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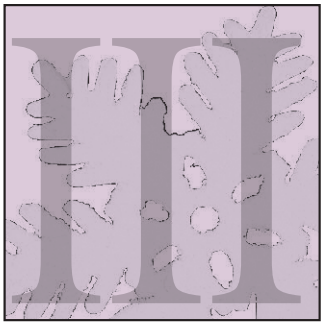

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President's Corner

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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

"I like the cold weather. It means you get work done." --Noam Chomsky

This winter has been one of the coldest on record and true to Noam Chomsky's seasonal philosophy, MDTC's Board, Sections and Committees have been busy this winter providing exceptional programs, hosting social events and planning extraordinary activities for our members.

Thanks to our 2017 Winter Meeting Committee—Chair **Drew Jordan, Nick Ayoub, Deborah Brouwer, Mike Conlon and Randy Juip**—the 2017 Winter Meeting held in November was a hit with informative panels of prominent attorneys, judges and consultants addressing emerging trends that are changing the practice of law. Special thanks to our MDTC member panelists **Brian Einhorn, John Hohmeier, Drew Jordan, John Mucha, Ed Perdue** and **Tony Taweel** for sharing their instructive and enlightening insights.

The Past Presidents Dinner the evening before our Winter Meeting provided an opportunity for the MDTC to acknowledge the service of our Past Presidents, to share in their comradery, and to recognize the service of our 2017 honorees with the presentation of Distinguished Service Awards to **Scott Holmes** and **Jenny Zavadil** and the Volunteer of the Year Award to **Carson Tucker**. We also recognized immediate Past President **Hilary Ballentine** for her leadership and the instrumental role that she played in ensuring the continued success of the MDTC. Hilary presented the Presidents Special Recognition Award to **Legal Copy Services.** Photos from the Past President's Dinner and the Winter Meeting are posted on the MDTC website, www.mdtc.org, and on the MDTC Facebook page.

Regional Chair **Matt Cross**, together with **Mike Conlon** and **Alan Couture**, hosted a holiday reception on a snowy December evening in Traverse City that was enjoyed by our northern Michigan members. Future regional events across the state are also being planned.

Led by Vice President **Josh Richardson** with assistance from his committee of **Dan Cortez**, **Terry Durkin**, **Tony Pignotti**, **Joe Richotte** and **Tony Taweel**, MDTC's leadership met at the beginning of February in Detroit for our 2018 Future Planning Session and also hosted a "meet and greet" reception at the historic Firebird Tavern in Greektown. Look for photos of both events on the MDTC website and Facebook page.

Thanks to the planning of committee members **Hilary Ballentine**, **Vanessa McCamant, John Mucha, Charles Pike, Angela Emmerling Shapiro and Beth Wittmann,** MDTC's second annual Legal Excellence Awards will take place on March 8, 2018 at the venerable Gem Theatre in Detroit with a strolling dinner and reception from 6 p.m. to 9 p.m. Joined by our emcee, WWJ Radio and WJBK Fox TV-Detroit Charlie Langton, this special evening will honor **Pat Geary** with presentation of the Excellence in Defense Award, **Kyle Smith** with the Golden Gavel Award, **John Jacobs** with the inaugural John P. Jacobs Appellate Advocacy Award, and the Hon. Michael Riordan of the Michigan Court of Appeals with the Judicial Award. Come join us on March 8th as we celebrate and recognize excellence in our profession.

Chaired by **Gary Eller**, our 2018 Annual Conference committee, **Kevin Lesperance, Mike Pattwell**, **Samantha Pattwell** and **Nate Scherbarth,** is planning a blockbuster Annual Conference, "Hot Coffee and Lost Trousers: What Every Defense Lawyer Should Know About the Law of Damages," scheduled for May 10-11, 2018 at the Soaring Eagle Casino and Resort in Mt. Pleasant. Mark your calendars now for this not to be missed conference featuring a faculty of noted economists, judges, lawyers, jury consultants, physicians and private investigators.

The MDTC's Board, Committees and Sections will continue to work year round to provide value for our members. We look forward to your continued participation and involvement and welcome your suggestions and recommendations about programs, events and activities that would be beneficial and of interest.

MDTC E-Newsletter
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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

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Introducing Nuance to the Whistleblowers' Protection Act

By: Nicholas Huguelet and Deborah Brouwer, Nemeth Law, P.C.

Executive Summary

In recent years, Michigan appellate courts have decided several cases that add complexity to the otherwise-straightforward Whistleblowers' Protection Act ("WPA"). Often resolved on motions for summary disposition, these nuances can have a significant impact on claims brought under the WPA. Accordingly, it is important for employers and practitioners to remain up-to-date on recent WPA case law.

Nicholas Huguelet practices in labor and employment law and has represented clients before federal and state courts, administrative agencies and arbitrators in both Michigan and Ohio. He has experience representing and counseling both private and public sector clients in collective bargaining, employment disputes and statutory and regulatory compliance.

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

During the last several years, employers have needed to keep a watchful eye on case law developed under Michigan's Whistleblowers' Protection Act ("WPA").[1] Both this year and last, the Michigan Supreme Court and Court of Appeals have issued several notable decisions interpreting the WPA. These decisions have broadened the protections of the WPA in some respects, narrowed them in others, and some have even surprised employers and practitioners. For example, in one recent case, an employee's confidential, privileged communication with her attorney was found to be a complaint to a "public body," and hence protected under the WPA. To avoid potential litigation, employers must keep abreast of the evolving case law and carefully consider changes to an employee's working conditions if that employee makes any complaint that might be protected by the WPA.

A Private Conversation With Your Attorney May Also Be A Communication To A Public Body

Few communications are as private and protected as the conversation between a client and his or her attorney. The attorney-client privilege is, after all, "the oldest of the privileges for confidential communication known to the common law."[2] Communications to a public body, on the other hand, are typically anything but confidential. Indeed, it has been said that an open and transparent government is "one of the core principles of democracy."[3] When it comes to claims made under the WPA, however, the Michigan Court of Appeals has ruled that a call to your attorney may be both a confidential communication and a report to a public body.

In *McNeill-Marks v MidMichigan Medical Center*,[4] the plaintiff was a registered nurse and clinical manager at defendant MidMichigan. McNeill-Marks also was a caretaker to her biological and her adopted children. The adopted children shared a maternal grandmother, who suffered from several psychiatric disorders. In the eight years prior to the termination of McNeill-Marks' employment, the children's grandmother threatened, harassed, and stalked both McNeill-Marks and her children. As a result, McNeill-Marks obtained several personal protection orders against the grandmother, which the grandmother regularly violated by attempting to contact her.

On December 27, 2013 (just before the expiration of the PPO then in effect), McNeill-Marks obtained a new, amended PPO on an ex parte basis. The terms of the PPO provided that it was "effective when signed" and "enforceable immediately." Roughly two weeks later, but before the PPO had been served, as McNeill-Marks walked out of an operating room at MidMichigan, she saw the grandmother being transported in a wheelchair. Before she recognized who it was, McNeill-Marks said hello, as she had

been trained to do. McNeill-Marks then recognized the patient when she heard her say – in a "sing-songy" voice, as if she was getting away with something – "Hello, Tammy." Visibly shaken, McNeill-Marks quickly retreated to an employee break room.[5]

Shortly afterwards, McNeill-Marks called her attorney and told him that the grandmother was at the hospital in violation of the PPO. According to McNeill-Marks, she never told her attorney that the grandmother was a patient at the hospital. Nevertheless, through happenstance and unrelated to the call, McNeill-Marks' process server served the PPO that evening on the grandmother in her hospital room.[6]

In response to service of the PPO, the grandmother complained to the hospital that McNeill-Marks had revealed protected health information in violation of HIPAA privacy regulations. The hospital conducted an investigation, during which McNeill-Marks admitted the conversation with her attorney. Finding that McNeill-Marks had revealed protected health information, the hospital discharged McNeill-Marks. A whistleblowers' suit followed.

To establish that she was engaged in activity protected by the WPA, McNeill-Marks was required to prove that she had reported a violation of law to a "public body." The Court of Appeals first found that the grandmother's contact with McNeill-Marks violated the PPO. In the Court's view, even if coincidently passing McNeill-Marks as she was being transported by wheelchair was not willful conduct, the statement "Hello, Tammy" and the tone of voice used violated the PPO. Having established a violation of law, the only open question for the Court was whether McNeill-Marks' call to her attorney constituted a report to a "public body."

In determining whether McNeill-Marks' attorney was a "public body," the Court examined the Act's statutory definition of "public body," which includes: "(iv) Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body."[7]

The Court focused on this definition of "public body," looking to the attorney's licensure and good standing with the State Bar of Michigan to find that he was a member of a "body which is created by state or local authority." The Court noted that the attorney's "licensure and active membership in the SBM were both mandatory" under state law. The Court also looked to the Revised Judicature Act, which identifies the SBM as a "public body corporate,"[8] for which the Supreme Court is empowered "to provide for the organization, government, and membership;" "adopt rules and regulations;" and set "the schedule of membership dues."[9] "Hence, under the plain language of the WPA, specifically MCL 15.361(d)(iv), [the attorney] qualified as a member of a "public body" for WPA purposes. As a practicing attorney and member of the SBM, [the attorney] was a member of a body 'created by' state authority, which, through the regulation of our Supreme Court, is also 'primarily funded by or through' state authority."[10]

With this result, the *McNeill-Marks* decision exemplifies a situation in which the WPA was interpreted in a way that practitioners likely did not expect, and illustrates that the WPA is a remedial statute amenable to broad interpretation.

Reporting Future Criminal Violations Is Not Protected By The WPA

In *Pace v Edel-Harrelson*,[11] the plaintiff, Pace, worked for a nonprofit shelter supported by public grants. Pace's supervisor told Pace that she intended to use grant funds to purchase a stove for her daughter, and that Pace should document the transaction under a client's name to hide the unauthorized purchase. Pace reported this conversation to the executive director, and was fired shortly thereafter. In response, she filed suit under the WPA. The trial court dismissed the complaint, finding that Pace had failed to allege that she had reported an *existing* violation of law (because her supervisor had not yet purchased the stove). The Court of Appeals reversed, holding that reporting a **plan to violate** a law triggers the protections of the WPA.[12] The Michigan Supreme Court disagreed.[13]

The Supreme Court noted that, by the language of the statute, the WPA applies to employees who report a violation or a suspected violation of law. As a result, the language of the statute is not sufficiently broad to include reports of future or planned violations of law. According to the Court:

MCL 15.362 contains no language indicating that future, planned, or anticipated acts amounting to a violation or a suspected violation of a law are included within the scope of the WPA. Consequently, a stated intention to commit an act amounting to a violation of a law in the future does not constitute 'a violation or a suspected violation of a law' for purposes of MCL 15.362 as a matter of law.[14]

Because Pace's supervisor merely announced her intention to violate the law in the future, and had not actually embezzled money at that time, Pace was not protected by the WPA.[15]

Pace demonstrates that not all complaints are protected activity under the WPA. When faced with a whistleblower complaint, then, employers and practitioners should carefully examine the allegations to determine whether the plaintiff has actually stated a claim.

Announcement Of Future Adverse Employment Actions Starts The Statute Of Limitations

In *Bradford v MGH Family Health Center*,[16] the Court of Appeals affirmed the dismissal of the plaintiff's WPA claim based on her failure to meet the statute of limitations. The WPA carries one of the shortest statute of limitations in law – claims must be filed within 90 days.[17] Bradford was employed under a one-year employment contract that could be terminated by either party without cause. Pursuant to a contractual provision

permitting one-year renewals, the parties annually renewed the contract for a number of years. After Bradford allegedly engaged in activity protected by the WPA, however, she was suspended with full pay and benefits, on October 10, 2013. Four days later, her employer notified Bradford that it would not renew her contract when it expired on December 1, 2013. Bradford filed suit on February 19, 2014 –81 days after the end of her employment, but more than 90 days after her suspension and the announcement of the nonrenewal of her contract. The trial court dismissed the complaint as untimely.[18]

The Court of Appeals upheld the dismissal, applying the Supreme Court's decision in *Wurtz v Beecher Metropolitan District*,[19] which held that "the WPA, by its express language, has no application in the hiring context. Thus, the WPA does not apply when an employer declines to renew a contract employee's contract."[20]

Bradford did, however, attempt to distinguish *Wurtz*. Bradford first argued that the contract at issue in *Wurtz* did not contain any renewal provision (whereas Bradford's did), and the *Wurtz* Court had specifically left open whether its holding applied to contracts with such provisions. The *Bradford* Court declined to distinguish *Wurtz* on the basis that Bradford's contract contained a clause permitting renewal and that the parties had a history of annually renewing the contract.

Bradford next argued that *Wurtz* should be distinguished because it specifically stated that the decision did not apply to at-will employees and Bradford was at-will, because her contract could be terminated without cause. The *Bradford* Court noted that, even though Bradford's contract could be terminated without cause, she was not a common law at-will employee, which was the context in which the phrase was used in *Wurtz*. Accordingly, the Court of Appeals upheld the dismissal of the complaint.[21]

Bradford reminds employers of the short statute of limitations applicable in whistleblower actions. Whistleblower defendants should carefully count the number of days since the alleged adverse employment action, because on occasion plaintiffs wait too long to file an action.

Retaliatory Adverse Employment Actions Other Than Discharge May Be Prohibited By The WPA

In *Smith v City of Flint*,[22] the Michigan Supreme Court clarified that the WPA protects employees from both termination and other retaliatory adverse employment actions. Smith was a police officer who publicly complained that revenue from a public safety millage was not being used to hire as many new police officers as possible. Shortly thereafter, Smith was removed from his duties as union president by order of the City's Emergency Manager and was reassigned to patrol duty during the night shift on the City's north end. Smith argued that "the north end of the City was 'considered crime ridden and a much more dangerous area of assignment for police officers' and that the south end was 'a more safe area.'"[23] He further alleged that his assignment to the night shift prevented him from performing his union duties.

In considering whether Smith had established an adverse employment action, the Supreme Court indirectly adopted the rule applied by the majority of the Court of Appeals.[24] That is, to state an adverse employment action under the WPA, the plaintiff must allege discrimination in a manner that objectively and materially affected his compensation, terms, conditions, location, or privileges of employment. According to the Court, Smith's allegations regarding his change in location (assignment to the north end) and hours (assignment to the night shift) were sufficient to establish an adverse employment action. As a result, the complaint survived summary judgment.[25]

Smith illustrates the need for employers to carefully examine all employment actions taken with respect to an employee who has complained about suspected illegal activity. Although termination is the adverse employment action most frequently alleged, changes in working conditions short of termination may be sufficient to state a claim under the WPA.

