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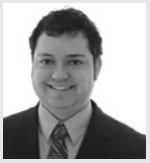

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President's Corner

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Richard W. Paul is a member of Dickinson Wright PLLC who focuses his practice on ADR, accountant liability litigation, automotive litigation, class actions, commercial and business litigation and product liability litigation.

Mr. Paul has served as an officer and Board member of the MDTC, Chair of the MDTC's Commercial Litigation Section, Chair of the MDTC's Annual and Winter Meetings, and was the 2013 recipient of the MDTC President's Special Recognition Award. He.is a former Chairperson of the State Bar of Michigan Litigation Section, is a Michigan State Court Administrative Office Approved Mediator and serves as a Case Evaluator in Wayne and Oakland Counties.

Mr. Paul is admitted to practice in Michigan, the U.S. District Courts for the Eastern and Western Districts of Michigan and the District of Columbia, the U.S. Sixth Circuit Court of Appeals, the U.S. Supreme Court and the U.S. Court of International Trade. Mr. Paul has also appeared *pro hac vice* in state courts throughout the country.

Mr. Paul is recognized in business and products liability litigation by *Michigan Super Lawyers*, *dbusiness Top Lawyers, Leading Lawyers--Michigan* and is rated A/V Preeminent by *Martindale-Hubbell*.

Mr. Paul received his A.B. degree *magna cum laude* from Dartmouth College and his J.D. degree from Boston College Law School.

From the President

"The future depends on what you do today." --Mahatma Gandhi

Thanks to the vision of our founding members, and the continued commitment of our past presidents and membership today, the MDTC remains strong and well positioned for the future.

Founded in 1979, the MDTC has been served by 37 past presidents, each of whom has contributed to the growth and success of the MDTC. I have been honored to know and work with many of the past presidents, each of whom has brought invaluable insights, guidance, and leadership to the organization. In his article in this edition of *Michigan Defense Quarterly*, "MDTC—The First Years," **Jim Kohl**, the MDTC's third president from 1982-1983, offers a unique historical perspective on the founding of the MDTC and its early years. MDTC would not be the viable organization it is today without the determination and enthusiasm of our founding members and past presidents like Jim. Today, the MDTC recognizes the contributions and ongoing support of our past presidents through the efforts of our Past Presidents Committee, currently chaired by **Ed Kronk**, MDTC's twenty-second president from 2001-2002, and the annual Past Presidents Dinner, which will be held this year on November 9, 2017 at the Sheraton in Novi. Seeing our past presidents reconnecting and reflecting on the MDTC's accomplishments at our yearly gathering reminds me of Andy Bernard of the TV show "The Office," who said, "I wish there was a way to know you're in the good old days before you've actually left them." Thanks, Jim for such an informative and heartfelt retrospective.

Ed Perdue's article in this edition of *Michigan Defense Quarterly*—"The Marine Corps Leadership Principles—Mustering Your Inner Talent to Lead in Today's Workplace"—exemplifies the talents and commitment of the MDTC's officers, Board of Directors Regional Chairs, Section Chairs, Committee Chairs. and Committee members, all of whom zealously contribute to the continuing success of our organization. A few recent examples:

- Thanks to our Golf Committee—**Terry Durkin, Mike Jolet** and **Dale Robinson**--MDTC's Annual Golf Outing on September 8, 2017 at the Mystic Creek Golf Club in Milford was our most successful golf outing ever with a record number of 114 golfers (the highest number since the event started in 1996) and over 25 supporting sponsors.
- Thanks to our Amicus Committee member **Dan Beyer** who stepped in for Amicus Committee brief writer **Carson Tucker** and appeared on behalf of the MDTC as *amicus curiae* at the August 31, 2017 oral argument before Judge Arthur Tarnow in the *Johnson v. Wolverine Human Services, Inc. et. al.* case pending in federal court in Detroit. The issue presented in the *Johnson* case, in which the Michigan Association for Justice also appeared as *amicus curiae*, centered on whether a private, non-profit organization can be considered a "state actor" and/or "acting under color of state law" for purposes of liability in a 42 U.S.C. § 1983 claim.
- Thanks to our 2017 Winter Meeting Committee—**Drew Jordan, Nick Ayoub, Deborah Brouwer, Mike Conlon and Randy Juip**—the 2017 Winter Meeting on November 10, 2017 at the Sheraton in Novi promises to be exceptionally

informative and enlightening for the both seasoned and newer practitioners alike. Entitled "Law Practice—The Next Generation—Navigating Emerging Trends Changing the Practice of Law," the conference will present panels of noted attorneys, judges and consultants, as well as the Administrator of the Michigan Attorney Grievance Commission, who will address these timely topics: (a) Cybersecurity—Protecting Your Practice and Your Clients; (b) Bridging the Gap Between New and Seasoned Attorneys; (c) Preserving Civility and Collegiality Among Members of the Bar; (d) Leadership Principles for Lawyers to Lead in Today's Workplace; (e) Technology in Today's Practice of Law; (f) Legal Malpractice and Ethical Issues Facing Today's Lawyers; and (g) A Judicial Perspective on Court Management and Courtroom Practices. You won't want to miss the latest updates, strategies, and practical tools to help you succeed in today's constantly changing legal environment.

- Thanks to **Josh Richardson** and **Mike Jolet** of our Firm Sponsorship Committee for a successful and record setting 2017-2018 firm sponsorship campaign, enabling the MDTC to continue to deliver value to our members.

I have been honored to know and work with many of the past presidents, each of whom has brought invaluable insights, guidance, and leadership to the organization.

Before closing, I must mention the passing of my Dickinson Wright colleague and mentor and the MDTC's fourteenth President, **Bob Krause,** who worked tirelessly to ensure the future success of the MDTC. Bob joined the MDTC in its formative years and actively served the MDTC as a longtime Board member, officer, and regular participant in the MDTC's events. A lawyer's lawyer and avid golfer, Bob received the MDTC Excellence in Defense Award in 2001 and was on the winning team of the MDTC Annual Golf Outing three separate times in 1989, 1996 and 2007. Bob served on the Michigan Supreme Court Standard Jury Instructions Committee, taught Trial Advocacy at the University of Michigan Law School, and was a faculty member for the IADC Trial Academy. For nearly 43 years, Bob was also an active DRI member, serving on the DRI Board from 1996 through 1998, and in 2006 was awarded DRI's Louis Potter Lifetime Achievement Award. Bob will be missed.

My favorite philosopher Yogi Berra said, "the future ain't what it used to be." For the MDTC, the future remains bright and promising, thanks to our solid foundation, our rich and enduring traditions, and the continuing commitment, leadership and engagement of our members.

MDTC E-Newsletter Publication Schedule

Publication Date	Copy Deadline
December	November 1
March	February 1
June	May 1
September	August 1

For information on article requirements, please contact:

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Michigan Defense Quarterly Publication Schedule

Publication Date	Copy Deadline
January	December 1
April	March 1
July	June 1
October	September 1

For information on article requirements, please contact:

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MDTC – THE FIRST YEAR(S)

By: Jim Kohl

The 1970's were a time of active, judicial liberalism in Michigan. Each appellate decision seemed more biased toward the plaintiffs than the one before. The plaintiffs' bar (then ATLA) had a Michigan chapter. It was quite influential as it was active in keeping track of experts, filing *amicus* briefs, occupying seats on the standard jury instruction and the court rule committees.

The defense bar had the DRI nationally and an organization in Detroit; but, nothing statewide in Michigan. My involvement began slowly with two events that should have put me on notice; but, for some reason they did not.

I had just been elected a shareholder at Plunkett, Cooney, Rutt, Watters, Stanczyk and Pedersen when Jerry Watters came into my office. My being summoned into his office was normal. His coming into my office was unusual. He told me that for a number of years he had been DRI's state membership chair. It did not involve much. Once a year DRI would call him to see what he was doing. He would then write to several of his friends to ask them to join. That was it. He asked that I succeed him as, "it will look good on your resume." I remember pointing out that I had just been elected a shareholder and had no desire to go anywhere else; so what difference would it make as to what looked good on my resume? He said, "look, just do it, OK?"

Some number of weeks later I received an invitation to attend the annual meeting of DRI's state and local leaders. It was being held in Kansas City, Missouri. DRI would pay my way. At that time I did not know the executive director or his well-earned reputation for being skinflint tight with the group's funds. So I accepted, bought a plane ticket, made a room reservation and attended.

Once there I did not know anyone. I went to the luncheon where the awards were being given and was surprised (quite surprised) to hear the president ask me to stand and be recognized as the nice young lawyer who had agreed to start a state organization in Michigan!

What to do? I knew that Ohio had an active chapter, so I contacted DRI's regional vice-president, Ted Sawyer, in Columbus. He invited my wife and me to OACTA's (Ohio Association of Civil Trial Attorneys) Fall meeting at Salt Fork Lodge in southeastern Ohio. I learned they had a state-wide meeting at the beginning of the summer and one in the fall. The summer meeting was more social, the fall meeting more business oriented. They also sent a copy of their by-laws.

I was a trial lawyer and did not practice any business law. *Michigan Law and Practice* therefore became my guidance. If anyone wonders why MDTC is a corporation, it is because I knew that I did not know what I was doing and wanted to protect my firm

Jim Kohl spent most of his professional life at Plunkett Cooney. During his career, he was elected an Advocate in the American Board of Trial Advocates and a Fellow of the American College of Trial Lawyers. He is now retired and spends his time receiving service of process.

and myself from any personal liability. What that may lack in intellectual elegance, it hopefully makes up for in straight forward honesty.

Being in my early 30's, no one around the state knew me. Everyone knew my senior partner, Mr. Bob Rutt. I made a deal with him. If he let me use his name, I would do all the work to get the group started.

Bob had a good friend in Grand Rapids, Dick Baxter. He was also DRI's membership chair for the west side of the state and renowned all over Michigan. I made the same deal with him – if he would lend his name, I would do the work. The three of us then began thinking of prominent defense lawyers we knew in each geographic area of the state. If we were to be successful, potential members would have to recognize those starting the group. I called each proposed incorporator and asked if they would be willing to serve. They all agreed.

Using a form book, pre-incorporation articles and by-laws were prepared. They were sent to Ohio, DRI, and the pre-incorporators for review before they were filed.

The pre-incorporators were:
Dick Baxter, Grand Rapids
Mike Fordney, Saginaw
Jack Carpenter, Petoskey
Jim Kohl, Detroit
John Collins, Lansing
John Peacock, Sault Ste. Marie
Bob Rutt, Detroit
Jim Daoust, Mt. Clemens[1]

Our first meeting of pre-incorporators was held in Detroit sometime in September 1979. The name, "Michigan Defense Trial Counsel," was selected. The proposed articles and by-laws were adopted and filed with the state that December.

The reasons for starting the group were stated in Article II and bear repeating:

(a) To promote improvement in the administration of justice and advancements of jurisprudence.

(b) To promote improved relations between the legal profession and the public.

(c) To promote the interests of the legal community.

(d) To develop, maintain and advance the rights of civil defendants in Michigan litigation.

(e) To support and work for improvement of the adversary system of jurisprudence in the operation of the courts.

(f) To encourage the prompt, fair and just disposition of tort claims.

(g) To enhance the knowledge and improve the skills of defense lawyers.

(h) To work for the elimination of court congestion and delays in civil litigation.

(i) To develop a program to assure that expert witnesses adhere to the highest standards of their respective professions.

I went to the luncheon where the awards were being given and was surprised (quite surprised) to hear the president ask me to stand and be recognized as the nice young lawyer who had agreed to start a state organization in Michigan!

We began with a letterhead that listed our pre-incorporators. It was not professionally prepared nor was it engraved; rather, it was typed and then mimeographed. DRI gave us their mailing list of Michigan members. On our mimeographed letterhead, a short letter under Rutt's signature was sent asking for $25 as their first year's dues in order to get the organization going. We had no money. DRI paid the postage. There were then about 225 DRI members in Michigan. As evidence of how bad things were for defense lawyers at that time, it took but a few weeks for 175 to send us their money.

Now viable, a letter was written to the Michigan Supreme Court notifying it of MDTC's existence. Application was also made to the State Bar to be recognized and listed in its Journal as a "special purpose organization."

By operation of law, the pre-incorporators of the organization became its first board of directors. In the three months between filing the articles and the first board meeting, March 29, 1980, three *amicus* briefs had been filed in the Michigan Supreme Court:

- *Sexton v Ryder Truck* (doctrine of *lex loci delicti* – brief by Bill Wolfram)
- *Owens v Allis Chalmers*__– (consideration of expert testimony and of the crashworthiness doctrine – brief by Bill Wolfram)
- *Fredericks v General Motors* – (consideration of whether the owner of a set of dies used by an independent contractor could be liable for the contractor's failure to guard – brief by John E.S. Scott and Rich Glaser)

The authors volunteered their time. MDTC had to pay the printing costs. We were broke, again.

The state bar refused our application as a special purpose organization because our membership was limited to defense lawyers. The state bar required that membership be open to all. The board, therefore, made the necessary change. The state bar accepted us. We did add a line to our application for membership asking what percentage of the applicant's practice was devoted to representing defendants in civil litigation.

The March 1980 board meeting also established standing committees:
A. Nominating
B. Legislative Liaison
C. Judicial Liaison
D. Newsletter
E. Education
F. Information
G. Finance
H. Liaison with other groups

Finally, we set our first annual members' meeting for June 1980 at The Homestead in Glen Arbor, Michigan. There were to be no substantive topics of discussion as we wanted the members to consider, debate, and adopt our working articles and by-laws. The only speaker was to be newly appointed US Federal District Judge Doug Hillman. He was a great speaker, and as Dick Baxter's former law partner, he did not charge us anything.

The state bar refused our application as a special purpose organization because our membership was limited to defense lawyers.

At the June 1980 meeting, the members nominated and elected their first board of directors and officers. Those elected as directors were: Dick Baxter, Jack Carpenter, John Collins, Mike Fordney, George Gotshall (Farmington Hills), Walt Griffin (Flint), Jim Kohl, John Peacock, and Bob Rutt. The last seat was held by Ed Brady (Detroit) as the president of the Detroit group. The officers were: Bob Rutt- president; Dick Baxter-vice-president; Jim Kohl-secretary, and Mike Fordney-treasurer.[2]

Insurance companies were just beginning to use house counsel in lieu of retained counsel. Our initial membership was composed entirely of retained lawyers. The issue of whether to extend membership to house counsel was decided in favor of accepting them.

The membership discussed and set the goals of MDTC. They were to:

- assist the Michigan Supreme Court by serving on standard jury instruction committees, court rule drafting committees, filing *amicus* briefs and by responding to whatever requests the Court might make of us;
- assist the Michigan Legislature by providing information and testimony;
- serve as a vehicle for keeping track of expert witness testimony. A form was distributed to those present and mailed to the others with a request that the form be filled out and returned to MDTC after each expert deposition;
- provide yearly seminars on topics of concern to the membership;
- be of assistance to candidates campaigning for public office where their views coincided with those of MDTC;
- publish a newsletter on a regular basis;
- provide a "defense hotline" whereby members could determine whether any other member had a brief of law on the same or similar issue as that confronting the requesting member.

A final note on the first membership meeting. Anticipating a need for adult beverages during the evening hours and what a hotel would charge to provide them, we purchased half gallon bottles of the most popular spirits and hosted our own parties. What was left over was taken home and brought back for the next year's meeting. Have I mentioned that finances were tight?

During this time several precedents were consciously established: we attended national DRI meetings; Mr. Kohl was asked to be the DRI representative; *Amicus* brief writers would continue to be unpaid volunteers; MDTC would pay all the attendant costs, and, if no one volunteered, we would discuss a fee; and membership and board meetings were rotated geographically around the state.

Our initial membership was entirely firms that specialized in litigation. Many of the state's largest law firms dealt in all types of legal matters and had only a litigation department. They were viewed as "business firms." A conscious effort was made to contact them to attain members from their litigation departments. Dickinson, Wright, McKean and Cudlip stepped up and has remained prominent to this day. The first newsletter was published in July 1980.

As the Detroit area was limited to three director positions, it was decided that the seat provided to the president of the Detroit association would not automatically roll-over into a three-year term for that individual. That is, they would hold their seat only for the year they were president of the association.

At the September 1980 board meeting Mr. Kohl and Mr. Fordney were tasked with investigating the viability of a mid-year meeting. Board members were assigned to each of the permanent committees. With $2,700 in the bank we felt rich. Real letterhead stationary was purchased.

The second annual meeting took place at Shanty Creek in June 1981. The theme was, "Defending Catastrophic Injury Cases." Leaders of the renowned Craig Institute in Denver, Colorado spoke. The membership was in excess of 300 and the treasury had almost $9,000.

The issue of whether to extend membership to house counsel was decided in favor of accepting them.

