrust matters and the teaming up of economics and technology experts can play a role in strengthening bases for expert opinions and mitigating litigation risks.

Endnotes

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Affordable Care Act (ACA): Future Care Cost Control in Claims

By: Richard J. Joppich, *Kitch Drutchas Wagner Valitutti & Sherbrook, PC*

Executive Summary
Evidentiary rules historically have precluded reference to insurance in an attempt to reduce damages in personal-injury litigation. The bases of this long-standing rule is eroding with the development of mandatory health insurance coverage through the Affordable Care Act (ACA), to the point that some courts are recognizing the realities of modern healthcare and health insurance coverage and allowing reference to and evidence of the impact of the ACA on economic-medical-expense-damage calculations.

> "The court finds that health insurance provided under the Affordable Care Act is reasonably likely to continue into the future and that its discussion before the jury is not precluded . . . Accordingly, what medical care and therapies would be provided by insurance through the ACA can be discussed/argued at trial."[1]

So states a recent 2015 order from the Kent County Circuit Court in *Donaldson v Advantage Health Physicians, PC, et al*. The cost of future-economic damages for medical care should be limited to costs of coverage and out of pocket limits under the Affordable Care Act (hereinafter "ACA").

Historically, mentioning the availability of healthcare coverage in front of a jury has been strictly taboo. Evidence of future healthcare costs associated with a claim, in general, has been the amount a healthcare provider charges for required services or devices made necessary by the claimed injury regardless of the existence of health insurance coverage.

The evidentiary preclusion of information concerning health insurance arose out of the fact that not every individual claimant had such coverage and, even if they did, it would be speculative to assume they would continue to have coverage for healthcare costs into the future. As a result, the claimant would be entitled to full recovery of future medical costs. The ACA, however, has changed this paradigm.

Mandated Healthcare Coverage

Maintaining minimum essential healthcare coverage under the ACA is mandatory for almost everyone.[2] There is no longer the historical choice of whether or not one wishes to obtain coverage. The constitutionality of this mandate was upheld by the United States Supreme Court in *Nat'l Fed'n of Indep Bus v Sebelius*.[3] The ACA again was affirmed by the Supreme Court in June 2015, when it was challenged on the basis of its precluding tax-credit subsidies to the residents of Michigan, where Michigan failed to set up an insurance exchange.[4]

Insurers under the ACA are precluded by federal statute from denying coverage or increasing premiums based upon age, disability, preexisting conditions, and several other factors.[5] Additionally, the insurer providing coverage under the ACA has no right of recovery from the proceeds of any third-party personal-injury-liability payment. Yet, insurers are required by law to provide certain minimal coverage benefits for services such as ambulatory patient services, emergency services, inpatient hospitalization, maternity and newborn services, mental health and addiction services, prescription drugs, rehabilitation services and devices, laboratory studies, preventative, wellness, and chronic-disease care, and pediatric services.

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From the patient side, in addition to the cost of their premiums, which entitles them to the essential benefits above, the individual out-of-pocket expense per year is capped at $6,850 for 2016.

Under the mandatory ACA coverage requirements, any future healthcare expense damages claims should be limited to the total potential out-of-pocket limit, plus any noncovered expenses. These amounts pale in comparison to the typical plaintiff/claimant life care planner's listing of needed services and assessment of total, unreduced charges for those services.

In some circumstances, an additional amount for providing the claimant with the platinum level coverage under the ACA may provide necessary claim-related benefits. Thus, the difference between the premium the claimant otherwise would be required to pay for coverage and the premium for the higher level of coverage may be added to the equation for future cost totals.

Court Views On Allowing Evidence Regarding Benefits Under The ACA

Courts around the country are beginning the trend of allowing evidence at trial regarding the effect of the ACA on future damages as part of direct evidence of permissible damages.[6] The ACA ensures plaintiffs will have insurance for future medical care needs, and since the ACA has survived constitutional challenges and multiple efforts at repeal and modification, it is reasonably certain to continue well into the future. Therefore, it is appropriate to consider ACA benefits in calculating reasonable future life care plan needs. ACA evidence is allowed as the law of the land.[7]

Several courts across the country have prohibited direct evidence of the ACA on the issue of damages at trial, but have permitted use of the ACA to reduce post-trial verdicts before judgment.[8] The question concerning the introduction of the ACA as evidence of medical costs was left to the trial court to decide as issues arose in *Donovan v Phillip Morris USA, Inc.*[9]

Courts around the country are beginning the trend of allowing evidence at trial regarding the effect of the ACA on future damages as part of direct evidence of permissible damages.

In a California case, *Aidan Leung v Verdugo Hills Hospital*,[10] the court set out three prerequisites to using future-insurance benefits such as the ACA in damage assessments by a life care planner: (1) link the coverage to items of care that are required in the life care plan; (2) demonstrate with reasonable certainty that plaintiff will have the coverage; and (3) show the coverage can be demonstrated to be in existence for a reasonably certain time period into the future.

Other courts, however, have been harsher in precluding the use of the ACA for purposes of future-damages reduction. In *Deeds v University of Pennsylvania Medical Center*,[11] mention of coverage benefits in questioning a life care planner required a new trial. In *Vasquez-Sierra v Hennepin Faculty Assoc*,[12] and *Halsne v Avera Health*,[13] the ACA was not allowed to reduce potential awards to plaintiff and the Minnesota courts were reluctant to change the collateral-source rules unless legislated. In *Caronia v Phillip Morris USA*,[14] the defense was not allowed to argue ACA reduction of future-monitoring costs to the plaintiff (although medical-monitoring claims ultimately were not recognized in the jurisdiction). In *Brewster v Southern Home Rentals*,[15] the court found that the possibility of future ACA coverage was too speculative to be relevant.

Conclusion

Whether it is through direct evidence of the cost of coverage and out-of-pocket expenses for purchase of ACA benefits for a claimant, or use of a plaintiff's failure to obtain coverage as a failure to mitigate damages, or even ACA use post-verdict in reduction of actual future costs of care, the ACA should be a large factor in damage-management strategies in claims.

The certainty of mandatory health insurance coverage under the ACA for injured claimants should, and in several instances has, worked to reduce and control runaway future healthcare cost claims.

Endnotes

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5 See 42 USC 300gg-4(a).
6 *Brewington v United States*, No. 13-07672-DMG, 2015 US Dist LEXIS 97720 (CD CA, July 24, 2015).
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MDTC Legislative Report

As I complete this report on the last business day of 2016, much of the dust from the recent election and lame duck session has settled, and the scene at the capitol building across the street is eerily quiet. Although there is widespread and often bitter disagreement on many important issues today, most everyone will agree that this year's presidential election was one for the record books. Its result, now finally official, has generated feelings of vindication for some, intense anger and disbelief for others, and surprise for a great many interested parties on all parts of the political spectrum. And it has provided lessons for both of our mainstream political parties that will perhaps produce some critical evaluation of who they represent, how future elections should be conducted, and where our country will go from here.

On December 28th, the House and Senate met briefly to declare the year's *sine die* adjournment, marking the official end of the 98th Legislature's service, but its work on legislation was concluded on December 15th. The election has left the Republicans comfortably in control of both houses for the next session, and thus, with no sense of urgency requiring fast action at the end of the year, the "lame duck" session was uncharacteristically orderly and peaceful, with several planned initiatives being deferred until 2017. As one commentator noted, it might have been more appropriately dubbed a "tame duck" session. Legislation revising Michigan's energy policies was finalized along with a few other initiatives discussed below, but a number of controversial issues, including proposals for stricter voter identification requirements, amendments to the Freedom of Information Act, and changes to the Public School Employees Retirement Act and municipal retirement systems to address unfunded liabilities, were deferred for more thoughtful consideration in the next session. And for a day or two in the last week of the session, there were seemingly credible reports that the long-stalled no-fault insurance reform legislation would be resurrected and cleared for final passage, but that discussion was also deferred when the necessary votes could not be mustered.

2016 Public Acts

As of this writing, there are 402 Public Acts of 2016, with many more bills addressing uncontroversial matters yet to be presented to, or considered by, Governor Snyder. The additional public acts of interest filed since my last report include:

2016 PA 389 – Senate Bill 853 (Stamas – R), this new act will prohibit local units of government from adopting or enforcing ordinances that prohibit, restrict, or regulate the use of plastic bags or other "auxiliary containers" designed for "transporting, consuming, or protecting merchandise, food, or beverages from or at a food service or retail facility." This new act will take effect on March 28, 2017.

2016 PA Nos. 360 to 366 – House Bills 5618 to 5621 and 5693 to 5695, this bipartisan package will amend several sections of the Revised School Code to allow school administrators discretion to impose alternative sanctions for misbehavior in lieu of the presently mandated expulsions and suspensions. These amendatory acts will take effect on August 1, 2017.

2016 PA Nos. 332 to 334 – Senate Bills 995 to 997 (Kowall – R and Warren – D), this bipartisan package has amended several sections of the Vehicle Code and adds new sections to facilitate the development of "autonomous" or driverless vehicles in

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Michigan and the experimental use of those vehicles on public roadways. These amendatory acts were approved by the Governor on December 8th, and took effect immediately upon their filing with the Secretary of State the next day. **2016 PA 335 – Senate Bill 998 (Horn – R)** is a companion to those acts, which will amend the Revised Judicature Act, MCL 600.2949b, to add a new subsection (3) providing that "A motor vehicle mechanic or a motor vehicle repair facility that repairs an automated motor vehicle according to specifications from the manufacturer of the automated motor vehicle is not liable in a product liability action for damages resulting from the repairs." That amendatory act will take effect on March 9, 2017.