As the above examples illustrate, while the WPA appears to be a relatively straightforward statute, the courts have developed nuanced case law that can have a dramatic impact on claims.

Endnotes

1 MCL 15.361, *et seq.* The WPA protects employees who report, are about to report, or who participate in an investigation of, a violation or suspected violation of law to a public body from discrimination or retaliation by their employers.

2 *Upjohn Co v United States*, 449 US 383, 388; 101 S Ct 677; 66 L Ed 2d 584 (1981).

3 *Schill v Wisconsin Rapids Sch Dist*, 327 Wis 2d 572, 581 (Wis 2010).

4 *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1; 891 NW2d 528 (2016).

5 *Id.* at 6-10.

6 *Id.*at 10-11.

7 MCL 15.361(d).

8 MCL 600.901.

9 MCL 600.904.

10 *McNeill-Marks*, *supra* note 4, at 23.

11 *Pace v Edel-Harrelson*, 499 Mich 1; 878 NW2d 784 (2016).

12 *Pace v Edel-Harrelson*, 309 Mich App 256; 870 NW2d 745 (2015).

13 *Pace*, *supra*, note 11.

14 *Id.* at 8.

15 *Id.* at 8-9.

16 *Bradford v Mgh Family Health Ctr,* unpublished opinion per curiam of the Court of Appeals, issued January 12, 2016 (Docket No. 352312); 2016 WL 156185.

17 MCL 16.363(1).

18 *Bradford*, *supra* note 16, at *2.

19 *Wurtz v Beecher Metro Dist,* 495 Mich 242; 848 NW2d 121 (2014).

20 *Id.* at 249.

21 *Bradford*, *supra* note 16, at *4.

22 *Smith v City of Flint,* 500 Mich 938; 889 NW2d 507 (2017), citing 313 Mich App 141 (2016) (Hood, J., dissenting).

23 *Smith v City of Flint,* 313 Mich App 141, 154; 883 NW2d 543 (Hood, J., dissenting).

24 In a two-paragraph order, the Supreme Court reversed the majority and adopted the reasoning in Judge Hood's dissent. 500 Mich 938. Judge Hood agreed with "the majority's determinations regarding the applicable law," but disagreed with the analysis. 313 Mich App 141, 153 (Hood, J., dissenting).

25 *See id.* at 155.

Theoretical Redemption of the Michigan No-Fault Consumer: *Why Medical Providers Cannot Sue the Michigan Automobile Insurance Placement Facility (or its servicing insurers)*

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

Executive Summary

The impact that the Michigan Supreme Court's fairly recent decision in Covenant v State Farm has had on litigating first-party no-fault claims cannot be understated. While there are a multitude of issues created by Covenant's fallout, there is a smaller, rarely argued issue that could potentially save Michigan consumers millions – yes millions – of dollars per year. The argument is that because medical providers are not "claimants" they cannot sue the Michigan Automobile Insurance Placement Facility or its servicing insurers.

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.

A People's History of Assigned Claims in Michigan

The Michigan Automobile Insurance Placement Facility (MAIPF, formerly known as the Michigan Assigned Claims Plan) assigns potential no-fault claims to participating insurers when there is no automobile insurance available to the injured person.[1] Assigned claims no-fault "benefits" are provided by operation of law, not by contract. As a result, any injured person's potential eligibility for benefits through the MAIPF is by operation of law as well.

The eligibility for an uninsured person to obtain personal protection insurance benefits was legislated in 1973 and is controlled by MCL 500.3172, which states that an eligible person "**may** obtain personal protection insurance benefits through an assigned claims plan."[2] The Department of State complied with this request and created the "Assigned Claims Plan." In 2012, things changed a bit.

In 2012, the Michigan Legislature transferred the administration of assigned claims from the Secretary of State to the MAIPF and the Legislature mandated that the MAIPF adopt and maintain an assigned claims plan. The MAIPF complied with the legislative mandate and created the Michigan Assigned Claims Plan (MACP). The MACP was then amended slightly in 2014, but the current version reads, in part, as follows:

A claim for personal protection insurance benefits under the Plan must be made on an application prescribed by the MAIPF.

1. The application for benefits must be complete and signed by the ***claimant.***
   a. **Claimant** means a **person suffering accidental bodily injury** arising out of the ownership, operation, or maintenance or use of a motor vehicle as a motor vehicle in this state.
   b. If the claimant is a minor, the application shall be signed by a parent or legal guardian.[3]

The plain language of this provision is clear that only the **injured person** can make a claim to the MAIPF or its servicing insurers. The plain language of the MACP presumably bars either "claims" or lawsuits made by medical providers. And since the MACP was developed and adopted by a state agency charged with executing and implementing a statute, it is entitled to deference or "the most respectful consideration."[4]

Because the MACP is entitled to deference, its provisions should control (that is, when the MACP does not conflict with other provisions of the no-fault act[5]). Like an unambiguous contract that may say the same thing, the MACP's definition of

"claimant" precludes any claim that is not brought by the injured person. The only real response to this in the trial courts is that the MACP conflicts with public policy – it does not.

The Interpretation of Dreams (and MCL 500.3143)

It is important to reiterate that claims against the MAIPF or its servicing insurers are not contract cases. As a result, benefits are provided through the MACP by operation of law and not by contract. With regards to assigned claims, medical providers repeatedly argue that because there is no contract provision precluding assignments (such as many no-fault policies attempt to do), MCL 500.3143 allows assignments and they can proceed with their lawsuits as long as they have a valid assignment. Such is not the case.

Medical providers' go-to position against the above argument (and any argument that assignments are void or invalid) is that the MACP conflicts with MCL 500.3143 because this statute allows an injured person to assign his or her claim. Wrong. MCL 500.3143 does not allow assignments; in fact, it does the opposite and reads in full as follows: "An agreement for assignment of a right to benefits payable in the future is void."

Essentially, what medical providers are trying to do to MCL 500.3143 is what they successfully did to MCL 500.3112 for years. They are trying to force courts to read something into the statute that simply is not there.[6] Medical providers argue that in *Professional Rehab v State Farm*,[7] the Court of Appeals interpreted MCL 500.3143 to allow assignments and essentially concluded that because the Act was silent on benefits not payable in the future, an assignment of benefits other than future benefits was proper.

Just like in *Lakeland Neurocare v State Farm*,[8] however, the Court of Appeals in *Professional Rehab* did not engage in any statutory analysis before concluding that MCL 500.3143 allowed assignment of any type of benefits.[9] To be perfectly honest, if MCL 500.3143 clearly indicated that a "claimant", i.e., the injured person, can assign his or her claim for no-fault benefits, then any argument against it would be short lived. But it does not say that.

MCL 500.3143 clearly forbids assignment of future benefits but is silent as to other benefits. As a result, and in order to conclude that section 3143 allows assignments, any court must go through the same statutory construction that the Supreme Court did in *Covenant* with regards to MCL 500.3112, which inevitably involves an analysis of the attendant circumstances at the time the no-fault act was legislated.

The plain language of this provision is clear that only the **injured person** can make a claim to the MAIPF or its servicing insurers. The plain language of the MACP presumably bars either "claims" or lawsuits made by medical providers.

War, Peace, and/or UMVARA

In the 1960s and before Michigan's no-fault act, Professors Robert Keeton and Jeffrey O'Connell studied auto accident reparations and determined the third-party tort system did not work – there were long delays before resolution and it was always a lump-sum payment. It was determined that it would be better to switch to a first-party system that did not consider fault and where allowable expenses related to an automobile accident could be paid as they were incurred.

The efforts of Keeton and O'Connell led to the development of the Uniform Motor Vehicle Reparations Act (UMVARA). One cannot understate the importance that UMVARA played in the development of the no-fault act, including MCL 500.3143 and MCL 500.3112.[10] For example, Section 29 of UMVARA actually allowed assignment of nearly all benefits – it allowed assignments of past due benefits as well as assignments of certain future benefits.

MCL 500.3143, when compared to the UMVARA assignment provisions, makes it even clearer that providers were not given any special rights by the Michigan Legislature when the no-fault act was enacted. MCL 500.3143 clearly bars assignment of future benefits while the UMVARA provision would have allowed a limited right to assign future benefits. Section 29 of UMVARA reads in full:

> An assignment of or agreement to assign any right to benefits under this Act for loss accruing in the future is unenforceable except as to benefits for:
>
> (1) work loss to secure payment of alimony, maintenance, or child support; or
>
> (2) allowable expenses to the extent the benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee.

Michigan courts have repeatedly held that the Legislature's failure to adopt the language contained in UMVARA creates a presumption that the corresponding language was considered and rejected.[11] Consequently, it must be presumed that the Legislature considered the UMVARA provision and **rejected the idea of giving any special rights to healthcare providers even by way of assignment**. In fact, further analysis of UMVARA makes it clear that the insurer can pay either the provider or the patient – regardless of whether an assignment has been made. For example, Section 23 of UMVARA is relevant and provides in part:

> Allowable expense benefits **may be paid** by the reparation obligor **directly** to persons supplying products, services, or accommodations to a claimant.[12]

In the drafters comment section relating to this provision, UMVARA provides as follows:

> The provision permitting direct payment to the suppliers of products, services, or accommodations is in addition to a provision, contained elsewhere (Section 29), permitting

> the claimant to assign his claim to the supplier**. The direct payment** authorized by this Section **may be made whether or not an assignment has been executed**.[13]

UMVARA makes another reference to this payment method by an insurer in the comment to another section of the act:

> Section 23(a) permits an insurer to make direct payment to the suppliers even if no assignment of benefits has been executed.

This UMVARA section and comment are virtually identical to what is contained in section 3112 of the no-fault act. MCL 500.3112 is essentially for the protection and convenience of the insurer and allows the insurer (but does not require it) to pay a medical provider (a supplier of services per UMVARA) directly if it chooses which is exactly the way the medical insurance industry worked on October 1, 1973 and continues through the present time. The current arguments in the trial courts usually focus on public policy concerns, thus, it is necessary to discuss it.

On Life, Liberty, and Public Policy

When it comes to arguing policy, providers (and unfortunately a majority of the trial courts) habitually rely on the 1880 case of *Roger Williams Ins Co v Carrington,*[14] where the Court found an anti-assignment clause in a property insurance policy was invalid for public policy concerns. For one, there is no "anti-assignment" clause in the MACP. Second, *Roger Williams* dealt with a fire policy, which is elective coverage, and not required, unlike Michigan no-fault insurance.[15] There are, however, other salient distinctions as well.

Subsequent to this 1880 decision, the Michigan Supreme Court changed and/or clarified the standards governing insurance policy interpretation. In both its decisions in *Rory* and *DeFrain*, the Court changed its approach to public policy.[16] Pursuant to both *DeFrain* and *Rory*, the public policy of Michigan is that the reasonableness of a clause such as one forbidding assignments is a matter for the Commissioner of Insurance and not the court to decide.[17] In any event, Michigan policy on this issue is best reflected by the Legislature's promulgation of the no-fault act, particularly MCL 500.3112.

MCL 500.3112 guarantees an insurer the right to discharge its liability by paying either the injured person or the provider. As a result, any assignment by an injured person technically violates the no-fault act because it interferes with an insurance carrier's right to discharge its liability by paying either the injured person or the provider.[18] In *Miller v State Farm Mut Auto Ins Co,*[19] the Michigan Supreme Court was confronted with another issue under the Michigan no-fault statute – MCL 500.3112.

What is illuminating is the Supreme Court's comment about MCL 500.3112:

> The [no-fault] act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of damages suffered in motor vehicle accidents. These ends are served, for example, by the act's provisions … for a 'safe' method of payment of benefits by insurers, MCL 500.3112 . . . .[20]

Thirty years later the Supreme Court implicitly endorsed the insurer's right, not a provider's or injured person's right, under MCL 500.3112 to choose payees: "No-fault benefits are 'payable to or for the benefit of an injured person ….' MCL 500.3112. In this case, through settlement, the benefits were paid to plaintiff …."[21] The Court went on to say that the insurer's liability for no-fault benefits was extinguished by this settlement.[22] This is exactly the type of "safe method of payment of benefits by insurers" referred to in 1981.[23]

As set forth above, the history of MCL 500.3112 clearly gives insurance carriers the right to choose who to pay when discharging its liability to the injured person: it can pay either the injured person or the provider. Even the first two pages of the *Covenant* decision reemphasized the importance of MCL 500.3112 and how it undoubtedly gives an insurance carrier the right to choose who to pay. The Supreme Court stated:

> While this provision undoubtedly allows no-fault insurers to directly pay healthcare providers for the benefit of an injured person, its terms do not grant healthcare providers a statutory cause of action against insurers to recover the costs of providing products, services, and accommodations to an injured person. Rather, MCL 500.3112 permits a no-fault insurer to discharge its liability to an injured person by paying a healthcare provider directly, on the injured person's behalf.[24]

Furthermore, public policy has changed in Michigan in the 130 years since *Roger Williams* for obvious reasons even aside from the fact that the automobile had not even been invented yet. Keeping in mind UMVARA and also how the Supreme Court has interpreted MCL 500.3112, any assignment from an injured person to the provider (without the approval of the carrier) would essentially interfere with a carrier's right to decide who to pay.

In any event, it is important to keep in mind throughout this entire discussion that it is the Michigan consumers who are bearing the burden of the no-fault system by having to pay increased premiums every year especially when it comes to the MAIPF. There can be little dispute that the no-fault system in general has been inundated with an unprecedented number of provider lawsuits in the last decade.[25] This ties directly into any potential public policy argument.

Fear and Loathing in Michigan

The numbers in footnote 25 should alarm any jurist because the exponential growth of medical provider lawsuits has without a doubt increased the cost to the legal system and overburdened the courts. The no-fault act, which became law on October 1, 1973, was supposed to be offered as an "innovative social and legal response to the long payment delays, inequitable payment structure, and **high legal costs** inherent in the tort (or "fault") liability system," as well as a response to the **overburdened court system**.[26]

Has it done this? Seems like medical provider suits are only adding to this problem, and allowing a claimant to piecemeal his or her claim so that a servicing insurer for the MAIPF has to (potentially) defend multiple different claims in various venues only compounds the problem. As discussed above, the entire no-fault system is becoming overburdened and one only needs to look at the rapid increase in the assessment required to keep the MACP functioning.