MDTC not only continued to apply to file *amicus* briefs, but the Supreme Court began asking us to file them. The Michigan Legislature was considering a bill to require defendants to make advance payments to claimants. Our legislative liaison, Jules Hanslovsky, appeared in opposition. MDTC was being solicited to fill positions on the court rule and standard jury instruction committees. A letter was written to the Supreme Court requesting "discovery only" depositions of experts. We continued to build the expert witness bank and to publish a quarterly newsletter.

The annual meeting had become established as a three-day affair held at a resort in early summer. A mid-year meeting was started to be held in Detroit as a one day event in early December. We started a program of regional chair persons.

Our third annual meeting took place in June 1982, at The Homestead. Nationally renowned jury consultant Dr. Don Vincent of Litigation Sciences was the lead speaker. Although only two and a half years old, the group voted to apply to be the host for the next annual meeting of DRI's state and local leaders. Our application was successful. The meeting was held in Detroit in May 1984.

By June of 1983, the group had reached the point where the post of an executive director seemed viable. Mike Fordney was aware of companies in Lansing that had employees who served as executive director for more than one organization. That kept the cost to something we could afford. Jean Smit, of Publicom was hired. The annual meeting was held at the Grand Hotel where somehow Mr. Fordney ended up in the presidential suite. At that point the group seemed secure.

I thank Madelyne for asking me to write this. It has brought back many great memories. I know I speak for all that were involved then, that what the group has become under the leaders that followed us has been beyond our dreams. Keep up the good work.

Endnotes

1 By virtue of being president of the Detroit group. It was our intent to provide a position on our board to each year's president of the Detroit organization.

2 The law firms of our early leaders were: Rutt and Kohl – Plunkett, Cooney, Rutt, Watters, Stanczyk & Petersen; Baxter – Hillman, Baxter & Hammond; Fordney – J. Michael Fordney, P.C.; Carpenter – Carpenter, Fenner, Barney & Hoffman; Collins – Foster, Swift, Collins & Coey; Peacock – Platt, Peacock & Van Wiegen; Dauost – Glime, Daoust & Wilds; Gotshall – Davidson, Gotshall, Kohl, Secrest, Wardle, Lynch & Clark; Griffin – Cline, Cline and Griffin; Brady – Vanderveer, Garzia, Tonkin, Kerr and Heaphy; John E.S.Scott and Rich Glaser – Dickinson Wright; Bill Wolfram – Faintuck, Shwedel, Wolfram, McDonald & Zipser; Hanslovsky – Willingham, Cote, Hanslovsky, Griffith & Foresman.

The Marine Corps Leadership Principles – Mustering Your Inner Talent to Lead in Today's Workplace

By Edward Perdue, Esq., *Dickinson Wright PLLC*

Introduction

Leadership is intangible, hard to measure, and difficult to describe. Its quality would seem to stem from many factors. But certainly they must include a measure of inherent ability to control and direct, self-confidence based on expert knowledge, initiative, loyalty, pride and sense of responsibility. Inherent ability cannot be instilled, but that which is latent or dormant can be developed. Other ingredients can be acquired. They are not easily learned. But leaders can be and are made.

-General C. B. Cates, 19th Commandant of the Marine Corps[1]

Just as Marines engage in programs of education and training to foster their innate leadership talents, we too can embark on a journey of self-discovery and development to improve our performance as leaders in our professional lives. The Marine Corps' Leadership Principles, employed in conjunction with the Leadership Traits (which are the subject of a separate discussion), are guides to progress in this area. Marines do their best to live these principles when leading other Marines and sailors, and these same principles can be applied to our positions in business, law, medicine and any other civilian endeavor that provides us the opportunity to exercise command and supervision over a group of individuals. Our discussion here will describe the eleven principles, consider how they are utilized and understood by Marines, and suggest potential applications of those to our professional lives.

The USMC Leadership Principles

1. Know Yourself and Seek Self Improvement

The Marine Corps instructs that this principle can be exercised through constant self-evaluation with reference to the leadership traits. Essentially, Marines try to develop a realistic and candid understanding of their own character and tendencies, and seek to improve any shortcomings.

Marines suggest the following specific methods of self-improvement:

- Make an honest evaluation of yourself to determine your strong and weak personal qualities
- Seek the honest opinions of your friends or superiors
- Learn by studying the causes for the success and failures of others
- Develop a genuine interest in people
- Master the art of effective writing and speech
- Have a definite plan to achieve your goal.[2]

Edward Perdue is a member at Dickinson Wright PLLC's Grand Rapids, Michigan office. He is a service-disabled veteran and served as an artillery officer in the United States Marine Corps, including service as a forward observer and forward air controller in Northern Iraq with the 2nd Battalion, 8th Marine Regiment during the Persian Gulf War. Ed practices in the areas of complex commercial litigation, creditors' rights, real estate litigation, product liability and insurance defense. A former municipal prosecutor, Ed has extensive first chair trial experience and acts as lead counsel on matters pending throughout the nation. Dickinson Wright has six offices throughout Michigan, as well as offices in Washington D.C., Nashville, Phoenix, Toronto, Las Vegas/Reno, Lexington, Ft. Lauderdale, Austin, and Columbus, OH. Ed can be reached at eperdue@dickinsonwright.com or 616-336-1038.

We can see that this program of self-improvement is not limited to the military context. The very exercise of evaluating one's own leadership qualities is likely to produce immediate benefits. In fact, this one principle can be viewed as a microcosm of the larger program of development in this area that is the subject of our treatment here. In short, we should endeavor to make a searching, brave and honest assessment of ourselves and then commit ourselves to a campaign of education and improvement where there are areas of need.

2. Be Technically and Tactically Proficient

The bottom line here is that in order to lead you must be able to "do." Marines respect those leaders who demonstrate a high degree of proficiency in their particular Military Occupation Specialty ("MOS"). For example, an artillery officer needs to be capable of doing all those things the Marines under him in the gun battery are expected to do including: safely transport powder and ammunition, lay the guns, set fuses on shells, calculate the fire direction data, place elevation and deflection (direction) on the guns, and fire the weapons. Similarly, infantry platoon leaders are expected to be proficient in the use of all of the small arms used in their platoon and in the company as a whole. They know how to breakdown, clean and operate not only their own pistol or rifle, but each squad automatic weapon and crew served machinegun used in the company. Marine officers must also be physically fit, capable of using communication and encryption devices, and competent with logistics/tactics, as well as a myriad of other skills that are employed in the course of undertaking a mission.

Here is what the Marine Corps suggests for improvement in this area:

- Know what is expected of you then expend time and energy on becoming proficient at those things
- Form an attitude early on of seeking to learn more than is necessary
- Observe and study the actions of capable leaders
- Spend time with those people who are recognized as technically and tactically proficient at those things
- Prepare yourself for the job of the leader at the next higher rank
- Seek feedback from superiors, peers and subordinates.[3]

Team success requires team training.

Again, these suggestions are directly applicable to our professional lives. We should be committed to continuing education, even when it is not "required" by our employer or licensing bodies. If our staff all had the flu and did not make it in to work, could we perform every action that is necessary to make a filing or generate a presentation on short notice? When was the last time we sought feedback from our subordinates, peers and superiors? To live this principle we may have to spend some time getting down in the trenches and learning what all of our team members are doing and how to do those things properly. That process will itself garner respect from subordinates and provide team leaders with additional insight when planning and making decisions.

3. Know Your People and Look Out for their Welfare

Not all Marines perform the same way under stress. Nor are all Marines blessed with the same physical or mental gifts. A good squad leader, for example, knows which Marines have the most endurance, which can be trusted to communicate a message accurately, which are strong enough to be assigned a machine gun, and which are best at land navigation. When assigning responsibilities on a patrol or in an attack, he or she knows who is best suited for the tasks at hand and how to best distribute the workload to ensure the mission is accomplished in a timely manner.

In addition, there is a second component to this principle. It almost goes without saying that next to accomplishment of the mission, the welfare of his or her people is a Marine leader's highest priority. Looking again to our sample squad leader, he or she is going to make sure that their Marines have operable weapons and tools, that they are well supplied with ammunition, food and water, and that they have time to eat, sleep and attend to any medical issues. It is not just about a performance review at the end of the year – a Marine leader ensures that her Marines are cared for and protected, and those Marines appreciate knowing that their superior has their back. On the chow line, Marine leaders eat last after their Marines have been fed.

The Marines remind us that practicing this principle involves the following:

- Put your Marines' welfare before your own
- Be approachable
- Encourage individual development
- Know your unit's mental attitude; keep in touch with their thoughts
- Ensure fair and equal distribution of rewards
- Provide sufficient recreational time and insist on participation.[4]

So too in our civilian roles can we be astutely aware of the unique gifts and shortcomings of our team members. As on a football team, not every team member has the speed and agility to run the ball. But they may be well suited to block on the line, play safety or kick the ball. Knowing our team members helps us accomplish our goals and also avoids frustrating team members by assigning them tasks for which they are ill-suited. By the same token, looking out for their welfare may mean providing them with the training and counseling they need to improve their performance in certain areas. We need to ensure our team has the tools it needs to get the job done, and that they are rewarded (as a team and as individuals) when they have performed well. As leaders, we must also be the champion of our team members – doing our best to advocate for their compensation and advancement, pushing back when they are unfairly blamed or attacked, and generally taking the heat for

poor team performance and dealing with the repercussions of that internally among our own team. Finally, we must avoid benefitting ourselves at the expense of our team. True leaders share success amongst their team, but as to those outside the team, bear the burden of failure alone.

4. Keep Your Personnel Informed

The Marine Corps believe that well-informed Marines perform better. Keeping them informed is related to their morale and efficiency. When Marines are kept in the loop they feel more invested in the team effort and less like a pawn in someone else's game. Marines with knowledge of a commander's intent can also take initiative and work towards accomplishment of the mission even in the absence of direct supervision by that leader.

The Marines suggest the following techniques when acting on this principle:

- Whenever possible, explain why tasks must be done and the plan to accomplish a task
- Be alert to detect the spread of rumors. Stop rumors by replacing them with the truth
- Build morale and espirit de corps by publicizing information concerning successes of your unit
- Keep your unit informed about current legislation and regulations affecting their pay, promotion, privileges, and other benefits.[5]

The two concepts that stand out when applying these techniques to our professions are 1) the importance for subordinates in understanding the leader's intent and mission; and 2) the relationship between knowledge of the surrounding circumstances and a team's cohesiveness, morale, and initiative. Knowing where a leader is going and what is being attempted allows for subordinates to fill in the gaps when direct supervision is not present. They should be encouraged to show such initiative, even if attempts to do so fall short or miss the mark.

Secondly, enthusiasm and buy-in are more likely among team members when they understand the problem and feel like they are contributing to its resolution. Sharing that success among team members and encouraging independent thinking also go a long way in building comradery and unit morale.

5. Set the Example

Marines place a great deal of emphasis on the professional competence, integrity and attitude of their leaders. Marines and sailors in a unit reflect the image set by their leadership. Marine leaders are expected to personally demonstrate courage, skill, and aptitude for the job at hand, physical fitness and military bearing of the highest order.

The Marine Corps mentions consideration of the following factors when applying this principle:

- Show your subordinates that you are willing to do the same things you ask them to do
- Maintain an optimistic outlook
- Conduct yourself so that your personal habits are not open to criticism
- Avoid showing favoritism to any subordinate
- Delegate authority and avoid over supervision, in order to develop leadership among subordinates.[6]

We should be committed to continuing education, even when it is not "required" by our employer or licensing bodies.

We can probably all recall at least one mentor or similar figure in our professional lives who set the bar high and met our early expectations of what a successful leader was. That person likely had their act together, looked the part, brought home the wins and shared some spotlight with us. As we mature in our professional lives it is our duty to ascend to that role. When we suit up in the morning, we should endeavor to have a day where we look sharp, exude confidence, act professionally, and avoid pettiness. To a certain extent we must elevate our thinking and our game if we expect others to follow us into the trenches of our profession. We can think our way into setting the example. This often involves taking a moment before acting or reacting, and thinking about appearances and how our words or actions will reflect upon us and those in our team. Again, if we expect others to follow us we must exhibit a concern for the team over the individual and we have to live the part.

6. Ensure that the Task is Understood, Supervised and Accomplished

Supervision is the most important step in executing a plan and accomplishing a mission. Accordingly, mastering this principle will have the most direct impact on the degree to which Marine leaders harness their human resources to accomplish their missions.

Give thought to the following when practicing this principle:

- Issue every order as if it were your own
- Use the established chain of command
- Encourage subordinates to ask questions concerning any point in your orders or directives they do not understand
- Question subordinates to determine if there is any doubt or misunderstanding in regard to the task to be accomplished
- Supervise the execution of your orders
- Exercise care and thought in supervision; over supervision will hurt initiative and create resentment, while under supervision will not get the job done.[7]

Before they can perform, subordinates need to understand what it is they are expected to do. A leader must effectively communicate his or her instructions by means which are clear, concise and not easily misunderstood. Having given succinct and easily understood instructions, leaders must then supervise the performance of those tasks by their

subordinates. That does not mean that tasks should be done for their subordinates or micromanaged, but attention must be paid to the means by and timing within which the tasks are being performed. Adjustments and comments can be made by the leader without over stepping one's bounds. At the end of the day however, goals and objectives need to be met by whatever means necessary. There is likely to be a fine balance here between the proper level of supervision and the need to provide autonomy to one's subordinates. Achieving the right levels of each will likely require some practice and fine tuning, and team members should be kept informed of the need for both supervision and autonomy/initiative, the paramount importance of meeting goals, and the process being undertaken to find the right supervisory balance.

7. Train Your Marines and Sailors as a Team

Marines believe that teamwork is critical to the success of the mission. They are encouraged to operate, train and play as a team. Marines also ensure that each member of a unit knows his job and responsibilities. And when they train as a team, Marines strive to do so under realistic conditions.

Here are factors the Corps suggests we keep in mind when practicing this principle:

- Stay sharp by continuously studying and training
- Encourage unit participation in recreational and military events
- Do not publicly blame an individual for the team's failure or praise just an individual for the team's success
- Ensure that training is meaningful, and that the purpose is clear to all members of the command
- Train your team based on realistic conditions
- Insist that every person understands the functions of the other members of the team and the function of the team as part of the unit.[8]

These concepts are antithetical to the lone-wolf professional. He knows what he is doing and does it well, but he is out for number one and does not have the time or inclination to train those around him. In his mind, subordinates should be grateful to have the opportunity to bask in his presence and will pick up some pointers by watching him do his thing along the way. The important thing is that he looks good and gets the credit.

We all likely know someone who fits this profile. While that person may be successful, however, that success has limitations and cannot occur in his or her absence. Of course, real leaders do not think or behave in this fashion. Team success requires team training. Whatever our field, we should practice working together under realistic conditions. We used to say in the Marines that the more we sweat in peace, the less we bleed in war. The same is true in our professions in that real world training will pay dividends when the actual evolution is undertaken. Ensure that your team members know their roles and responsibilities, and cross-train your team members so they can perform the functions of those above and below them on the team hierarchy. Have fun and enjoy each other's company outside the professional setting from time to time. Team members who know and like each other, and who are aware of each other's strengths and weaknesses, perform at a higher level when it is crunch time.

We need to ensure our team has the tools it needs to get the job done, and that they are rewarded (as a team and as individuals) when they have performed well.

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8. Make Sound and Timely Decisions

This concept overlaps with the leadership trait of "decisiveness." It was driven home to me on many occasions in the field that a well-considered but timely decision, based on the best information available, is infinitely more advisable than an exhaustively analyzed decision executed much later. Marines seek to avoid "analysis paralysis" for reasons related to the advantages of tempo and maintaining the initiative in combat operations. Of late there has been a movement toward the "70% solution," which advocates making the decision when approximately that percentage of the total available information is at hand. An extreme example is the thought process which is engaged in by fighter pilots in a dog fight – they must make critical decisions very quickly, in split seconds, which decide life or death for themselves, their crew and their opponents. They do not have the luxury of hand-wringing over what the right call is or whether the decision made a moment ago was perfectly analyzed. They must make decision after decision based on the observations they are making and the tactics they want to employ, one after another, until they or the enemy is defeated (or the engagement is broken off).

Here are some methods the Marines suggest for developing your skills in this area:

- Developing a logical and orderly thought process by practicing objective estimates of the situation
- When time and situation permit planning for every possible event that can reasonably be foreseen
- Considering the advice and suggestions of your subordinates before making decisions
- Considering the effects of your decisions on all members of your unit.[9]

9. Develop a Sense of Responsibility among your Associates

When Marines train they regularly place junior Marines in positions of authority and train them to perform one or more levels higher than their regular position. It is also engrained in Marine Corps philosophy that micro-management should be avoided. The old saying goes that sergeants are the ones that really run the Marine Corps.

There is more than a kernel of truth in the adage that if officers want to get something done, and have it done right, they should tell an enlisted Marine to do it and get out of the way. The delegation of authority in the Marine Corps is the regular course of business, and any level of over-management is immediately identified and properly resented by the Marines who know they should be doing the work and accomplishing the mission without being told how to do it.