2016 PA 341 – Senate Bill 437 (Nofs – R) and **2016 PA 342 – Senate Bill 438 (Proos – R)**, passed on the last day of the session and enthusiastically approved by Governor Snyder, these amendatory acts have effected a wide-ranging revision of Michigan's energy laws, and are considered by many to be the most important legislation enacted during the lame duck session. They will take effect on April 20, 2017.

Other Bills in the Pipeline

Senate Bill 289 (O'Brien – R), which would create a new "bad-faith patent infringement claims act" to provide new protections against "patent trolls" – individuals or entities that assert unfounded claims of patent infringement in bad faith to extort payments of royalties from businesses that often feel compelled to acquiesce rather than bear the considerable cost of defending threatened infringement litigation. This bill has been enrolled, and was presented to the Governor on December 28th. If approved, it will take effect on October 1, 2017.

Senate Bill 982 (Schuitmaker – R) proposes a variety of amendments to the Uniform Fraudulent Transfer Act, MCL 566.31, *et seq*. This Bill has been enrolled, and was presented to the Governor on December 28th. If approved, it will take effect 90 days after the date of its filing with the Secretary of State.

Senate Bill 1104 (Shirkey – R) proposes an amendment of the Revised Judicature Act to add a new section MCL 600.1482, which would provide that, in actions alleging medical malpractice, the damages recoverable for past medical expenses or rehabilitation service expenses shall not exceed the actual damages for medical care arising from the alleged malpractice, and that the court may not allow presentation of evidence of past medical expenses or rehabilitation service in excess of the actual damages for medical care. The new section would define "actual damages for medical care" as the dollar amount actually paid for past medical expenses or rehabilitation services by or on behalf of the individual whose medical care is at issue, but excluding any contractual discounts, price reductions or write-offs, and any remaining dollar amount that the plaintiff is liable to pay for the medical care. This bill has been enrolled, and was presented to the Governor on December 27th. If approved, it will take effect 90 days after the date of its filing with the Secretary of State.

House Bills 4423 and **4424 (Jacobsen – R), 4425 (Outman – R)** and **4426 (Kivela – D)** propose amendments of the Vehicle Code addressing establishment of speed limits and speeding violations. The amendments would include new provisions which would require MDOT and the State Police to increase the speed limit to 75 miles per hour on at least 600 miles of limited access highways and 65 miles per hour on 900 miles of trunk line highways within a year after the effective date of the legislation if engineering and safety studies determine that the speed limits may be raised to those levels. These bills have been enrolled, and were presented to the Governor on December 22nd.

House Bill 4686 (Santana – D) would amend the Governmental Liability Act, 1964 PA 170, to amend MCL 691.1402a, regarding municipal liability for maintenance of sidewalks, to insert a new Subsection (5). The new provision would clarify that a municipal corporation having a duty to maintain a sidewalk under subsection (1) may assert, in addition to other available defenses, "any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense that the condition was open and obvious." This bill has been enrolled, and was presented to the Governor on December 21st.

What Do You Think?

Our members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the board through any officer, board member, regional chairperson or committee chair.

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Appellate Practice Report

If Checklists Help Surgeons, They Just Might Help Lawyers With Briefing and Argument, Too

Atul Gawande, a surgeon at Brigham and Women's Hospital, seems to spend equal time in the operating room and on the New York Times' bestseller list. His writing usually focuses on medical issues, but he uses insights from medicine to address wider themes. His latest book, *Being Mortal,* proposes a fundamental shift in how we think about death and end-of-life care. The book that prompted this column, however, deals with a more mundane subject: checklists. It happens that Dr. Gawande has something to teach lawyers about how to be more effective in briefing and oral argument.

Dr. Gawande's Manifesto

The Checklist Manifesto,[1] originally published in 2009, is exactly what its title promises. It's an exhortation to expand the use of checklists and a paean to their utility. And Dr. Gawande's argument for using checklists is compelling. He writes that there are two basic kinds of errors: those caused by ignorance and those caused by "ineptitude."[2] In the first category, we fail because we lack the necessary knowledge. In the second, "the knowledge exists, yet we fail to apply it correctly."[3] Dr. Gawande convincingly shows that, although medical and scientific knowledge has expanded at an almost exponential pace, serious, avoidable errors persist.

So the problem isn't knowledge; it's making sure we apply knowledge correctly. Using a checklist is a simple way to make sure we do so.

And it works. For example, *The Atlantic* cited a program at Veterans Affairs suggesting that the use of checklists reduced annual mortality by 18%.[4] The World Health Organization developed its own surgical checklist and reports that its use decreases mortality, surgical complications, and the length of hospital stays.[5] Of course, simply writing a checklist isn't a panacea.[6] It requires consistent use—and a change of culture.

The Case for Legal Checklists

Lawyers face many of the same knowledge-management issues as doctors, including increasing specialization and complexity. Dr. Gawande notes a "36 percent increase between 2004 and 2007 in lawsuits against attorneys for legal mistakes—the most common being simple administrative errors, like missed calendar dates and clerical screw-ups, as well as errors in applying the law."[7]

And it's no wonder. We have to master an ever-widening body of substantive law. We have to put that knowledge into practice based on complicated court rules, local rules, and individual judges' practice guidelines. We have to do the work of zealously representing our clients—producing quality work, keeping track of deadlines, looking ahead for forks in the road—while spending time developing relationships that will lead to future cases. All the while, we're inundated with concentration-sapping emails, texts, and phone calls.

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So the problem isn't knowledge; it's making sure we apply knowledge correctly. Using a checklist is a simple way to make sure we do so.

Modern law—modern *life*, for that matter—is a recipe for the second kind of error that Dr. Gawande identifies: those where we have the know-how and fail to employ it.

Many of these errors won't break a case. Forgetting to attach an exhibit, for example, may not destroy a client's legal position. But sometimes it might. Employing checklists might be a simple, cost-effective way for lawyers to cut down on errors. Indeed, some courts provide their own checklists. The Sixth Circuit Court of Appeals, for example, provides a checklist for briefs.[8]

Sample Checklists

Here, for example, is a checklist for filing a brief:

- ☐ Obtain client approval for filing
- ☐ Review relevant court rules or local rules
- ☐ Include each section required under court rules (e.g., questions presented, standard of review, etc.)
- ☐ Verify compliance with rules concerning formatting and page limits
- ☐ Proofread
- ☐ Check for misspellings that might evade spellcheck (e.g., names, "trail" instead of "trial," etc.).
- ☐ Proofread again
- ☐ Include request for oral argument if necessary
- ☐ Shepherdize/make sure all cases are current
- ☐ Verify that all exhibit references/ pin cites direct reader to correct page
- ☐ Redact exhibits as necessary to preserve privilege and to comply with redaction rules
- ☐ Verify that exhibits are complete and legible
- ☐ Include relief requested
- ☐ Include proof of service that lists the necessary parties
- ☐ Verify that next date or task is calendared

Here's a sample checklist for oral argument:

- ☐ Make travel arrangements and verify location/time of argument
- ☐ Notify client of argument date/ time
- ☐ Review briefs
- ☐ If there are other represented parties on your side of the "v," contact those attorneys to discuss division of allotted time.
- ☐ Review underlying record to prepare to answer factual questions
- ☐ Review key cases
- ☐ Update cases to determine whether any have been overruled, modified, or questioned
- ☐ Prepare outline for oral argument
- ☐ Research judges on panel to assess relevant jurisprudence
- ☐ Prepare references for oral argument (e.g., timeline, critical citations to record)
- ☐ Prepare list of possible questions from panel and short answers
- ☐ Analyze opponent's likely arguments and prepare rebuttals
- ☐ Prepare and memorize short introduction
- ☐ Verify court rules regarding use of electronics or visual aids

A checklist shouldn't be a static creation. The idea is to update checklists as problems arise so they continually narrow the gap through which errors can slip. And if that practice works for surgeons, maybe it can help us avoid errors like forgetting to request oral argument, accidentally attaching a privileged document, or being surprised by a question at oral argument that we should have anticipated.

Developing appropriate checklists, updating them, and using them consistently may require an investment of time. But, if the impact of checklists in the medical world is any guide, that time will be well spent.

Effect of pending motions for attorney fees on the finality of a judgment

A fundamental rule of appellate jurisdiction is the need for a "final" decision – whether it be a judgment or order. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). In federal court, a "'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v United States*, 324 US 229, 233 (1945). But what if there is a pending motion for attorney fees at the time the underlying judgment or order is entered? Does that affect the time for filing an appeal?

In federal court, the answer is generally "no." Federal courts have long recognized that a post-trial motion for attorney fees does not prevent the judgment on the merits from being final.

Developing appropriate checklists, updating them, and using them consistently may require an investment of time. But, if the impact of checklists in the medical world is any guide, that time will be well spent.

See Budinich v Becton Dickinson & Co, 486 US 196 (1988). And in *Ray Haluch Gravel Co v Central Pension Fund of the Int'l Union of Operating Eng'rs*, ___ US ___; 134 S Ct 773 (2014), the Supreme Court recently clarified that it makes no difference whether the attorney fees are being sought under a statute or contract (e.g., a contract provision awarding attorney fees to the "prevailing party").