Simply put, the "assessment" is how much assigned claims cost every year. In 1997, the assessment in Michigan was only $37.7 million, but by 2008 it had ballooned to over $140 million. Apparently during the same period of time, the average assessment for every insured vehicle in Michigan grew from $6.04 to $20.66.[27] Make no mistake that claims for uninsured motorists coming through the MAIPF are being born by Michigan consumers who actually pay for no-fault insurance, and this upward trend is not stopping:[28]

Assessment Year 2017/Billing Year 2016 – $265,603,477.62

Assessment Year 2016/Billing Year 2015 – $248,155,822.36

Assessment Year 2015/Billing Year 2014 – $238,737,085.65

Assessment Year 2014/Billing Year 2013 – $227,748,456

Assessment Year 2013/Billing Year 2012 – $226,756,696

Assessment Year 2012/Billing Year 2011 – $204,401,454.25

Assessment Year 2011/Billing Year 2010 – $172,733,186.02

Assessment Year 2010/Billing Year 2009 – $160,023,835.11

Assessment Year 2009/Billing Year 2008 – $148,455,608.20

Assessment Year 2008/Billing Year 2007 – $141,423,725.08

Nobody litigating no-fault cases in Michigan can deny that the number of lawsuits has absolutely exploded in the last decade, and people who recognize this cannot deny that favorable case law allowing providers to sue insurance carriers has tracked this explosion. Anyone reading this article who does not litigate no-fault cases and has a hard time believing that medical provider lawsuits are driving up the cost of no-fault insurance, should take a stroll through Wayne County Circuit Court motion call on any Friday or go to any district court mentioned in footnote number 19.

Consequently, it must be presumed that the Legislature considered the UMVARA provision and **rejected the idea of giving any special rights to healthcare providers even by way of assignment.**

Conclusion

Assigned-claims benefits are (arguably) a necessary corollary of a mandatory no-fault system, but these benefits are essentially a gift. A gift that does not come without its cost: the consumers of Michigan who actually pay for no-fault insurance are the ones ultimately paying for this gift. When someone without insurance is injured in an accident but has no incentive, motivation, or desire to pursue his or her own claim for benefits, a medical provider cannot (or should not) pursue it on his or her behalf regardless of whether there has been an "assignment."[29]

In 2008, the assessment born by Michigan no-fault consumers was essentially half of what it is now. Some might say it is coincidental that the vast majority of medical providers who insist on treating no-fault claimants and then flood the courts with lawsuits did not even exist in 2008. But this ignores the fact that since the most litigious medical providers joined the PIP game, the annual assessment has gone up over $100 Million. Coincidental? No. Deliberate? Absolutely.

Endnotes

1 "The Secretary of State managed the Assigned Claims program until December 17, 2012, when it transitioned to the Michigan Automobile Insurance Placement Facility." http://www.michacp.org

2 (emphasis added).

3 MACP § 5.1(A) (emphasis added).

4 *In re Complaint of Rovas Against SBC,* 482 Mich 90, 103; 754 NW2d 259 (2008); *McGill v Automobile Ass'n of Mich*, 207 Mich App 402, 409 n 1; 526 NW2d 12 (1994) ("While the Commissioner of Insurance's Interpretive Statement, Bulletin 92-03, does not have the full force or effect of law, MCL 24.203(6); MSA 3.560(103)(6), we generally give deference to administrative agency interpretations. *DAIIE v Comm'r of Ins*, 119 Mich App 113, 119; 326 NW2d 444 (1982)").

5 See ensuing discussion regarding public policy, MCL 500.3143, and MCL 500.3112.

6 Just like MCL 500.3112 did not provide a statutory right to sue a no-fault carrier, MCL 500.3143 does not explicitly allow any type of assignment. Nevertheless, that did not stop providers from using § 3112 for over a decade to launch direct actions against no-fault carriers. A phenomenon that was explicitly (and implicitly) endorsed by a dozen Court of Appeals decisions, medical providers are now attempting to do the exact same thing to MCL 500.3143 that they did to MCL 500.3112: read something into the statute that is not there.

7 *Profl Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167; 577 NW2d 909 (1998).

8 *Lakeland Neurocare Centers v State Farm Mut Auto Ins Co ex rel Michigan Dept of State Assigned Claims Facility*, 250 Mich App 35; 645 NW2d 59 (2002), overruled by *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, ___ Mich ___; 895 NW2d 490 (2017). The Michigan Supreme Court admonished several panels of the Court of Appeals for their failure to conduct the appropriate statutory analysis of MCL 500.3112 before concluding that this section of the Act permitted providers to directly sue no-fault carriers.

9 The *Professional Rehab v State Farm* case is repeatedly cited by providers in support of the position that the no-fault act allows assignments. *Professional Rehab*, however, is devoid of any statutory analysis whatsoever and does not even discuss the legislative intent or attendant circumstances at the time the no-fault act was implemented.

10 On numerous occasions the Michigan Supreme Court has cited UMVARA in analyzing Michigan no-fault issues:

- In 2013, the Court, in reaching its decision, mentioned that UMVARA was the model for the Michigan No-Fault Act over 40 years ago. *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475; 835 NW2d 363 (2013).
- In 2012, the Court noted that the term "replacement services" originated from the Uniform Motor Vehicle Accident Reparations Act. *Johnson v Recca*, 492 Mich 169; 821 NW2d 520 (2012).

- In *Priesman v Meridian Mutual Ins Co*, 441 Mich 60, 66; 490 NW2d 314 (1992), the Court said that UMVARA, a model act, was considered by the Legislature when the no-fault act was adopted.
- The phrase "use of a motor vehicle as a motor vehicle" originated from the UMVARA. The Court said that the drafters' comments on that phrase were pertinent to the analysis of the issues presented in the case. *Thornton v Allstate Ins Co,* 425 Mich 643, 657; 391 NW2d 320 (1996).
- In *Manley v Detroit Auto Inter-Ins Exch,* 425 Mich 140, 164; 388 NW2d 216 (1986), the Court said that the drafters' comments and UMVARA were pertinent to the analysis of the no-fault sections in that case since the language of the no-fault sections was substantially similar to the language in UMVARA.
- In 1994, the Court in *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1994), also said that the drafter's comments in UMVARA were relevant to the Michigan no-fault issue presented in that case.
- The importance of UMVARA is perhaps best seen in the following excerpt from *Miller v State Farm Mut Ins Co*, 410 Mich 538; 302 NW2d 537 (1981), which dealt with the issue of calculating survivor's loss benefits under MCL 500.3108: "In answering that question, our obligation is to discover and give effect to the Legislature's intention in enacting § 3108 as best we can determine it from the language employed in § 3108 and the no-fault act as a whole, and in light of such legislative history as is available. . . . Section 3108 was derived from Senate Bill No. 782 of 1971 and the corresponding House Substitute for Senate Bill No. 782. It is apparent that the relevant provisions of those bills were based, in turn, upon provisions contained in the Motor Vehicle Basic Protection Insurance Act (MVBPIA) and UMVARA. In view of the Legislature's obvious reliance upon the relevant sections of the model acts, it is evident that it was cognizant of, and in agreement with, the policies which underlie the model act's language." *Id.* at 556-559.

11 See e.g., *Husted v Auto-Owners Ins Co*, 459 Mich 500, 509-510; 591 NW2d 642 (1999).

12 (emphasis added).

13 (emphasis added).

14 *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880).

15 Nor is the cost of a fire policy borne by Michigan Consumers at large.

16 *Rory v Continental Ins Co*, 473 Mich 457, 461;703 NW2d 23 (2005); *DeFrain v State Farm Mut Auto Ins Co,* 491 Mich 359, 372; 817 NW2d 504 (2012).

17 The *Rory* Court recognized that because the responsibility of evaluating and approving insurance policy provisions rests with the Commissioner of Insurance, the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government. *Rory*, 473 Mich at 476. See also *Auto Club Group Ins Co v Booth*, 289 Mich App 606; 797 NW2d 695 (2010) (rejecting public policy argument and noting "our Supreme Court has determined that the explicit 'public policy' of Michigan is that the reasonableness of insurance contracts is a matter for the executive, not judicial, branch of government") (internal quotations omitted).

18 That is, without the insurers consent. It is important to note that a lot (if not all) No Fault policies contain some sort of provision that forbids assignments of benefits or transfers of rights without the carrier's consent. While the "transfer of rights" provisions are debatable given the language, the clauses precluding assignment of benefits are less arguable.

19 *Miller v State Farm Mut Ins Co*, 410 Mich 538; 302 NW2d 537 (1981).

20 *Id.* at 568

21 *Miller v Citizens Ins Co*, 490 Mich 904; 804 NW2d 740 (2011).

22 *Id.*

23 *Miller v State Farm, supra* note 19, at 568 (internal quotations omitted).

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

25 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. http://www.census.gov/compendia/statab/2010/. The reality, however, is that PIP litigation is being initiated by significantly less than 1% of these providers. Rather than rely on anecdotal perception, FOIA requests were sent out in April 2015 to many different district courts throughout Southeast Michigan as well as a few circuit courts. While the circuit court numbers are proving difficult to obtain, five separate district courts have responded. These numbers do not reflect the hundreds of no-fault lawsuits that medical providers intervened into on a daily basis.

- Affiliated Diagnostics of Oakland, LLC: 2012 to the present – **674 lawsuits** filed (44th and 46th District Courts only)
- Mendelson Orthopedics, P.C.: 2011 to May, 2015 – **320 lawsuits** filed (37th District Court only)
- Summit Medical Group, LLC; 2011 to May, 2015 – **259 lawsuits filed** (19th District Court only)
- Summit Physicians Group, PLLC: 2013 to May, 2015 – **194 lawsuits** filed (19th District Court only)
- Infinite Strategic Innovations, Inc.: 2013 to May, 2015 – **190 lawsuits** filed (19th District Court only)
- Northland Radiology, Inc.: 2014 to May, 2015 – **101 lawsuits** filed (46th District Court only)
- Doctors Medical, LLC: 2013 to May, 2015 – **74 lawsuits** filed (19th District Court only)
- Fountain Park Pharmacy: 2014 to May, 2015 – **68 lawsuits** filed (44th District Court only)
- Silver Pine Imaging, LLC: 2013 to May, 2015 – **57 lawsuits** filed (15th District Court only)
- Covenant Medical Center: 2012 to February 2016 – **142 lawsuits** filed (70th District Court)
- Pure Open MRI: 2015 to February, 2016 – **106 lawsuits** filed (15th District Court)
- Silver Pine Imaging, LLC: 2014 to February, 2016 – **132 lawsuits** filed (15th District Court)
- Spectrum Health Hospitals: 2012 to February, 2016 – **1656 lawsuits** filed (17th District Court and 61st District Court)
- Pure Open MRI: September 2015 to April 2016 – **147 lawsuits** (15th District Court only).
- Clear Imaging: September 3, 2014 – April 2016 – **36 lawsuits** (15th District Court only).
- Silver Pine Imaging: November 2013 – April 2016 – **176 lawsuits** (15th District Court only).
- Superior Diagnostics: December 2015 – April 2016 – **55 lawsuits** (15th District Court only).
- Horizon Imaging: May 2014 – December 2015 – **28 lawsuits** (15th District Court only).

26 *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (emphasis added).

27 http://www.mackinac.org/13858 (citing Michigan Assigned Claims Fund, "Statement of Historical Expenditures/Assessments").

28 http://www.michacp.org/assessment.aspx. ("In accordance with MCL 500.3171, costs incurred in the administration of the Assigned Claims Plan shall be allocated fairly among insurers and self-insurers. The assessment for benefits and administrative costs is made annually). But make no mistake: the "assessment" gets passed on and the burden of it is borne by Michigan consumers who actually pay no-fault premiums. See http://www.mackinac.org/13858

29 The providers remedy – as it always has been – is to seek payment from the individual.

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Determining Liability In Collisions At Signalized Intersections

By: Christian R. Sax, *P.E., PTOE, ACTAR*

Executive Summary

The liability from an intersection collision is often in dispute. Understanding the operations and design of the traffic signal can help determine which party disregarded the traffic signal and/or which driver's alleged scenario is more probable. The following example illustrates how an operational analysis of the traffic signal in addition to a collision reconstruction can help establish which driver was liable for the collision.

Christian R. Sax is a licensed professional engineer, professional traffic operations engineer, certified work zone traffic control supervisor, and an accredited traffic accident reconstructionist by the Accreditation Commission for Traffic Accident Reconstructionist (ACTAR). He holds a certification as a Crash Data Retrieval Analyst. He has performed collision reconstruction and engineering analyses on hundreds of cases involving work zone and traffic control related issues, commercial tractor/trailers, passenger vehicles, pedestrian accidents, bicycle and motorcycle collisions, and rollovers and has testified as an expert witness at deposition and trial settings.He can be reached at (972) 518-0900 or csax@rimkus.com.

Collision Scenario

The following collision occurred between a Chrysler Town & Country and a Chevrolet Cavalier at the intersection of 1st Avenue and Oak Street (Figure 1). 1st Avenue was a two-way, three-lane undivided roadway that traveled east and west. Oak Street was a two-way, three-lane roadway that traveled north and south. The intersection of 1st Avenue and Oak Street was a "T-type" intersection, where northbound Oak Street terminated at 1st Avenue.

The intersection of 1st Avenue and Oak Street was controlled by traffic signals. Northbound traffic on Oak Street was controlled by two three-section (red-yellow-green) traffic signals. Eastbound traffic on 1st Avenue was controlled by two three-section traffic signals (Figure 2). Westbound through traffic on 1st Avenue was controlled by two three-section traffic signals. Additionally, westbound left-turning traffic was controlled by a single four-section traffic signal (Figure 3). The four-section traffic signal showed a solid red arrow, solid yellow arrow, flashing yellow arrow, and a solid green arrow.

According to the Chrysler driver, she was traveling westbound on 1st Avenue and intended to make a left-turn onto southbound Oak Street at the intersection. She stated that when she arrived at the intersection, the westbound left-turn signal was a flashing yellow arrow. She partially entered the intersection, waited for an eastbound vehicle to pass, and when the left-turn signal turned to solid red she proceeded to turn left onto southbound Oak Street.

According to the Chevrolet driver, he was traveling eastbound on 1st Avenue in the through-lane and traveled straight through the intersection. The Chevrolet driver stated that he was stopped at the stop bar for a solid red signal indication and entered the intersection when the eastbound signal turned green.

The goals in this type of collision reconstruction are to determine where the vehicles collided in the intersection, their impact speeds, and determine which driver's scenario was consistent with the physical evidence and the traffic signal timing. The damage to the vehicles, intersection orientation, signal timing, and testimony were used to analyze the subject collision.

Figure 1: Intersection configuration.