Here are suggestions from the Corps on how to develop this principle:

- Operate through the chain of command
- Provide clear, well thought out directions
- Give your subordinates frequent opportunities to perform duties normally performed by senior personnel
- Be quick to recognize your subordinates' accomplishments when they demonstrate initiative and resourcefulness
- Correct errors in judgment and initiative in a way which will encourage the individual to try harder
- Give advice and assistance freely when your subordinates request it
- Resist the urge to micro manage
- Be prompt and fair in backing subordinates
- Accept responsibility willingly and insist that your subordinates live by the same standard.[10]

One way that civilian leaders demonstrate loyalty to their team members is to show a keen interest in their professional development. Delegating authority and assigning tasks to subordinates builds trust, respect and confidence between a commander and his or her team members. This in turn fosters buy-in from team members in the mission and increases their initiative. By delegating tasks a leader not only demonstrates faith in the team members, but also increases, rather than diminishes, his or her authority. Standing by ones subordinates and demonstrating how to take ownership of both success and failure, leaders both show the way and increase the team members' appreciation and desire for increased responsibility.

10. Employ Your Command within its Capabilities

While it may seem counter-intuitive, Marines are not mindless automatons who engage in frontal assaults against all odds. In fact, Marines appreciate the need to assign missions to units that can achieve success. For example, when planning an attack, the rule of thumb for the ratio of attackers to defenders is three to one. Marines would not expect a squad of thirteen to go against a company of 200 (although such mismatches have been overcome in the long history of our Corps). Marine leaders must engage in that type of analysis and should not ask for more than can realistically be delivered on the battlefield. In addition, while aggressiveness is always encouraged, and a "can do" attitude is expected among gung-ho Marines, missions must be realistically tailored to a unit's capabilities. Vainglorious attempts by leaders for their units to achieve impossible goals are detrimental to unit morale. Failures which could have been avoided through a candid assessment of unit capabilities set back a leader's credibility and do significant damage to a leader's relationship with team members.

Work on the development of this leadership skill may include:

- Avoid volunteering your unit for tasks that are beyond their capabilities
- Be sure that tasks assigned to subordinates are reasonable
- Assign tasks equally among your subordinates
- Use the full capabilities of your unit before requesting assistance.[11]

Clint Eastwood's character, Dirty Harry, once said in a film: "A man's got to know his limitations."[12] The same is true for a leader and his or her team. Civilian leaders must be intimately familiar with the capabilities and limitations of their groups. To use another military example, Napoleon was well known for his encyclopedic mind. He knew, and demanded, constantly updated information on the numerical strengths, weapons, equipment, average marching speeds, and commanding leadership styles for each of his many units on any given campaign. With this knowledge he would spread voluminous maps across the floor of his campaign tent and be at work hour after hour with a compass and a protractor, calculating exactly how to maneuver and employ his units in a manner which best utilized their capabilities and took account of their shortcomings. As professional leaders we must also have command of the realistic capabilities and best uses of our teams. While we should also seek out responsibility and opportunities to help achieve our organization's goals, we should also be wary of biting off more than our team can realistically chew.

11. Seek Responsibilities and Take Responsibility

Marine leaders are encouraged to seek out increasing levels of responsibility and more and more challenging assignments. They are also taught to accept responsibility for the performance of their unit. While it is commonplace for victory to have a thousand fathers and defeat to be an orphan, leaders with integrity will own their unit's failures and share their unit's successes. Finally, Marine leaders are taught to stick with their gut and to stand by their convictions.

Here is what Marines recommend for professional development in this area:

- Learn the duties of your immediate senior, and be prepared to accept the responsibilities of these duties
- Seek a variety of leadership positions that will give you experience in accepting responsibility in different fields
- Take every opportunity that offers increased responsibility
- Perform every task, no matter whether it is top secret or seemingly trivial, to the best of your ability
- Stand up for what you think is right. Have courage in your

convictions
- Carefully evaluate a subordinate's failure before taking action against that subordinate
- In the absence of orders, take the initiative to perform the actions you believe your senior would direct you to perform if present.[13]

These concepts are easily applicable to our civilian professional lives. As mentioned above, as leaders we should be on the lookout for opportunities for our people to shine and grow. Part of being a leader also involves taking ownership of failures and shortcomings in your team's performance. When you win, let the group bask in the glow of that victory. You did not accomplish that yourself and your team will very much appreciate being recognized. Finally, do not be a wilting flower – stand by your convictions when necessary. When a decision is made, however, even if you do not agree with it, set your ego aside and get on board for the effort to accomplish the mission.

CLOSING THOUGHTS

At the close of this humble effort to codify and explain those intangibles which we loosely call "leadership," keep in mind these final thoughts. Leadership is really a combination of a group's ethos (or group values) and those more tangible elements of its leadership philosophy. Successful leaders understand their group dynamics and integrate that understanding with the tools in their leadership toolbox. By doing so, they strive to fashion the most effective and compelling plans to achieve particular goals. From the start, Marines are expected to be students of the concepts which have been discussed here. That is only part of their education in what more globally is considered the art and science of war. But you too can be a student and master teacher of your craft. Think about approaching team development as an opportunity to pass along hard won secrets or understandings – all for the good of the group's success. Imbue your work with an almost mystical and artistic quality such that your team members will see the beauty in the systems or methods which you are training them to employ. Finally, winning is fun, and never underestimate the power of having fun while working on how to win more often.

Endnotes

1 Quoted in Official USMC Pub. RP 0103, *Principles of Marine Corps Leadership*, hereafter ("RP 0103"). This work has also been influenced by the discussion of the application of 11 principles to Marine officers on Marines.com. www.marines.com/being-a-marine/leadership-principles.
2 RP 0103 at § 3.
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Magnum Force* (Warner Bros 1973).
13 *Id.*

Third-Party-Beneficiary Theory Is A Pickle For Medical Providers

By: John Hohmeier, *Scarfone & Geen, P.C.*

Executive Summary

The recent Covenant v State Farm *decision telegraphed a couple potential avenues for medical providers to continue suing no-fault insurance carriers. One of those potential avenues is the theory that medical providers are third-party beneficiaries to insurance contracts. However, while medical providers may incidentally benefit from a no-fault policy, there is virtually no way they can successfully argue that they are intended third-party beneficiaries with the right to sue.*

John Hohmeier joined Scarfone & Geen, P.C. in 2012 to litigate first- and third-party no-fault cases. He was both trial and appellate Counsel in *Dawoud v State Farm Mut Auto Ins,* where the Court of Appeals issued a published opinion further limiting and clarifying the derivative nature of medical provider's rights in the no-fault arena.

Mr. Hohmeier is also a Chair for the Insurance Law section of the Michigan Defense Trial Counsel. While still in school at Thomas M. Cooley Law School, his commentary on the interaction of emotion and brain chemistry with a person's ability to recall veridical memories was published in the Thomas M. Cooley Law Review.

Michigan no-fault litigation has (once again) been turned on its head with the recent release of the Michigan Supreme Court decision: *Covenant Medical Center, Inc v State Farm Mutual Automobile Ins. Co*.[1] In ruling that medical providers have no "statutory" right to sue no-fault carriers, the Supreme Court surreptitiously left open a dead end for providers: third-party beneficiaries.[2]

What Is A Third-Party Beneficiary?

While we are the frontier of no-fault law given the *Covenant* decision, third-party-beneficiary law has not changed in Michigan for over 50 years. Originally, Michigan followed the common law rule that third-parties could not sue on a contract. That rule was modified somewhat in 1963 when the Legislature enacted the third-party-beneficiary statute,[3] but the statute did not change the law relating to **incidental** beneficiaries.

> In 1954, the Michigan Supreme Court summarized that law as follows:
>
> A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof. Where the contract is primarily for the benefit of the parties thereto, **the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach**.[4]

Almost forty years later, the Michigan Supreme Court reaffirmed the holding in *Greenlees* by quoting the exact same paragraph presented above.[5] In any event, footnote 39 in *Covenant* appears to be an afterthought to the whole discussion and certainly is not a statement of law or an affirmation that third-party beneficiary is a viable cause of action for medical providers.

It remains true that while any particular provider **may** incidentally benefit from any given insurance policy,[6] this does not give medical providers a cause of action directly against any given insurance carrier.[7] As has been the case for more than 50 years in Michigan: only **intended** third-party beneficiaries – directly referred to in the contract – may sue to enforce the contract.[8]

A person or entity is an **intended** third-party beneficiary of a contract only when the promisor undertakes an obligation **directly** to or for that person or entity. Where the contract is primarily for the benefit of the contracting parties (like any particular no-fault policy is) the mere fact that a third party would be **incidentally** benefitted does not give the third party a right to sue for an alleged breach. Incidental beneficiaries may not sue to enforce a contract – only intended third parties may sue to enforce a contract.[9]

A person or party injured or damaged by another is not an intended third-party beneficiary of a contract of liability insurance between the person who caused the injury and that person's liability insurer. In this situation, the injured person has no right of direct action against the liability insurer even though the insurance contract may contemplate the payment of money to someone other than the insured.[10]

The Court of Appeals in *Allstate Ins Co v Keillor*,[11] concluded that the "plaintiff's policy did not establish a promise or duty to benefit the defendant as an injured third party. Plaintiff's policy created a contractual promise to indemnify the insured, not directly benefit the injured party." The Michigan Supreme Court had no problem with the reasoning of the Court of Appeals on this issue as it agreed with the Court of Appeals' analysis that Keillor was **not** a third-party beneficiary.[12]

Medical Providers Are Not Intended Third-Party Beneficiaries

There is no Michigan case law indicating that a medical provider is an intended third-party beneficiary of an insurance or liability contract. There is also no legal authority that would allow a medical provider to sue the insurer directly as a third-party beneficiary to an insurance contract.

The only statute in Michigan governing the rights of third-party beneficiaries is MCL 600.1405, which states in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promise.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

The words "directly" and "said person" are crucial to the legislative intent of the statute and also to the statute's application. The Supreme Court has held that in order to be a third-party beneficiary under MCL 600.1405, the promisor (the insurance carrier) must undertake an obligation directly to or for a specific person or party (in this case, any specific medical provider):

> In describing the conditions under which a contractual promise is to be construed as for the benefit of a third party to the contract in § 1405, the Legislature utilized the modifier "directly." **Simply stated, section 1405 does not empower just any person who benefits from a contract to enforce it.** Rather, it states that a person is a third party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. (emphasis added).[13]

Whether a provider actually provided treatment is irrelevant - the analysis of MCL 600.1405 begins and ends with the policy of insurance.

So in order for any particular medical provider to be a third-party beneficiary of the insurance contract between any insurance carrier and its insured, the carrier must have undertaken an obligation directly **to** or **for** the specific medical provider asserting the claim.[14] Given the nature of any particular no-fault policy, there is likely no mention of any specific medical provider. As a result, nowhere does any carrier undertake an obligation directly to any specific medical provider.

Moreover, any specific medical provider is one of millions of medical providers who the insured could go to for services. There is likely no provision in any given policy that the insured must go to any specific provider for treatment, so the carrier does not undertake an obligation for any specific provider.[15] Because any given carrier does not undertake an obligation directly to or for any specific medical provider, medical providers are not intended third-party beneficiaries to the contract of insurance and cannot use this theory to sue the carrier directly.

Certainly providers will argue (as they have been doing) that either the policy or the No-Fault Act itself creates a class of intended third-party beneficiaries who possess the right to sue on the contract. But this logic creates an undefined class and ignores the fact that virtually any medical provider in the country (or "service" provider for that matter) would then be considered an intended third-party beneficiary.

Somewhat recently in *Shay v Aldrich*, the Supreme Court held that:

> …the standard for determining whether a person is a third-party beneficiary is an objective standard and must be determined from the language of the contract only. A majority of this Court has affirmed this rule in recent cases and further emphasized that the promise must be made ***directly*** for the person and, thus, that incidental beneficiaries of contracts could not recover.
>
> This rule reflects "the Legislature's intent to ensure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." Although if taken out of context this sentence could be read to mean that the important inquiry is the subjective understanding of the contracting parties, when read in context, it is clear that contracting parties' "intent" with regard to third-party beneficiaries

> is to be determined solely from the "form and meaning" of the contract.[16]

As stated, there is (likely) no language in a no-fault policy mentioning a specific medical provider, so any specific provider is certainly not "directly referred to in the contract." If the "contracting parties' 'intent' with regard to third-party beneficiaries is to be determined solely from the 'form and meaning' of the contract" as instructed recently by the Supreme Court,[17] then the mere fact that there is no mention of any specific medical provider in any given policy precludes the carrier from ever "intending" to undertake an obligation specifically to or for a specific medical provider.

Schmalfeldt v N Pointe Ins Co, cited by the Michigan Supreme Court in *Covenant*, is very similar to the situation involving medical providers.[18] In *Schmalfeldt*, a person was injured in a bar and the bar had liability insurance with defendant which provided medical payments coverage.[19] The plaintiff was injured in the bar and tried to sue the insurance company directly for his medical expenses.

North Pointe Insurance moved for summary disposition arguing that Schmalfeldt was not an intended third-party beneficiary of the insurance agreement. The Court agreed that Schmalfeldt was merely an incidental beneficiary and was not entitled to bring an action directly against the insurance company to enforce the contract:

> The focus of the inquiry, however, should be whether North Pointe, by its agreement to cover medical expenses for bodily injuries caused by accidents, had undertaken to give or to do or refrain from doing something directly to or for Schmalfeldt pursuant to the third-party beneficiary statute, MCL 600.1405(1). Thus, as *Brunsell* clarifies, we must turn to the contract itself to see whether it granted Schmalfeldt third-party beneficiary status.
>
> We affirm the decision of the Court of Appeals because the contract contains no promise to directly benefit Schmalfeldt within the meaning of 1405. Nothing in the insurance policy specifically designates Schmalfeldt, or the class of business patrons of the insured of which he was one, as an intended third-party beneficiary of the medical benefits provision. At best, the policy recognizes the possibility of some incidental benefit to members of the public at large, but such a class is too broad to qualify for third-party status under the statute.[20]

Any particular provider[21] is, at best, an incidental beneficiary to any insurance policy. Any provider, however, is one of hundreds of thousands of potential "providers" in Michigan, and one of millions across the country that an insured could go to for services. Incidentally, the insured just happened to go to "insert provider name here." This alone does not make the provider an intended third-party beneficiary with rights to enforce the contract.[22]

How many medical providers are there in Michigan alone that could potentially qualify for payment of PIP benefits under any particular no-fault policy? Literally hundreds of thousands and this does not include the hundreds of thousands (maybe millions) of additional attendant care or household service providers.[23] How many potential medical providers are there in the country that could potentially provide services to an injured person? Millions.

Do all the millions of potential medical providers qualify as intended third-party beneficiaries to any particular injured person's insurance policy? Considering the Michigan Supreme Court's narrow interpretation of MCL 600.1405, certainly not:

> A third person cannot maintain an action upon a simple contract *merely* because he would receive a benefit from its performance or because he is injured by the breach thereof. Where the contract is primarily for the benefit of the parties thereto, the mere fact that a third person would be incidentally benefited does not give him a right to sue for its breach.[24]

As the Supreme Court recognized in *Koenig v City of S Haven*, it is easy to blur the distinction between intended and incidental beneficiaries.[25] But when enacting MCL 600.1405, the Legislature must have been aware of contracting parties' potential fear of unanticipated third-party claims because the Legislature chose to change the law with great caution.[26] The Michigan Supreme Court has repeatedly acknowledged and mandated this cautious approach to analyzing the third-party-beneficiary issue.[27]

In any particular case, a specific provider is likely to argue that because it is the actual provider of services in this instance, it (or its class) is sufficiently described in the policy so as to create third-party-beneficiary status. The providers argue that if the above analysis is to be accepted, then essentially nobody could qualify as an intended third-party beneficiary under the policy. Answer: so what?

The Supreme Court has already frowned upon this approach to MCL 600.1405, indicating that "this reasoning would, of course, mean that virtually every contract could be viewed as impliedly creating a class of third-party beneficiaries because the inquiry would proceed backward from an injury to create a class. Such an analysis robs the statute of all meaning."[28] Whether a provider actually provided treatment is irrelevant - the analysis of MCL 600.1405 begins and ends with the policy of insurance.

In the situation involving medical providers, any particular provider is merely one of potentially millions of people or entities across the nation who may incidentally benefit from an injured person's policy with the carrier or be injured by its breach.[29] This alone does not render the provider an intended third-party beneficiary in order to bestow upon the provider a direct cause of action against an insurance carrier.