So what about cases pending in Michigan courts? Does the same rule apply? Apparently not. While case law is sparse, it appears that the Michigan Court of Appeals has taken a different approach to finality when it comes to unresolved attorney fee issues. On the one hand, MCR 7.202(6)(a)(iv) provides that postjudgment orders "awarding or denying attorney fees or costs under MCR 2.403, 2.405, 2.625 or other law or court rule" are considered "final orders" that are separately appealable. Thus, a party should not wait to appeal the judgment or order deciding the merits of the case until after a statutory or court rule-based attorney fee issue is resolved. See *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005; 2005 WL 1278478, *3 (Docket No. 256144) (holding that the plaintiffs could not challenge the trial court's summary disposition decision because they did not timely appeal; although they did timely appeal from the trial court's postjudgment order awarding attorney fees and costs, the Court of Appeals held that its jurisdiction was limited to the postjudgment order).

On the other hand, the Court of Appeals has held that there is no final judgment if there is an unresolved claim for **contractual** attorney fees. In *TGINN Jets, LLC v Hampton Ridge Props, LLC*, unpublished opinion per curiam of the Court of Appeals, issued Aug 29, 2013; 2013 WL 4609208 (Docket Nos. 294622, 297844), the plaintiffs filed a lawsuit claiming breach of contract. Following a bench trial, the trial court found in favor of the plaintiffs and awarded damages. The trial court entered a judgment to that effect on March 25, 2009, and also determined that the plaintiffs were entitled to contractual attorney fees, "in an amount to be determined in future proceedings." *Id*. at *2. A separate opinion and order awarding attorney fees was entered on September 29, 2009, after which the defendants filed a claim of appeal.

On appeal, the plaintiffs argued that the Court of Appeals lacked jurisdiction "to consider any issues other than those relating to the award of attorney fees." *Id*. The Court of Appeals disagreed, finding that the March 25, 2009 judgment was not the final judgment because it "did not resolve the issue of contractual attorney fees, which was a distinct claim in plaintiffs' complaint." *Id*. Observing that "'[a]ttorney fees awarded under contractual provisions are considered damages, not costs'" under Michigan law, the Court held that the plaintiffs' claim for contractual attorney fees "was not resolved until the trial court issued its September 29, 2009, order establishing the amount of contractual attorney fees, making that order 'the first judgment or order that dispose[d] of all the claims' alleged in plaintiffs' complaint." *Id*. (citations omitted).

So what should practitioners take from all of this? In federal court, a postjudgment request for attorney fees is treated as a collateral "cost" issue that does not affect the finality of the decision on the merits, even if the attorney fees are being requested pursuant to a contract. But in Michigan, the Court of Appeals appears to distinguish between contractual attorney fees and those available under a statute or court rule. Thus, if a judgment on the merits has been entered in a case where a motion has been filed for contractual attorney fees, in all likelihood that judgment will not be considered final for purposes of appeal.

Important Amendments to the Federal Rules of Appellate Procedure

Effective December 1, 2016, the Federal Rules of Appellate Procedure have been amended. While the amendments are not extensive, there are a few worth noting:

- Elimination of the "3-day rule" such that 3 days are no longer added to deadlines for responding to electronically-served documents. (FRAP 26(c));
- Clarification that post-judgment motions must be filed within the time period allowed under the Federal Rules of Civil Procedure (generally 28 days) in order to toll the time period for filing an appeal. This means that filing a post-judgment motion within an extension of time granted by the district court will not toll the appeal deadline. This amendment resolves a circuit split on the issue. (FRAP 4(a)(4));
- New requirements for filing amicus briefs in connection with motions

In federal court, a postjudgment request for attorney fees is treated as a collateral "cost" issue that does not affect the finality of the decision on the merits, even if the attorney fees are being requested pursuant to a contract. But in Michigan, the Court of Appeals appears to distinguish between contractual attorney fees and those available under a statute or court rule.

for panel and *en banc* rehearing. These changes impact the deadlines for filing an amicus brief (and any required motion for leave) either in support of, or in opposition to, a petition for rehearing, as well the length limits for such briefs. (FRAP 29(b));

- Changes to the length limits for motions and case-initiating petitions. These documents used to be subject to page limits. Now they are subject to word limits, in the same manner as briefs. Most significantly, petitions (and responses) for permission to appeal are now limited to 5,200 words, and petitions for writs of mandamus and other extraordinary writs are limited to 7,800 words. (FRAP 5(c) and 21(d)). Motions and responses are limited to 5,200 words. (FRAP 27(d)).
- Reductions in the length limits for briefs. The appellant's and appellee's principal briefs are limited to 13,000 words (formerly 14,000 words), while reply briefs are limited to 6,500 words (formerly 13,000). (FRAP 32(a)(7)(B)(i) and (ii)). These limits are extended for combined appellee/cross-appellant briefs (15,300 words) and for combined cross-appellee/reply briefs (13,000 words). (FRAP 28.1(e)).
- Changes to the length limits for petitions for rehearing (both panel and *en banc*). Petitions for rehearing are limited to 3,900 words (formerly 15 pages). (FRAP 35(b) and 40(b)).

Endnotes

1 Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Picador 2010). Dr. Gawade's book is based on his 2007 article for *The New Yorker*, which is available here: http://www.newyorker.com/magazine/2007/12/10/the-checklist

2 *Id.* at 8.

3 *Id.*

4 James Hamblin, *Save a Brain, Make a Checklist*, The Atlantic, March 17, 2014. Available at: http://www.theatlantic.com/health/archive/2014/03/save-a-brain-make-a-checklist/284438/ (last visited December 4, 2016).

5 http://www.who.int/patientsafety/safesurgery/faq_introduction/en/#Q4

6 See Hamblin, *supra,* describing a controversial study reported in the *New England Journal of Medicine.*

7 Gawande, *supra*, at 11.

8 See http://www.ca6.uscourts.gov/sites/ca6/files/documents/forms/Briefs%20Checklist.pdf (last visited December 4, 2016).

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Legal Malpractice Update

Courts will review a plaintiff's underlying claims for frivolousness individually when determining whether an award of attorney fees and costs to the prevailing party is appropriate pursuant to MCL 600.2591. Where each claim is frivolous, an award of all fees and costs incurred in the matter may be justified.[1]

Law Offices v First Merit Bank, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2016 (Docket Nos. 328197; 328699); 2016 WL 6781558.

Facts: Plaintiff entered into a loan agreement with First Merit Bank and gave it two promissory notes, one of which was secured by a mortgage on real property purchased and used as the situs of plaintiff's law office. After a default on the notes, the bank filed a collection action and initiated foreclosure proceedings in circuit court. Plaintiff filed counterclaims based on various tort, contract, and statutory theories. The foreclosure went through and the bank purchased the property at a sheriff's sale. Plaintiff law office did not redeem the property, but failed to vacate.

The bank then filed a district court action for summary possession to remove plaintiff from the property. The bank succeeded and the district court issued an order declaring that the sheriff's sale was valid and the bank was entitled to possession. The district court authorized an attorney and a court officer (also defendants) to assist in removing the tenant and restoring the possession of the property to the bank, which was accomplished shortly after issuance of the order.

Plaintiff sought leave to appeal the district court ruling. At that time, the bank's claims as well as plaintiff's counterclaims were still pending in the circuit court action. The circuit court ultimately denied leave to appeal the eviction, awarded summary disposition to the bank, and dismissed plaintiff's counterclaims.

Notwithstanding the full litigation of the propriety of the foreclosure and eviction, plaintiff filed a new circuit court suit against the bank, attorney, law firm, court officer, and law office alleging forcible ejectment and unlawful detainer, trespass, abuse of process, tortious interference with business relationships, defamation, and conversion. The circuit court dismissed each claim on defendants' motions for summary disposition. The circuit court also found that plaintiff's claims were frivolous and awarded all of the defendants their attorney fees and costs. Plaintiff appealed the decision.

Ruling: The Court of Appeals first dismissed plaintiff's argument that the circuit court judge should have recused himself because the same judge had a role in the eviction matter. The Court of Appeals was quick to point out that the judge only heard the eviction matter pursuant to the circuit court's appellate jurisdiction and dismissed plaintiff's motion for leave to appeal on procedural grounds. In doing so, the Court rejected plaintiff's argument that the judge's "rulings in his appellate capacity (and on procedural grounds) indicate[d] that the judge must have formed beliefs about the merits of the current action that cannot be set aside." The Court reasoned that a trial court's acquaintance with a party's prior history is not indicative of bias or prejudice requiring recusal. And because there was no other evidence of actual impropriety or the appearance of impropriety, the judge had no obligation to recuse himself.

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The circuit court also found that plaintiff's claims were frivolous and awarded all of the defendants their attorney fees and costs.

Next, the Court addressed each of plaintiff's claims and the circuit court's award of attorney fees and costs. In doing so, the Court looked at each claim individually. As to the forcible ejectment and unlawful detainer claim, the Court held it was frivolous because the bank ejected plaintiff only pursuant to court orders. Plaintiff was aware of those orders when it filed its complaint, asserting the eviction was "without a court order and without notice." These claims were "devoid of legal merit and factually untrue," making the claim frivolous. The same applied to plaintiff's trespass claim. Plaintiff knew that defendants were authorized to enter the premises, and therefore could not trespass. The Court found plaintiff's abuse-of-process claim equally deficient because it "lacked sufficient facts to establish any ulterior motive," which is required for such a claim. Because "[o]n its face, the bank's motive for obtaining the eviction order was to regain possession of the property securing a promissory note that was in default," the claim was frivolous. The bank's legitimate motive also dismantled plaintiff's intentional-interference-with-business-relations claim. That claim required a showing that "defendants acted both intentionally and either improperly or without justification." Defendants had not acted improperly, but only pursuant to court order. Further, as to plaintiff's defamation claim, the court found that "plaintiff does not identify any oral or written statement made by any defendant." Without any such allegation, the claim was frivolous and failed to allege the required elements. Finally, plaintiff's conversion claim was similarly deficient. The claim required a showing that the bank wrongfully used plaintiff's personal property for the bank's own personal interest. The only arguable "use" of plaintiff's property was when the bank removed it from the premises—but this was lawful and consistent with the bank's rights pursuant to court order, and thus could not establish conversion.