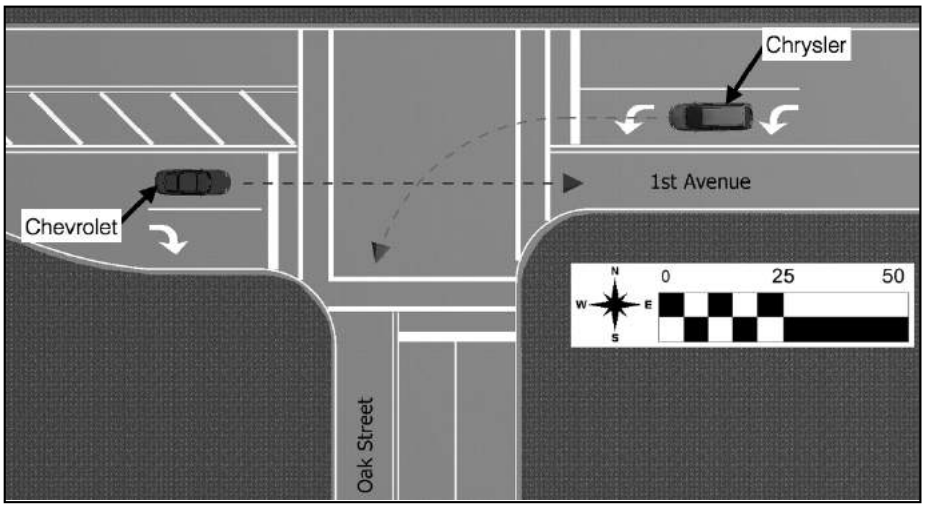
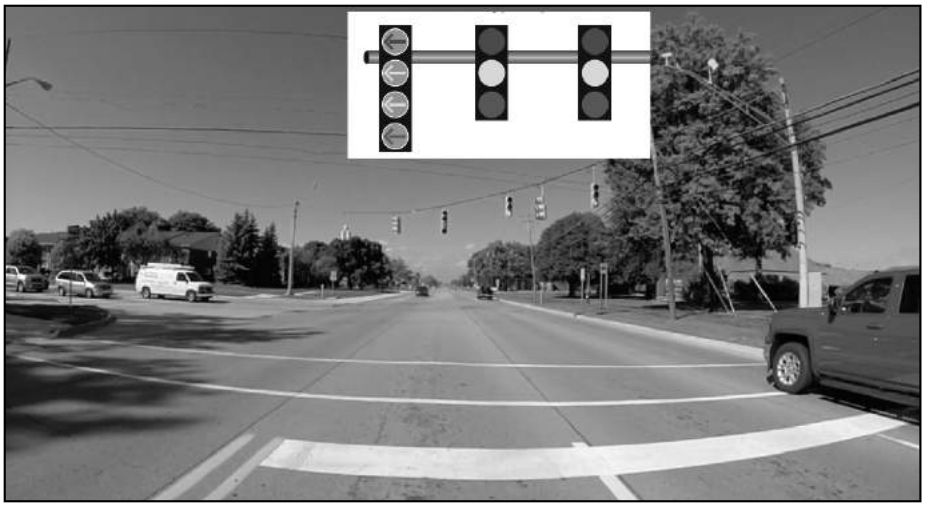


Figure 2: Eastbound 1st Avenue.

Figure 3: Westbound 1st Avenue.



Collision Reconstruction

The Chrysler was inspected. The Chevrolet was not available for inspection, and thus, photographs documenting the damage to the Chevrolet were relied upon. The Chrysler had damage to the right-front corner. The Chevrolet had damage to the front end. Based on the damage to the Chrysler and the Chevrolet, the front center of the Chevrolet impacted the right-front corner of the Chrysler (Figure 4).

The Chrysler was equipped with an Airbag Control Module (ACM) that could be imaged using commercially available equipment. The ACM had the capability to save certain crash parameters after the primary safety functions (e.g. deploying airbags) were completed. The Chrysler ACM provided 5 seconds of pre-crash data, which included steering wheel angle, travel speed, brake application, and acceleration rate. The data from the Chrysler indicated that the Chrysler accelerated from a stop and initiated a left-turn in the five seconds prior to the collision. Approximately 0.6 seconds prior to the collision the Chrysler driver applied the brakes while continuing to turn left. Thus, the Chrysler's pre-crash ACM data was consistent with the testimony of the Chrysler's driver, in that the Chrysler was stopped then accelerated into the left turn.

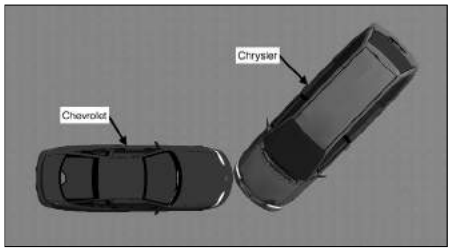
A series of simulations were performed to determine the orientation of the vehicles in the collision scenario, the dynamics of the Chrysler and Chevrolet, impact speeds, and the impact severity for the subject collision. The ACM data indicated that the Chrysler was traveling between 7 and 9 mph at the time of impact. Based on the damage to the Chrysler and Chevrolet, the impact speed of the Chevrolet was between 35 and 45 mph. As noted, the driver of the Chevrolet stated that he was stopped at the traffic signal and accelerated from rest when the traffic signal turned green. The distance from the stop bar to the point of impact was 28 feet. Based on generally accepted acceleration rates for passenger vehicles, the travel speed of the Chevrolet would have been between 11 and 16 mph

if the Chevrolet had accelerated from rest up to the point of impact.

The impact speed of the Chevrolet was not consistent with a vehicle stopped at the stop bar and accelerating to impact with the Chrysler, as the Chevrolet driver had claimed. Thus, the Chevrolet driver's collision scenario was not possible. The impact speed and pre-crash data was consistent with the Chrysler coming to a stop in the intersection and then accelerating while making a left turn and applying the brakes just before impact.

The results of the collision reconstruction determined the impact speeds and pre-impact driver actions for each of the vehicles. However, the results from the collision reconstruction were insufficient to determine liability in the subject collision.

Figure 4: Impact orientation.

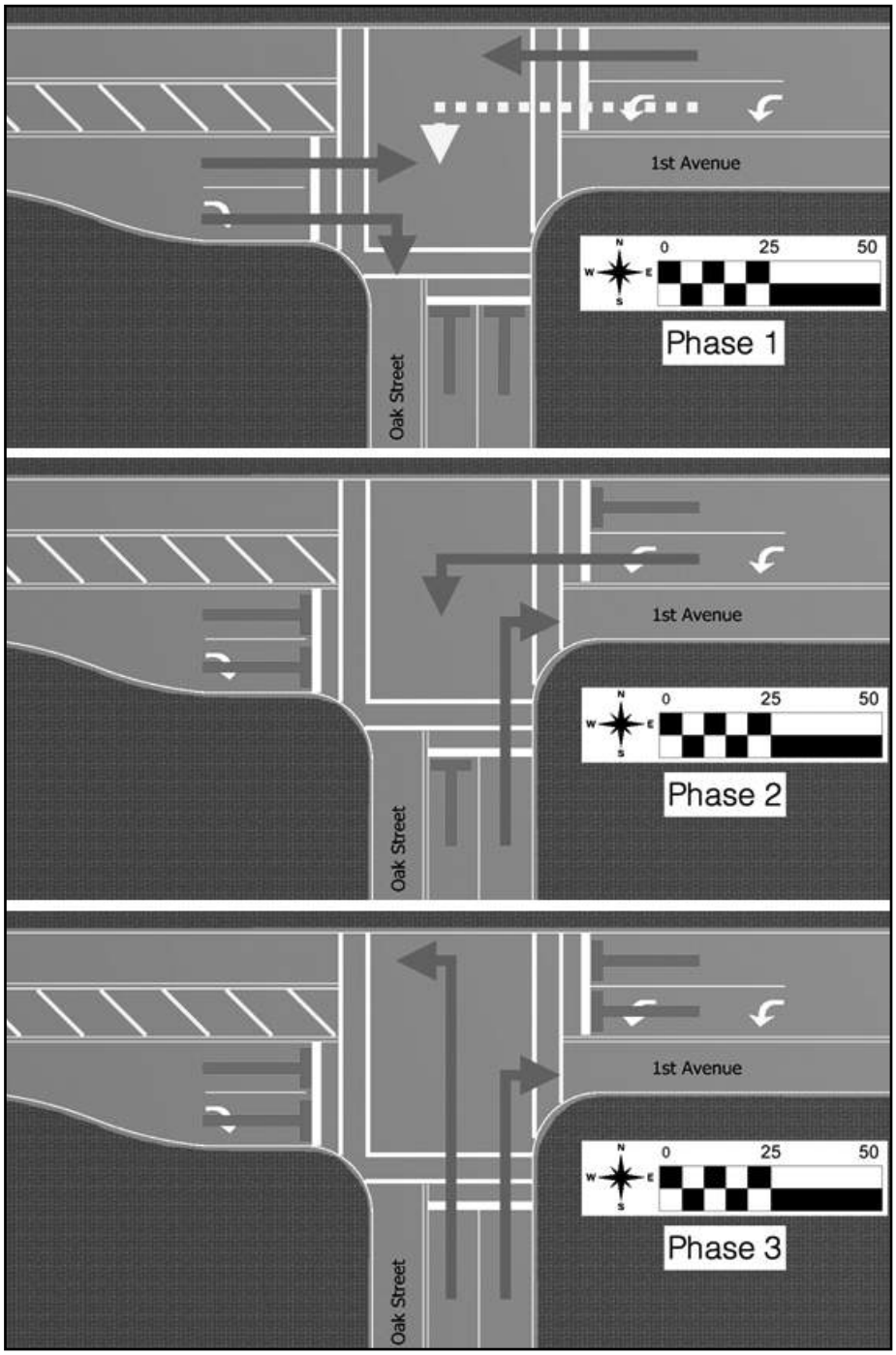


Signal Timing Analysis

A signal timing analysis was conducted to determine the plausibility of each driver's scenario. In order to determine how the traffic signal operated, the following information was requested from the County.

1. Traffic Signal Timing sheets for the day of the crash.
2. Phasing Sequence Diagram.
3. Signal Plan Sheet.
4. Conflict monitor device report.
5. Turning movement counts.
6. Road construction and maintenance records for the year preceding and the 6 months after the day of the crash.
7. Complaint documents regarding the subject intersection.

Figure 5: Phase Diagram.



The information was requested via a Freedom of Information Act (FOIA) request and should be requested for each signalized intersection collision. Each requested document provides a different aspect of the intersection for analysis.

Green, yellow, and red signal indications are assigned to movements in phases. Each phase represents a vehicle movement or group of movements that are assigned an indication at the same time (Figure 5). The phasing sequence was verified during a site visit and memorialized via a video synchronization of the traffic signal. Thus, a demonstrative exhibit could be presented to the jury regarding a specific phase of the signal timing.

During phase 1, the eastbound and

westbound through traffic on 1st Avenue received a green ball at the same time that the westbound left-turn received a flashing yellow arrow. The eastbound and westbound lanes on 1st Avenue went to a yellow ball followed by a red ball at the same time. After phase 1 went to a red ball, the westbound 1st Avenue left-turn lane and the northbound Oak Avenue right-turn lane received a green arrow during phase 2. Phase 2 was only activated if there was a vehicle detected in the westbound 1st Avenue left-turn lane. If there were no vehicles detected in the westbound 1st Avenue left-turn lane, then phase 2 would be skipped. During phase 3, the northbound left-turn lane and right-turn lane on Oak Avenue received a Green Arrow.

Based on the phasing sequence of the traffic signal, the Chrysler driver's collision scenario was consistent with the physical evidence. She stated that the left-turn signal was a flashing yellow arrow when she arrived and that she waited for an eastbound vehicle to pass and then proceeded into the intersection when the signal turned to solid red. According to the phasing sequence, the scenario described by the Chrysler driver indicated that she arrived at the intersection during Phase 1 and she proceeded into the intersection when Phase 1 ended and Phase 3 was beginning. The scenario that the Chrysler driver described is termed a "sneaker." A "sneaker" refers to a vehicle that is waiting to make a permissive left turn, but due to insufficient gaps in traffic, must complete their turns at the end of the phase. The "sneaker" legally enters the intersection, on the flashing yellow arrow, but is not able to clear the intersection until the change-and-clearance interval or even the beginning of the next phase (i.e. the signal turns to solid yellow arrow or even solid red). The intersection signal timing generally assumes two "sneakers" per cycle. This indicated that the Chevrolet had to have entered the intersection on a red ball signal. The collision reconstruction along with the signal timing analysis was consistent with the Chrysler driver's scenario and was not consistent with the scenario presented by the Chevrolet driver.

Conclusions

Traffic signals act in a predictable and repeatable manner and can only do what they are designed and built to do. When a crash occurs at a signalized intersection, a collision reconstruction may not provide enough information to determine liability. At a signalized intersection, there are documented and repeatable methods to establish the events that led up to the event. With a proper understanding, the traffic signal operations in conjunction with the collision reconstruction and testimony can assist in determining liability.

Appellate Practice Report

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E-Filing Comes to the U.S. Supreme Court—Sort Of.

Change comes slowly to the United States Supreme Court. Each of the Court's sessions still begins with the centuries-old invocation: *Oyez! Oyez! Oyez!* The Court still prohibits video and still photography. Each advocate still begins an argument with, "Mr. Chief Justice, and may it please the Court…." And some court observers are still getting over the shock of the gold stripes that the late Chief Justice Rehnquist added to his robe after seeing a similar robe in a Gilbert and Sullivan production.

So it's no surprise that the Supreme Court has been slow to embrace e-filing. Although federal circuit courts have happily used e-filing for at least a decade, the Supreme Court has continued to require paper briefs, professionally printed in booklet form. It's an expensive process. But the wait for e-filing in the Supreme Court finally ended on November 13, 2017—sort of.

Since November 13, 2017, the Court has required attorneys to e-file copies of their briefs. Any member of the Supreme Court Bar and any attorney appointed under the federal Criminal Justice Act can register to e-file through a link on the Supreme Court's website. It takes a couple days to get a password, so registering in advance is a good idea.

Here's the rub: parties still have to file paper briefs, too. The electronically filed brief is **in addition** to the traditional booklet-form briefs required under the Supreme Court's rules. Although the Court anticipates a time when parties will only need to file briefs electronically, the current rules require parties to file electronic copies "at the time of filing or reasonably contemporaneous" with the filing of a paper brief.

A few caveats about e-filing in the Supreme Court. First, not everything submitted to the Court should be e-filed. The Court's *Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System* explains that the only letters that parties may e-file are: (1) motions for extensions, (2) notice that a party no longer has an interest in the litigation, (3) amended corporate disclosures, (4) substitutions of public officers, (5) renewed applications to a particular justice under Supreme Court Rule 22.4, (6) waivers of the 14-day waiting period for submission to the Court under Supreme Court Rule 15.5, (7) consents to *amicus* briefs, and (8) letters that respond to a specific request from the Court.