Afterthought

Some advocates still attempt to rely on (then) Judge Taylor's 20-year-old comment in *LaMothe v Auto Club Ins Ass'n*. Verbatim, Judge Taylor's comment is as follows: "Thus, we can anticipate that health care services providers, as practical litigants, would bypass the insured and directly sue, pursuant to third-party-beneficiary theories, the entity with prospects identical to their own for engendering jury sympathy-the insurer."[30]

After *LaMothe,* Judge Taylor went on to become Justice Taylor of the Michigan Supreme Court. When he was presented with the third-party-beneficiary issue four years after *Lamothe*, he had a different view because he completely refuted this passing comment.[31] In essence, his educated opinion completely contradicts the proposition that no-fault providers are intended third-party beneficiaries of a no-fault insurance contract.[32]

Justice Taylor authored the *Koenig* opinion, which held that only intended third-party beneficiaries, not incidental beneficiaries, may enforce a contract. More importantly, however, he indicated that while a third-party beneficiary may be one of a class of persons if the class is sufficiently described or designated, "the class must be less than the entire universe, e.g., 'the public.'"

Three years after Justice Taylor's *Koenig* decision was released – and more than seven years after his comment in *LaMothe* – the Michigan Supreme Court majority, including Justice Taylor, reaffirmed the opinion from *Koenig* and quoted the following passage:

> [A] third-party beneficiary may be a member of a class, but the class must be sufficiently described. This follows ineluctably from subsection 1405(1)'s requirement that an obligation may be undertaken *directly* for a person to confer third-party beneficiary status. **As can be seen then, this of course means that the class must be something less than the entire universe, e.g., "the public";** otherwise, subsection 1405(2)(b) would rob subsection 1405(1) of any narrowing effect. The rationale would appear to be that a contracting party can only be held to have knowingly undertaken an obligation *directly* for the benefit of a class of persons if the class is reasonably identified. Furthermore, in undertaking this analysis, an objective standard is to be used in determining from the contract itself where the promisor undertook "to give or to do or to refrain from doing something *directly* to or for" the putative third- party beneficiary.[33]

It remains true that while any particular provider may incidentally benefit from any given insurance policy, this does not give medical providers a cause of action directly against any given insurance carrier.

The rulings in *Koenig* and *Brunsell* certainly seem to apply to medical providers because under Michigan no-fault law virtually everyone is a potential provider. As stated above, there are nearly 200,000 healthcare providers in Michigan, and there are millions of healthcare providers in the United States – all of which are potential providers for any given Michigan no-fault claim.[34]

Since this universe of potential medical providers is equivalent to the "public," these potential providers are only incidental beneficiaries of the no-fault contract and not intended third-party beneficiaries – as a result, they have no right of direct action and recovery against a no-fault carrier.[35] There is virtually no way that any given medical provider can successfully argue that it is an intended third party-beneficiary of any given insurance policy.

Endnotes

1 *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, ___ Mich ___; 895 NW2d 490 (2017).

2 *Id.* at 505, n 39:

> We conclude today only that a healthcare provider possesses no statutory right to sue a no-fault insurer. While defendant argues that a provider likewise possesses no contractual right to sue a no-fault insurer given that healthcare providers are incidental rather than intended beneficiaries of a contract between the insured and the insurer, this Court declines to make such a blanket assertion. That determination rests on the specific terms of the contract between the relevant parties. See *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003) ("A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise 'directly' to or for that person.") (citations omitted; emphasis added). This Court need not consider whether plaintiff possesses a contractual right to sue defendant in the instant case because plaintiff did not allege any contractual basis for relief in its complaint.

3 MCL 600.1405.

4 *Greenlees v Owens Ames Kimball Co*, 340 Mich 670, 676; 66 NW2d 227 (1954) (emphasis added).

5 *Kammer Asphault Paving Co, Inc v East China Township Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993).

6 This article does not address the issue of an injured person claiming benefits under the Michigan Assigned Claims Plan. Clearly in situations such as these, there is no contractual rights to benefits; rather, the injured person may be entitled to benefits by operation of law. As a result, because there is no "contract" in an assigned claims case, there can be no third-party beneficiary theory presented by a provider.

7 See *Allstate Ins Co v Keillor,* 190 Mich App 499, 502; 476 NW2d 453 (1991) (ruling that even though the insurer may have to step in and indemnify its insured, the plaintiff was not a third-party beneficiary; therefore, the plaintiff could NOT sue the insurer directly under that theory), rev'd on other grounds, *Allstate Ins Co v Hayes*, 442 Mich 56; 499 NW2d 743 (1993) (stating that the Court of Appeals correctly concluded that Keillor was not a third-party beneficiary, however, clarifying that "the fact that the injured party is not a third-party beneficiary of the insurance contract is not determinative of his 'standing' to continue the action.").

8 Only intended third parties may enforce a contract; incidental beneficiaries may not. See *Koenig v City of South Haven,* 460 Mich 667; 597 NW2d 99 (1999).

9 *Id.*

10 *Keillor,* 190 Mich App 499.

11 *Id.* at 502.

12 *Allstate Ins Co v Hayes*, 442 Mich 56, 63; 499 NW2d 743 (1993).

13 *Koenig,* 460 Mich at 676-677 (emphasis added).

14 Rather than to have undertaken an obligation for medical providers in general.

15 Again, the fact that any specific provider (or class of providers) is not mentioned in any given policy precludes the argument that the carrier obligated itself from the outset to do anything for the benefit of any provider specifically.

16 *Shay v Aldrich*, 487 Mich 648, 664-665; 790 NW2d 629 (2010) (citations omitted) (emphasis added).

17 *Id.* at 665.

18 *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003).

19 The policy provided coverage of $5,000 for medical expenses for bodily injury caused by an accident on or next to the insured's premises.

20 *Schmalfeldt*, 469 Mich at 429. It is unclear why the Michigan Supreme Court made the comments it did in footnote 39.

21 Not providers as a whole; there is a meaningful difference.

22 *Schmalfeldt*, 469 Mich 422; see also *Elsner v Farmers Ins Grp, Inc,* 364 Ark 393; 220 SW3d 633 (2005) (ruling that the plaintiff "was a member of a large class of health care providers who could provide services to [the injured person]. There is nothing in the contract to indicate that he was an intended third-party beneficiary, and, if anything, he was merely an incidental beneficiary who does not possess the right to bring a direct action against [the insurer].").

23 Based on the 2010 abstract from the United States Census Bureau, there are approximately 170,000 medical providers in Michigan and this does NOT include family members and friends who are potential household service and attendant care providers, or the multitude of providers that came into being after 2010 (which we know are significant). See http://www.census.gov/compendia/statab/2010/.

24 *Kammer Asphalt Paving*, 443 Mich at 190, quoting *Greenlees*, 340 Mich at 676 (emphasis added).

25 *Koenig*, 460 Mich 667 at 678.

26 *Id*.

27 See e.g. *Shay*, 487 Mich at 664-665; *Koenig*, 460 Mich 667; *Kammer Asphalt Paving*, 443 Mich 176; and *Greenlees*, 340 Mich 670.

28 *Id.* at 683 (emphasis added).

29 So while providers may be correct in that no one could qualify as a third-party beneficiary in the situation presented here, this does not mean that this Court must create a class that does qualify.

30 *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

31 *Koenig*, 460 Mich at 678.

32 It is somewhat ironic that Plaintiff claims a right to sue under a no-fault insurance contract when for thousands of no-fault claimants there is no contract; rather, benefits are allowed by operation of law. See e.g. *Harris v Auto Club Ins Ass'n*, 494 Mich 462, 471-472; 835 NW2d 356 (2013); MCL 500.3114(5); similarly, MCL 500.3172 and the Michigan Assigned Claims Plan.

33 *Brunsell v City of Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002) (emphasis added).

34 Additionally, since lay people can provide transportation, replacement services, and attendant care services, virtually the hundreds of millions of US residents are potential providers as well.

35 See generally *Keilor*, 190 Mich App at 501-501, rev'd on other grounds, *Allstate v Hayes*, 422 Mich 56, 63 (1993) (an injured person is not a third-party beneficiary of a liability insurance contract and cannot sue the liability insurer – even though the contract took place paying someone for the benefit of the insured); *Schmalfeltt*, 469 Mich 422 (an injured person is not a third-party beneficiary of a premise owner's insurance contract which provides medical payments coverage and cannot directly sue the insurer – even though the contract contemplates paying someone for the benefit of the insured).

GPS Trackers: Legal? Its applications and implications

By: S.A. De Visser, *Great Lakes Investigation, LLC*

Executive Summary

Since the introduction of GPS trackers to the marketplace, court cases and lawsuits addressing the legal uses and ethical uses of trackers have been inconsistent from the federal level down to the state level. Likewise, to date, there is no definitive Michigan case law. No lower courts have addressed the usage of trackers by professional investigators for the purpose of surveillance in civil insurance claims. The State of Michigan, however, addresses the use of GPS trackers in the Michigan Penal Code, MCL 750.539l. In essence—it is legal. Professional Investigators (PIs) are exempted from criminal prosecution for the placement of trackers on personal properties (i.e. vehicles) for the purpose of information gathering and surveillance in civil insurance matters.

A key issue, however, is one of perception narrated by plaintiff attorneys to taint juries, even in the face of incriminating video documentation of their clients, and that, albeit legal, placing trackers on plaintiffs' vehicles is "sneaky" and should be seen as such.

Mr. De Visser is sole owner of a professional investigative agency with more than 25 years of investigative experience for insurance companies, corporations, third-party administrators, and defense law firms. While possessing a broad range of skill sets within fraud and the investigative industry, he has successfully brought to conclusion for his clients hundreds of investigations and surveillance, saving clients millions of dollars.

A brief history of the private investigator industry shows a long-standing field of "old school" surveillance—one to two vehicles going mobile, chasing plaintiffs and claimants, hiding inside tinted window surveillance vans; grown men in shrubberies with high-powered cameras taking close-ups of presumed nefarious fellows. Old-school surveillance entailed setting up a suitable surveillance position in a neighborhood and taking copious close-up photos and videos of plaintiffs or claimants (hereinafter referred to as "subjects") doing things contrary to what they alleged in their depositions, facilitations, or answers to interrogatories. Times change, however, and so do surveillance tools and technologies.

In the last decade, there has been an increase in use of GPS tracking technology for surveillance. GPS tracking devices have become an invaluable tool for private investigators. In fact, insurers, third-party administrators, and some self-insured companies are even quietly endorsing professional investigative firms to use tracking devices.

GPS tracking data delivers concrete evidence in a safe and cost-effective way. GPS tracking technology allows investigators to conduct casual surveillance, removing any threat of following a subject at high speeds down Gratiot or Van Dyke during rush hour. The risk of accidents, incidental road rage events, or losing the subject altogether, is avoided. Yet, the legal-defense industry, understandably, may have concerns about the use of these tracking devices, such as legality and privacy concerns.

So, what do these devices look like? How do they function? What type of concrete evidence do they give defense attorneys?

Overview of GPS Tracking Devices

A GPS tracking device is defined as any electronic device that is designed or intended to be used to track the location of a motor vehicle regardless of whether that information is recorded. The tracking devices are relatively small, about the size of a deck of playing cards, or an Altoid container. They are generally flat black and can be encased in a black water resistant (pelican case) covering with a strong magnet. Trackers transmit their location in any given time period to a host (laptop or smart phone) via satellite in real time. Once attached, the trackers are difficult to detect unless, for example, the owner of the vehicle goes to a Midas or Belle Tire and the vehicle is hoisted. Even then the tracker is difficult to spot if it is attached high up on the frame or around the muffler. It is best to attach a tracker to the rear portion of the vehicle, and never in the front of the vehicle or to the engine block, because those specific placements heighten a consistent signal returning to the host.

Tracking data provides detailed vehicular stopping and starting reports, as well as movements and address history. The tracking data is quite accurate and specific. Data

mined can show a subject's activity for as long as 45 days (battery life). While the use of GPS trackers is safer in today's road-rage society, the devices also provide economical alternatives for long term surveillances. For example, in larger cities or heavy traffic areas, several investigators would be needed to conduct a surveillance effectively and safely. This results in much higher fees than the daily or weekly rate for monitoring a GPS device. The rate for surveillance using trackers ranges from $25-$65 per day plus $100 for attachment and $100 for removal, compared to $65-$100 per hour for an investigator, plus mileage over a period of several days.

Legality of the Use of GPS Trackers in Personal Injury Cases

Since the introduction of GPS trackers to the marketplace, court opinions addressing the legal and ethical issues of trackers have been inconsistent from the federal level down to the state level. In 2012, the United States Supreme Court ruled that government and law enforcement agents in criminal matters are precluded from placing trackers to monitor movements without a warrant. The dialog on this topic remains ongoing as technology advances and applications of trackers increase; however, federal law has not specifically addressed whether it is legal or ethical to use GPS trackers in civil matters.

To date, there is no definitive Michigan case law regarding the usage of trackers by professional investigators for the purpose of surveillance in civil insurance claims. The Michigan Legislature, however, addressed the use of GPS trackers in the Michigan Penal Code. The Michigan Penal Code, MCL 750.539l, exempts professional investigators and their employees and agents from being precluded in applying tracking devices on motor vehicles:

> (1) A person who does any of the following is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both:
>
> (a) Installs or places a tracking device, or causes a tracking device to be installed or placed, in or on a motor vehicle without the knowledge and consent of the owner of that motor vehicle or, if the motor vehicle is leased, the lessee of that motor vehicle.
> (b) Tracks the location of a motor vehicle with a tracking device without the knowledge and consent of either the owner or the authorized operator of that motor vehicle or, if the motor vehicle is leased, either the lessee or the authorized operator of that motor vehicle.
>
> * * *
>
> (2) Subsection (1) does not apply to any of the following
>
> * * *
>
> (j) Except as provided in subsection (3), the installation or use of a tracking device by a professional investigator or an employee of a professional investigator lawfully performing his or her duties as a professional investigator or employee of a professional investigator for the purpose of obtaining information with reference to any of the following:
> (i) Securing evidence to be used before a court, board, officer, or investigating committee.
> (ii) Crimes or wrongs done, threatened, or suspected against the United States or a state or territory of the United States or any other person or legal entity. . . . (emphasis added).

In essence—it is legal. Professional Investigators (PIs) are exempted from criminal prosecution for the placement of trackers on personal properties (i.e. vehicles) for the purpose of information gathering and surveillance in civil insurance matters.

Defense lawyers, however, need to be aware when hiring private investigators for surveillance, that it is likely some professional investigators hide the fact they use tracking devices. The motive for non-disclosure could simply be trade secret, sort of akin to the rationale of a magician not sharing magic-trick secrets. There is nothing to hide; one must just be prepared to righteously defend the right to use this technology.

What Happens When a Subject Finds the GPS Devices

In 2015, this author was deposed on the issue of placing a tracker on a plaintiff's vehicle in an auto PIP claim. It had come to light, literally, due to an electronic glitch, when the tracker battery ran low and a tiny LED blue light blinked as the battery ran down. This would not have been a problem except that the plaintiff's vehicle, parked over a shiny black, rain enhanced, asphalt driveway, reflecting noticeably as the plaintiff exited his dwelling and was about to depart for generic whereabouts. The plaintiff noticed the blinking light and brought the tracker to his attorney, who in turn angrily contacted the insurer's defense counsel.

Defense counsel had no knowledge of the tracker since it was the client who authorized the use of a tracker. Defense counsel was presented with a copy of the Penal Code and subsequently sent it to the plaintiff's attorney. Once the plaintiff's attorney was presented with the statute all would be in full compliance with the world. Right? The Penal Code was specific, was it not?

Incidentally, this investigator would have wished the manner in which the tracker was removed had been addressed by defense counsel. Would it not have been better to force plaintiff's attorney to admit or deny that his client took the tracker off despite his recorded testimony that he was incapable of bending over?

This author was then surprised when summoned for a deposition. What could there be to discuss…to depose? Both investigator and defense attorney reasoned, based on the Penal Code, this was clear cut, a lawful action.

The investigator had a legal right to use a tracking device under the circumstances

described. This author had been given clear approval by the client to place a tracker on the plaintiff's vehicle. The insured had sued the insurance company. Litigation was looming. The vehicle, a blue Ford Fusion, had been in several minor vehicular accidents, and a key issue in the case was whether the vehicle was drivable and operable by the plaintiff, as the plaintiff had alleged to the insurance company that the vehicle was "totaled."

At the onset of the surveillance, the Fusion was parked in the plaintiff's driveway, with the rear portion butting up to a public sidewalk. The tracker was placed in the rear bumper as the Fusion sat in the driveway, as described above.

Throughout the deposition, the plaintiff's attorney did not attempt to define the act of placing the tracker on his client's vehicle as trespassing, or a violation of privacy. He did get on record that the tracker was placed on the Fusion while parked in the plaintiff's driveway. A direct attack of trespassing or invasion of privacy, however, never materialized, with the exception of describing this investigator as, "sneaking around and stuff."

The issue at deposition was whether this investigator was knowingly in compliance with MCL 750.539l(2)(j)(i) and (ii) of the Penal Code. Plaintiff's attorney inquired as to whether this investigator understood his "duty" as a professional investigator for the purpose of obtaining information and securing evidence to be used before a court. Plaintiff's counsel reasoned that applying a tracker on his client's vehicle was not in compliance with the Penal Code because it could not be foreseeable that the PIP claim was "going to court." Therefore, this investigator had no legal right to place a tracker on the vehicle under MCL 750.539l(2)(j):

Deposition, Pages 22 through 25:

Q: Except as provided in Subsection 3, the installation or use of a tracking device by a professional investigator, which you are; correct?