Finally, the Court of Appeals held that all of the fees awarded were reasonable. This included $10,399.88 for the court officer and law office, $15,074 for the bank, and $56,814 for the attorney and law firm. The Court held that the award for the attorney and law firm was justified as their counsel also became co-counsel for the bank. The court found that the rates were reasonable, and relied on testimony that the first counsel for the bank and counsel for the attorney and law firm shared information in order to reduce costs.

A denial of an application for leave to appeal for "lack of merit in the grounds presented" is tantamount to a decision on the merits. Such a decision will sever the proximate-cause element of a legal-malpractice claim based on failing to timely file an appeal of right.[2]

MacDowell v Attorney and Law Firm, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2016 (Docket No. 328902); 2016 WL 4468714.

Facts: Attorney represented plaintiff in his divorce, with a trial occurring in January 2013. A written opinion was issued in February 2013, and a judgment of divorce was entered on May 6, 2013. Plaintiff asserted that attorney didn't advise him of the judgment until the end of June 2013, after the time for filing an appeal of right had passed. The attorney filed an application for leave to appeal, which was denied "for lack of merit in the grounds presented." Plaintiff asserted the failure to inform him of the judgment prior to the time to file an appeal of right constituted malpractice because it cost him the ability to file such an appeal. Defendants argued, and the trial court agreed that, because the Court of Appeals denied the application "for lack of merit in the grounds presented," the appeal would not have been successful. As a result, plaintiff could not show that but for the attorney's actions, he would have succeeded on appeal. Plaintiff appealed that ruling.

Ruling: The Court of Appeals affirmed the trial court's ruling. The Court upheld the legal principle that "denial of an application 'for lack of merit in the grounds presented' is a decision on the merits of the issues raised." Such a decision was "tantamount to a decision on the merits of the arguments which would have been raised in a timely filed appeal of right." The Court pointed out that the issues raised in the denied application for leave to appeal were the same issues that plaintiff would have asserted in a timely filed brief in an appeal of right. And because those same issues were denied "for lack of merit in the grounds presented," plaintiff couldn't establish that defendants' failure to file a timely appeal of right proximately caused his injury.

Practice Note: A decision on the merits of an application for leave to appeal may prevent an adversely affected client from successfully pursuing a malpractice claim. This is particularly true when an appeal of right is not

Next, the Court addressed each of plaintiff's claims and the circuit court's award of attorney fees and costs. In doing so, the Court looked at each claim individually.

timely filed and an application for leave to appeal is denied "for lack of merit in the grounds presented."

Endnotes

1 The authors acknowledge the valuable assistance of Jason M. Renner, a former associate of the firm.

2 The authors acknowledge the valuable assistance of Joshua N. Brekken, an associate of the firm.

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Medical Malpractice Report

A New Twist on *Daubert* May Allow Novel Opinions

Figurski v Trinity Health-Michigan, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2016 (Docket No. 318115); 2016 WL 4069459.

Facts: In *Figurski*, plaintiff newborn was diagnosed with a perinatal arterial ischemic stroke (PAIS) that plaintiff alleged was part of a global hypoxic ischemic brain injury resulting from mismanagement of labor and delivery. The latent or inactive phase of labor (contracting) lasted 29 hours, followed by two hours of active (pushing) labor. Labor was augmented with the drug Pitocin, which plaintiff claimed caused tachysystole from hyperstimulation of the uterus. Tachysystole occurs when too many contractions take place in a specific period of time, over a prolonged portion of the labor.

Plaintiff's theory was that trauma to the fetus, including compression of the head from contracting, caused the PAIS and global hypoxic ischemic brain injury. Mother was diagnosed with chorioamnionitis (an infection of the placenta) and there was meconium (in *utero* bowel movement) discovered after the baby was born via C-section. Although the child was described as a healthy, 9 lb. 3 oz. boy, he began having seizures shortly after birth. A CT scan showed a stroke that was "hours to days" old.

Plaintiff alleged that a brain injury resulted from traumatic head compression or regional cerebral edema resulting from failure of the baby to descend down the birth canal, macrosomia (large baby), excessive contractions related to Pitocin with trauma augmented by the failure to descend, hypoxic ischemic injury resulting from uteroplacental insufficiency, and (umbilical) cord compression. Plaintiff also alleged that the obstetrician and labor-and-delivery personnel breached the standard of care in their use and management of Pitocin; by failing to respond to changes in the heart rate demonstrated on the fetal heart tracing; and by failing to timely perform a C-section.

Perinatology and neonatology physician Carolyn Crawford, M.D., signed an affidavit of merit on behalf of plaintiff. Dr. Crawford's affidavit listed a number of risk factors for the injuries sustained by the child that she believed contributed to, or accounted for, the outcome. At deposition, Dr. Crawford testified that she believed head compression or other head trauma occurred during labor and caused the PAIS. She also testified that she believed the child suffered a global hypoxic ischemic injury that included the stroke. She opined that the global hypoxic ischemic injury also occurred secondary to the effects of mismanagement of Pitocin, tachysystole from uterine hyperstimulation, and resultant trauma to the fetal head.

Before trial, defendant brought two motions in limine. One was to preclude a claim for global hypoxic ischemic injury secondary to trauma, on the basis that, other than the PAIS, no other brain injury was diagnosed. Defendant also contended that there was no scientific basis to support Dr. Crawford's opinion that hypoxic ischemic injuries result from head compression or trauma related to the use of Pitocin and the forces of labor. Defendant relied *Craig v Oakwood Hospital*[1] since the Michigan Supreme Court rejected an almost identical theory of recovery in that case.

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Pending any further action by the Michigan Supreme Court, *Figurski* is a case in which a plaintiff can pursue a novel theory of causation.

Defendant filed a separate motion in limine and/or for partial summary disposition to preclude a claim that intrapartum care caused the stroke. Analogous arguments were made in support of that motion. In addressing the PAIS specifically, defendant asserted that it was uncontested that the baby had such a stroke. Defendant requested that the court preclude plaintiff from offering opinions regarding the cause of the stroke, on the basis that there were no medically recognized causes of PAIS. Defendant further averred that Dr. Crawford did not offer a reliable scientific opinion to support her theories regarding its cause. Defendant contended even assuming *arguendo* that risk factors can equate to causation, Dr. Crawford's statistics on risk factors and outcomes were unreliable and were contradicted in the published medical literature.

In response to defendant's motions, plaintiff submitted another affidavit from Dr. Crawford and attached 51 exhibits consisting of published articles that allegedly supported Dr. Crawford's opinions and theories on the issues in question. The trial court took both motions under advisement, but rather than render a detailed written opinion, the trial court ordered a *Daubert*[2] hearing. Dr. Crawford testified at the *Daubert* hearing and discussed the articles attached to her second affidavit. Dr. Crawford dismissed literature presented by defendant on cross-examination as immaterial or "politically motivated" to protect physicians.[3]

Following the *Daubert* hearing, the court again took the motions under advisement and ultimately rendered a written opinion. The trial court held that there was no reliable basis for Dr. Crawford's opinions and that they did not pass muster under *Daubert*. The court found there was no support for plaintiff's claims of perinatal malpractice and granted partial summary disposition as to those claims. The trial court excluded Dr. Crawford's opinions on causation, including plaintiff's theory that a global hypoxic ischemic injury occurred during labor.

Plaintiff sought leave to appeal with the Michigan Court of Appeals, asserting that the trial court abused its discretion in striking plaintiff's expert witness and dismissing his theory of perinatal malpractice. The Court of Appeals issued an initial unpublished *per curiam* opinion on March 5, 2015, reversing the trial court. Therein, the Court of Appeals relied heavily upon its opinion in *Elher v Misra*.[4]

Defendant sought leave to appeal to the Michigan Supreme Court. On April 1, 2016, the Michigan Supreme Court issued an order in lieu of granting leave to appeal. Therein, it vacated substantial portions of the Court of Appeals' opinion and remanded the case back to the Court of Appeals for reconsideration in light of the Supreme Court's reversal of *Elher*.[5]

Sections IV.A, B & C of the Court of Appeals' March 5, 2015 opinion were not vacated by the Michigan Supreme Court. Those sections of the original Court of Appeals' opinion described the proceedings during the defense motions in limine, as well as the subsequent *Daubert* hearing. With reference to the motions in limine, the original Court of Appeals' opinion explained plaintiff's position that the child suffered one injury, which included a PAIS. The defense was described as positing that a fetus cannot suffer a stroke from "traumatic" uterine contractions or other forces of labor.

As to the *Daubert* hearing, the Court of Appeals illustrated Dr. Crawford's testimony at length, and prominently cited the literature she produced. Notably, Dr. Crawford admitted there was no direct support in the literature for her causation theories. Rather, she relied on portions of information from various literary sources to parse together scientific support for her opinions. The Court of Appeals also described several interesting interactions between plaintiff's counsel and the trial court judge.