Second, e-filing doesn't count as service. Parties still need to serve briefs in paper form as required under Supreme Court Rule 29.

Third, attorneys don't need to create a separate Notice of Appearance for electronic filing. The Court's *Guidelines for the Submission of Documents* explains that the e-filing system creates a notice of appearance automatically when a filer submits a brief.

Although the Court's e-filing system is just a small step toward paper-free operations, it does offer some advantages. Parties can hyperlink e-filings—both to internal links and to "external source[s] cited in the document." Parties will also receive e-mail notification of new events in a case. The Court provides a technical-support staff during business hours and allows parties to e-mail electronic copies of documents to a specified e-mail address if they encounter technical problems after hours.

But the best feature of the Court's new e-filing system benefits the public at large as much as parties to appeals: The Court will now make briefs available online. And, unlike PACER, the Supreme Court's e-filing system will provide access for free. Although many of these briefs are already available through paid-access services like Westlaw and Lexis,

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the Supreme Court's new system will facilitate public access to court records.

Jurisdictional vs Nonjurisdictional Appeal Filing Deadlines

Most of us think of appeal filing deadlines as absolute. That certainly is the case under the Michigan Court Rules. But as demonstrated by a recent decision from the United States Supreme Court, *Hamer v Neighborhood Housing Serv of Chicago*, ___ US ___ (Nov 8, 2017), it is not always so when it comes to the Federal Rules of Appellate Procedure.

State Court

It is well established under the Michigan Court Rules that the "time limit for an appeal of right is jurisdictional." MCR 7.204(A). In general, this means that an appeal of right in a civil case must be filed within 21 days of the judgment or order appealed from, MCR 7.204(A)(1)(a), or 21 days after the entry of an order denying a timely "motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed." MCR 7.204(A)(1)(b).[1] If an appeal as of right is not filed in accordance with the court rules, it will be dismissed for lack of jurisdiction. See *Baitinger v Brisson*, 230 Mich App 112, 113; 583 NW2d 481 (1998) ("We dismiss defendant's appeal for lack of jurisdiction under MCR 7.203 because it was not filed within the period provided in MCR 7.204(A)(1).").

Federal Court

But the analysis is more nuanced under the federal rules. Generally, civil appeals under Federal Rule of Appellate Procedure 4 must be filed "within 30 days after entry of the judgment or order appealed from." FR App P 4(a)(1)(A). And just as under the Michigan Court Rules, the federal courts of appeals lack jurisdiction over appeals that are not filed within the 30-day period. *Bowles v Russell*, 551 US 205, 209-210 (2007) ("'This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'").

Unlike MCR 7.204, however, Rule 4 allows the 30-day appeal period to be extended even in cases where the losing party received timely notice of the judgment.[2] This is where things become somewhat complicated. Under Rule 4(a)(5), a district court "may extend the time to file a notice of appeal" if the losing party files a motion "no later than 30 days after the [appeal period] expires" and shows "excusable neglect or good cause." Rule 4(a)(5) also limits the length of an extension of time to appeal to "30 days after the [prescribed appeal period] or 14 days after the date when the order granting the motion is entered, whichever is later." FR App P 4(a)(5)(C).

At first blush, it would seem that since the 30-day appeal period is jurisdictional, so too must be the time limit that Rule 4(a)(5)(C) places on a district court's extension of the appeal period. Not so, according to a recent decision from the United States Supreme Court. In *Hamer v Neighborhood Housing Serv of Chicago*, ___ US ___ (Nov 8, 2017), the district court granted summary judgment to the defendants and dismissed the plaintiff's age discrimination claims on September 14, 2015. Just before the 30-day appeal period was set to expire on October 14, 2015, the plaintiff's counsel moved to withdraw as well to extend the time for the plaintiff to file a notice of appeal. The district court granted both motions, extending the appeal period by an additional 60 days, from October 14 to December 14, 2015. Based on that extension, the plaintiff filed her notice of appeal to the Seventh Circuit on December 11, 2015.

On its own initiative, the Court of Appeals questioned the timeliness of the plaintiff's appeal and, after requesting briefing on the issue, dismissed it for lack of jurisdiction. The court reasoned that since extensions of the appeal period are limited by Rule 4(a)(5)(C) to 30 days, the plaintiff's notice of appeal was untimely and had to be dismissed.

The Supreme Court, however, reversed. The Court observed that although a district court's ability to extend the appeal period under Rule 4(a)(5) ultimately derives from 28 USC 2107(c),[3] the only **statutory**, and hence "jurisdictional," time limit placed on such extensions is in "cases in which the appellant lacked notice of the entry of judgment." In those cases, the district court can reopen the appeal period for up to "14 days from the date of entry of the order reopening the time for appeal." 28 USC 2107(c)(2). But "for other cases, the statute does not say how long an extension may run."

Consequently, the Court held, Rule 4(a)(5)(C)'s limitation on extensions of time is not a "jurisdictional appeal filing deadline," but rather a "mandatory claim-processing rule" that is subject to "forfeiture" or other "equitable considerations." The Court explained that only statutory time limitations affect a court's "adjudicatory authority over the case," whereas mandatory claim-processing rules such as Rule 4(a)(5)(C) "may be waived or forfeited."

The Court concluded that because the Court of Appeals had "erroneously treated as jurisdictional Rule 4(a)(5)(C)'s 30-day limitation on extensions of time to file a notice of appeal," a remand was necessary for that court to determine whether the defendants' failure to object "effected a forfeiture," or "whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint."

Conclusion

Although the best practice is to follow **any** appeal filing deadline, regardless whether it is contained in a statute or a court rule, the Supreme Court's decision in *Hamer* suggests that, at least in federal court, the failure to do so is not necessarily fatal.

Endnotes

1 There are certain exceptions to the 21-day time period (e.g., appeals from certain agency decisions where a different time period is prescribed by statute), but they are beyond the scope of this article.

2 MCR 7.204 and Rule 4 are similar in providing for extensions of time in cases in which a party did **not** receive notice of the judgment. Pursuant to MCR 7.204(A)(3), "[i]f the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely." Rule 4's analogous provision permits a district court to "reopen the time to file an appeal" if (1) the party files a motion either "180 days after the judgment or order is entered" or 14 days after the party received notice, whichever is earlier, and (2) "no party would be prejudiced." FR App P 4(a)(6).

3 28 USC 2107(c) provides that a district court "may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."

Legal Malpractice Update

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Michigan's Appellate Courts Shed New Light on Michigan Attorneys' Rights and Responsibilities[1]

Overview

The Michigan Court of Appeals recently issued several decisions that affect the profession and practice of law in Michigan. The first, *Estate of Maki v Coen,* holds that an attorney representing a conservator of a protected individual's estate represents **only** the conservator, and not the protected individual as well. In a more recent opinion, *Nortley v Hurst,* the Court held that Michigan's statute of repose for legal-malpractice claims may apply retroactively. And, in *Estate of Nash v City of Grand Haven,* the Court adopted a common-interest privilege that expands Michigan's attorney-client privilege. These cases are summarized below.

Estate of Maki v Coen

Estate of Maki v Coen, 318 Mich App 532 (2017), holds that an attorney who represents a conservator represents only the conservator—not the conservator's ward.

Until *Maki,* some parties argued that a conservator's attorney represented both the conservator **and** the conservator's ward—the "protected individual," as the Estates and Protected Individuals Code, MCL 700.1101 et seq, ("EPIC") puts it. Typically, parties argued for this pass-through attorney-client relationship based on the Michigan Court of Appeals' opinion in *Steinway v Bolden*, 185 Mich App 234 (1990).

But the *Maki* court saw a compelling reason to conclude that *Steinway* was no longer good law. *Steinway* relied on Michigan's now-repealed Revised Probate Code, which included a provision stating that a conservator hired an attorney to provide services "in behalf of the estate." The Michigan Legislature abandoned that language when it enacted the EPIC. Now, Section 5423 (MCL 700.5423(2)(z)) of the EPIC states that a conservator may hire an attorney "to advise or assist the conservator in the performance of the conservator's administrative duties[.]" So the Court of Appeals held that the conservator's attorney in *Maki* owed duties only to his client, and not to the "protected individual" that his client served. It therefore affirmed the circuit court's order granting summary disposition to the attorney and his law firm.

Nortley v Hurst

In 2013, the Michigan Legislature enacted a statute of repose for legal-malpractice claims (MCL 600.5838b). Those claims are still subject to a two-year statute of limitations, which starts running when the attorney stops representing the client as to the matters out of which the claim arose. Likewise, legal-malpractice claims are still subject to the six-month discovery rule (MCL 600.5805; MCL 600.5838), which allows a client to file a claim six months after he or she discovers, or should have discovered, malpractice.

The statute of repose subjects these limitations periods to an inflexible cap. Now, a client cannot pursue a malpractice action against an attorney more than six years after the act or omission giving rise to the claim. Even if a claim is timely under the discovery rule, it can be barred under the statute of repose.

One of the major areas of litigation after the statute of repose's enactment was whether this statute applied retroactively, or to claims that arose before the statute's effective date

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of January 2, 2013. The Court of Appeals answered the question of retroactivity in *Nortley v Hurst*, __ Mich App __; 2017 Mich App LEXIS 1535 (2017).

Nortley retained the defendant/attorney, Dennis Hurst, in August 2008. She alleged that Hurst committed malpractice in allowing her judgment of divorce to enter on June 12, 2009—11 days before her rights in her ex-husband's social security would have vested. She said she learned about her claim on September 5, 2015, and she filed her action on January 15, 2016. So Nortley's action was timely under the discovery rule but not under the statute of repose. Nortley argued that the court couldn't apply the statute of repose retroactively. She contended that the statute of repose doesn't **say** that it applies retroactively (usually a prerequisite to retroactive application) and that applying it retroactively would deprive her of a vested right.

The Court of Appeals disagreed. *Nortley*, slip op at 6. It observed that Nortley still had two years to file her claim when the Legislature enacted the statute of repose. Consequently, summary disposition was affirmed.

Estate of Nash v City of Grand Haven

Finally, the Court of Appeals adopted an expansion of the attorney-client privilege in *Estate of Nash v City of Grand Haven*, __ Mich App __; 2017 Mich App LEXIS 1545 (2017). Attorney-client communications relating to legal advice are privileged, of course. But what if another party communicates with both a party and that party's attorney in an attempt to develop a common legal strategy?

Ordinarily, a non-party's involvement in otherwise privileged communications destroys the privilege. Under *Nash,* however, those communications are subject to the attorney-client privilege. Adopting the federal common-interest doctrine, the *Nash* court held that this doctrine applies "where the parties undertake a joint effort with respect to a common legal interest, and … is limited strictly to those communications made to further an ongoing enterprise." The "communications need not be made in anticipation of litigation" to fall within this rule.

Nash was a FOIA case in which the plaintiff sought records relating to a sledding accident on city property. The Court applied the common-interest privilege to communications between the city or its attorneys and defendants in the underlying tort action.

Conclusion

These summaries come with a caveat. Parties in *Nortley* and *Nash* may ask the Michigan Supreme Court to review the Court of Appeals' opinions in those cases. If the Michigan Supreme Court grants leave, the Court of Appeals' holdings may or may not stand. As for *Maki,* the Michigan Supreme Court has already rejected an application for leave. The plaintiff's motion for reconsideration remains pending.

Endnotes

1 David Anderson and Michael Sullivan thank Trent Collier for his significant contributions to this report.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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When I last reported at the end of August, I expressed hope that our legislators would make some significant progress on the important issues of the day before their final adjournment of the year. With nobody running for election or re-election this year, they have been free of the pressures that an election year brings, although many of them have been looking ahead to next year and planning accordingly. But for now, we are enjoying a respite from election year antics, which will begin again in earnest next year, and thus, the show across the street at the Capitol has seemed rather mundane when compared with the more interesting scandal, intrigue and dysfunction unfolding each day in Washington.

We have seen a few substantive accomplishments along with a fair amount of tinkering around the edges, but there has been little that will be widely noted or long remembered. During the fall sessions, our Legislature has focused much of its attention on initiatives which were addressed but left unresolved last year. There have been further discussions of legislation proposing no-fault auto insurance reform, which have once again failed to produce agreement. Separate packages of legislation addressing the widespread and dangerous underfunding of pension and health benefits for retired employees of local governments were passed by both houses on December 7th, without the highly controversial provisions originally proposed, which would have imposed state financial management on local governments with underfunded retirement plans that failed to make sufficient remedial progress.

In the time that remains this year, we could yet see action on a package of House bills which would end the assessment and collection of driver responsibility fees, and a package of Senate bills which would allow licensed individuals greater freedom to carry concealed weapons in weapon-free zones while prohibiting the open carrying of firearms in those areas, subject to enumerated exceptions. But there is no great sense of urgency, as any bills that are not enacted into law before the end of this odd-numbered year will be eligible for further consideration and passage next year.

New Public Acts

As of this writing on December 8th, there are 192 Public Acts of 2017. Those which may be of interest to our members include the following:

2017 PA No. 192 – House Bill 4208 (Miller – R) This act, inspired by the unfortunate affair of Representatives Todd Courser and Cindy Gamrat, has amended the Michigan Election Law to provide that the resignation or removal of a State Senator or Representative will remain in effect for the remainder of the unexpired term.

2017 PA Nos. 154, 155, 156 and **157 – House Bills 4170 (Tedder – R)**; **4171 (Cox – R)**; **4173 (Vaupel – R)** and **4174 (Love – D)** Public Act 154 has amended the Public Health Code to provide for the creation and use of a standardized Physician Orders for Scope of Treatment Form ("POST Form") to convey medical orders for specific types or levels of treatment to be provided in settings outside of a hospital, to which a patient, patient advocate or guardian may consent. Public Acts 155, 156 and 157 have made consistent changes in the Estates and Protected Individuals Code, the Adult Foster Care Facility Licensing Act and the Michigan Do-Not-Resuscitate Procedure Act. In cases where a health professional has knowledge of a POST Order and a Do-Not-Resuscitate Order providing inconsistent instruction with respect to resuscitation, the health professional will be required to follow the instructions provided in the most recent order. These amendatory acts will take effect on February 6, 2018.

2017 PA No. 132 – House Bill 4508 (Iden – R), has created a new "Cyber Civilian Corps Act," which will establish the Michigan Cyber Civilian Corps Program within the

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Department of Technology, Management and Budget. Under this new program, the department will be authorized to invite and utilize volunteers having expertise in cybersecurity to provide rapid response assistance to municipal, educational, nonprofit or business organizations in need of expert assistance during a cybersecurity incident. Volunteers serving in this capacity would be required to submit to a criminal background check, and would have limited immunity from civil and criminal liability for actions performed pursuant to their volunteer service. This act will take effect on January 24, 2018.