A: Yes, lawfully performing his or her duties as a professional investigator or employee of a professional investigator for the purpose of obtaining information with reference to any of the following.

Q: Are you saying that (j.) (i.), securing evidence to be used before a court, a board, officer, or investigative committee is where you find yourself?

A: Yes.

Q: Now, the truth of the matter is, as we know today, there was a court proceeding at that time; correct?

A: Correct.

Q: Okay? There wasn't a board or officer that was involved; correct?

A: Correct.

Q: Or an investigating committee; correct?

A: Correct.

Q: You -- it would seem to me – securing evidence to be used before a court that is why you were securing it.

A: Correct.

Q: You -- it would seem to me -- securing evidence to be use before a court that isn't why you were securing it, wasn't it?

A: Well, there's two. The securing the evidence to be used before a court. It was in -- while, the assumption was eventually is going to be litigated.

Q: You did know that, did you Sir?

A: Well, once [Defense Counsel] has it eventually it's going to be litigated.

Q: And I'm going to ask you that again and I'm going to be very kind about it. You did not know that, did you? ...could have settled this case with me before it ever got to court.

A: …when defense counsel is retained by an insurance company, they are foreseeing litigation. So, based on that…I was going to obtain information [with the placement of a GPS tracker].

Q: Okay.

A: Or that was going to be my assumption as I go out there in preparation of a future event, litigation.

Q: So, you're telling me that you're going to tell a jury later that if the assignment would have gone from [the Insurer] versus [defense counsel] a lawyer you would not have placed a GPS device on this vehicle.

A: Probably correct. Definitely.

Q: Am I correct?

A: Yes.

Deposition, page 62, Reexamination by the Plaintiff Attorney:

Q: I'm just confused about something. A guy with your experience, did you think [the plaintiff] was a terrorist or something? How does (j.) (ii.) -- how does (j.) (ii.), crimes or wrongs done, threaten or suspected against the United States –

Because it's –

Q. Well, let me finish. -- or the state or territory of a state or other persons or…

A. I looked at wrongs done any other person or legal entity.

Q. Okay. Cool. You actually looked at that.

A: We had --

Q: Did you actually look at that?

A: Yes.

Q: Okay. Fine.

A: Can I add or --

Q: No. I just wanted to make sure you looked at it, that's all. Okay. I have no further questions.

Conclusion

Is it prudent then, based upon foreknowledge of being discovered and a looming trial, that GPS trackers should be used. The insurance industry generally

does not have a problem with GPS tracking even before a claim is litigated. Can the threat of discovery taint the video documentation attained through the use of tracking devices be worthwhile? As with new technology there is an upside and downside. GPS trackers are cost effective and increase the likelihood of obtaining great incriminating video. But what will the jury perceive? A plaintiff attorney easily can paint the narrative of the professional investigator as a "sneaky" fellow. This can taint any jury, whether or not GPS tracking is legal.

As defense counsel, do not assume that a professional investigator knows all the legal nuances of the statute as he or she applies that small black box to a subject's vehicle in the dead of night. A plaintiff's attorney, a good one, will not be impressed with the knowledge of this statute even if it is time he or she has read it. A good attorney will hone in on the PIs understanding of that statute and test whether that PI not only believed the PI complied with the statute but the PI understood the specific statute's subsections and what specific part of the statute the PI believed he or she complied with to legally invade privacy rights. The PI better be ready.

Before giving approval for a PI to use a GPS tracker, make certain that PI is well versed in the statute and equally well versed in the placement of this technology as seen under the statute. Otherwise under oath, in a deposition, or in court, an unprepared PI could damage the chances of an otherwise winnable case, despite excellent hi-definition video documentation. A possible no cause or small award could blow up into a six-figure hit for your client.

It appears, from personal experience, the "other side" more or less will be on a fishing expedition. Professional investigators and defense attorneys can get ahead of this "perception" issue, by shaping the narrative in our clients' favor. It is imperative to impress a narrative to juries that placement of GPS trackers, and the manner in which they are placed, is for safety reasons. In actuality, it does protect the long term privacy rights of the subject. No longer does a PI have to "sneak around" the subject's neighborhood; instead, it allows the subject to go out into public places to be monitored.

This calls for non-dubious gamesmanship on the investigator's part, with assistance from defense counsel, which will balance out the vexing showmanship that the other side will surely muster. A good investigator should relish that challenge and should have the acumen for it.

MDTC Schedule of Events

2017

November 9	Past Presidents Dinner – Sheraton, Novi
November 10	Winter Conference – Sheraton, Novi

2018

March 8	Legal Excellence Awards - Gem Theatre, Detroit
May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
September 7	Golf Outing – Mystic Creek
October 4	Meet the Judges - Sheraton Detroit Novi, Novi
October 17-21	DRI Annual Meeting - Marriott, San Francisco
November 8	Past Presidents Dinner – Sheraton, Novi
November 9	Winter Conference – Sheraton, Novi

2019

June 20-22	Annual Meeting & Conference – Shanty Creek, Bellaire
September TBA	Golf Outing
September 24-26	SBM Annual Meeting
October TBA	DRI Annual Meeting
March	Legal Excellence Awards – TBA

2020

June 18-19, 2020	Annual Meeting & Conference – Treetops Resort, Gaylord
September	Golf Outing
September	Board Meeting
September TBA	SBM Annual Meeting
October TBA	DRI Annual Meeting
March	Legal Excellence Awards - TBA

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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A Primer on the Michigan Supreme Court's "Mini Oral Argument On the Application" (MOAA)

While the procedure has been in use since 2003, many practitioners have not yet had occasion to participate in a Michigan Supreme Court "mini oral argument on the application," or MOAA (pronounced "mō-ah").

Overview of the MOAA Process

MCR 7.305(H)(1) provides that in response to an application for leave to appeal, the Supreme Court may "grant or deny the application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order." Of course, in the vast majority of cases the Court will deny the application. While the Court will sometimes grant relief by peremptory order, in only a handful of cases does the Court grant leave to appeal and order full briefing and argument.

In some cases, the Court needs additional assistance from the parties before making its determination, and will direct the court clerk "to schedule oral argument on whether to grant the application or take other action." As explained in the Supreme Court's Internal Operating Procedures, a MOAA "allows the Court to explore the issues in a case without the full briefing and submission that apply to a grant of leave to appeal." MSC IOP 7.305(G)[1]. The granting of a MOAA requires a majority vote, just like granting leave to appeal. *Id.*

Supplemental Briefs

When the Court orders a MOAA, it typically directs the filing of supplemental briefs, usually due 42 days after entry of the MOAA order. Oftentimes the order will identify specific issues that the Court wants the parties to address. MSC IOP 7.305(G)[1][a]. Supplemental briefs are subject to the same requirements as merit briefs, and "should address the issues specified by the Court in its order." *Id.*

The Court's "Guide for Counsel In Cases To Be Argued in the Michigan Supreme Court" advises practitioners to "keep in mind that if the Court has ordered a MOAA, it is likely interested in a specific issue that it considers important, but it is unsure whether that issue warrants a full grant." Thus, any such issues should be fully addressed, as they will "likely be regarded as controlling by the Court."

Because MOAAs are "usually scheduled relatively soon after the briefing period ends," the Court discourages motions to extend time to file supplemental briefs. MSC IOP 7.305(G)[1][b]. And because the Court contemplates the parties' supplemental briefs being filed at the same time, "[i]f one party moves to extend the filing date and it is granted, the Court's order will sua sponte provide the same extension to the other party, keeping with the mutual due date specified in the MOAA order." *Id.* Reply briefs are "rarely permitted," and are accepted "only upon order of the Court." *Id.*

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Amicus Briefs

While the court rules only address the filing of amicus briefs in calendar cases, the Supreme Court does permit them to be filed at the MOAA stage. MSC IOP 7.305(G)[1][c]. The Court applies the same deadlines as in calendar cases: "That is, an amicus brief, along with a motion to accept the brief if required by MCR 7.312(H), is due within 21 days after the last timely filed supplemental brief is submitted or the time for filing the supplemental briefs has expired, whichever is earlier." *Id.*

Oral Argument

MOAA cases are scheduled and argued alongside calendar cases, but there are important differences in how arguments in MOAAs are conducted, as explained in the Supreme Court's "Guide for Counsel":

> First, each side is limited to 15 minutes of argument. Second, counsel is given only two minutes of uninterrupted argument. As a practical matter, however, the Justices frequently begin questioning counsel prior to the expiration of the two minutes. In addition, while it is possible to reserve time for rebuttal, it will likely be a practical impossibility. Given the limited time for argument, it is imperative to be clear and concise when making your arguments and answering questions.

Decision

After the MOAA, the Court will consider "a range of options to address the case, including granting or denying leave to appeal, issuing a peremptory order, or issuing an opinion." See "Guide for Counsel," p 11. The Court's "Guide for Counsel" explains that it is "important to recognize that, in MOAA cases, the Court is less likely to issue a full opinion following argument." *Id.* Thus, practitioners should "[t]hink carefully about what you would like the Court to do" and be prepared to "discuss and defend" that position at oral argument. *Id.* If the goal is to obtain a peremptory order, it is important to "tell the Justices precisely what the order should accomplish." *Id.* On other hand, "[i]f your goal is to convince the Court to grant leave to appeal, tell the Court why denying leave or issuing a peremptory order is insufficient." *Id.*

The Absurd-Results Doctrine in Michigan

The absurd-results doctrine provides that a court may depart from a statute's plain language if following it would lead to an outcome the court views as ridiculous and inconsistent with the statute's overall purpose. For detractors, applying the absurd-results doctrine is nothing short of judicial mutiny against the Legislature. For the rule's proponents, it's an act of judicial mercy, to be dispensed when legislators inadvertently enact language contrary to their intent.

The debate over this doctrine has taken place in judicial conference rooms and in the pages of reporters for decades. Michigan's judiciary has included both proponents and detractors of the absurd-results rule. And, as a result, the doctrine has waxed and waned in Michigan jurisprudence over the years.

Because MOAAs are "usually scheduled relatively soon after the briefing period ends," the Court discourages motions to extend time to file supplemental briefs.

The Absurd-Results Doctrine Before *McIntire*

The doctrine was apparently in favor for much of Michigan's history. In *Salas v Clements* (1976),[1] for example, the Michigan Supreme Court called the doctrine a "fundamental rule of statutory construction[.]"[2] It explained "that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question."[3]

The statute at issue in *Salas* applied to plaintiffs who were injured by an intoxicated dram-shop patron. For a plaintiff to sue a dram shop for selling alcohol to an intoxicated patron who injured the plaintiff, the plaintiff had to name the intoxicated patron in the lawsuit. She also had to keep that patron in the lawsuit until the conclusion of litigation.[4] The plaintiffs in *Salas* couldn't find the intoxicated patron who injured them and therefore couldn't satisfy the "name and retain" requirement.

The Michigan Supreme Court concluded that applying the "name and retain" requirement to a plaintiff who couldn't identify the patron would be silly.[5] It based this conclusion on the belief that the statute was designed to prevent plaintiffs from entering into collusive settlements with the intoxicated patron, and then suing the dram shop with the patron's paid-for assistance. The Court wrote, "To suggest that an injured plaintiff 'name and retain' as defendant an intoxicated person whose identity he does not know in order to prevent collusion … is patently absurd."[6] The Court therefore limited the "name and retain" requirement to plaintiffs who knew the identity of the intoxicated patron.

McIntire Calls the Doctrine into Doubt

Salas represented the general state of the absurd-results doctrine until *People v McIntire*, a 1999 opinion from the Michigan Supreme Court.[7] The defendant was granted immunity in exchange for testimony before a grand jury in a murder investigation. Later, the prosecutor determined that the defendant was actually the murderer.[8] He charged the defendant with murder, arguing that the defendant's immunity was "void" because the defendant lied to the grand jury.[9]

Over a dissent from then-Judge Robert Young, the Court of Appeals held that the prosecution could proceed despite the defendant's immunity. The Court of Appeals majority opined that it wouldn't make sense to apply immunity when the defendant gave untruthful testimony: "In our judgment, … a requirement of truthful testimony is compelled by the

language of this statute when viewed in its obvious context."[10]

Then-Judge Young rejected the majority's decision as an improper interference with the legislature's lawmaking authority. Although the majority didn't actually claim to apply the absurd-results doctrine, Judge Young took that doctrine (and the majority) to task in an extended footnote. He rejected the doctrine as "'nothing but an invitation to judicial lawmaking.'"[11]

By the time the Michigan Supreme Court considered *McIntire*, Judge Young was Justice Young. He recused himself, and the Supreme Court adopted his Court of Appeals dissent.

For Michigan jurists, *McIntire* was a fatal blow to the absurd-results doctrine.

Return of the Doctrine

Yet *McIntire* didn't quite spell the end of the absurd-results doctrine. In *Cameron v Auto Club Insurance Association* (2006),[12] three dissenting justices and one concurring justice spoke favorably of the doctrine. To be fair, Justice Markman's concurrence made it clear that he didn't think the doctrine would apply to the majority's conclusion in *Cameron*. That left three justices who rejected the absurd-results doctrine entirely, three who would have applied the doctrine in *Cameron*, and one who accepted the doctrine in general but wouldn't apply it to *Cameron*.

Two years later, in *Detroit International Bridge Company v Commodities Export Co* (2008),[13] the Court of Appeals concluded that *Cameron*'s three-dissents-and-a-concurrence consensus represented the re-adoption of the absurd-results rule. (Judge Murray observed in March 2010 that the *Detroit International* court was a bit too enthusiastic about *Cameron*.[14]) But the Michigan Supreme Court seemed to give the doctrine a renewed thumbs-up in *People v Tennyson* (2010),[15] where Justice Markman's majority opinion stated that "statutes must be construed to prevent absurd results."[16]

Since *Tennyson*, the goal of avoiding absurd results seems to be an accepted part of statutory interpretation.[17] That said, the doctrine has a second-class status at times; the suggestion that a court tacitly relied on the doctrine is not likely to be taken as a compliment by most judges.[18]

> In some cases, the Court needs additional assistance from the parties before making its determination, and will direct the court clerk "to schedule oral argument on whether to grant the application or take other action."

Strategy for Advocates

What all this means for appellate advocates in Michigan is that the absurd-results doctrine is a possible but not especially attractive line of argument. Invoking the doctrine is essentially an admission that the statute at issue is contrary to your client's position. It's an act of throwing yourself on the mercy of the court. And some judges are deeply convinced that they lack the power to exercise that kind of mercy.

Until a future Michigan Supreme Court majority gives us another *McIntire*, the absurd-results doctrine can be used—but it should be used sparingly.

Endnotes

1 *Salas v Clements,* 399 Mich 103; 247 NW2d 889 (1976).

2 *Id.* at 109.

3 *Id.* at 109.

4 *Id.* at 106, citing MCL 436.22 (repealed).

5 *Salas,* 399 Mich at 109.

6 *Id.*

7 *People v McIntire,* 461 Mich 147, 155-162 n2; 599 NW2d 102 (1999).

8 *Id.* at 148.

9 *Id.*

10 *People v McIntire,* 232 Mich App 71, 92; 591 NW2d 231 (1998).

11 *McIntire,* 461 Mich at 156, n 8, quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21.

12 *Cameron v Auto Club Insurance Association,* 476 Mich 55, 110-112; 718 NW2d 784 (2006).

13 *Detroit International Bridge Company v Commodities Export Co,* 279 Mich App 662; 760 NW2d 565 (2008).

14 *Progressive Michigan Insurance Co v Smith, 287* Mich App 537; 791 NW2d 480 (2010).

15 *People v Tennyson,* 487 Mich 730; 790 NW2d 354 (2010).

16 *Id.* at 742 (cleaned up).

17 See, e.g., *Elahham v Al-Jabban,* 319 Mich App 112; 899 NW2d 768 (2017), citing *Rogers v Wcisel,* 312 Mich App 79, 87; 877 NW2d 169 (2015)

18 *Ray v Swager,* __ Mich __, *23; __ NW2d __ (July 31, 2017) (Wilder, J. dissenting).

Legal Malpractice Update

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Statute of Limitations & Accrual of Claims

Kovacs v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued June 20, 2017 (Docket No. 331448).

Facts: The plaintiff hired the attorney defendants to negotiate an employment contract on his behalf. The plaintiff had been in negotiations with North American Bancard ("NAB") for eight years before hiring the defendants to represent him in the final phase of negotiations. The contract was fully negotiated and executed by April 2010.

In 2012, the CEO of NAB engaged in the recapitalization of the company and withdrew $175 million from the company. The plaintiff believed that his employment agreement should have included recapitalization of the company by the CEO as a triggering event causing the plaintiff's incentive bonus to be paid. The plaintiff contacted the defendants and explained that it was his understanding that when the CEO received a cash out from the business, so would the plaintiff. But the defendants informed the plaintiff that recapitalization wasn't a triggering event that would cause the plaintiff's bonus to be paid.