The last section of the original Court of Appeals' opinion preserved by the Michigan Supreme Court was its description of the trial court's opinion after taking the issues raised at the *Daubert* hearing under advisement. Specifically, that a lengthy written opinion was issued which addressed the literature and potential scientific bases for Dr. Crawford's opinion. The Court of Appeals remarked that the trial court rejected most of the opinions and the literature, but had failed to perform a detailed analysis under MCL 600.2955.[6]

Ruling: On July 28, 2016, the Court of Appeals issued its second unpublished *per curiam* opinion in *Figurski*. In many respects, the Court of Appeals essentially reiterated its prior opinion of March 5, 2015, but without reliance upon the now-reversed Court of Appeals' decision in *Elher*.[7] The Court of Appeals also distinguished the *Figurski* and *Elher* cases, in upholding its prior decision that Dr. Crawford's opinions and theories should not be excluded. Defendant filed an application for leave to appeal to the

The trial court excluded Dr. Crawford's opinions on causation, including plaintiff's theory that a global hypoxic ischemic injury occurred during labor.

Michigan Supreme Court on September 7, 2016. That application is currently pending.

The Michigan Court of Appeals addressed the vacated portion of its prior opinion with reference to the standard of review applicable to a trial court's decision on the admission or exclusion of expert testimony. It held that a dual standard of review applied.

With reference to whether the trial court properly performed its gatekeeping function, the applicable standard of review was held to be *de novo* under *Gilbert.*[8] If the trial court properly performed the gatekeeping role, the Court of Appeals then applies an abuse of discretion standard to the trial court's decisions to admit or exclude the evidence at issue. In its July 28, 2016 opinion, the Court of Appeals restated this dual standard, but in a much more concise fashion. It also relied on the Supreme Court's decision in *Elher* for application of those standards.

With reference to the law applicable to expert testimony, the Court of Appeals framed the issue as a controversy surrounding the cause of the PAIS. Plaintiff attributed the stroke to trauma during labor. Defendant asserted that the stroke was unrelated to the labor, and that there was no reliable information pointing towards a specific cause of PAIS in newborns. With reference to the allegations that the child suffered a global hypoxic ischemic injury, plaintiff relied upon the opinion of Dr. Crawford. Defendant asserted there was never any diagnosis of global hypoxic ischemic injury.

The Court of Appeals provided a lengthy dissertation on the evolution of law surrounding the admissibility of expert opinions. This included discussion of MRE 702,[9] the emergence of *Daubert* based on the prior standard annunciated in *Davis-Frye,*[10] and the subsequent history of the *Daubert* case. The Court of Appeals extensively defined many terms, sometimes inappositely. The Court of Appeals also looked to the *Kumho Tire*[11] case in which the United States Supreme Court applied *Daubert* standards to non-scientific expert testimony. The Court of Appeals accurately described the enactment of MCL 600.2955 as "in response to" the *Daubert* and *Kumho* opinions.

The Court of Appeals' opinion discusses the import of MCL 600.2955 in vetting expert opinions, but the Court's analysis is rather scant. The opinion doesn't provide application of the elements of the statute to the facts of *Figurski*. The opinion continues the historical discussion of law relating to expert testimony by referencing *Gilbert v. Daimler Chrysler*[12] at length. Notably, the *Gilbert* decision was primarily one that addressed qualifications of an expert to address issues and secondarily, the scientific bases for the expert's opinions.

The Court of Appeals' opinion also discusses the *Craig* case extensively, including *Craig's* application of the old *Davis-Frye* standard. Even though the facts and proposed expert opinions in *Craig* were closely analogous to *Figurski*, the Court of Appeals' opinion goes to great lengths to distinguish *Craig* in the context of subsequent developments in the law. (Notably, those developments have made the admission of novel scientific theories more restrictive, not less so.)

The Court of Appeals also relied upon its opinion in *Chapin v A&L Parts, Inc.,*[13] in which the plaintiff allegedly suffered from mesothelioma after working as an automotive-brake mechanic for 45 years. The Court of Appeals relied on *Chapin* for the proposition that the trial court cannot conduct its own "mini trial" of a case since a *Daubert* vetting of expert testimony is "not a search for absolute truth." According to *Chapin*, the role of the trial court is to filter out unreliable testimony while keeping in mind the evolving nature of science.

Finally, the Court of Appeals discussed *Edry v Adelman,*[14] in which an oncologist's expert testimony was stricken on the basis that there was no published literature to support his opinions, or any general acceptance of his causation theories. The Court of Appeals pointed out that in *Edry*, there was neither literature nor general acceptance of the expert's theories. But in *Figurski*, the Court of Appeals was impressed that Dr. Crawford produced numerous articles and offered extensive testimony regarding the alleged acceptance of her theories in the scientific community.[15]

The Court of Appeals concluded that the trial court judge had far exceeded her role as gatekeeper and rather than decide issues related to expert opinions, decided the issue of proximate causation itself. The Court of Appeals was critical that the judge looked primarily at the conclusions of plaintiff's expert, and not the way in which those conclusions were reached. The Court of Appeals also cited other analogous expert testimony from other (unpublished) Court of Appeals' opinions in which it endorsed the theory that head compression can cause fetal injury.

The Court of Appeals' opinion

Notably, Dr. Crawford admitted there was no direct support in the literature for her causation theories. Rather, she relied on portions of information from various literary sources to parse together scientific support for her opinions.

describes its consideration of the Michigan Supreme Court's pronouncement in *Elher*. Even in light of *Elher,* the Court of Appeals still concluded that the trial court erred in granting defendant's motion in limine to exclude plaintiff's causation expert and dismissing the claims of perinatal malpractice.

The Court of Appeals distinguished the facts of *Elher* from the case before it in several respects. For instance, the *Elher* opinion dealt with an expert being offered on the issue of standard of care whereas, in *Figurski*, the expert was offered on the issue of proximate causation. In *Elher*, the plaintiff's expert offered his personal definition of the standard of care, a fact not present in the *Figurski* case. In *Elher*, the plaintiff's expert offered no literature whatsoever to support his opinions, whereas Dr. Crawford produced massive amounts of literature that she testified formed the basis for her opinions. In *Elher*, there was significant literature that contradicted the opinion of the plaintiff's expert.[16] In the *Figurski* case, some literature was produced by the defense that contradicted Dr. Crawford's opinions or at least shed doubt upon them. The Court of Appeals commented that the defendant produced nothing directly or specifically contrary to Dr. Crawford's opinions.[17] Also, in *Elher,* the defense produced expert testimony that contradicted the opinions of the plaintiff's proposed expert, whereas, in *Figurski*, no defense expert was produced at the time of the *Daubert* hearing.

Based upon these distinctions from the *Elher* case, and after eliminating any reliance on the Court of Appeals decision in *Elher*, the conclusion was that Dr. Crawford's testimony should be admitted and plaintiff could pursue recovery based upon a theory of perinatal malpractice. Although the July 28, 2016 opinion is unpublished and therefore not precedential, it may prove in certain venues to be persuasive with reference to the admission of novel theories of causation or even liability.

Summary: Pending any further action by the Michigan Supreme Court, *Figurski* is a case in which a plaintiff can pursue a novel theory of causation. Careful review of the original *Figurski* Court of Appeals' opinion of March 5, 2015, makes it clear that, while Dr. Crawford believes in her theory of causation, she struggled to explain how the literature directly supports it. Dr. Crawford herself admitted that none of the literature she produced expressly supports her theory, but that piecing together portions of the literature created peer-reviewed support for her opinion.

The Michigan Supreme Court must first decide whether to grant or deny leave to appeal. If leave is granted, the Supreme Court's substantive decision in *Figurski* will be important. Should the Court of Appeal's decision be affirmed, this means our Supreme Court endorses piecing together literature to bolster the essence that opinions pass the "peer reviewed" test. If the basis for an expert opinion passes "peer reviewed" muster in this fashion, a plaintiff can argue that the opinion has general acceptance within the relevant expert community. Almost any novel theory of liability or causation could be "supported" by piecing together enough portions of published literature. That outcome would be dire in light of the fact that it would seem to contradict the long history of case law pertaining to expert testimony, the intent of MRE 702, and more importantly, the history and progeny of MCL 600.2955.

Figurski indirectly provides some practical tips that may be useful in analyzing expert testimony offered on behalf of a plaintiff or to be offered on behalf of a defendant: Recognize what issue or issues the expert is actually qualified to discuss (standard of care, proximate cause, or both). Attempt to obtain any literature that forms the basis of a plaintiff expert's opinion before the expert's discovery deposition. Ask the expert to cite to any literature that supports their opinion during the deposition regardless of whether the expert considers the literature to be authoritative, generally reliable, or neither. If an expert testifies that he or she is unaware of the existence of any peer-reviewed literature that supports the offered opinions, this may be helpful in a future attempt to exclude the expert's opinions. Pursue this testimony with some follow-up questions to further establish the lack of literature and/or general acceptance in the relevant expert community.

It is advisable to discuss at length with your own expert any literature identified by the other side. It is important to become very familiar with the literature upon which a plaintiff will allegedly rely, and ask your expert (and your client) to provide literature that supports the defense position on standard of care and proximate causation. If the trial court conducts a *Daubert* hearing, thoroughly argue the weaknesses of the opponent's literature. In *Figurski*, it was clear that the defendant made the trial judge aware that none of the literature produced by Dr. Crawford directly supported her

The Court of Appeals also distinguished the *Figurski* and *Elher* cases, in upholding its prior decision that Dr. Crawford's opinions and theories should not be excluded.

opinions. This forced Dr. Crawford to explain that the literature had to be "pieced together" to support her opinions; a fact that must be addressed in the setting of a *Daubert* hearing.

