MICHIGAN DEFENSE
QUARTERLY

Volume 34, No. 4 - 2018

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MICHIGAN DEFENSE
QUARTERLY

Volume 34, No. 4 - 2018

Cite this publication as 34-4 Mich Defense Quarterly

Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

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

"How lucky I am to have something that makes saying goodbye so hard."
--Winnie the Pooh

It's hard to believe that almost a year has passed and my tenure as President of the MDTC will soon be coming to an end. I've been privileged and fortunate to have worked with so many talented and impressive individuals whose dedication and commitment have served the MDTC so well. So, as I begin to close my term as President, I'd like to thank our membership for a remarkable year and to specially recognize some of our volunteers for their contributions and exceptional service.

Thanks to our Executive Committee—Vice President **Josh Richardson,** Treasurer **Irene Bruce Hathaway,** Secretary **Terry Durkin**, and Immediate Past President **Hilary Ballentine**—and to our Board of Directors—**Deborah Brouwer, Michael Conlon, Conor Dugan, Gary Eller, Angela Emmerling Shapiro, Mike Jolet, Rik Joppich, Vanessa McCamant, John Mucha III, Dale Robinson, Carson Tucker** and **Paul Vance**--whose insights and stewardship were instrumental in successfully guiding the MDTC this past year.

Thanks to our Regional Chairs in Flint **(Barbara Hunyady),** Grand Rapids **(Charles Pike),** Lansing **(Mike Pattwell),** Marquette **(Jeremy Pickens),** Saginaw **(Drew Jordan),** Southeast Michigan **(Joe Richotte)** and Traverse City **(Matthew Cross),** as well as to our Section and Committee Chairs **(Robyn Brooks, Daniel Cortez, Graham Crabtree, Jeremiah Fanslau, Daniel Ferris, Fred Fresard, Amber Girbach, Clifford Hammond, John Hohmeier, Nicholas Huguelet, Barbara Hunyady, Lee Khachaturian, Kevin Lesperance, Kari Melkonian, Brian Moore, Thaddeus Morgan, John Mucha III, Robert Murkowski, Ridley Nimmo, David Ottenwess, Olivia Paglia, Samantha Pattwell, Anthony Pignotti, Nathan Scherbarth, Tony Taweel, Paul Vance** and **Beth Wittmann),** all of whom were dedicated to providing unparalleled educational, networking and other opportunities for our membership.

Thanks to committee members **Hilary Ballentine**, **Vanessa McCamant, John Mucha III, Charles Pike, Angela Emmerling Shapiro and Beth Wittmann,** MDTC's second annual Legal Excellence Awards held in March at the Gem Theatre in Detroit was a singular success. A record attendance of over 200, including past and present Michigan Supreme Court justices, state and federal trial and appellate judges, and the current and past presidents of the State Bar of Michigan, attended the reception and strolling dinner honoring **Pat Geary** with 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.

Thanks to our 2017 Winter Meeting Committee—Chair **Drew Jordan, Nick Ayoub, Deborah Brouwer, Mike Conlon and Randy Juip**—and to our 2018 Annual Meeting Committee—Chair **Gary Eller**, **Kevin Lesperance, Mike Pattwell**, **Samantha Pattwell** and **Nate Scherbarth**—who planned and implemented enlightening and informative conferences for our membership.

Thanks to our Amicus Committee—Chair **Kim Hillock, Nick Ayoub, Dan Beyer, Anita Comorski, Irene Bruce Hathaway, Grant Jaskulski, Peter Tomasek** and

Carson Tucker—who worked fervently in submitting a record number of appellate amicus briefs.

Thanks to our Golf Committee—**Terry Durkin, Mike Jolet** and **Dale Robinson**--MDTC's Annual Golf Outing in September was our most successful golf outing ever with a record number of 114 golfers (the highest number since the event started in 1996) and over 25 supporting sponsors.

Thanks to our *MDTC Quarterly* staff—Editor **Mike Cook** and Associate Editors **Matthew Brooks, Victoria Convertino, Katharine Gostek** and **Tom Isaacs**—whose publications provided instructive articles and reports to keep our members up to date and well-informed.