Then, in 2013, the plaintiff discovered that NAB created a new regulatory fee charged to merchants. The plaintiff believed that his employment agreement included the new merchant fees in the calculation of his commission. But his employment agreement didn't cover the newly created merchant fees either.

The plaintiff filed a legal-malpractice complaint on July 31, 2014, alleging that the defendants failed to include certain terms in his employment contract, which caused him harm. The defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). The trial court denied the defendants' motion. The Court of Appeals reversed the trial court's decision, holding that the statute of limitations barred the plaintiff's legal-malpractice claim.

Ruling: The Court of Appeals determined that the plaintiff's claim was barred by the two-year statute of limitations governing malpractice actions (MCL 600.5805(6)) and was not saved by the six-month discovery exception to the statute of limitations (MCL 600.5838(2)).

The statute of limitations for an action charging malpractice is two years after the claim accrues. MCL 600.5838(1) provides that a claim for professional malpractice accrues when the professional discontinues serving the plaintiff in a professional capacity as to the matters out of which the claim for malpractice arose, regardless of when the plaintiff discovers or has knowledge of his or her claim. Relying on *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994), and *Maddox v Burlingame*, 205 Mich App 446; 517 NW2d 816 (1994), the court employed a two-step analysis to determine when plaintiff's claim accrued. First, the court considered what legal service attorney defendants performed that allegedly caused plaintiff's claim to arise. Then, the court determined when the defendants completed that legal service.

Referencing plaintiff's own deposition testimony, the court determined that attorney defendants were hired specifically to negotiate the employment contract. Because attorney defendants completed their job when negotiations concluded and the parties signed the employment agreement, the plaintiff's claim accrued by April 1, 2010. So, the two-year statute of limitations period expired on April 1, 2012—more than two years before the plaintiff filed his complaint.

The court also rejected plaintiff's contention that the six-month discovery exception in MCL 600.5838(2) saved his claim. Under that section, a malpractice claim may

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be commenced within six-months after a plaintiff discovers or should have discovered the existence of the claim. The court noted that, under *Gebhardt*, the discovery period begins to run when the plaintiff discovers he has a **possible** cause of action (as opposed to knowledge of a **likely** cause of action). And, the discovery rule applies to the discovery of an injury, not the discovery of a later realized consequence of the injury. *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993).

Because the plaintiff realized that the omission of certain terms from the employment contract caused him harm in 2012 (recapitalization of the company), or, at the latest, 2013 (new merchant fee), the six-month period lapsed by the time he filed his complaint in July 2014.

Practice Note: Consider sending disengagement letters to your clients when your representation ends. While they are not necessary to establish when representation ends, they can be helpful.

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MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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As I prepare this report in the last week of August, the Michigan summer is coming to its end. The mornings are cooler, the kids are going back to school, and we are looking forward to the Legislature's return to the Capitol after Labor Day. Things have been fairly quiet at the Capitol this summer. The public demonstrations on the front lawn have been relatively few and orderly - for the most part. But I have recently found myself distracted by the noise of heavy construction across the street as the grounds and parking lots on the north, south and west sides of the Capitol building have been torn up in the first phase of the Capitol Committee's two-year, $70 million, infrastructure improvement project.

Our legislators have not yet been bothered much by that disruption, as they have had a nice break this summer. Although many of them are perpetually running for re-election, none of them are facing the voters' judgment this fall, and there were only two relatively brief session days in July and August. There has been time for planning and meetings with constituents in the home districts, and there will now be a full schedule of legislative sessions in the fall. Thus, I assume that our legislators will return next week tanned and rested and full of new ideas, and I will be expecting to have significant accomplishments to summarize in my next report.

New Public Acts

In the last weeks of its sessions before the summer recess in June, the Legislature completed its work on the budget for the next fiscal year and produced a flurry of legislation. As of this writing on August 30th, there are 117 Public Acts of 2017 – 76 more than when I last reported on June 1st. The few that may be of interest to our members as civil litigators include the following:

2017 PA 101 – Senate Bill 333 (Jones – R) will amend the Revised Judicature Act, MCL 600.8031, to refine the statutory definition of "business or commercial disputes" included within the jurisdiction of the business courts. The amendments will clarify that the existing reference to "members" of a business enterprise is limited to members of a limited liability company or similar business organization, and that the list of parties included in a "business or commercial dispute" will also include guarantors of a commercial loan. The list of specifically excluded actions under subsection 8031(3) will be expanded to include supplementary hearings for enforcement of judgments, actions for foreclosure of construction and condominium liens, and actions for enforcement of condominium and homeowners association governing documents. The legislation will also amend MCL 600.8035 to clarify that the business court has jurisdiction over business and commercial disputes in which equitable or declaratory relief is sought. This amendatory act will take effect on October 11, 2017, and will apply to cases filed on and after that date.

2017 PA 96 – Senate Bill 245 (Jones – R) will repeal MCL 750.226a, which provides a criminal penalty of imprisonment for up to a year and/or a fine of up to $300 for possession of a switchblade. This act will take effect on October 11, 2017.

2017 PA 95 – Senate Bill 219 (Green – R) will amend several sections of 1927 PA 372, to effect numerous refinements of the statutory provisions governing application for concealed-pistol licenses, the processing of such applications, and the issuance, suspension, revocation, and suspension of concealed-pistol licenses. This amendatory act will also take effect on October 11, 2017.

2017 PA 89 – House Bill 4213 (Lucido – R) will amend the Michigan Liquor Control Act, MCL 436.1703 – the "minor in possession" statute – to specify that a preliminary chemical breath analysis cannot be administered to a minor without the

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minor's consent or a court order, which a peace officer may seek if consent cannot be obtained. This amendatory act will take effect on October 10, 2017.

2017 PA 85 – House Bill 4427 (Runestad – R) has created a new "law enforcement body-worn camera privacy act." This new act, which will take effect on January 8, 2018, will provide safeguards against disclosure of video records of events recorded by body cameras worn by law enforcement officers in private settings, and in circumstances where disclosure would run afoul of the Crime Victim's Rights Act. Although the new act will not require use of body cameras, it will also establish new requirements for preservation of body camera recordings and require law enforcement agencies utilizing body-worn cameras to develop policies for their use, and for the maintenance and disclosure of the recordings produced, consistent with the act's requirements.

The proposed constitutional amendments would create an Independent Citizens Redistricting Commission for establishment of state legislative and congressional districts as a permanent Commission in the legislative branch.

2017 PA 65 – House Bill 4613 (VerHeulen – R) has created a new "trial court funding act," which will create a new Trial Court Funding Commission within the Department of Treasury. The 14-member Commission will review and recommend changes to the trial court funding system in light of the Supreme Court's holding, in *People v Cunningham,* 496 Mich 145 (2014), that a provision of the Code of Criminal Procedure did not provide independent authority for assessment of costs in criminal matters. The Commission will also be required to review and recommend changes to the trial court funding system in general; review and recommend changes to the methods by which the courts impose and allocate fees and costs; suggest statutory changes necessary to effect the recommended changes; and file a final report with the Governor and the legislative leaders within 2 years.

Old Business and New Initiatives of Interest

House Bill 4416 (Hoitenga – R) would amend the Penal Code, MCL 750.227, to eliminate the existing prohibition of carrying a pistol concealed on or about one's person, or in a vehicle, without a license for carrying a concealed weapon. Approval of this change would effectively eliminate the present requirement that a concealed pistol license be obtained in order to carry a pistol concealed or in a vehicle within Michigan, although the current prohibition would be maintained with respect to persons who are prohibited by state or federal law from possessing a firearm. And with the elimination of the licensing requirement, the firearm training required for issuance of a concealed pistol license would no longer be required as a prerequisite for concealed carrying. A Bill Substitute H-1 was passed by the House on June 7, 2017, and has now been referred to the Senate Committee on Government Operations.

House Bill 4312 (LaFave – R) would amend the Revised Judicature Act's provisions addressing admission to the State Bar to allow attorneys licensed to practice in other states to be admitted to the Michigan Bar without satisfying the established educational requirements under specified circumstances. This bill was reported by the House Judiciary Committee on June 7, 2017 with a Bill Substitute H-1, which now awaits further consideration by the full House on the Third Reading Calendar. The same bill has been introduced as **Senate Bill 195 (Casperson – R)** and referred to the Senate Judiciary Committee.

House Bill 4848 (Lucido – R) would amend 1966 PA 189, regarding issuance and execution of search warrants, to add a new section MCL 780.651A. The new section would establish new procedures for issuance of search warrants to compel access to, or production of, electronic communication information, and for obtaining approval after-the-fact in situations where such information has been obtained without a warrant in an emergency involving an imminent danger of death or serious physical injury requiring access to the information obtained. This bill was introduced on July 12, 2017, and referred to the House Judiciary Committee.

Things have been fairly quiet at the Capitol this summer.

House Joint Resolution S (Wittenberg–D) proposes an amendment to Const 1963, art 2, § 9, which reserves the authority of the voters to challenge legislative enactments by referendum. The proposed amendment would modify the language which currently provides that the power of referendum "does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds." Over the years, this limitation has often been abused by the political party in control to immunize legislation from challenge by voter-initiated referendum by including a small appropriation for an insignificant purpose. This abuse has been sanctioned by our Supreme Court based upon its finding that the language is clear and must therefore be applied as written. The amendment proposed by this Joint Resolution would prevent future abuses by limiting the application of this exception to "***general appropriation*** acts making appropriations ***that substantially fund 1 or more state departments or to acts making appropriations to meet deficiencies in state funds."*** This proposed constitutional amendment will be submitted to the voters for approval at the next general election if approved by the requisite two-thirds vote in both houses. This writer is unwilling to bet any of his own money that this will occur unless the amendment is separately proposed by a petition of the voters.

And while speaking of issues that the Legislature is unlikely to act upon, it is worth noting that **House Joint Resolution G (Barrett – R)**, proposing a part-time Legislature, has not been scheduled for consideration since its introduction was noted in my last report, and that the petition drive sponsored by Lieutenant Governor Calley proposing the establishment of a part-time Legislature in a slightly different manner is now collecting signatures in the face of

stiff opposition from parties who prefer the status quo.

This new act, which will take effect on January 8, 2018, will provide safeguards against disclosure of video records of events recorded by body cameras worn by law enforcement officers in private settings, and in circumstances where disclosure would run afoul of the Crime Victim's Rights Act.

The touchy subject of legislative redistricting is another issue that the voters may ultimately be given an opportunity to decide in the absence of legislative action. It should be noted, in this regard, that a Ballot Proposal Committee known as "Voters Not Politicians" has drafted a Petition that addresses this issue by proposed amendments to Articles IV and V of the State Constitution. The form of the Petition was recently approved by the Board of State Canvassers, and the collection of signatures is now underway.

The proposed constitutional amendments would create an Independent Citizens Redistricting Commission for establishment of state legislative and congressional districts as a permanent Commission in the legislative branch, to be assisted in the performance of its administrative duties by the Secretary of State. The new provisions establish detailed qualifications for membership on the 13-member Commission, and procedures for selection of its members, designed to produce a diversity of political viewpoints and ensure that the Commission's actions and decisions will not be directed or unduly influenced by any one political party. The new provisions also include detailed procedures to be followed by the Commission in the performance of its duties, and detailed criteria and guidelines to be applied in its drawing of the legislative and congressional districts. The Supreme Court, in the exercise of original jurisdiction, could direct the Commission in the exercise of its duties to review a challenge to an adopted plan, and remand a plan to the Commission for further action if it does not comply with state or federal constitutional requirements or applicable federal law, but the proposed language emphasizes that, "in no event" shall any body, other than the Commission, "promulgate or adopt a redistricting plan or plans for this state."

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.

Medical Malpractice Report

By: Kevin M. Lesperance and David J. Busscher, *Henn Lesperance PLC*

What Time Is It? *Mitchell v Kalamazoo Anesthesiology* and Medical Record Timestamps in Medical Malpractice Cases

In a medical-malpractice action, the medical records often make or break the case. For the medical-malpractice defense bar in particular, it is difficult to understate how important these records are. Pre-suit reviews and recommendations are made based on the medical records. Initial pleadings are drafted in large part based on the information available in the medical records. An important component of initial discovery in medical-malpractice defense includes obtaining authorizations from treatment providers and facilities so that additional records can be obtained. Many hours are spent reviewing the voluminous pages of medical records relevant to a single case. At trial, key medical records are blown up as exhibits, and witness testimony is compared to, and impeached by, the significant medical records in the case.

The federal mandate of electronic medical record keeping has changed the way that medical records are created, stored, and used. In the past, records would be handwritten, regularly illegible, and sometimes quite limited. However, the records that did exist were made when somebody took the time to intentionally create them, and the information written in them would normally be pertinent to the subject of that record. Although it sounds ridiculous to say, those old paper records looked essentially the same when the healthcare provider wrote them as they did when they were entered into evidence at trial. Electronic medical records share none of those qualities. Electronic medical records commonly include quite a bit of automated information—rather than re-entering old information, that information is auto-filled and can be updated as needed. Information including current medications, prior treaters, and past test results can be available at the click of a button. The idea of a document being signed and dated takes on new meaning as providers click bubbles that auto-fill the date, time, and an electric image of a signature.

As every medical-malpractice attorney has discovered, even when an electronic record was specifically and intentionally created by a provider, it can look wildly different on paper than it does on the computer, and it can even contain different information in different places. Whether during a meeting, a deposition, or even in an effort to impeach testimony at trial, providers confronted with their own words and signature will still assert that they have never seen that record before—and they are telling the truth. The printouts provided to the attorneys just do not look anything like the records on the computer used in the day-to-day practice of medicine.

This is not meant to encourage some kind of nostalgia for paper record keeping—electronic medical records are convenient, they are easier to store, copy, and share, they can include images and dictations, they can be easily searched, and they can encourage thorough record keeping. However, electronic medical records can and do present unique litigation challenges for medical-malpractice attorneys, and those challenges need to be anticipated and addressed to ensure the successful defense of any given case. A recent published opinion by the Michigan Court of Appeals, released for publication on August 24, 2017, *Mitchell v Kalamazoo Anesthesiology PC*, ___ Mich App ___;

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___ NW2d ___; 2017 WL 3642673 (2017) (Docket No. 331959), provides a good example of both the importance of medical records in medical-malpractice cases and the ways that information in those records can provide fodder for challenges to their authenticity.

In *Mitchell*, the plaintiff brought a medical-malpractice action against an anesthesiologist and his practice asserting that the anesthesiologist negligently performed a procedure and caused permanent injury to the plaintiff. Specifically, the plaintiff alleged that the anesthesiologist improperly placed a needle or catheter in his shoulder in a way that directly impacted the phrenic nerve in his shoulder, resulting in permanent shortness of breath and trouble breathing. The defendants, however, asserted that the needle and catheter were correctly placed, and that the plaintiff unfortunately suffered from a known complication of the procedure that could occur in the absence of any negligence.[1]

One of the key issues at trial was whether a copy of an ultrasound image that the defense sought to admit was an accurate scan of the original ultrasound image. The image purported to show proper placement of a needle and catheter by the anesthesiologist while performing a nerve block.[2] The plaintiff challenged the authenticity of the ultrasound image for several reasons.

To begin, the defendant anesthesiologist testified that he printed an image of the ultrasound scan taken during the procedure, but he did not know what happened to the image. As a result, the image was not produced for quite some time during discovery, but eventually was produced. A document-imaging supervisor testified that a scanned copy of the image was found in the medical center records, but that the original record had been destroyed, and that human error caused the delay in disclosure of the record.[3]

The image showed that a sticker with the plaintiff's identifying information on it had been placed over another sticker, and that the new sticker was different from other such stickers used on the day of the plaintiff's procedure. In addition, the time listed on the ultrasound image timestamp was 4:16:27 p.m., but the time of the procedure listed in the plaintiff's chart was 15:32 (i.e., 3:32 p.m.), which suggested "that the ultrasound image was taken 45 minutes **after** the notes indicated that plaintiff had his procedure."[4]

> [T]he defense attorney should figure out why the timestamps are wrong/inconsistent, or appear wrong and should investigate to determine a reasonable explanation. In almost every case, there is a perfectly innocuous explanation which will head off questions about the authenticity of the document.