2017 PA No. 128 – Senate Bill 223 (Jones – R) has created a new "Law Enforcement Officer Separation of Services Record Act." This new act will require law enforcement agencies to maintain a written record detailing the reasons for, and circumstances surrounding, a law enforcement officer's separation from employment with the agency. The separating officer will be entitled to review the statement of reasons and provide a written statement of his or her reasons for any disagreement with the agency's stated reasons, which must be kept and furnished to requesting agencies along with the agency's statement of reasons. An officer who has left employment with a law enforcement agency and later seeks employment with another law enforcement agency in Michigan will be required to sign a waiver authorizing disclosure of the first agency's statement of reasons for the prior separation from employment, and the first agency will be required to provide its statement of reasons to the requesting agency, which may not hire the officer without receiving and reviewing the first agency's report. This new act will take effect on January 15, 2018.

Old Business and New Initiatives of Interest

Senate Bill 597 (Proos – R) would amend three sections of the Public Health Code to provide that a physician shall not issue a medical order, orally or in writing, to withhold or withdraw life sustaining treatment, or to not resuscitate a patient, and that a health facility or agency shall not implement such an order, without first obtaining the consent of one of the following: 1) the patient or resident; 2) a parent or legal guardian of a patient or resident who is a minor or ward; or 3) a designated patient advocate, if the patient advocate has been given authority to grant this consent and the patient or resident is unable to participate in medical treatment decisions.

We have seen a few substantive accomplishments along with a fair amount of tinkering around the edges, but there has been little that will be widely noted or long remembered.

Senate Bill 598 (Proos – R) would amend the Estates and Protected Individuals Code to establish new procedures for seeking appointment of a guardian in cases where it is claimed that a designated patient advocate has not been properly appointed, is not complying with the terms of the designation or applicable provisions of the law, or is not acting in a manner consistent with the patient and prospective ward's best interests. The bill also proposes new procedures for settlement of disputes as to whether a patient is unable to participate in medical decision making, whether a patient advocate is complying with the terms of the patient advocate designation and/or applicable statutory provisions, and whether the patient advocate's actions are consistent with his or her designated authority and the patient's best interests. The new provisions proposed by this legislation would provide that a patient advocate or other petitioner could not authorize or implement a medical treatment decision to withhold or withdraw life sustaining treatment before disposition of a petition filed to secure a determination of these issues, and that for purposes of those proceedings, there would be a rebuttable presumption that continuation of life would be consistent with the best interests of the patient or prospective ward. Senate Bills 597 and 598 were introduced and referred to the Senate Committee on Oversight on September 28, 2017.

House Bill 4616 (Howell – R) would amend 1990 PA 319, MCL 123.1101, *et seq*., which prohibits local regulation of firearms and ammunition with exceptions specified therein, to provide new procedures for challenging and restraining enforcement of local ordinances enacted in violation of the act. Enforcement action could be pursued by individuals or the Attorney General, and if the local ordinance in question is found to be in violation of the act, the court would be required to enjoin its enforcement and award actual damages, costs, and reasonable attorney fees to the challenging party. This bill was passed by the House on September 27, 2017, and has now been referred to the Senate Committee on Government Operations.

Senate Bill 644 (Jones – 644) proposes the creation of a new "Insurance Agents Liability Act" which would define and limit the liability of insurance agents for acts and omissions in the performance of their duties. That liability would be consolidated under a newly-defined cause of action that would replace existing causes of action, including "any cause of action at common law or in equity for negligence, breach of contract, misrepresentation, fraud, breach of fiduciary duty, unjust enrichment, or quantum meruit," all of which would be abolished. This bill was introduced and referred to the Senate Committee on Insurance on November 1, 2017, but has not been scheduled for hearing as of this writing.

Online Resources

It is worth repeating that copies of legislative materials, including bills, resolutions, legislative analyses, the House and Senate Journals, and a detailed history of each bill and resolution, may be found on the Legislature's very excellent website. The website includes copies of all Public Acts and the official compilation of Michigan statutory law. The available bills and resolutions include the versions as originally introduced and as passed by each house, and also includes links to bill substitutes that have been reported from the House and Senate Committees or adopted in proceedings before the full House or Senate.

Medical Malpractice Report

By: Kevin M. Lesperance and Benjamin M. Dost, *Henn Lesperance PLC*

Is *Castro v Goulet* the Canary in *Scarsella v Pollak*'s Coal Mine?

If you have defended a medical-malpractice case since 2000 where the medical-malpractice plaintiff filed a complaint without any Affidavit of Merit ("AOM") near the running of the statute of limitations, your legal defense was straight-forward. Under the Michigan Supreme Court's decision in *Scarsella v Pollak*, the filing of that complaint without an AOM failed to commence the lawsuit and, therefore, did not toll the statute of limitations.[1] After all, MCL 600.2912d requires that plaintiffs "shall file" an AOM with the complaint. However, as clear as the analysis has been for at least the past 17 years, the Michigan Supreme Court recently signaled in *Castro v Goulet* that *Scarsella* could be reconsidered in the future.[2]

Scarsella v Pollak

In *Scarsella*, the plaintiff filed his medical-malpractice complaint "two to three weeks" before the two-year statute of limitations would have barred the claim.[3] The plaintiff did not, however, file an AOM with his complaint, nor did he move for a 28-day extension in which to file an AOM under MCL 600.2912d(2).[4]

The defendant filed a motion for summary disposition based on the plaintiff's failure to file any AOM under MCL 600.2912d. Two days before the hearing on the defendant's motion, i.e., eight months after plaintiff had filed the complaint and well beyond the statute of limitations, the plaintiff filed his first AOM.

The trial court ruled that the plaintiff's failure to file an AOM with his complaint rendered the complaint null and void. The Court of Appeals affirmed, reasoning that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit."[5]

The Michigan Supreme Court adopted the opinion of the Court of Appeals in its entirety, and succinctly clarified that when a medical-malpractice plaintiff wholly omits to file any AOM required by MCL 600.2912d, "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitations."[6]

Castro v Goulet

In *Castro*, the alleged malpractice occurred on February 9, 2011, so the 2-year limitations period was set to expire on February 9, 2013. The plaintiffs filed their complaint, and their motion to extend the time for filing the AOM, on February 4, 2013. The plaintiffs then filed an AOM on February 26, 2013, less than 28 days after they filed their complaint and motion for a 28-day extension, but after the statute of limitations. The trial court granted the plaintiffs' motion for an extension on March 8, 2013. However, the trial court granted the defendants' motion for summary disposition because the plaintiff's motion to extend the time to file the AOM was granted March 8, 2013, which was after the limitations period had expired on February 9, 2013.

The Court of Appeals reversed the trial court, holding that the plaintiffs' action was timely. The Court of Appeals reasoned that "it is ultimately the granting of the motion that effectuates the 28–day tolling, not merely filing the motion for an extension."[7] The Court also noted that the tolling period runs from the date the complaint is filed,

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and the plaintiff cannot resurrect a claim where the complaint itself was untimely. In *Castro*, however, the complaint was filed within the two-year period of limitations, along with the plaintiff's motion to extend the time to file an AOM. An AOM was filed less than 28 days later, and plaintiff's motion to extend the time to file the AOM was ultimately granted. Therefore, the suit was timely filed.

The Michigan Supreme Court denied the defendants application for leave to appeal in a two-sentence order. However, the honorable and respected Justice David F. Viviano wrote a concurring opinion in which he explicitly stated that the Supreme Court "should, in an appropriate case, reconsider our opinion in *Scarsella v Pollak*."[8] Medical-malpractice practitioners should pay heed to his well-reasoned analysis, below, and possibly begin to explore a legislative fix at this time.

Although Justice Viviano's concurrence offers no guarantee that the Supreme Court will take up the issue in the near future, or prompt the Legislature to clarify whether or not a complaint filed without any AOM tolls the statute of limitations, you have now seen the proverbial canary fall off its perch.

Justice Viviano's Concurrence

Justice Viviano's analysis in *Castro* begins with the generally applicable timing provisions found in MCL 600.1901. Under MCL 600.1901, "[a] civil action is commenced by filing a complaint with the court." The commencement of an action must conform to the limitations periods prescribed by statute, and a person cannot "bring or maintain an action … unless … the action is commenced within the period of time prescribed by" MCL 600.5805. Because MCL 600.1901 pertains only to the filing of the complaint, medical-malpractice practitioners must look to MCL 600.5856 to determine the effect of the statute of limitations once the complaint has been filed.

MCL 600.5856 tolls the running of the statutory limitations period in three circumstances:

> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant….
>
> (b) At the time jurisdiction over the defendant is otherwise acquired.
>
> (c) At the time notice is given in compliance with the applicable notice period under [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose.

Justice Viviano points out that in *Scarsella* the Michigan Supreme Court concluded that the general timing requirements do not apply in medical-malpractice cases because, as noted above, MCL 600.2912d(1) provides that a plaintiff "**shall file** with the complaint an affidavit of merit signed by a health professional…." (emphasis added). The AOM in *Scarsella* was not filed with the complaint, and was only later filed after the statutory limitations period elapsed, contrary to the statutory mandate of MCL 600.2912d that an AOM "shall" be filed with the complaint, which is "mandatory and imperative."[9]

In other cases addressing the filing of an AOM, our Supreme Court has noted that MCL 600.2912d gives a specific instruction for medical-malpractice lawsuits, and therefore, controls over the more general and conflicting provisions found in MCL 600.1901 and MCL 600.5856.[10] For example, MCL 600.1901 provides that a "civil action is commenced by filing a complaint with the court," and MCL 600.5856 provides that the statute of limitations is tolled "[a]t the time the complaint is filed." On the other hand, MCL 600.2912d refers specifically to medical-malpractice actions, and requires that a plaintiff "shall file with the complaint an affidavit of merit."

According to Justice Viviano's analysis in *Castro*, however, MCL 600.5856 and MCL 600.2912d do not conflict:

> But § 5856 and § 2912d do not conflict, and the latter would not be nullified if the former's general tolling rules applied to medical malpractice claims. Section 2912d says absolutely nothing about the limitations period and does not explicitly condition tolling on a timely filed AOM. All the statute requires is that the plaintiff file the AOM with the complaint, or later if an exception applies. No one has yet offered a convincing argument why it would be inconsistent to mandate the AOM filing in § 2912d(1) while at the same time permitting § 5856(1) to toll the running of the statutory limitations period. Tolling in these circumstances would not appear to vitiate the requirements of § 2912d(1): plaintiffs would still have to file the AOM and their claims might be dismissed when they failed to do so, just not on statute of limitations grounds. In other words, § 2912d(1) has its own work to do—namely, forcing plaintiffs to provide medical opinion evidence that their claims are not frivolous—and it need not take on the additional task of tolling the limitations period, especially when it nowhere mentions that period.[11]

Though much weight is put on "legislative intent," the lack of clarity on this issue may well be due to legislative oversight. As such, it only makes sense that the Legislature would want to clarify the issue, now that Justice Viviano has put a spotlight on it.

Next, Justice Viviano concludes that MCL 600.2912d treats the complaint and AOM as distinct documents. Because MCL 600.5856(a) refers to the complaint but not the AOM, "a persuasive argument can be made that the Legislature did not intend for the AOM to play any role in tolling."[12]

Justice Viviano's concurrence discusses two aspects of legislative intent. First, he cautions that "[a]bsent any explicit textual indication that filing the AOM is a condition to tolling, *Scarsella*'s contrary

conclusion is questionable because we must be cautious 'not [to] read into the statute what is not within the Legislature's intent as derived from the language of the statute.'"[13] MCL 600.5856 tolls the running of the statutory limitations period if the plaintiff provided a Notice of Intent ("NOI"). That the Legislature provided for the NOI's tolling effect, but not the AOM's, suggests that AOMs may not be needed for tolling to occur after the timely filing of a complaint. According to the textual language of MCL 600.5856, the complaint explicitly tolls the period of limitations, not the AOM.

However, as clear as the analysis has been for at least the past 17 years, the Michigan Supreme Court recently signaled in *Castro v Goulet* that *Scarsella* could be reconsidered in the future.

Second, Justice Viviano notes the legislative history in support of the above conclusion. Specifically, in 1993, the Legislature considered a proposed version of MCL 600.2912d[14] that would have required a plaintiff to file a "certificate" with his or her complaint to show that the plaintiff had served an AOM together with the NOI.[15] Under that proposal, the failure to serve an AOM along with the NOI meant the limitations period would continue to run (i.e., not be tolled). However, the Legislature never enacted that proposal.

Justice Viviano also addressed some of the complications with the rule of *Scarsella*, as evidenced by the arguments made in *Castro*. Specifically, the defendants in *Castro* argued that the trial court needed to rule on and grant the 28-day extension before expiration of the limitations period. Likewise, if the trial court granted the extension to file an AOM, but granted it more than 28 days after the plaintiff filed the complaint, then the suit would also be barred. Moreover, Justice Viviano continued:

> If *Scarsella* is incorrect, then the fact that § 2912d(2) is silent regarding the statute of limitations makes perfect sense: the AOM has no effect on commencing a lawsuit for purposes of the statute of limitations. As a result, the Legislature would not need to mention tolling when providing an AOM-filing extension period. Instead, the general tolling provisions would apply, and a plaintiff's filing and service of the complaint would halt the limitations period.[16]

That being said, it is noteworthy that Justice Viviano seems to leave the door open, if only a crack, and indicates he could still be persuaded that *Scarsella* was correctly decided:

> There may be reasons *Scarsella* reached the correct result, and even if not, stare decisis might counsel retaining it. I do not, of course, decide those questions here. But given its shaky legal foundation and the continuing dislocations in our law it has caused, I would reconsider that decision in an appropriate future case.[17]

Potential Impact

Justice Viviano's concurrence in *Castro* is a similar call to action for the defense bar as Justice Brian K. Zahra's concurrence in *Greer v Advantage Health*.[18] There, Justice Zahra noted that, to the extent the Legislature did not intend MCL 600.6303(4) to exclude from the statutory collateral-source rule anything greater than the actual amount of a contractual lien exercised by a lienholder, it needed to amend the statute to expressly state that intent. Soon after, our Legislature amended MCL 600.1482 which now precludes medical-malpractice plaintiffs from introducing evidence of damages beyond the amount actually paid for past medical expenses, excluding contractual discounts, write-offs, and price reductions. Simply put, concurrences can and do signal a coming shift in the law, and we should get on the forefront of this issue.