Thanks to Vice President **Josh Richardson** and his committee of **Dan Cortez**, **Terry Durkin**, **Tony Pignotti**, **Joe Richotte** and **Tony Taweel**, MDTC's leadership convened in February in Detroit for our 2018 Future Planning Session and hosted a well-attended reception of lawyers and judges at the historic Firebird Tavern in Greektown.

And a special, heartfelt thanks to our Executive Director **Madelyne Lawry** and her assistant **Valerie Sowulewski** who have worked tirelessly to make the MDTC a success. I am extremely grateful for all they do and for all they have done this past year to support me and the MDTC. They are truly our pillar of strength.

Thank you for the opportunity to have served you. Looking forward, the MDTC is in excellent hands with an engaged and active leadership committed to ensuring the continued success of the organization. The words of Yogi Berra quoted in my first President's Corner—"we have deep depth"—certainly ring true as we move forward into a new year.

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Michigan Defense Quarterly
Publication Schedule

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

For information on article requirements, please contact:

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Revisiting *Bryant*: Is It Medical Malpractice Or Ordinary Negligence?

By: Michael J. Cook

Executive Summary

Identifying whether a claim is for ordinary negligence or medical malpractice can be a high-stakes issue. Currently, Michigan has a three-part test to distinguish medical-malpractice claims from ordinary-negligence claims. Attorneys and judges are struggling to reach consistent, predictable results under that test. Eliminating the third factor of the test would improve it by removing subjectivity while also resolving a conflict in the law.

Michael J. Cook's practice focuses on appellate litigation, including post-verdict matters and pre-trial dispositive motion practice to prepare cases for appeal. He has represented clients on a wide variety of civil-litigation matters, including professional liability (particularly medical-malpractice and legal-malpractice cases), contractual indemnity, and general liability. Michael is the co-chair of Collins Einhorn Farrell PC's appellate-practice department and the editor of Michigan Defense Quarterly. He also served as a judicial law clerk for the Honorable Robert P. Young, Jr. on the Michigan Supreme Court from 2007 to 2009.

Introduction

What is medical malpractice? It seems like a simple question. But defining medical malpractice can be cumbersome, particularly when lawyers are involved. "I know it when I see it" doesn't quite do the job. And neither does the three-part test that Michigan courts currently use.

Certainly, no test can stop litigants from disputing the issue. But improvements that lead to more predictable, consistent results can and should be made. The simple solution is to eliminate the third step of the current test.

What's the problem?

Identifying the nature of the action from the outset has heightened importance for medical-malpractice claims. Tort reform created specific procedural requirements for medical-malpractice claims.[1] Failure to follow those requirements carries significant consequences.[2] And, aside from the procedural requirements, the distinction between medical malpractice and ordinary negligence can also significantly change the stakes.[3] Since the difference can have a dramatic impact on a case, parties are fighting over the difference between ordinary negligence and medical malpractice with increasing frequency.

For example, medical-malpractice claims have a shorter limitation period than ordinary-negligence claims. So the claim could be time-barred if it's for medical malpractice, but timely if it's for ordinary negligence. A lack of clarity in which claim is at issue can deprive a defendant of the value of a statute-of-limitations defense.[4]

In other cases, the distinction determines the stakes. There's a cap on noneconomic damages for medical-malpractice actions.[5] But there's no cap when the action is for ordinary negligence only. So when medical-malpractice law applies, the cap quickly quells a multi-million-dollar demand for noneconomic damages and puts the parties in the same ballpark (or, at least, the same city). But when the nature of the claim can remain disputed and a potential ordinary-negligence claim remains at issue, the parties aren't even playing the same game. The lack of clarity deters settlement and undermines the intent of the damages cap.[6]

The Michigan Supreme Court's decision in *Bryant v Oakpointe Villa Nursing Centre*[7] is the root of the problem. *Bryant* aimed to clarify how courts should distinguish medical malpractice from ordinary negligence. But it missed.

Bryant—A Change Is Needed.

Though often described as a two-part test,[8] *Bryant* set out a three-step analysis.[9] Courts must first determine whether the claim "is being brought against someone who, or an entity that, is capable of malpractice."[10] If so, they must ask two questions: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience."[11] If all three questions are answered, "yes," then the claim is for medical malpractice.