Despite these concerns, the document imaging supervisor testified she did not see a problem with the sticker, and she also did not think that there was an issue with the timestamp difference, suggesting that the difference "could have resulted from some kind of incongruence between the system's time and daylight savings time."[5] Based on this testimony, the defendants successfully argued that the image was authentic and should be admitted. Beyond that, the defendants argued that the plaintiff should not be allowed to present evidence about the delay in production of the image or to argue that the image copy contained in the electronic medical record was not authentic, because there was no evidence that anything "nefarious" or "dishonest" happened, and any "innuendo and supposition" by the plaintiff about the image would prejudice the defense. The plaintiff, though, argued that the image should be excluded from evidence, or alternatively, that he should be allowed to attack the image's genuineness and reliability at trial.[6]

The trial court agreed with defense counsel and determined that the evidence of the image was sufficiently authenticated to be admissible, and also held that allowing testimony challenging the authenticity of the image would invite a "trial within a trial," and so prohibited the plaintiff from offering any such testimony. At trial, the image was a key piece of evidence in the case. Even Plaintiff's own expert admitted that the image showed proper treatment and the defendants obtained a judgment of no cause of action. The plaintiff appealed, claiming that the trial court erred by authenticating the ultrasound image for admission and erred by excluding evidence and argument attacking the genuineness and reliability of the image.[7]

On appeal, the Court of Appeals found that the trial court did not err by authenticating the contested image, but did err by prohibiting the plaintiff from challenging the authenticity of the image. The Court noted that there are two related but distinct questions regarding the authenticity of evidence:

> The first question is whether the evidence has been authenticated—whether there is sufficient reason to believe that the evidence is what its proponent claims for purposes of admission into evidence. The second question is whether the evidence is actually authentic or genuine—whether the evidence is, in fact, what its proponent claims for purposes of evidentiary weight and reliability.[8]

The first question is reserved solely for the trial judge "in the role as evidentiary gatekeeper," to determine whether the proponent of the evidence can "make a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be."[9] The second question, regarding the weight and reliability of the evidence, "is reserved solely to the fact-finder, here the jury."[10]

This means that even after a piece of evidence is authenticated such that it is found to be admissible, the parties may still submit evidence and argument to the jury regarding whether that piece of evidence is, in fact, genuine and reliable. Because there was sufficient evidence for a reasonable juror to conclude the image was genuine, the Court found that the trial court did not err by ruling the image was admissible. However, because there was a bona fide dispute regarding the genuineness of the ultrasound image, the Court of Appeals found that the trial court did err by preventing the plaintiff from presenting argument and evidence about the weight and reliability that should be attached to the image.[11]

Even so, the Court noted that evidentiary error is not ordinarily grounds for appellate relief. In this case, though, the Court found that the ultrasound image was "a (arguably **the**) crucial piece of evidence."[12] For that reason, the Court determined that evidence regarding the image's reliability and genuineness, such as the issues with the sticker, the way it was stored, and the timestamp discrepancy, "would have been quite relevant as to the weight (if any) the jury should have placed on the image."[13] Therefore, it held that substantial justice required that the trial court judgment be reversed and vacated.

There are several different lessons that can be gleaned from this published opinion. A refresher on the Court's gate-keeping role in the admission of evidence is always helpful. Similarly, the distinction between baseline authenticity for the purposes of admission and whether the weight of the evidence supports that some piece of evidence is what a party claims it to be is also an important distinction to keep in mind.

However, one important point that this case highlighted for the authors of this article was the issue of the timestamp discrepancy. Apparently, the timestamp for the ultrasound image was approximately 45 minutes different than the time that the procedure was recorded to have taken place.

The Court found time discrepancy to be one of the significant possible pieces of evidence that the plaintiff should have been allowed to present to the jury in an attempt to argue the image was not authentic. The Court even took the time to mention that it found the daylight savings time explanation of the document imaging supervisor to be unconvincing. In the end, unfortunately, the Court of Appeals found that the exclusion of that and other evidence tending to challenge the authenticity of the image copy was so significant that it warranted a completely new trial.

In the authors' experience, time discrepancies of this sort are common, and they have a variety of causes. Sometimes, there are two different electronic medical record systems being used, and their clocks are not synced. Sometimes, the time in the electronic medical record is different from the computer it is being used on, or is different from a personal watch or cell phone someone uses for reference in manually entering time. The electronic timestamps can be the time a record is created or completed and not when the actual care was provided. Often, it seems, the timestamp present in the records is just an accident of when a provider happened to look back through a chart, or happened to leave a computer dialog box open without saving a note. All of these reasonable explanations can make the automatic timestamp enter a time other than when the service or treatment was actually provided.

Sometimes, these time discrepancies are small, with only a few minutes' difference. Other times, the discrepancies are large—one of the authors recently came across a note in an electronic medical record that had a timestamp over two years after the treatment had been provided. The note did not matter to the case, but the health provider defendant indicated that it was written contemporaneously, and obviously not two years later. He could not explain why the time was so far off. Even small discrepancies, though, can make a big difference.

However, electronic medical records can and do present unique litigation challenges for medical-malpractice attorneys, and those challenges need to be anticipated and addressed to ensure the successful defense of any given case.

These authors were involved in a different case in which the various electronic medical records were subject to several different time systems. Each of the systems recorded information on a time schedule different from the others. The patient in that case was supposed to receive a certain dose of a powerful narcotic every four hours. However, review of the records and the automatic timestamps supplied by each of the different systems made it seem as though the patient was receiving that four-hour dosage as often as every half hour, which would have been a fatal amount of the drug. Although the timestamp issue could eventually be explained, those records formed an initial basis for the patient's lawsuit, and the defendant was stuck on its heels trying to explain how the time systems were the problem, rather than the care actually provided. This situation is just one example of many.

On appeal, the Court of Appeals found that the trial court did not err by authenticating the contested image.

Generally, because medical records are extremely important to the defense of a medical-malpractice case, it is important for medical-malpractice defense attorneys to get ahead of discrepancies in timestamps from the electronic medical record. Of course, the best solution would be for all of the clocks to be in sync and for events to be recorded at the time they happen. This is something worth addressing with institutional clients, and it is possible that some kind of information technology best practices or update schedules could help alleviate these problems.

Even so, that could only solve part of the problem.

Providers very regularly access records and enter information about what happened in the care of a patient at times other than when the care is actually being provided. The provider may not intentionally input a timestamp along with a note or a record, but the electronic system might assign it a time anyway. Then, when the record is printed, that timestamp will show up and have to be explained. In light of *Mitchell*, we should be prepared to give those explanations.

Specific to medical-malpractice defense, there are two parts to getting ahead of a challenge to a time discrepancy: 1) recognizing it exists, and 2) explaining how it got there. Of course, it would not be reasonable or necessary to pay attention to all of the timestamps on all of the electronic medical records being reviewed for a case. However, with key records, the ones that might be blown up and shown to a jury because they could make or break the case, it would be best practice to assure that the various timestamps make sense.

If they do, great, one less thing to worry about. If not, then the defense attorney should figure out why the timestamps are wrong/inconsistent, or appear wrong and should investigate to determine a reasonable explanation. In almost every case, there is a perfectly innocuous explanation which will head off questions about the authenticity of the document.

Witnesses, particularly the providers themselves, also need to be aware of any such discrepancies and be prepared to explain their existence in a deposition. As mentioned above, when a healthcare provider gets a paper copy of the electronic medical record, it often looks nothing like what is seen on a computer screen, and some things, like timestamps, could be invisible or part of an automated process on the computer that the provider did not even realize was being recorded. It certainly would not be helpful for a key provider witness to be challenged with an odd timestamp on a key record for the first time while sitting in front of a jury, particularly if the provider has not had time to carefully look into the matter. Instead, the issue must be considered and addressed ahead of time.

In the end, this timestamp issue is just one among many we all face. In *Mitchell*, there were other challenges to the authenticity of the document, and it is possible that the timestamp discrepancy alone would not have been enough for the Court of Appeals to find error and order a new trial. Nonetheless, because of the primacy of medical records in the defense of medical-malpractice claims, even the small issue of inconsistent timestamps in the records is an issue that should be considered by every attorney defending such a case.

Endnotes

1 *Mitchell*, ___ Mich App at ___; slip op at 1-2.
2 *Id.* at 2.
3 ***Id.*** at 3.
4 ***Id.***
5 *Mitchell*, ___ Mich App at ___; slip op at 3.
6 ***Id.*** at 4.
7 ***Id.***
8 *Mitchell*, ___ Mich App at ___; slip op at 5.
9 ***Id.***
10 ***Id.***
11 ***Id.*** at 6.
12 ***Id.*** (emphasis in the original)
13 ***Id.*** at 7

No-Fault Report

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Fallout From *Covenant Medical Center v State Farm* and Other Supreme Court Issues

For those of us who practice in the no-fault insurance arena, the past few months could best be characterized as the "Summer of Covenant" or "Covenant 24/7." The courts have been inundated with motions for summary disposition, motions to amend complaints, motions to strike assignments and countless other motions – all stemming from the Michigan Supreme Court's landmark decision in *Covenant Med Ctr v State Farm*, __ Mich __; 895 NW2d 490 (May 25, 2017) (Docket No. 152758). Not surprisingly, there has also been a flurry of appellate court activity applying the Supreme Court's holding in *Covenant*, to the effect that while medical providers no longer have a statutory cause of action to recover payment of medical expenses from a no-fault insurer, the medical provider might be able to pursue alternative theories of recovery.

The most significant decision handed down in the post-*Covenant* era thus far is *WA Foote Mem'l Hosp v Michigan Assigned Claims Plan*, __ Mich App __; __ NW2d __ (August 31, 2017) (Docket No. 333360). This case was one of the first cases to be considered by the Michigan Court of Appeals after *Covenant*, as oral argument had already been scheduled to occur before the release of the Supreme Court's decision in *Covenant*. As a result, the primary issue in *WA Foote Mem'l Hosp* was whether or not *Covenant* was to be applied retroactively or prospectively, only. The importance of the Court of Appeals' opinion was underscored by the fact that certain district court judges were applying *Covenant* on a prospective basis, only, thereby preserving the medical provider's right to sue no-fault insurers under pre-*Covenant* case law. In its published opinion, though, the Court of Appeals put a swift end to those decisions, and ruled that the Michigan Supreme Court's decision in *Covenant* is to be given full retroactive effect, regardless of whether the insurer had actually raised a "*Covenant*" defense, based upon the provider's purported lack of standing to commence litigation.

The *WA Foote Mem'l Hosp* decision was initially brought before the Court of Appeals because the hospital had initiated a claim for no-fault benefits with the Michigan Assigned Claims Plan without conducting a thorough investigation as to whether there might be a higher priority insurer in the picture. After suit was filed against the MACP, it was discovered that there was, in fact, a higher priority insurer in the picture but, because the insurer had not received notice within one year of the date of loss, the hospital could not initiate a claim against that insurer. The lower court had granted summary disposition in favor of the MACP, noting that the hospital could have identified a higher priority insurer if it had filed suit directly against the patient for the unpaid medical bills, if it had obtained the information from the patient at the time of the treatment, if it had obtained the police report regarding the accident, or had followed up on information that it had regarding actual ownership of the vehicle occupied by the patient.

While the appeal was pending, the Michigan Supreme Court released its decision in *Covenant*, at which time the parties briefed the issue as to whether or not *Covenant* should be applied retroactively. In a rather lengthy opinion, the Court of Appeals issued the following key rulings:

- First, the court ruled that, in light of the U.S. Supreme Court's decision in *Harper v Virginia Dept of Taxation*, 509 US 86; 113 SCt 2510; 125 L.Ed.2d 74 (1993) and the Michigan Supreme Court's decision in *Spectrum Health v Farm Bureau*, 492 Mich 503; 821 NW2d 117 (2012), *Covenant* was to be given full retroactive effect;

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- The court rejected the provider's argument that the insurer had failed to properly preserve the issue, noting that the Court Rules, specifically, MCR 2.111(F)(2), indicate that the defense of a "failure to state a claim upon which relief can be granted" is not waived even if not asserted in a responsive pleading or motion;
- Regarding the provider's argument that it should be allowed to amend its Complaint to assert an alternative theory of recovery, including the pursuit of benefits under an assignment theory, the Court of Appeals noted that "the most prudent and appropriate course for us to take at this time is to remand this case to the trial court with discretion that it allow Plaintiff to move to amend its Complaint, so that the trial court may address the attendant issues in the first instance." *W A Foote Mem'l Hosp*, slip op at 20.

Now that the issue of *Covenant*'s retroactivity has been resolved, the author anticipates that the next round of appellate court activity will concern the validity of the various assignments that are being obtained by medical providers.

Since *Covenant* was released, the Supreme Court has vacated a number of prior decisions from the Court of Appeals, with instructions to the Court of Appeals to reconsider the case in light of *Covenant*. These decisions, along with a brief statement of what the case initially involved, include the following:

- *Detroit Med Ctr v MPCGA*, Supreme Court Docket No. 154363 (Court of Appeals had reversed a summary disposition decision concerning an "unlawful taking" issue);
- *VHS Huron Valley Sinai Hosp v Sentinel Ins Co*, Docket No. 154978 (Court of Appeals' decision dealt with whether a release of an uninsured motorist claim barred a provider's suit for payment of PIP medical expenses);
- *Spectrum Health Hosp v Westfield Ins Co*, Docket No. 151419 (Court of Appeals refused to consider two lower court decisions regarding the compensability of maintenance injuries under the Parked Vehicle Exclusion set forth in MCL 500.3106(1)(1)); and
- *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, docket no. 151343 (Court of Appeals' decision pertained to whether or not the Michigan Assigned Claims Plan could be forced to assign an insurer in a situation where the underlying patient was injured in an automobile accident while driving his own motor vehicle)

In perhaps an indication of what is to come, the Court of Appeals recently issued an opinion instructing the lower court to dismiss the lawsuit where the provider had failed to secure an assignment before filing suit. In *Standard Rehab Inc v Grange Ins Co of Michigan*, unpublished opinion per curaim of the Court of Appeals, issued September 5, 2017 (Docket No. 331734), the Court of Appeals had granted leave to appeal "to determine whether reports prepared for non-party independent medical examinations (IMEs) may be obtained during discovery for the purpose of establishing bias by the physician retained by Defendant insurer to prepare an IME report in the instant case." During the pendency of the appeal, the Michigan Supreme Court issued its decision in *Covenant*, and the matter was brought up during oral argument. At oral argument, counsel representing Standard Rehabilitation conceded that the underlying patient had not made an assignment of their claims to Standard Rehabilitation before the lawsuit being filed. Therefore, the matter was "remanded with direction to dismiss this case." This order is actually in keeping with the trends in the circuit courts and district courts, which have been regularly dismissing lawsuits filed by medical providers where the provider has failed to obtain an assignment.

Other Supreme Court Action

Lost in the *Covenant* aftermath was the fact that the Michigan Supreme Court issued two other decisions that impact no-fault jurisprudence. One of these cases discusses what constitutes proper notice of a claim under MCL 500.3145(1). The second deals with the compensability of injuries arising out of a parked motor vehicle. These two cases are analyzed below.

Perkovic v Zurich American Ins Co, 500 Mich 44; 893 NW2d 322 (2017)

In order to initiate a claim for no-fault benefits, most, if not all, no-fault insurers require that an application for benefits be filed. These applications usually provide information regarding the accident itself, as well as a description of the injuries, the places where the injured claimant received any hospital or medical treatment, and information regarding any claims for work-loss benefits. The information included in an application for benefits is designed to comply with MCL 500.3145(1), which contains a strict one-year notice provision:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. . . The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Many insurers have been denying claims for benefits if the injured claimant fails to complete and submit a timely application for benefits. In *Perkovic*, though, the Michigan Supreme Court made it clear that by virtue of the plain language of MCL 500.3145(1), the notice requirement can be satisfied by a medical provider who submits medical records, billing records, and in appropriate cases, the police report, because taken together, these documents provide:

- The name and address of the claimant (set forth on the billing statement from the medical provider);

- The name of the person injured (which appears in both the medical and billing records);
- The nature of his injury (contained within the medical records themselves); and
- The time and place of the injury (contained in the police report or in the medical records).

Perkovic initially involved a dispute among three insurers – Perkovic's personal no-fault insurer (Citizens), his trucking fleet insurer (Zurich) and his bobtail insurer (Hudson) – over which insurer would be responsible for payment of his no-fault benefits, arising out of a trucking accident. In an earlier proceeding, the Court of Appeals determined that the fleet insurer, Zurich, occupied the highest order of priority for payment of Perkovic's no-fault benefits. After a remand to the circuit court, Zurich filed a motion for summary disposition, claiming that it did not receive proper notice of the loss, even though it had received medical records and billings from the Nebraska Medical Center within one year. Both the circuit court and the Court of Appeals had granted summary disposition in favor of the insurer, determining that even if there had been technical compliance with the requirements of MCL 500.3145(1), the "purposes" behind the statutory provision were not satisfied because there was nothing in the claim submissions that would have put the insurer on notice that the provider was submitting a claim for Michigan no-fault insurance benefits.

On appeal, the Supreme Court, in a 6-1 decision authored by Justice Bernstein, rejected any such reliance on the "purposes" behind the one-year notice provision. Instead, adopting a classic textualist argument, the Supreme Court determined that, "the documents transmitted to Defendant contained all of the information required by MCL 500.3145(1) and were sent in behalf of Plaintiff by the Nebraska Medical Center."

Former Justice Young agreed with the reasoning of the majority opinion, but dissented from the results reached by the majority. Justice Young opined that the notice had to be given by "a person claiming to be entitled to benefits" at the time the notice was given.