Although Justice Viviano's concurrence offers no guarantee that the Supreme Court will take up the issue in the near future, or prompt the Legislature to clarify whether or not a complaint filed without any AOM tolls the statute of limitations, you have now seen the proverbial canary fall off its perch. In theory, the "appropriate case" that Justice Viviano mentions would warrant revisiting *Scarsella* could be filed any day now, or may have already been filed and is sitting in your file cabinet. In other words, there may be a shift in the impact of a medical-malpractice plaintiff failing to file any AOM, sooner rather than later.

Recommended Legislative Fixes to MCL 600.5856 and/or MCL 600.2912d

There is no reason for any confusion continuing to exist about whether a complaint filed without any AOM tolls the period of limitations. This is the type of issue that can and should be addressed and fixed by the Legislature. Though much weight is put on "legislative intent," the lack of clarity on this issue may well be due to legislative oversight. As such, it only makes sense that the Legislature would want to clarify the issue, now that Justice Viviano has put a spotlight on it.

Perhaps the easiest way to address and fix this issue would be to amend MCL 600.5856 by adding paragraph (d), mirroring the language found in paragraph (a), but with the additional requirement that an AOM be filed to toll the statute. For example, the addition could provide:

The statutes of limitations or repose are tolled in any of the following circumstances:

> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
>
> …
>
> **(d) At the time the complaint and affidavit of merit are both filed in an action alleging medical malpractice, if a copy of the summons, complaint, and affidavit of merit are served on the defendant within the time set forth in the supreme court rules.**

Another way to clarify and resolve this issue would be to amend MCL 600.2912d to explicitly state that a complaint filed without an AOM does not toll the statute of limitations:

> (1) Subject to subsection (2), the

plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. **A complaint filed without an affidavit of merit does not toll the statute of limitations.** The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:

And with that, we refer this matter to our members with strong legislative contacts.

Endnotes

1 461 Mich 547; 607 NW2d 711 (2000).

2 501 Mich 884; 901 NW2d 614 (2017).

3 *Scarsella*, 461 Mich at 549.

4 MCL 600.2912d(2) allows a party to file a motion for an additional 28 days to file an AOM for "good cause shown."

5 *Scarsella*, 232 Mich App at 64.

6 *Scarsella*, 461 Mich at 553.

7 *Castro*, 312 Mich App at 5.

8 *Castro,* 501 Mich at ___; slip op at 1.

9 *Scarsella*, 461 Mich at 549.

10 See, for example, *Ligons v Crittenton Hosp*, 490 Mich 61, 82-84 (2011) and *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68, 93-94 (2015).

11 *Castro*, 501 Mich at ___; slip op at 3-4.

12 *Castro*, 501 Mich at ___; slip op at 4.

13 *Id*. (quoting *AFSCME v Detroit*, 468 Mich 388, 400 (2003)).

14 1993 HB 4067. http://www.legislature.mi.gov/documents/1993-1994/billintroduced/House/pdf/1993-HIB-4067.pdf

15 Under the proposed MCL 600.2912f, the AOM was to be served with the Notice of Intent, not the complaint.

16 *Castro*, 501 Mich at ___; slip op at 7.

17 *Castro*, 501 Mich at ___; slip op at 8.

18 499 Mich 975 (2016).

No-Fault Report

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WISHFUL THINKING

Warning – the opinions expressed herein are solely those of the author, and do not necessarily represent the opinions of the MDTC, the MAJ, the State Bar of Michigan, the defense bar, the plaintiff's bar, the neighborhood bar, the insurance industry, the medical industry, the auto industry, the Republican party, the Democratic party, the Libertarian party, or those who attended your New Year's Eve party!

There . . . with the legal disclaimer out of the way, it's time to sit back and look back with fondness (or sadness, or dismay, or what have you) over the events of 2017, including the release of the Michigan Supreme Court's long-awaited decision in *Covenant Med Ctr v State Farm*, __ Mich __; 895 NW2d 490 (2017), the defeat of HB 5013, and all of the other interesting developments that have taken place in the wonderful world of Michigan no-fault, and to offer some commentary on issues that the Legislature may wish to consider if and when it decides to take up the issue of no-fault reform again. So, in the spirit of the holiday season, as we begin a brand new year, it's time to engage in some Wishful Thinking!

Work Loss and the Failure to File Tax Returns

MCL 500.3107(1)(b) provides that work-loss benefits are payable for "loss of income from work an injured person would have performed during the first three years after the date of the accident if he or she had not been injured." In most cases, verification of an injured claimant's income is not an issue. A Wage, Salary and Benefits Verification Form is sent to the injured claimant's employer and, upon receipt of the necessary payroll information, the work-loss claim is processed.

What about those individuals who claim to be "self-employed," but who fail to file tax returns to substantiate their income? Believe it or not, the injured claimant's failure to file tax returns is not necessarily fatal to a claim for no-fault work-loss benefits! In *Ward v Titan Ins Co*, 287 Mich App 552, 791 NW2d 488 (2010), overruled in part by *Admire v AutoOwners Ins Co*, 494 Mich 10; 831 NW2d 859 (2013), the Michigan Court of Appeals, in a 2-1 decision, reversed the decision of the circuit court (which had barred the injured claimant from submitting a claim for work-loss benefits due to his failure to file tax returns) and held that the injured claimant's deposition testimony alone would be sufficient to create a question of fact regarding his entitlement to recover no-fault benefits. The Court of Appeals ruled that the insurer was free to argue that the injured claimant's failure to file tax returns could be considered by the jury in determining whether or not the injured claimant actually suffered a work loss, but the bottom line is that the insurer still has to defend against the work-loss claim, instead of obtaining a summary dismissal of this claim. Judge Markey, in dissent, would have affirmed the lower court's ruling.

In addition, consider the situation of a self-employed individual whose claim for work-loss benefits is contradicted by his own tax returns, which show that he actually reported far less income to the IRS than what he submits to his insurer in support of a claim for work-loss benefits. I have heard many of my opposing counsel argue that the information contained on one's income tax returns should not be considered an accurate reflection of one's actual earnings! What about the old phrase, "Live by the sword, die by the sword"?

Therefore, why not consider adding the following language to the work-loss provisions in MCL 500.3107(1)(b):

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(i) A person is not eligible to recover work-loss benefits under this section, or section 3107a, if he or she has failed to file federal, state or local income tax returns for the calendar year immediately preceding the date of loss, when otherwise required to do so by law.

(ii). The income reported on an injured person's tax returns, filed with the appropriate federal, state or local taxing authorities during the calendar year leading up to the date of loss or during the year immediately preceding the accident, shall be presumed to reflect the injured person's actual earnings, for purposes of calculating the work loss payments under this section, or under section 3107a.

Wishful thinking …

Shouldn't there be some mechanism for an inter-county transfer of matters from, say, a district court in Oakland County to the circuit court where the injured person has filed his or her own lawsuit?

Venue

The author has a great deal of respect for all of the judges of the Wayne County Circuit Court – Civil Division, who work diligently to handle all of the various no-fault cases that come before them, and do their best to grapple with every new case that comes out of the Court of Appeals or the Supreme Court. Many of these cases, though, involve Claimants who do not even live in Wayne County? Many of the accidents do not occur in Wayne County, either! Has anyone ever wondered why the Wayne County Circuit Court has found itself to be the sole arbiter of so many no-fault claims over the past few years?

The answer can be found in the Court of Appeals decision in *Ferguson v Pioneer State Mut'l Ins Co*, 273 Mich App 47, 731 NW2d 94 (2006). *Ferguson* actually involved two separate cases filed against the same insurer, and while both cases involved claims for underinsured motorist benefits, only one case involved first-party, no-fault PIP benefits. In the *Ferguson* case, the plaintiff filed suit in the Genesee County Circuit Court, even though under the tort venue provisions of MCL 600.1629, the appropriate venue would have been the Kent County Circuit Court. In the companion case, *Ferre v Pioneer State*, the plaintiff filed suit in the Ingham County Circuit Court, even though under the tort venue provisions of MCL 600.1629, Eaton County would have been the appropriate forum. The circuit court in both cases denied the insurer's motion for change of venue. The Court of Appeals affirmed both decisions, finding that a claim for underinsured motorist benefits was a breach-of-contract claim, not a tort claim. Therefore, pursuant to MCL 600.1621 (the breach of contract venue provision), suit could be filed against the insurer in any county in which the insurer does business, and "because defendant undisputedly conducts business in both Genesee and Ingham counties, the trial courts did not err in denying defendant's motions for change of venue." *Ferguson*, 273 Mich App at 54.

Interestingly, the *Ferguson* decision makes no specific reference to venue in cases involving only claims for PIP benefits. Nonetheless, my colleagues on the other side of the aisle have repeatedly quoted the *Ferguson* decision in support of their contention that because a claim for no-fault benefits is a "breach of contract" action, they should be permitted to file suit in the Wayne County Circuit Court, even though their clients may live in Saginaw, Lansing, Grand Rapids, Traverse City, or even a lightly populated rural county in northern Michigan! Is it really a wise use of judicial resources to have a majority of no-fault claims filed in the Wayne County Circuit Court, where the case itself has absolutely no connection to that forum?

While utilizing a breach of contract venue provision may be acceptable where the injured person is the named insured, his or her spouse or a relative of the named insured domiciled in the same household (who derive their benefits from the insurance contract), what about those claims where the individual's entitlement to no-fault benefits does not arise under a contract, but rather arises "solely by statute"? In *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 899 NW2d 744 (2007), the Michigan Court of Appeals ruled that a fraud exclusion contained in an insurance contract is binding only on those individuals who are actually parties to that contract; i.e., the named insured, his or her spouse, or a relative domiciled in the same household, who would recover benefits under MCL 500.3114(1). All other potential claimants, such as motorcyclists or occupants and/or non-occupants of the motor vehicle involved in the accident who do not have insurance of their own in their households, are entitled to recover benefits "solely by statute" and not under the contract. As a result, those claimants are not bound by any fraud exclusions contained within the contract. The insurance contract, and its provisions, is simply irrelevant, according to the *Shelton* Court. Furthermore, in cases arising out of the Michigan Assigned Claims Plan, there is no contract anywhere! Why rely upon a breach of contract venue provision where there exists no contract at all?

What about those individuals who claim to be "self-employed," but who fail to file tax returns to substantiate their income? Believe it or not, the injured claimant's failure to file tax returns is not necessarily fatal to a claim for no-fault work-loss benefits!

In an effort to curb the obvious forum shopping that is taking place, and to distribute no-fault claims on a more equitable basis throughout the State of Michigan, why not consider adding the following venue provisions:

1. For those injured persons obtaining first-party, no-fault insurance benefits pursuant to MCL 500.3114(1) [pertaining to the named insured, his or her spouse and relatives domiciled in their household], the county in which the injured person

resides at the time the policy was issued or was last renewed is the county in which to file and try the action.

2. For those injured persons claiming benefits through the Michigan Assigned Claims Plan, as provided for in sections 3171 through 3175, the county in which the injured person resides at the time of the incident giving rise to the claim for no-fault benefits is the county in which to file and try the action.

3. For all other injured persons claiming benefits through sections 3114(2), 3114(3), 3114(4), 3114(5) or 3115(1), the county in which the injured person resides is the county in which to file and try the action.

Has anyone ever wondered why the Wayne County Circuit Court has found itself to be the sole arbiter of so many no-fault claims over the past few years?

Simply put, by tying the issue of venue to the county in which the insurance contract was actually issued or, in the case of "strangers to the contract" or those MACP claimants who obtain benefits solely by statute, to their county of residence, we no longer have the specter of an individual living in, say, Montcalm County filing suit in the Wayne County Circuit Court – a forum which has no connection whatsoever to the underlying claim except for the fact that the insurer happens to do business there – as it probably does throughout the entire State of Michigan! Wishful thinking . . .

Medical Provider Suits

While the author was certainly not privy to the negotiations that were taking place between the insurance industry and the medical industry during the debates over HB5013, it is quite apparent that unless and until the insurance industry and the medical industry can agree upon an appropriate fee schedule, whether it be a percentage of Medicare reimbursement, workers' compensation reimbursement, or what have you, there is little likelihood that there will be any meaningful no-fault reform regarding medical expenses.

However, in our world of "wishful thinking," let us consider a situation where the insurance industry and the medical industry are on the verge of reaching some sort of an agreement, but the medical industry wants to legislatively overrule the Michigan Supreme Court's decision in *Covenant Med Ctr v State Farm*, __ Mich __; 895 NW2d 490 (2017), and to reinstate the provider's ability to file an independent cause of action against a no-fault insurer for payment of its medical expenses, subject, of course, to the ability of the injured person to recover benefits. (In other words, if the injured person would be disqualified from recovering benefits, so, too, would the provider be disqualified.) Should the Legislature consider any procedural reforms in this regard?

Again, in the author's imaginary world of "wishful thinking," perhaps the Legislature should consider the following. A medical provider's ability to file suit (usually in a district court) should be limited to those district courts where the injured person actually lives, or to the district court where the medical provider actually renders the services for the injured person. It is common knowledge that most provider suits are filed in a handful of district courts in the Metro Detroit area, and more often than not, those district courts have absolutely no connection to any given claim other than the fact that the insurance company happens to do business in that locale – as it does throughout the entire State of Michigan! What about the specter of subpoenaing an injured person who lives in, say, Port Huron, to a district court in Dearborn or Ann Arbor to testify in a medical provider suit, even though the services themselves may have been performed in, say, Mt. Clemens?

Furthermore, even in our post-*Covenant* world, an insurer still faces the prospect of defending multiple lawsuits, where an injured person's medical providers have obtained assignments. Instead of filing suits based upon a purported violation of the No-Fault Insurance Act, medical providers are now filing suit based upon an assignment theory. Shouldn't there be some mechanism for an inter-county transfer of matters from, say, a district court in Oakland County to the circuit court where the injured person has filed his or her own lawsuit? Shouldn't the district court be obligated to transfer such cases to the appropriate circuit court, and shouldn't the circuit court be obligated to accept such transfers so long as the transfer occurs before, say, Case Evaluation? Wouldn't such procedural reforms result in a far more economical use of judicial resources, and aid in the ultimate resolution of claims arising out of a single, identifiable event; i.e., a motor vehicle accident resulting in an injury to a single individual? After all, all of the "players" would be "at the table" for purposes of resolving coverage or entitlement issues, evidentiary issues, etc. Ahh, wishful thinking. . .

Finally, I would like to extend all readers of this column my very best for a Healthy, Happy and Prosperous New Year, and that is not just "wishful thinking"!