The first two steps are firmly rooted in Michigan law. The third isn't. And the third step is the problem. It's based on a misreading of precedent. It contradicts other Supreme Court case law. And it leads to an unworkable slippery slope.

Step One: Is The Defendant Capable Of Malpractice?

As *Bryant* stated, "[t]he first issue in any purported medical malpractice case concerns whether it is being brought against someone who, or an entity that, is capable of malpractice."[12] Before 1975, only physicians, surgeons, and dentists could be held liable for medical malpractice.[13] In more recent times, the Legislature has expanded the reach of medical-malpractice liability by amending the accrual statute to include other professionals.[14]

Simply put, "[a] malpractice action cannot accrue against someone who, or something that, is incapable of malpractice."[15] So when the Legislature added professionals to the accrual statute, it added to who can be liable for medical malpractice. In 1986, the Legislature enacted an accrual statute specifically for medical-malpractice actions.[16]

Step Two: Did The Alleged Mistake Occur Within The Course Of The Parties' Professional Relationship?

The next step is where *Bryant* started distinguishing the substance of medical-malpractice claims and ordinary-negligence claims. Courts must consider "whether the claim pertains to an action that occurred within the course of a professional relationship."[17]

Bryant drew this step from *Dorris v Detroit Osteopathic Hospital Corporation*.[18] Both courts stated that, "'[t]he key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship.'"[19] *Bryant* explained that the professional relationship must be one where a person or entity capable of malpractice was "subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility,[20] to render professional health care services to the plaintiff."[21]

Bryant and *Dorris* were right. Negligence occurring in the course of a professional relationship is "the key" for a malpractice claim. That's what distinguishes a medical-malpractice claim from every other claim against a medical provider. For example, if a doctor has a car accident with a patient on his way home from work, the patient's claim against the doctor wouldn't pertain to an action that occurred within their professional relationship. So it wouldn't be a malpractice claim.

This part of *Bryant*'s test is also firmly rooted in Michigan law. It's traceable to the Michigan Supreme Court's decision in *Delahunt v Finton*,[22] which defined malpractice as "the negligent performance by a physician or surgeon[23] of the duties devolved and incumbent upon him on account of his contractual relations with his patient."[24] For decades, Michigan courts applied that definition.[25]

But *Bryant* and *Dorris* tacked on another layer of analysis not found in *Delahunt*. Neither opinion explained why, or even acknowledged that it was deviating from precedent.

Step Three: Is Expert Testimony Required?

The third step is where *Bryant* went astray. It held that courts must consider "whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience."[26] In other words, "whether the claim raises questions of medical judgment requiring expert testimony …."[27] If the claim doesn't require expert testimony, it's an ordinary-negligence claim.[28]

There are three problems with *Bryant*'s third step: (1) it's based on a misreading of Michigan case law; (2) it contradicts Michigan case law; and (3) it leads to the unworkable slippery slope.

> Identifying the nature of the action from the outset has heightened importance for medical-malpractice claims.

Problem 1: *Dorris* Misread *Wilson* To Require Expert Testimony In Medical-Malpractice Cases. *Wilson* Did No Such Thing.

Bryant relied on *Dorris* as support for the third step. And, true, *Dorris* stated that the distinction between medical malpractice and ordinary negligence "depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment."[29] *Dorris* cited *Wilson v Stilwill*[30] for that proposition, but that's not what *Wilson* said.

In *Wilson*, the trial court directed a verdict for a hospital because the plaintiff didn't present expert testimony on the standard of care for his malpractice claim. The Supreme Court affirmed, holding that expert testimony was required because "the instant case presents a standard of conduct issue which cannot be determined by common knowledge and experience, but rather raises a question of medical judgment."[31]

There are two separate issues at play there. Whether a claim is for malpractice is one. Whether the claim requires expert testimony is the other. If the parties dispute what the standard of conduct

required or whether the defendant met it (and they usually do), expert testimony is required.[32] That's *Wilson*'s holding.