Depending upon the circumstances, it may be beneficial to produce defense experts to respond to expert opinions offered by a plaintiff at the hearing. Make sure any defense experts not only address the literature that supports the defense position, but literature produced by a plaintiff that contradicts his or her own theories. In addition to arguing the point, have your expert testify that piecing together (or cherry picking) literature from several sources is not how scientific theories gain general acceptance in the relevant expert community. Last, but not least, recognize that your opponent may be purposefully attempting to create bias on the part of the trial judge in order to claim bias at an appellate level. Attempt to diffuse any bias that an impatient or frustrated trial judge may be demonstrating so as to prevent issues unrelated to the substance of the expert testimony from gaining any significance.

Endnotes

1 471 Mich 67; 684 NW2d 296 (2004).

2 *Daubert v Merrell Dow Pharm, Inc,* 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

3 Some experts who testify on behalf of plaintiffs in so-called "birth trauma" cases espouse the belief that the American College of Obstetricians and Gynecologists (ACOG) is strictly a political-action organization or lobby, as opposed to a professional association.

4 308 Mich App 276; 870 NW2d 335 (2014).

5 On February 8, 2016, the Michigan Supreme Court reversed the *Elher* opinion and held that expert opinions cannot be based on personal beliefs, especially when there is no evidence of general acceptance within the relevant expert community and no peer-reviewed medical literature supporting the opinion. In *Elher* the defendants presented contradictory peer-reviewed medical literature. The Michigan Supreme Court in *Elher* determined that the trial court did not abuse its discretion in excluding the expert. 499 Mich 11; 878 NW2d 790 (2016). The Supreme Court decision in *Elher* was discussed in 32-4 Mich Defense Quarterly, *Medical Malpractice Report: An Expert's Standard of Care Opinion in Med-Mal Cases is Inadmissible When Based Solely on that Expert's Personal Beliefs*, pp. 42-44 (2016).

6 MCL 600.2955 provides:

(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

7 For this reason, our discussion of the Ruling includes information from both of the Court of Appeals' unpublished opinions.

8 *Gilbert v Daimler Chrysler Corp*, 470 Mich 749; 685 NW2d 392 (2004).

9 Michigan Rule of Evidence 702 provides:
Rule 702 Testimony by Experts
If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

10 *People v Davis*, 343 Mich 348; 72 NW 2d 269 (1955); *Frye v United States,* 54 App DC 46; 293 F 1013, 1014 (1923).

11 *Kumho Tire Co Ltd v Carmichael*, 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999).

12 See endnote 8.

13 274 Mich App 122; 732 NW2d 578 (2007).

14 486 Mich 634; 786 NW2d 567 (2010).

15 The March 5, 2015 Court of Appeals' opinion also relied extensively on the 2014 opinion in *Elher v Misra*, subsequently reversed by the Michigan Supreme Court, and the impetus for the Supreme Court's April 1, 2016 order vacating the defendant's application for leave to appeal. *See* 308 Mich App 276; 870 NW2d 335 (2014).

16 The plaintiff's expert in *Elher* testified that a common bile duct injury occurring during laparoscopic cholecystectomy is "always" malpractice. Even the majority of plaintiff general surgery experts did not share this "purist" view. The medical literature is replete with references to common bile duct injury being a recognized complication of the laparoscopic cholecystectomy procedure, which can occur despite adherence to the standard of care in performing the surgery.

17 Which, notably, essentially proves defendant's point. That is, there is no literature that directly supports Dr. Crawford's theories. Consequently, why would anyone bother to research and publish about an alternate or contradictory theory to a non-existent one?

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No-Fault Report

Dismissal of PIP Claim Based on *Bahri* … Was It Really Fraud or Just a Mistake?

With its decision in *TBCI Inc v State Farm*, 289 Mich App 39, 795 NW2d 229 (2010), the Court of Appeals took its first significant step toward applying a fraud exclusion in a no-fault insurance contract to bar an entire claim for no-fault benefits. In that case, the underlying claimant had submitted a claim for attendant-care-service benefits, and in the context of the claimant's own suit for PIP benefits, the jury affirmatively determined that the claim was fraudulent. After the claimant's trial, one of his medical providers, TBCI Inc., filed its own separate cause of action to recover payment of the medical expenses incurred by the underlying claimant. In defense, State Farm relied upon the fraud exclusion contained in the claimant's insurance policy and argued that, pursuant to that exclusion, the claimant was no longer entitled to recover any benefits under the insurance contract. State Farm further argued that, because the medical provider was "in privy" with the underlying claimant, the medical provider's claim for payment of medical expenses was likewise barred. Applying the principles of *res judicata*, the Court of Appeals affirmed the dismissal of the provider's cause of action, based on State Farm's fraud exclusion. Unfortunately, the effect of the Court of Appeals' decision in *TBCI* was limited because *TBCI* involved two separate proceedings – an affirmative finding of fraud by the trier of fact in the first proceeding, and a subsequent claim by a medical provider in a second proceeding to recover said expenses.

The Court of Appeals finally put some teeth into the insurer's fraud exclusion when it released its seminal decision in *Bahri v IDS Property Casualty Ins Co*, 308 Mich App 420, 864 NW2d 609 (2014). *Bahri* marked the first time the Court of Appeals applied an insurer's fraud exclusion in a **pending action** to dismiss an entire claim for no-fault benefits. In *Bahri*, plaintiff was involved in a motor-vehicle accident on October 20, 2011. As part of her claim, she submitted a claim for household-replacement-service expenses dating back to October 1, 2011 – three weeks before her involvement in the subject accident! Furthermore, surveillance revealed that plaintiff was fully capable of performing many of the activities for which she was seeking compensation under her household-replacement-service claim. Given these facts, the Court of Appeals had no problem concluding that such claims were fraudulent on their face:

> We agree with the trial court that the fraud exclusion applied in the instant case. In order to substantiate her claims for replacement services, plaintiff presented a statement indicating that services were performed by "Rita Radwin" from October 1, 2011, through February 29, 2012. Because the accident occurred on October 20, 2011, on its face, the document plaintiff presented to defendant in support of her PIP claim is false, as it sought recoupment for services that were performed over the 19 days preceding the accident. [*Bahri*, 308 Mich App at 425.]

Furthermore, to the extent that the surveillance videos contradicted the information contained on the household-replacement-service forms, the Court of

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Bahri marked the first time the Court of Appeals applied an insurer's fraud exclusion in a pending action to dismiss an entire claim for no-fault benefits.

Appeals likewise had no problem concluding that the entire claim was barred by virtue of the fraud exclusion in defendant's insurance policy:

> This evidence belies plaintiff's assertion that she required replacement services, and it **directly and specifically contradicts** representations made in the replacement services statements. **Reasonable minds could not differ in light of this clear evidence that plaintiff made fraudulent representations for purposes of recovering PIP benefits.** Stated differently, we find no genuine issue of material fact regarding plaintiff's fraud. **Because plaintiff's claim for PIP benefits is precluded, intervening plaintiffs' claim for PIP benefits is similarly barred, as they stand in the shoes of plaintiff. [***Bahri*, 308 Mich at 426 (emphasis added; citation omitted).]

Significantly, it was plaintiff's fraudulent household-replacement-service-claim forms that barred her **medical provider's claims** for payment of the medical expenses incurred by plaintiff, as a result of the injuries suffered in the subject accident. Interestingly, it was the intervening plaintiffs/medical providers who were the actual appellants in that litigation – not the injured plaintiff!

After *Bahri*, the Court of Appeals has subsequently issued multiple unpublished opinions that have affirmed the dismissal of the plaintiff's **entire cause of action** in light of a fraudulent claims submission. For example, in *Ward v State Farm*, unpublished opinion per curiam of the Court of Appeals, issued September 15, 2016 (Docket No. 327018); 2016 WL 4954184, plaintiff submitted a claim for no-fault benefits with her insurer, State Farm, arising out of a motor vehicle accident that occurred on September 29, 2013. Specifically, she submitted a claim for household-replacement-service expenses under MCL 500.3107(1)(c), and in support, she submitted forms that were allegedly filled out by the service provider, Ashley Wutzke. She also submitted a claim for work-loss benefits, on the basis that she was unable to continue her employment at a day-care center due to the injuries suffered in the subject accident. However, the service provider, Ashley Wutzke, testified that she never performed household chore services during the period of time referenced in the claim forms, and the documentary evidence obtained from plaintiff's employer showed that she had been discharged due to employee misconduct. The lower court granted defendant's motion for summary disposition pursuant to *Bahri* and the plaintiff appealed.