Supreme Court Update

By: Mikyia S. Aaron, *Clark Hill, PLC*
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The Michigan Supreme Court Vacates the Court of Appeals Order Finding that the Denial of a Motion to Modify Parenting Time and to Change a Minor Child's School Enrollment Was Not a "Post Judgment Order Affecting the Custody of a Minor" Within the Meaning of MCR 7.202(6)(a)(iii)

On November 16, 2017, the Michigan Supreme Court vacated an order of the Court of Appeals and remanded the case to the Court of Appeals for reconsideration of whether the trial court's denial of the defendant-father's motion to modify parenting time and to change his child's school enrollment was "a postjudgment order affecting the custody of a minor" under MCR 7.202(6)(a)(iii) and appealable by right under MCR 7.203(A)(1).

Marik v Marik, No. 154549 (Mich., November 16, 2017).

Facts: This case arises out of a consent judgment entered in 2011, which granted the plaintiff-mother and the defendant-father joint legal and physical custody of the parties' twin sons. The children's primary residence was with the plaintiff-mother. In 2012, the defendant-father filed his first motion to remove the children from plaintiff-mother's selected school and to have the children enrolled in the school of his choice. The Friend of Court referee, however, issued a recommended order that the children remain enrolled in the school selected by the plaintiff-mother. The defendant-father timely filed objections to the recommended order, but after a de novo hearing, he stipulated to cancel the hearing and withdrew his objections.

In 2016, the defendant-father again petitioned the Friend of Court to change the children's school enrollment. He also motioned the court to modify the parenting time arrangement to help facilitate the desired school change. Under the 2011 consent judgment, the defendant-father had the children 45% of the time, but the modification requested would have increased the defendant-father's parenting time to roughly 50%. In his motion, the father conceded that the twin boys were performing satisfactorily at the school selected by the plaintiff-mother, but cited convenience and the offering of a better education as reasons supporting his desired enrollment change and increased parenting time. Following an evidentiary hearing, the Friend of Court referee denied the defendant-father's second motion. The circuit court likewise denied the second motion on the grounds that the defendant-father was unable to show how the requested changes would benefit the children.

Following the trial court's order denying the defendant-father's motion, he filed a claim of appeal by right with the Court of Appeals, which was administratively dismissed a week later for lack of jurisdiction. The defendant-father then sought reconsideration from a panel of judges on the jurisdictional issue, which was likewise denied. He then sought review of the jurisdictional decision from the Michigan Supreme Court.

> [T]he Court vacated the Court of Appeals finding that jurisdiction did not exist where there is no appeal by right under MCR 7.203(A) based on its prior ruling in *Ozimek v Rodgers*.

Important Note: This case was argued together with the application pending in *Ozimek v Rodgers*. *Ozimek* likewise involved a postjudgment motion seeking to change a minor child's school enrollment. On remand from the Michigan Supreme Court, the Court of Appeals held that jurisdiction did not exist where there is no appeal by right under MCR 7.203(A) because an order denying a motion to change schools is not an order affecting the custody of a minor within the meaning of MCR 7.202(6)

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(a). The Court of Appeals reasoned that the term "custody" in MCR 7.202(6)(a)(iii) did not comprise the concept of legal custody, and therefore, the change in the child's school enrollment had no effect on the parties' parenting time. The change in the child's school enrollment likewise did not affect the custody of the parties' son. Accordingly, the Court held that it did not have jurisdiction and declined to exercise its discretion to treat the claim of appeal as an application for leave to appeal.

Ozimek v Rodgers, 317 Mich App 69 (2016), appeal denied, Supreme Court No. 154776, 2017 WL 5506113 (Mich Nov. 16, 2017), and overruled by *Marik v Marik*, No. 154549 (Mich. Nov. 16, 2017).

Ruling: The Michigan Supreme Court overruled the Court of Appeals' finding that an order denying a motion to change schools is not an order affecting the custody of a minor. The Court reasoned that the *Ozimek* Court erred in finding that the term "custody" in MCR 7.202(6)(a)(iii) does not comprise the concept of "legal custody." Accordingly, the Court vacated the Court of Appeals finding that jurisdiction did not exist where there is no appeal by right under MCR 7.203(A) based on its prior ruling in *Ozimek v Rodgers*. The Court remanded the case for reconsideration of whether the denial of the defendant-father's motion to modify parenting time and to change his child's school enrollment was "a postjudgment order affecting the custody of a minor" and appealable by right under the standard applicable prior to *Ozimek v Rodgers*.

Amicus Report

By: Kimberlee A. Hillock, *Willingham & Coté, P.C.*

The Supreme Court has agreed to hear oral argument on four cases in which the MDTC has participated as amicus.

***Illiades v Dieffenbacher North America, Inc*[1]**

The plaintiff, a press operator, was injured while using a press manufactured by the defendant. The press was equipped with a safety device called a "light curtain" that was supposed to halt the machine's operation. Some "light curtains" were more sensitive than others. The plaintiff was working on a different press with a less sensitive light curtain the day of his injury. All press operators were trained not to rely exclusively on the light curtains and to wait until the press had stopped before removing parts. But operators were required to maintain certain productivity levels, and they used the light curtains to halt the presses during removal of the parts.

The plaintiff was injured when he partially climbed into the press while it was in automatic mode, and the press automatically cycled, crushing him inside. The statute, MCL 600.2945(c), provides that a manufacturer is not liable in a product-liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. The defendant moved for summary disposition on the theory that the plaintiff knowingly and intentionally bypassed the safety device and climbed inside the press contrary to training, the employer's rules, and his knowledge of how the press could be safely operated. The plaintiff argued that his actions were foreseeable, and there was a question of fact whether operators were supposed to reach inside the press to remove parts. The trial court granted summary disposition to the defendant.

The Court of Appeals, in a two-to-one, unpublished opinion, reversed. The court held that unforeseeable misuse was not an appropriate basis for granting summary disposition, when there was a question of fact whether the plaintiff acted within the boundaries of common practice. The majority analogized to the criminal standard for foreseeability, i.e., ordinary negligence is foreseeable, but gross negligence is not. Judge Jansen dissented. She noted that the plaintiff acted contrary to all his training. While some reaching into the press might be foreseeable, there was no evidence to support a holding that partially climbing into the press was reasonably foreseeable.

On April 7, 2017, the Michigan Supreme Court granted mini oral argument on the application.[2] The order directed the parties to address "whether the plaintiff Steven Iliades' conduct prior to being injured constituted misuse of the press machine that was reasonably foreseeable." Irene Bruce-Hathaway with Miller Canfield Paddock & Stone, PLC, drafted the amicus brief on behalf of MDTC. Oral argument was held November 7, 2017, and a decision remains pending.

***Jendrusina v Mishra*[3]**

In *Jendrusina,* the plaintiff alleged that his doctor first diagnosed him with renal insufficiency in 2007. The plaintiff's doctor began regularly testing his kidneys at least as early as 2007. The plaintiff knew his kidney levels were being tested, but he claimed that (a) he was not always told the results, and (b) the doctor told him in 2008 that his kidney levels were a bit high but there was nothing to worry about. In 2009, the plaintiff's doctor conducted an ultrasound of the plaintiff's kidneys and told the plaintiff that his kidneys were fine. On January 3, 2011, the plaintiff went to the emergency room with flu-like symptoms and was informed that he had acute end-stage renal failure. From that date forward, the plaintiff has been on regular dialysis.

The period of limitation on a medical-malpractice claim is two years. MCL 600.5805(6). The Legislature has provided for a six-month discovery tolling period, which permits a plaintiff to bring a cause of action within six months after the plaintiff

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discovers or should have discovered the existence of the claim. MCL 600.5838a(2). The onus is on the plaintiff to demonstrate that as a result of physical discomfort, appearance, condition, or otherwise, he or she neither discovered nor should have discovered the existence of the claim at an earlier date.

Six months from the January 3, 2011 emergency room visit was July 3, 2011. The plaintiff did not provide a notice of intent to sue until March 18, 2013, and did not file suit until September 17, 2013. He claimed that he did not know about his cause of action until his nephrologist told him on September 20, 2012, that if he had begun seeing a nephrologist in 2008, he would not be on dialysis. This meant that the plaintiff's claim accrued in 2008, when the alleged malpractice occurred, and the plaintiff's claim was time-barred unless saved by the discovery tolling statute.

The Supreme Court has agreed to hear oral argument on four cases in which the MDTC has participated as amicus.

In a two-to-one published opinion, the Court of Appeals majority held that the plaintiff should not have known of his cause of action until September 20, 2012, thus holding that the plaintiff's claim was timely filed. The Court held that a reasonable person would not have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease. While the majority recognized that it was possible for the plaintiff to have discovered the alleged malpractice shortly after being informed that he had kidney failure on January 3, 2011, the majority held that there was no law imposing such a duty on a plaintiff to investigate his potential claim. Judge Jansen dissented. In her opinion, the period of limitation began to run when he learned he had kidney failure in January 2011.

On May 10, 2017, the Supreme Court granted mini oral argument on the application. It directed the parties to address whether plaintiff's complaint was timely filed under MCL 600.5838a(2), and *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997). Kimberlee A. Hillock, with Willingham & Coté, PC drafted the amicus brief on behalf of the MDTC. Oral arguments were held December 6, 2017, and a decision remains pending.

***Martin v Milham Meadows Ltd Partnership*[4]**

MCL 554.139(1) requires a landlord to keep his or her premises "fit for the use intended by the parties" and in "reasonable repair." In *Martin*, the plaintiff sued his apartment complex and its management company after he slipped on his basement stairs. In dismissing the plaintiff's complaint, the trial court found no triable question regarding the stairway's condition, and concluded that defendants had no notice of the danger.

The Court of Appeals held that evidence demonstrated that the plaintiff notified defendants of the slippery condition of the stairwell, and defendants violated MCL 554.139(1) by failing to make their premises as safe and accessible as possible and by not implementing additional safety measures. The Court of Appeals dismissed the fact that the plaintiff had safely used the allegedly slippery steps almost two thousand times over several years, even though the Michigan Supreme Court has held that a premises only needs to provide reasonable access. The Court also overlooked the fact that the additional safety measures weren't part of the original condition of the premises and, thus, weren't reasonable repairs.

On May 19, 2017, the Michigan Supreme Court granted a mini oral argument on the application and directed the parties to address "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)."[5] Jonathan B. Koch with Collins Einhorn Farrell P.C., drafted the amicus brief on behalf of the MDTC. Oral argument on this case was heard on January 10, 2018.

***Bazzi v Sentinal Ins Co*[6]**

Ali Bazzi was involved in a serious single-car accident in 2011 when he was 19 years old. Subsequently, Ali's mother, Hala Bazzi, set up a shell company called Mimo Investments, LLC, which had no bank accounts or bills, and neither received from nor paid out funds to its alleged subsidiary. Hala then obtained a commercial policy from a different insurer in the name of the LLC for a vehicle she leased in her name personally in order to obtain cheaper insurance for her and her son.

The plaintiff was injured when he partially climbed into the press while it was in automatic mode, and the press automatically cycled, crushing him inside.

Shortly after the new policy was issued, Ali was involved in another serious accident and sued Sentinal for no-fault benefits. Sentinal filed suit to rescind its policy on the basis of fraud. The trial court permitted rescission as to Hala and her daughter Miriam, but held that Bazzi still had a claim based on the innocent-third-party exception, which the court concluded imposed statutory benefits under the no-fault act despite the fact that the policy had been rescinded.

The insurance company applied for leave to appeal to the Court of Appeals, arguing that the innocent-third-party rule was abrogated by the Michigan Supreme Court in *Titan Ins Co v Hyten*.[7] The Court of Appeals initially denied the application. The Supreme Court remanded to the Court of Appeals to hear the appeal on leave granted. On remand, the Court of Appeals panel issued three opinions. The lead opinion stated,

> (1) there is no distinction between an "easily ascertainable rule" and an "innocent third-party rule," (2) the Supreme Court in *Titan* clearly held that fraud is an available defense to an insurance contract except to the extent that the Legislature has restricted that defense by statute, (3) the Legislature has not done so with respect to PIP benefits under the no-fault act, and, therefore (4) the judicially created innocent third-party rule has not survived

the Supreme Court's decision in *Titan*.

The concurring opinion stated that it fully concurred with the lead opinion, but clarified a prior decision. Judge Beckering dissented. She would have held that the innocent-third-party rule was a distinctly different rule from the easily ascertainable rule discussed in *Titan*. She would have declined to extend *Titan* on the basis that the coverage at issue in *Titan* was substantially different from the type of coverage at issue in *Bazzi*.

On May 17, 2017, the Supreme Court granted leave to appeal.[8] The grant order did not direct the parties to address any specific issues. Maurice A. Borden, with Sondee, Racine & Doren, PLC, drafted the amicus brief on behalf of the MDTC. Oral argument on this case was heard on January 11, 2018.

Anyone seeking amicus support should visit the MDTC webpage and download the application for amicus briefs at: http://www.mdtc.org/documents/Sections/Amicus/MDTC-Proposed-Revised-Amicus-Application.pdf. Once the form is filled out, it should be submitted to Amicus Committee Co-Chair, Kimberlee A. Hillock at khillock@willinghamcote.com.

Anyone interested in volunteering as an amicus writer for the Michigan Defense Trial Counsel should likewise send inquiries to Amicus Committee Co-Chair, Kimberlee A. Hillock at khillock@willinghamcote.com.

Endnotes

1 Unpublished opinion per curiam of the Court of Appeals, issued July 19, 2016 (Docket No. 324726).

2 Supreme Court Docket No. 154358.

3 316 Mich App 621; 892 NW2d 423 (2016).

4 Unpublished opinion per curiam of the Court of Appeals, issued July 19, 2016 (Docket No. 328240).

5 Supreme Court Docket No. 154360.

6 315 Mich App 763; 891 NW2d 13 (2016).

7 491 Mich 547; 817 NW2d 562 (2012).

8 Supreme Court Docket No. 154442.

MDTC Schedule of Events

2018

March 8	Legal Excellence Awards - Gem Theatre, Detroit
April 19	MDTC Board Meeting – Holiday Inn Express, Okemos
May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
September 14	Golf Outing – Mystic Creek
September TBA	Board Meeting – TBA
September 26-28	SBM – Annual Meeting – DeVoss Place Grand Rapids
September 26	SBM Awards Banquet - Respected Advocate Award
October 4	Meet the Judges - Sheraton Detroit Novi, Novi
October 17-20	DRI Annual Meeting - Marriott, San Francisco
November 8	MDTC Board Meeting – Sheraton, Novi
November 8	Past Presidents Dinner – Sheraton, Novi
November 9	Winter Conference – Sheraton, Novi

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