But a claim can still be for malpractice if there's no dispute over the standard of care. *Wilson* confirmed that too. It stated that "when a medical malpractice action not involving ordinary negligence is brought against a hospital, **as a general rule, expert testimony is required**."[33]

So *Wilson* acknowledged that, in "general," malpractice claims require expert testimony; but not always. *Dorris* misread *Wilson* to say that expert testimony is always required in medical-malpractice cases. *Bryant* mistakenly adopted that misreading as the third step of its analysis.

Bryant aimed to clarify how courts should distinguish medical malpractice from ordinary negligence. But it missed.

Problem 2: *Bryant*'s Adoption Of *Dorris*'s Misreading Creates A Conflict In Michigan Case Law. Malpractice Claims Don't Always Require Expert Testimony, Yet *Bryant*'s Test Defines Medical Malpractice By The Need For Expert Testimony.

Nearly every medical-malpractice case will require expert testimony. But, until *Dorris* and *Bryant*, the Supreme Court recognized that rare exceptions exist and not every malpractice claim requires expert testimony.[34]

The Supreme Court's opinion in *LeFaive v Asselin*[35] illustrates the point. The plaintiff alleged that the defendant left a curved surgical needle in his abdomen during an appendectomy. After a jury verdict for the plaintiff, the defendant argued that "in malpractice cases [expert] evidence is necessary to establish negligence."[36] The Court disagreed and affirmed the jury's verdict.

LeFaive explained that "[i]n the majority of such [malpractice] cases, the professional standard of practice is necessarily involved and requires testimony of competent experts."[37] But expert testimony wasn't required for the plaintiff's malpractice claim because "there is no question of skill or judgment, no question of practice beyond the knowledge of laymen."[38]

Though *LeFaive* is expressly a malpractice case, it wouldn't be under *Bryant*. So the third step in *Bryant*'s test creates a conflict in Michigan law. On one hand, there's an undisturbed line of cases acknowledging that expert testimony is usually, but not always, required in medical-malpractice cases. The Supreme Court reiterated that point very recently.[39] On the other hand, there's *Bryant* and *Dorris*, holding that the need for expert testimony defines medical malpractice.[40]

Problem 3: *Bryant*'s Slippery Slope and The Problems That It Causes.

The Court of Appeals' opinion in *Trowell v Providence Hospital & Medical Centers, Inc*[41] illustrates the predictable result of *Bryant*'s third step. The analysis decays. It becomes a question of how superficial or simplistic the alleged error can be made to sound. It encourages artfully vague pleading. And Michigan jurisprudence and the parties operating under it suffer as a result.

In *Trowell*, the plaintiff alleged that a nurse's aide dropped her (twice) while assisting her to the bathroom. The Court of Appeals panel suggested that the plaintiff's claim would be for ordinary negligence "if evidence was developed showing that the aide dropped her because the aide decided to answer a cell phone call …" (there was no such allegation).[42] But what if, for example, the plaintiff testified that the nurse's aide dropped her because the aide answered her cell phone and the nurse's aide testifies that she didn't answer her cell phone? That would be a credibility issue. Only a jury could resolve it. So, under *Bryant*'s third step, the entire nature of the case would be unknown until the jury returns its verdict. Whether the procedural requirements and the noneconomic damages cap applied couldn't be known until the end of a trial. In other words, the parties would have no idea what the rules were until the end of the game. That's unworkable and unfair.[43]

It's particularly unfair because it's avoidable. Other malpractice actions don't suffer from the same problem. The analysis for distinguishing malpractice is simpler in those cases. They aren't subject to and don't get tripped up in *Bryant*'s third step. Instead, courts look to "[t]he type of interest allegedly harmed …"[44] If the claim involves a professional's alleged negligent performance of duties he owed the plaintiff based on a contractual relationship, it's a malpractice claim.[45] For example, when a claim against an attorney is based on "inadequate representation," it's a malpractice claim, regardless whether the alleged error was obvious or nuanced.[46] There's nothing unique to medical-malpractice claims that requires a more involved analysis that could, potentially, leave the parties in the dark about the nature of the claim and the available damages until the very end of the case.

Negligence occurring in the course of a professional relationship is "the key" for a malpractice claim. That's what distinguishes a medical-malpractice claim from every other claim against a medical provider.