In affirming the decision of the lower court to dismiss plaintiff's **entire cause of action**, the Court of Appeals stated:

> Plaintiff also contends that the trial court improperly made a credibility determination when it allegedly credited the deposition testimony of the purported service provider and discredited plaintiff's testimony. Plaintiff testified that her friend, Ashley Wutzke, came to her home literally every single day from September 30, 2013, until February 2, 2014, to perform services, such as cleaning, washing, and driving plaintiff. But when deposed, Wutzke testified that she **never** cleaned plaintiff's home and only took plaintiff shopping and drove her to appointments. While "[t]he court is not permitted to assess credibility, or to determine facts on a motion for summary judgment," [citation omitted], it is clear that reasonable minds would find this blatant inconsistency fatal to plaintiff's claim, see *Bahri*, 308 Mich App at 425-426 (holding that "reasonable minds could not differ in light" of evidence that clearly contradicted the plaintiff's assertions that she required replacement services).
>
> Moreover, assuming *arguendo* that the above, clear dichotomy between plaintiff's testimony and Wutzke's testimony is insufficient under a motion for summary disposition to show that plaintiff made a false statement in an attempt to conceal a material fact from defendant, plaintiff also made other statements that warrant judgment in favor of defendant. Plaintiff asserted that she was entitled to wage-loss benefits because, although she did not want to, she "had to" leave work "because of the accident." But the documentary evidence contradicts plaintiff's assertion. Defendant produced plaintiff's records from her daycare

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employer, which described a series of warnings for the failure to adhere to company policy that ultimately led to her termination. Due to this clear documentary evidence, reasonable minds could not differ on the conclusion that plaintiff made a false statement with the intent to conceal a material fact from defendant in relation to her wage-loss claim. See *id*. Therefore, pursuant to the contract's plain terms, "[t]here is no coverage under th[e] policy," and defendant was entitled to summary disposition. **Notably, *all* coverage is forfeited under the policy if a false statement was made "in connection with *any* claim under this policy."** (Emphasis added.) **Therefore, plaintiff's false statement in connection with her wage-loss claim voids all coverage under the policy, including her claim for medical benefits.**

> Accordingly, were we to hold that the trial court impermissibly engaged in making credibility determinations when it ruled that plaintiff's statement that Wutzke provided replacement services was false, we affirm on the alternate ground that plaintiff made a demonstrably false statement—based on documentary evidence instead of mere conflicting testimony—related to why she was terminated from her job. [*Ward*, slip opinion at pp 4-5 (italics in original, emphasis added).]

Importantly, the Court of Appeals emphasized that the insurer's evidence of fraud must "directly and specifically contradict" the claims that were presented by the plaintiff, before the fraud exclusion would be triggered.

In *Thomas v Frankenmuth Mut'l Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2016 (Docket No. 326744); 2016 WL 3718352, the Court of Appeals likewise dismissed plaintiff's entire cause of action, based upon a fraudulent claim for transportation-service expenses. In that case, plaintiff was injured in a motor vehicle accident on July 6, 2013. Plaintiff's treating physician, Dr. James Beale, M.D., instructed plaintiff not to drive for six months. In his deposition, plaintiff denied that he ever drove an automobile at any time during this six-month period. However, surveillance conducted by Frankenmuth showed that plaintiff was driving a vehicle on two separate occasions while, at the same time, using non-emergency medical transportation on those very same days. After suit was filed, Frankenmuth moved for summary disposition pursuant to the language of its fraud exclusion, set forth in the policy. The lower court granted the insurer's motion for summary disposition based on *Bahri, supra,* and plaintiff appealed.

On appeal, the Court of Appeals likewise affirmed the decision of the court below to dismiss plaintiff's cause of action in its entirety. As noted by the Court of Appeals:

> *Bahri* compels a similar conclusion in this case. Plaintiff's claim for PIP benefits involves, in large part, a claim for transportation services due to his purported inability to drive. Yet plaintiff was observed driving his car multiple times on the same day he availed himself of medical transportation services. Further, when offered a chance to perhaps explain why he drove on that particular day, plaintiff instead represented multiple times that he had not driven at all during the relevant time period. These representations were thus "reasonably relevant to the insurer's investigation of a claim." *Bahri*, 308 Mich App at 425. Plaintiff's argument that *Bahri* is distinguishable because *Bahri*, in part, involved claims for replacement services that had not actually been provided, is unavailing. The *Bahri* Court specifically noted that the surveillance belied the plaintiff's assertion that she needed help with the tasks she was observed performing without help, including revealing that she was driving on a day that she stated that she required transportation assistance. *Id*. at 425-426. The fact that plaintiff in this case in fact actually availed himself of transportation services on the day he was observed does not defeat the fact that he was observed performing an activity "inconsistent with [his] claimed limitations" on a day that he asserted he required transportation. *Id*. at 425. Further, we also find unpersuasive plaintiff's argument that his repeated assertions during his deposition that he did not drive

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> were innocent mistakes. If they were not knowing misrepresentations, then they were certainly reckless ones, in the face of the proof that he drove his car at least twice on the same day he availed himself of transportation services. [*Thomas*, slip opinion at p 3.]

Once again, the insurer prevailed because its surveillance "directly and specifically contradicted" a claim actually presented by plaintiff; namely, a claim for transportation services.

Finally, in *Diallo v Nationwide Mut'l Fire Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2016 (Docket No. 328639); 2016 WL 6780735, plaintiff was injured in a motor vehicle accident that occurred on July 2, 2013. Plaintiff subsequently presented a claim for household-replacement-service expenses through August of 2014. However, from April 2014 through August 2014, plaintiff was in Europe while her husband/service provider remained at home. Upon discovering the fraud, defendant moved for summary disposition under *Bahri*, which was granted by the circuit court.

On appeal, the Court of Appeals again affirmed the dismissal of plaintiff's cause of action, relying on *Bahri*. In this case, the Court of Appeals commented on how similar the facts in this case were to *Bahri*, when it noted:

> The facts of the present case reveal that plaintiff submitted claims for household replacement services for every day from April 1, 2014, through the end of August of 2014. Those forms list the address as plaintiff and Sarr's [plaintiff's husband] home address. The forms in question were all signed by Sarr. The forms indicate that there were "multiple providers" but only listed the names of Sarr and Khallo Diallo, plaintiff's mother.
>
> It is further undisputed that during the months of April, May, June, July and part of August, plaintiff was in Europe. It is also undisputed that Sarr and Khallo were not in Europe during those times …. [*Diallo*, slip opinion at p. 4.]

Given the fact that the person receiving the services was an entire continent away, the Court of Appeals had no difficulty concluding that plaintiff's entire cause of action should be dismissed.

> Accordingly, on this record, we are presented with a strikingly similar case to *Bahri*. Here, as in *Bahri*, it was physically impossible for the household replacement services to be performed in the manner outlined in the submitted claims. In *Bahri*, there were claims made for replacement services that were impossible to exist because the claimed days occurred before the accident that allegedly caused the injuries occurred. In the present case, household services claims were submitted by Sarr when he was undisputedly in Michigan and plaintiff was undisputedly in Europe. Further, both plaintiff and Sarr provided sworn testimony that the submitted replacement service forms reflected that Sarr actually performed the services that were claimed. Quite frankly and simply, that was impossible because Sarr and plaintiff were on different continents, an ocean away from one another. [*Diallo*, slip opinion at p. 5.]

Again, the Court of Appeals was able to reach this result because the evidence obtained by the Defendant "directly and specifically contradicted" a claim that had been presented by the underlying Plaintiff.

By contrast, where the insurer fails to show a "direct and specific contradiction" to the plaintiff's claim, the plaintiff may be able to survive a *Bahri* motion. Such was the case in *Sampson v Jefferson*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2016 (Docket No. 326561); 2016 WL 3855882. In *Sampson*, plaintiff was injured in a motor vehicle accident on December 20, 2012. He was diagnosed with a fracture of the cervical spine. He also sustained cervical and lumbar spine disc herniations as well as an injury to his left shoulder. As a result of these injuries, plaintiff submitted a claim for household-replacement-service expenses during the month of March 2013. The household-service-claim form for March 2013 was described as a "blank grid seven squares across, labeled Sunday through Saturday, and five squares down, presumably for the weeks of the month." Significantly, there were no dates in any of the squares, even though all 35 squares had been filled out with handwritten letter, which designated

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which services were performed. Notably, the service provider indicated that he did not drive plaintiff around, or run errands for plaintiff, every day of the month. The insurer obtained videotaped surveillance of plaintiff on March 6, 2013, and March 9, 2013, which showed him driving a car to a gas station and back home, taking a child's bicycle out of the car, removing a duffle bag from the car and going to a store and getting some pizza. The lower court denied the insurer's motion for summary disposition, and the Court of Appeals accepted the insurer's interlocutory appeal. The same panel that issued the decision in *Thomas v Frankenmuth* concluded that the evidence presented by the insurer did not "directly and specifically contradict" the claim submitted by plaintiff. Therefore, at the very least, there existed an issue of fact as to whether or not plaintiff's claim was barred by virtue of the fraud exclusion in defendant's policy. As noted by the Court of Appeals:

> Although the videotape recordings depict plaintiff driving and running errands for a short time on March 6, 2013, and for a few hours on March 9, 2013, the videotape recordings do not establish that the household services statement contained a false representation. The videotape recordings are consistent with plaintiff's deposition testimony. Specifically, plaintiff testified that in March 2013, he stopped wearing his neck brace all the time because his doctor instructed him not to become dependent on it and because plaintiff did not want to be perceived as disabled. He testified that he began to drive approximately one month after the accident because he had no help and therefore had no choice but to drive. Plaintiff did not indicate that he could drive without pain or without exacerbating his injury. He did not testify that he could drive at any time during the day. Plaintiff had a shoulder injury that prevented him from lifting anything over his head or lifting anything more than 10 or 15 lbs. However, plaintiff explained 'I still had some strength and I was taking a lot of pain medication. So I was in pain, but when I was taking my mediation, I wasn't really in that much pain because of the medication.' With regard to the replacement services, plaintiff testified that Beard performed all the tasks that plaintiff could no longer do, including cooking and cleaning. He testified that Beard consistently came to his house to help him during the first six months after the accident.
>
> The videotapes only depict plaintiff at several points during the day on March 6, 2013, and March 9, 2013, and they do not depict plaintiff's conduct during every hour of the relevant days. Plaintiff contended that he could perform certain tasks during certain times of the day when his pain level was not too high and his pain medications did not prevent him from doing so. **There is nothing depicted on the videotapes that contradicts plaintiff's position or establishes that the services were never performed on those days.** Beard is depicted in the March 9, 2013, videotape recording, which further supports plaintiff's contention that Beard provided replacement services for him on the days in question. **Additionally, Defendant did not prove falsity because the forms do not establish on what dates the driving and errand-running services were claimed. Again, the squares are not pre-numbered to correspond with the dates of the applicable month, no numbers were added, and there were no affidavits or testimony to otherwise establish what entries corresponded to what dates.** [*Sampson*, slip opinion at pp. 3-4 (emphasis added).]