Ironically, when seen in light of *Covenant,* a medical provider has the right to file a claim with a no-fault insurer "in behalf of the injured party," but does not have the right to enforce payment of medical expenses incurred by that same party in whose behalf the notice was given, against that same no-fault insurer.

Kemp v Farm Bureau, __ Mich __; __ NW2d __ (June 15, 2017) (docket no. 151719)

In a 4-3 decision authored by Justice Viviano, the Michigan Supreme Court reversed the judgment of the Michigan Court of Appeals and determined that there existed a genuine issue of material fact as to whether or not injuries suffered by an injured claimant while unloading his personal belongings out of a parked motor vehicle were compensable under the no-fault insurance act. In *Kemp*, the plaintiff opened the rear door of his extended cab pickup truck and reached into the vehicle to grab his belongings, including his briefcase, an overnight bag, a thermos, and a lunchbox. As he was lowering them from the vehicle, he suffered an injury to his calf muscle. He filed suit against his insurer, Farm Bureau, to recover no-fault benefits arising out of the incident. Farm Bureau denied the claim and argued that (1) Kemp's injury did not arise out of the ownership, operation, maintenance or use of the parked motor vehicle as a motor vehicle, (2) the injury did not arise as a direct result of physical contact with property being lifted onto or lowered from the vehicle in the loading or unloading process, as required by MCL 500.3106(1)(b), and (3) his injury did not have a causal relationship to the motor vehicle that was more than incidental, fortuitous, or "but for." The circuit court granted summary disposition in favor of Farm Bureau and in a 2-1 decision, the Court of Appeals affirmed.

In its opinion, the Supreme Court affirmed the three-step analytical framework initially enunciated by the Supreme Court in *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626; 563 NW2d 683 (1997). First, the injured claimant must demonstrate that the circumstances surrounding the loss falls within one of the three exceptions to the parked-vehicle exclusion set forth in MCL 500.3106(1). Next, the claimant must show that the injury arose out of the ownership, operation, maintenance or use of the parked motor vehicle as a motor vehicle. Finally, the claimant had to demonstrate that the injury had a causal relationship to the parked motor vehicle that was more than incidental, fortuitous, or "but for."

With regard to the first issue, the Supreme Court noted that there existed a genuine issue of material fact as to whether or not the injury was the "direct result" of physical contact with the property that Mr. Kemp had just removed from his pickup truck. In so ruling, the Supreme Court rejected Farm Bureau's argument that the injury must be "due to" physical contact with the property. Instead, all that was required was that the injury was caused by contact with the property being loaded or unloaded. Second, the court determined that the unloading of one's personal belonging out of one's vehicle satisfied the "transportational function" requirement of *McKenzie v ACIA*, 458 Mich 214; 580 NW2d 424 (1998), as a matter of law. Finally, the court ruled that there existed a genuine issue of material fact as to whether or not the causal relationship between the injury and the motor vehicle accident was more than incidental, fortuitous, or "but for," as required by its earlier decision in *Thornton v Allstate Ins Co*, 425 Mich 643; 391 NW2d 320 (1986).

Justice Zahra, joined by Chief Justice Markman and Justice Wilder, dissented from the majority's opinion. Justice Zahra and his colleagues concluded that the plaintiff had failed to establish a genuine factual basis from which to conclude that "the injury was a direct result of physical contact with . . . property being lifted onto or lowered from the vehicle in the loading or unloading process," as required by MCL 500.3106(1)(b). Justice Zahra also invited his colleagues to reexamine the causation element of the *Putkamer* analytical framework – an invitation that was declined by the majority.

Although perhaps these cases do not have the significance that the *Covenant* decision had, both *Perkovic* and *Kemp* clarify the proper type of notice that must be given under the No-fault Insurance Act, and under what circumstances claimants can recover for injuries arising out of parked motor vehicles.

Supreme Court Update

By: Mikyia S. Aaron, *Clark Hill, PLC*
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The Supreme Court Declines to Review Whether Municipalities Have the Right to Choose When to Enforce Zoning Ordinances

On June 9, 2017, the Michigan Supreme Court denied leave to appeal the Court of Appeals' ruling that, notwithstanding decades of unlawful and improper use of zoned areas, municipalities have the right to choose whether to enforce zoning ordinances.

Charter Township of Lyon v. Petty and *Charter Township of Lyon v. Hoskins*, __ Mich __; 896 NW2d 11 (June 9, 2017) (Docket Nos. 155024 & 155025).

Facts: The defendants were two separate families who owned property in the Charter Township of Lyon. Each family owned businesses that were run from their primary residences. After several neighbors began to complain about excessive, early-morning noise coming from the Hoskins and Petty family residences, the township cited both families for zoning violations on the grounds that both families were unlawfully using residential property for commercial use. However, the families opposed the violations on the basis that they had been using their residential property for commercial use for decades before the cited violation.

The trial court upheld the township's cited zoning violations on the grounds that MCL 125.3101 *et seq.*, gave the township the right to enforce all zoning ordinances, regardless of any delay in past enforcement and any inconvenience to parties affected by such enforcement.

Ruling: The Michigan Supreme Court denied leave to consider whether municipalities have the right to choose when to enforce zoning ordinances. Pursuant to MCR 7.305(H)(1), the Court also vacated the following language from the Court of Appeals' judgment acknowledging the township's right to enforce zoning ordinances:

- "[m]oreover, as a matter of law, $7,000 worth of additions to a storage barn falls short of the 'substantial change in position' or 'extensive obligations and expenses' necessary for equity to overcome a township's zoning authority[,] 83 Am Jur 2d § 937, p 984;" and
- "[c]ourts have also held that the property owner must establish 'a financial loss . . . so great as practically to destroy or greatly to decrease the value of the . . . premises for any permitted use[,]' *Carini v Zoning Bd of Appeals*, 164 Conn 169, 173; 319 A2d 390 (1972)."

The court vacated the above language "because neither statement is necessary to the disposition of this case or **well-grounded in Michigan jurisprudence**." (Emphasis added.)

Practice Note: Under MCR 7.305(H)(1), the Michigan Supreme Court may either grant or deny an application for leave to appeal, enter a final decision, direct argument on the application, or issue a peremptory order.

The Supreme Court Expands the Exception to the Michigan No-Fault Insurance Act Relating to Injuries Resulting from Loading and Unloading Property from a Parked Motor Vehicle

On June 15, 2017, the Michigan Supreme Court held that loading and unloading property from a parked motor vehicle can, in fact, result from the motor vehicle's transportational function.

Kemp v Farm Bureau Gen Ins Co of Michigan, __ Mich __; __ NW2d __; 2017 WL 2622670 (June 15, 2017) (Docket No. 151719).

Mikyia S. Aaron is an associate with the Labor & Employment Practice Group in Clark Hill's Detroit Office. Mikyia counsels employers, management, and human resource personnel regarding labor and employment best practices. Prior to joining Clark Hill, Mikyia gained substantial experience with labor and employment relations while assisting plaintiffs' counsel with various collective-bargaining employment matters. Mikyia graduated from the University of Detroit Mercy School of Law, where she attended as a recipient of the Dean's scholarship. While at UDM, Mikyia served as the Editor-in-Chief of UDM's Law Review, and was an active member of UDM's Moot Court Board of Advocates. Mikyia has been the recipient of several awards and scholarships, including the Women Lawyers Association of Michigan Foundation's 2015 Outstanding Woman Law Student Award. She has also been featured as a "Young Progressive Leader on the Rise" by Progressive Leaders Magazine (Metro Detroit edition). Mikyia is also very active in the Southeastern Michigan legal community and serves on the University of Detroit Mercy School of Law Alumni Board of Directors and the D. Augustus Straker Bar Association Board of Directors.

Facts: The plaintiff sustained an injury to his lower back and right calf while retrieving personal property from his parked motor vehicle. Following the injury, the plaintiff filed suit against his auto insurer, defendant Farm Bureau General Insurance Company of Michigan ("Farm Bureau") seeking no-fault benefits under MCL 500.3106(1).

[G]ave the township the right to enforce all zoning ordinances, regardless of any delay in past enforcement and any inconvenience to parties affected by such enforcement.

The Michigan No-fault Insurance Act, MCL 500.3101 *et seq.*, requires no-fault insurers to pay personal injury protection ("PIP") benefits to an insured for any and all injuries sustained from the "ownership, operation, maintenance, or use of a motor vehicle." See MCL 500.3105(1). However, PIP benefits are not usually paid to insureds for injuries involving parked motor vehicles, unless the insured can successfully meet the requirements of the parked-car exception in MCL 500.3106(1)(b). The parked-car exception requires that the injury sustained directly result from physical contact with property being loaded or unloaded from the parked motor vehicle.

After the plaintiff filed suit seeking no-fault benefits, defendant Farm Bureau moved for summary disposition, pursuant to MCR 2.116(C)(10), arguing that the plaintiff was not entitled to no-fault benefits because: (1) the injuries he sustained did not arise out of the normal use of the parked motor vehicle as a motor vehicle, (2) the injuries did not meet the requirements of the parked-car exception in MCL 500.3106(1)(b), and the injury did not have a causal relationship to the parked car that was more than "incidental, fortuitous or but for" as required by the relevant statute.

The trial court granted the defendant's motion for summary disposition, and the plaintiff appealed to the Michigan Court of Appeals. The Court of Appeals affirmed the trial court's judgment in a split decision. The Court of Appeals majority held that the plaintiff's vehicle was used as a "storage space for his personal items" and was "merely the site" of the injury. The majority based its ruling on the determination that the plaintiff's injuries did not result from the transportational function of his motor vehicle because similar movements "routinely occur in other places."

Ruling: The Michigan Supreme Court reversed the ruling of the Michigan Court of Appeals. The Court ruled that Farm Bureau was not entitled to summary disposition because the plaintiff had, in fact, satisfied the transportational function requirement as a matter of law. Specifically, the plaintiff was able to show that his injury arose as he was unloading his personal property from his parked motor vehicle. The plaintiff was also able to show that he was in physical contact with his personal property at the time he sustained the injuries at issue. Accordingly, the Court held that the plaintiff created a genuine issue of material fact concerning whether his injury was the direct result of his physical contact with his personal property. Consequently, the Court reversed the judgment of the Court of Appeals and remanded the case in order for the appropriate fact finder to determine whether the plaintiff's property was of sufficient weight to have caused the injuries he sustained.

Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, PLLC*

The MDTC amicus writers have been busy since our last update, submitting briefs in both the state and federal courts. Three of the recent cases in which the MDTC has participated as amicus are summarized below.

Responding to a request for amicus briefing from the Supreme Court in *Martin v Milham Meadows I Limited Partnership*, the MDTC submitted a brief authored by Jonathan B. Koch of Collins Einhorn Farrell, PC.[1] The Supreme Court's order granted oral argument on the application and requested briefing as to "whether genuine issues of material fact preclude summary disposition on the plaintiff's claim that the stairs at issue were not 'fit for the use intended by the parties' and that the defendants did not keep the stairs in 'reasonable repair.' MCL 554.139(1)(a) and (b)."

The *Martin* case involved the plaintiff's slip and fall on the basement stairs in his rented townhouse. The MDTC's brief noted that "fit for the use intended by the parties" means that the stairs must provide reasonable access to the different levels of the building. The statute does not require perfection, or that the stairs be as safe and accessible as possible, or that the defendant implement additional safety measures. The stairs in question provided "reasonable access" where the plaintiff had indisputably used the stairs on a daily basis without incident for over three years.

It is anticipated that the *Martin* case will be argued before the Supreme Court sometime in the Court's next term, which begins in the fall.

The MDTC filed a brief in the Michigan Court of Appeals in support of the defendant in *Henry v Dow Chemical Co*, authored by Joseph E. Richotte and Haley A. Jonna of Butzel Long, P.C.[2] While this case has an extensive appellate history, the current issue is whether the plaintiffs' claims are barred by the statute of limitations.

The *Henry* case involves allegations of environmental contamination, with the plaintiffs claiming that the defendant's discharge of dioxin into the Tittabawassee River from the late 1890's through the mid-1970's exposed them to adverse health risks. The plaintiffs sued Dow in 2003. The MDTC's amicus brief argued that the plaintiff's claims are untimely where Michigan's common law discovery rule was abrogated by the Legislature in 1963. Thus, the plaintiffs' claims accrued when their property was contaminated, not when the plaintiffs later learned of the contamination or when their property values declined.

Addressing the plaintiffs' alternative argument that the federal discovery rule contained in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") should operate to preserve their claim, the MDTC's brief explained that the rule did not save the plaintiffs' untimely claims. Retroactively resurrecting the plaintiffs' claims would violate state sovereignty under the Tenth Amendment. Further, even if this discovery rule applied, the plaintiffs were on notice from the late 1970's of the contamination and had a duty to investigate their claims.

The Court of Appeals issued a 2-1 published opinion in this case on June 1, 2017, affirming the trial court's denial of summary disposition. The matter is currently pending before the Supreme Court on the defendant's application for leave to appeal.

The MDTC took an unusually active role as amicus in a pending federal court case. Responding to a request for amicus briefing from Judge Arthur J. Tarnow of the Eastern District of Michigan, relative to a motion for summary judgment. The MDTC submitted a brief in *Johnson v Wolverine Human Services, Inc*, authored by Carson J. Tucker of the Law Offices of Carson J. Tucker.[3] In this case arising under 42 USC 1983, at issue was whether a private, non-profit charitable organization and its employees, contracted by the State of Michigan to provide a shelter program to

Anita Comorski is a principal in the appellate department at Tanoury, Nauts, McKinney & Garbarino, PLLC. She is currently a member of the State Bar of Michigan Appellate Practice Section, Michigan Defense Trial Counsel, the Michigan Supreme Court Historical Society, and the Advocate's Guild. Ms. Comorski has represented clients in appeals before the Michigan Court of Appeals, the Michigan Supreme Court, and the Sixth Circuit Court of Appeals.

troubled youths, could be considered state actors for purposes of § 1983.

> The MDTC's brief noted that "fit for the use intended by the parties" means that the stairs must provide reasonable access to the different levels of the building.

The MDTC's brief detailed the latest Supreme Court jurisprudence on § 1983 claims. Particular concerns addressed by the MDTC included the expansion of the doctrine generally and the possible exposure of health care providers licensed by the State of Michigan. Daniel Beyer of Kerr, Russell and Weber, PLC, the newest member of MDTC's amicus committee, contributed to the oral argument on August 31, 2017 before Judge Tarnow.

Judge Tarnow took the matter under advisement and is expected to issue a written opinion and order.

This update is only intended to provide a brief summary of the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC does maintain an amicus brief bank on its website accessible to its members. For a more thorough understanding of the issues addressed in these cases, members are encouraged to visit the brief bank to review the complete briefs filed on behalf of this organization.

Endnotes

1 Michigan Supreme Court Docket No. 154360.

2 Michigan Court of Appeals Docket No. 328716.

3 United States District Court Docket No. 2:15-cv-13856.

In Memory of Our Friend and Leader Robert ("Bob") Krause

Father, Husband, Friend, Lawyer, Leader - Robert (Bob) S. Krause was an outstanding human being, gentleman, and superb lawyer who passed away on July 13, 2017. As a lawyer's lawyer, Bob was a master with a jury and a major rainmaker at the firm of Dickinson Wright PLLC, where he was a long-time chairperson of Dickinson Wright's product-liability practice group. During his long and illustrious career, Bob represented the Big 3 automakers in all forms of products liability litigation, including, but not limited to, asbestos matters, as well as representing corporate powerhouses, such as Johnson & Johnson, Bristol Meyers Squibb, and DuPont. Beyond being an outstanding trial lawyer and litigator, Bob also served as a mentor to many attorneys who turned out to be some of the leading trial attorneys, litigators, and judges in and beyond the State of Michigan.

Bob was one of the driving forces in establishing the Michigan Defense Trial Counsel in which he served as a long-time board member, officer, and eventually its president. He also received MDTC's Excellence in Defense Award, which is the most prominently celebrated award of the organization. For nearly 43 years, Bob was also a very active DRI member with his serving as a DRI board member from 1996 through 1998. The very prestigious DRI Louis Potter Lifetime Achievement Award was, in 2006, bestowed upon Bob.

Besides his love for the practice of law, Bob was an ardent supporter of his law school alma mater Notre Dame and enjoyed fishing and golf throughout different parts of the world. Needless to say, Bob had a full life, but his greatest enjoyment and pride lied with the times he spent with his wife of 50 years, Terri, and three sons, Kevin, Sean and Jeff, daughters-in-law Paula, Helen, and Robin, and grandchildren Jonathan, Katie, Vivian, Therese, and Alexandria. He is dearly missed by not just his family members, but colleagues and friends whose lives he touched and are left with the many fond memories of his humor, kindness, and warmth.

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Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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APPELLATE PRACTICE

I am one of six Michigan members of the American Academy of Appellate Lawyers, and have litigated more than 500 appeals. I am available to consult (formally or informally) or to participate in appeals in Michigan and federal courts.

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