A Solution to the problem: Eliminate the third part of *Bryant*'s analysis.

Identifying a problem isn't much use without a solution. And, here, the simplest solution is the best—eliminate the third step.[47] The result is that a claim is for medical malpractice if (1) the defendant is capable of medical malpractice and (2) the claim pertains to an action that occurred within the course of a professional relationship. It's a return

to *Delahunt*, which neither *Bryant* nor *Dorris* gave any reason for departing from.

The third step in *Bryant*'s analysis had no basis in Michigan law. It was based on misreading case law and there is no reason to perpetuate that mistake.

The concern with eliminating the third step might be that the resulting test is too broad. But that concern would be unfounded. The second step sifts out those claims that are untethered to medical treatment, e.g., a car accident between doctor and patient.

Another example: parties might dispute whether a claim is for medical malpractice if the plaintiff trips over loose carpeting in his doctor's office. One party might argue that it's a premises-liability claim while the other says that it's medical malpractice. Premises liability is the better argument.[48] But, most important, the distinction wouldn't hinge on factual questions. It's a question of law in which "the gravamen of an action is determined by reading the complaint as a whole …."[49] The parties will know the ground rules before the jury returns a verdict.

So how would this test apply in a case like *Trowell*? In a word, easily. The hospital is capable of malpractice. And the alleged errors pertain to an action that occurred within the course of the plaintiff's professional relationship with the hospital. Neither point was disputed.[50] So the plaintiff's claims were for malpractice only.

How would this test have applied in *Bryant*? Again, easily. *Bryant* lumped its first and second steps together.[51] The defendant was capable of malpractice and each of the plaintiff's claims involved her decedent's professional relationship with the defendant. So all of the claims were for medical malpractice.

The only claim in *Bryant* that would have been affected by eliminating the third step was the last one, which the Court labeled "failure to take steps."[52] The plaintiff alleged that nurses and nurse assistants failed to take corrective measures after they determined that her decedent was at risk of asphyxiation.[53] *Bryant* held that the claim was for ordinary negligence because no expert testimony was required to determine whether the defendant was negligent in failing to respond to the risk of asphyxiation.[54]

Bryant tried to make a distinction when there was no difference. The alleged failure to take corrective action involves an obvious error. But it's an error in providing professional care, much like leaving a surgical needle in a patient's abdomen.[55] It was and should be a medical-malpractice claim. Eliminating the third step would lead to that result.

There are three problems with Bryant's third step: (1) it's based on a misreading of Michigan case law; (2) it contradicts Michigan case law; and (3) it leads to the unworkable slippery slope.

Conclusion

Bryant's third step attempted to refine the analysis of a seemingly simply question: What is medical malpractice? But the refinement that it chose doesn't work. It conflicts with other established principles of law and it's prone to inconsistent or unpredictable results. So there's room for improvement. Eliminating *Bryant*'s third step would be an improvement. The result of that change would be that medical-malpractice law applies to more claims. That would align with the purpose of the procedural protections that the Legislature placed on medical-malpractice claims.[56] It would also resolve the conflict between *Bryant* and other case law and it would be a far simpler standard to apply. And predictable results should always be the aim for the law.

Endnotes

1 MCL 600.2912b (notice of intent to sue required); MCL 600.2912d (affidavit of merit required); MCL 600.2912e (affidavit of meritorious defenses required); MCL 600.2169 (specific expert qualification requirements).

2 *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68; 869 NW2d 213 (2015) (premature filing of complaint without waiting notice of intent period doesn't commence the action and limitation period continues to run); *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000) (complaint filed without affidavit of merit doesn't toll limitation period for malpractice claim); *Kowalski v Fiutowski*, 247 Mich App 156; 635 NW2d 502 (2001) (defendant could be defaulted for failure to file affidavit of meritorious defense).

3 MCL 600.6404(6) (joint liability in medical-malpractice cases); MCL 600.6306a (judgment calculations); MCL 600.1483 (noneconomic damages caps); see, e.g., *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004) (holding that damages cap applied to $10 million jury award).

4 *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 311; 399 NW2d 1 (1986) (a primary purpose behind the statute of limitations is "protect[ing] defendants from having to defend against stale or fraudulent claims").