Again, this case emphasizes the importance of securing evidence that "directly and specifically contradicts" a claim that was actually submitted by the plaintiff, either during the claim stage or during the course of litigation.

These cases dealt with fraud exclusions contained within an insurance policy. Obviously, in a case being handled by the Michigan Assigned Claims Plan and its assigned insurers, there is no "policy." However, the MACP and its assigned insurers have the benefit of a statutory "fraud exclusion," found at MCL 500.3173a(2). This section of the No-fault Act provides:

> A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the

Again, this case emphasizes the importance of securing evidence that "directly and specifically contradicts" a claim that was actually submitted by the plaintiff, either during the claim stage or during the course of litigation.

Michigan automobile insurance placement facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511. **A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.** [MCL 500.3173a(2) (emphasis added).]

To date, there have been no decisions from the Michigan Court of Appeals interpreting this provision. However, the author is confident that if presented with evidence which "directly and specifically contradicts" a claim presented by a plaintiff, whether at the claims stage or at the litigation stage, the same result should apply as in *Bahri*, *Thomas*, *Ward*, and *Diallo* – plaintiff's entire cause of action should be dismissed. Otherwise, the policyholders of the state, which fund the Michigan Assigned Claims Plan, would end up being responsible for payment of claims that are based, in part, on fraud.

Amicus Committee

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Amicus Report

Michigan Supreme Court Justice Bridget Mary McCormack on Amicus Briefs, and Former Chief Justice Clifford Taylor on Appeals in the Michigan Supreme Court

On November 10, 2016, Michigan Supreme Court Justice McCormack accepted MDTC's invitation to come to the Board of Directors meeting and answer questions about amicus briefs. Former Chief Justice of the Michigan Supreme Court, Clifford Taylor spoke at the MDTC 2016 Winter Meeting on what the Supreme Court looks for in deciding whether to grant or deny leave to appeal.

Justice McCormack stated that in general, the Michigan Supreme Court appreciates receiving amicus briefs because they tend to present a broader, stepped-back view of the law, rather than focus on the individual facts of the case at hand. She said that an amicus should not bother to waste ink if it is merely reiterating a party's position. Justice McCormack told the board that the amicus briefs submitted by the MDTC have been thorough, credible, and not a "stretch" position. (So kudos to all our volunteer amicus-brief writers. Keep up the good work. You are doing a fantastic job.)

The Supreme Court rarely, if ever, denies a motion to file an amicus brief if the motion is timely filed. Thus, it behooves the amicus practitioner to timely file the brief. The Michigan Court Rules do not provide a due date for filing an amicus brief at the application stage. However, if the motion and brief are filed before the commissioner is finished reviewing the case and drafting the report, the commissioner will include the amicus arguments in the report. Commissioners may take as much as six months to review an appeal; however, it is better to strive for the 21-day deadline from the date that the answer to the application is filed to ensure review. Amici who consistently file untimely motions and briefs are more likely to have their motions denied.

When asked whether amicus briefs should be submitted at the application stage or only after leave has been granted, Justice McCormack said to definitely submit them at the application stage. She explained that every month, each Justice reviews approximately 200 applications for leave to appeal. The Justices do not receive the actual application briefs but, rather, rely on reports from commissioners who summarize the arguments and the law, and recommend a proposed disposition.

If a commissioner recommends a disposition other than a denial, the case is discussed at a weekly conference. If the commissioner recommends denying leave, and none of the Justices "hold" the case for discussion, the denial order will enter. If a Justice holds a case, then that case is likewise discussed in the weekly conference.

Chief Justice Taylor explained that the Court receives approximately 2,000 applications for leave to appeal each year, but only hears argument on approximately 60 cases either on leave granted or on mini oral argument on the application (MOAA). That means an applicant has about a three percent chance of having his or her appeal heard.

Thus, the importance of properly framing a jurisprudentially significant issue is paramount. Justice McCormack stated that if the issue is significant to the

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Justice McCormack stated that in general, the Michigan Supreme Court appreciates receiving amicus briefs because they tend to present a broader, stepped-back view of the law, rather than focus on the individual facts of the case at hand.

jurisprudence of the state, and if the appellant is having difficulty demonstrating jurisprudential significance, amicus should step in and frame the jurisprudentially significant issue.

Chief Justice Taylor gave an example of proper framing of a jurisprudentially significant issue. The Supreme Court is not concerned with case-specific details pertaining to utilities. However, whether a party can rely on the finalization of a settlement is an issue that would have state-wide impact on the state's jurisprudence. He gave examples of general categories of issues that would be considered jurisprudentially significant:

- Dual threads of authority in the Court of Appeals
- Court of Appeals misreading or disregarding Supreme Court precedent
- Supreme Court precedent that is inconsistent with statutory language

Chief Justice Taylor provided several tips for applicants to the Supreme Court. He explained that the current Supreme Court is very much a textualist Court. He stated that an appellant should pretend that he or she is arguing to the late United States Supreme Court Justice Scalia. Justice Taylor recommended buying and reading the book, *Reading Law*, by Scalia and Bryan Gardner. He stated that Justice Zahra frequently asks his clerks what part of *Reading Law* is implicated in the appeal under review. He recommended having independent eyes review the appellate brief before filing it. He pointed out the importance of reading the MOAA or grant order and doing exactly as the Supreme Court stated.

The MDTC greatly appreciates the time, effort, and advice of Justice McCormack and former Chief Justice Taylor in coming to speak at the Board of Directors meeting and the MDTC 2016 Winter Meeting. The advice provided by them is vitally important to members of the appellate bar. Thank you.

Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
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Michigan Court Rules Adopted and Rejected Amendments

For additional information on these and other amendments, visit the Court's official site at

http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

Sean Fosmire is a 1976 graduate of Michigan State University's James Madison College and received his J.D. from American University, Washington College of Law in 1980. He is a partner with Garan Lucow Miller, P.C., manning its Upper Peninsula office.

ADOPTED AMENDMENTS

2013-18 – Technology amendments

Rule affected: Numerous
Issued: September 21, 2016
Effective: January 1, 2017

Numerous court rules have been amended to provide for electronic filing and technology in several contexts, none directly applicable to civil cases under Chapter 2 of the Michigan Court Rules except MCR 2.004, governing hearings involving incarcerated persons. In general, references to "videoconferencing" now read "videoconferencing technology."

PROPOSED AMENDMENTS

2014-29 – Entry of consent judgments

Rule affected: 2.602
Issued: September 21, 2016
Comments to: January 1, 2017

A new subsection (B)(5) to be added, to provide that a stipulated judgment or amendment of a previous judgment, signed and approved by all parties bound by it, may be submitted without notice to the opposing party if it so provides. It must be accompanied by an affidavit to establish the basis for the entry of the judgment. If it is an amendment of a previous judgment in a case now closed, submission as provided serves to reopen the case.

MEMBER NEWS

Work, Life, and All that Matters

Collins Einhorn Farrell PC, a leading defense litigation firm based in Southfield, Michigan, is pleased to announce that it has been honored as a *2016 Top Workplaces National Standard* by The Detroit Free Press. The list includes the best places to work in the State of Michigan, of which only 135 companies achieved the level of National Standard. Collins Einhorn was only one of ten law firms in the state to receive this distinction.

The evaluation for the Top Workplaces program is based upon feedback from an employee survey that measured qualities such as organizational health, the employee's job and employee engagement. The award was announced in a special section of the Sunday, November 20, 2016 edition of the Detroit Free Press.

Neil W. MacCallum, Chairman of Collins Einhorn, shared his enthusiasm over the announcement. "A company is only as good as its employees. We take pride in our culture which in turn strengthens the delivery of the legal services we provide to our clients," stated MacCallum. "To be formally recognized by our employees is the best possible award."

Collins Einhorn continues to prioritize the satisfaction of our employees. Some employee "extras" include monthly company luncheons, holiday parties, drawings for sporting event tickets and airline tickets, and other perks. In the last two years alone, Collins Einhorn has seen tremendous growth with the addition of over 25 new employee positions

Member News *is a member-to-member exchange of news of* ***work*** *(a good verdict, a promotion, or a move to a new firm),* ***life*** *(a new member of the family, an engagement, or a death) and* ***all that matters*** *(a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

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2017

March 9	Legal Excellence Awards Banquet – Detroit Historical Museum
June 22-24	Annual Meeting – Shanty Creek, Bellaire
September 8	Golf Outing - Mystic Creek Golf Club
Sept 27-29	SBM – Annual Meeting – Cobo Hall, Detroit
October 4-7	DRI Annual Meeting – Sheraton, Chicago
November 9	Past Presidents Dinner – Sheraton, Novi
November 10	Winter Meeting – Sheraton, Novi

2018

May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
October 4	Meet the Judges - Sheraton, Novi
October 17-21	DRI Annual Meeting - Marriott, San Francisco
November 8	Past Presidents Dinner – Sheraton, Novi
November 9	Winter Meeting – Sheraton, Novi

2019

June 20-22	Annual Meeting – Shanty Creek, Bellaire

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