5 MCL 600.1483.

6 See *Zdrojewski v Murphy*, 254 Mich App 50, 80; 657 NW2d 721 (2002) ("The purpose of the damages limitation was to control increases in health care costs by reducing the liability of medical care providers, thereby reducing malpractice insurance premiums, a large component of health care costs.").

7 *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411; 684 NW2d 864 (2004).

8 See, e.g., *Trowell v Providence Hosp & Med Ctrs, Inc*, 316 Mich App 680, 686; 893 NW2d 112 (2016); *Lucas v Awaad*, 299 Mich App 345, 360; 830 NW2d 141 (2013); *Lee v Detroit Med Ctr*, 285 Mich App 51, 61; 775 NW2d 326 (2009).

9 *Id.* at 419.

10 *Id.* at 420.

11 *Id.* at 422.

12 472 Mich at 420.

13 See *Kambas v St Joseph's Mercy Hosp of Detroit*, 389 Mich 249; 205 NW2d 431 (1973).

14 See *Adkins v Annapolis Hosp*, 420 Mich 87; 360 NW2d 150 (1984).

15 *Id*. at 95.

16 1986 PA 178; MCL 600.5838a.

17 471 Mich at 422.

18 *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999).

19 *Bryant*, 471 Mich at 422, quoting *Dorris*, 460 Mich at 45. *Dorris* was, in turn, quoting *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652-653; 438 NW2d 276 (1989), which cited *Becker v Meyer Rexall Drug Co*, 141 Mich App 481, 485; 367 NW2d 424 (1985), which relied on *Delahunt v Finton*, 244 Mich 226, 230; 221 NW 168 (1928).

20 These categories are taken from the accrual statute, MCL 600.5838a(1). See *Adkins*, 420 Mich at 94-95.

21 471 Mich at 422-423.

22 *Delahunt v Finton*, 244 Mich 226, 230; 221

NW 168 (1928). *Dorris* quoted *Bronson*, 175 Mich App at 652-653, which cited *Becker*, 141 Mich App at 485, which relied on *Delahunt*.

23 Again, the Legislature expanded medical-malpractice liability beyond physicians, surgeons, and dentists when it amended the accrual provision in 1975. *Adkins*, 420 Mich at 95.

24 *Id.* at 230.

25 See *Becker*, 141 Mich App at 485 (holding that the plaintiff's claim was for malpractice under *Delahunt* because "[t]he duty allegedly breached … arose out of the professional relationship between defendant and decedent"); see also *Malik v Wm Beaumont Hosp*, 168 Mich App 159, 168; 423 NW2d 920 (1988) ("The term 'malpractice' denotes a breach of the duty owed by one rendering professional services to a person who has contracted for such services; in medical malpractice cases, the duty owed by the physician arises from the physician-patient relationship.").

26 471 Mich at 422.

27 *Id.* at 423.

28 *Id.*

29 460 Mich at 46.

30 *Wilson v Stilwill*, 411 Mich 587; 309 NW2d 898 (1981).

31 *Id.* at 611.

32 *Id.*

33 *Id.* at 611 (emphasis added).

34 See *Lince v Monson*, 363 Mich 135, 141; 108 NW2d 845 (1961) (malpractice case acknowledging that expert testimony isn't required "where the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layman that the conduct was careless and not conformable to the standards of professional practice and care employed in the community"); *Zanzon v Whittaker*, 310 Mich 340, 345; 17 NW2d 206 (1945) ("Both in this and in other jurisdictions authority will be found in support of the proposition that under certain circumstances, such as disclose to the mind of the layman failure to properly perform professional duty, there may be recovery in malpractice cases notwithstanding no expert testimony is produced in support of plaintiff's claim." (emphasis added)); *Higdon v Carlebach*, 348 Mich 363, 374, 378; 83 NW2d 296 (1957) (no expert testimony required in malpractice against dentist who cut the plaintiff's tongue when only dispute was whether the plaintiff moved during a dental procedure); *Winchester v Chabut*, 321 Mich 114, 119; 32 NW2d 358 (1948) (no expert testimony required in malpractice action in which the defendant doctor left a cotton surgical sponge in the plaintiff's leg); *LeFaive v Asselin*, 262 Mich 443; 247 NW 911 (1933) (no expert testimony required for malpractice claim when surgeon left surgical needle in abdominal cavity); see also *Miles v Van Gelder*, 1 Mich App 522, 533; 137 NW2d 292 (1965) (discussing "the law concerning the exception to the general rule requiring expert evidence in an action of malpractice"). There are some errant Court of Appeals cases stating that expert testimony is an "absolute prerequisite" to recovering on a malpractice claim. See, e.g., *Bivins v Detroit Osteopathic Hosp*, 77 Mich App 478, 488; 258 NW2d 527 (1977), rev'd on other grounds 403 Mich 820; 282 NW2d 926 (1978).

35 *LeFaive v Asselin*, 262 Mich 443; 247 NW 911 (1933).

36 262 Mich at 445-446.

37 *Id.* at 446.

38 *Id.*

39 See *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016) ("'Generally, expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard.'" (emphasis added)), quoting *Sullivan v Russell*, 417 Mich 398; 338 NW2d 181 (1983) (holding that the plaintiff "made out a prima facie case of dental malpractice" because expert testimony wasn't required given the nature of the claim—"unsolicited treatment of teeth … which resulted in pain and a change in appearance").

40 *Bryant* didn't suggest that it was overruling anything, much less decades of precedent. It's unlikely that the *Bryant* majority intended to silently overrule nearly a century of case law. The same Justices were critical of the Court's history of "displac[ing] without overruling" its precedent, which resulted in "a confused jumble" of case law in other areas of the law. See *Rory v Continental Ins Co*, 473 Mich 457, 488; 703 NW2d 23 (2005); *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003).

41 *Trowell v Providence Hosp & Med Ctrs, Inc*, 316 Mich App 680; 893 NW2d 112 (2016). The Supreme Court ordered and heard argument on the defendant's application for leave to appeal. Michigan Supreme Court No. 154476.

42 *Trowell*, 316 Mich App at 700.

43 The Court of Appeals has struggled to consistently assess the vagaries inherent in attempting to parse what does and doesn't require medical judgment beyond a layman's knowledge, particularly in patient-fall cases. Compare *Sheridan v West Bloomfield Nursing & Convalescent Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Mar 6, 2007 (Docket No. 272205); 2007 WL 678642; *Sawicki v Katzvinsky*, unpublished opinion per curiam of the Court of Appeals, issued Mar 17, 2015 (Docket No. 318818); 2015 WL 1214843; *McIver v St John Macomb Oakland Hosp*, unpublished opinion per curiam of the Court of Appeals, issued Feb. 12, 2015 (Docket No. 303090); 2015 WL 630393, with *Wiley*, 257 Mich App at 510, *Groesbeck*, unpub op, 2013 WL 951090; *Campins*, unpub op, 2004 WL 2009264; *Lewandowski*, unpub op, 2003 WL 22850024.

44 *Aldred v O'Hara-Bruce,* 184 Mich App 488, 490-491; 458 NW2d 671 (1990), citing *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984), and *Stroud v Ward*, 169 Mich App 1, 9; 425 NW2d 490 (1988).

45 *Delahunt*, 244 Mich at 230.

46 *Aldred,* 184 Mich App at 490-491.

47 An alternative solution would be to replace the third step with a question that tracks language in the accrual statute: Was the defendant "engaging in or otherwise assisting in medical care and treatment" when the act or omission that is the basis for the claim occurred? MCL 600.5838a(1). The Supreme Court relied on that language before. See *Regalski v Cardiology Associates, P.C.*, 459 Mich 891; 587 NW2d 502 (1998). *Bryant* chose not to rely on the accrual statute, stating that "it does not define what constitutes a medical malpractice action." The undefined phrase "medical care and treatment" is also problematic and could lead to some inconsistent results or unpredictability.

48 See *Buhalis*, 296 Mich App at 692 ("If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability ….").

49 *Id.* at 691 (citation omitted).

50 *Trowell*, 316 Mich App at 687 n.3, 692 n.5.

51 471 Mich at 425.

52 *Id.* at 430.

53 *Id.* at 430.

54 *Id.* at 431.

55 E.g., *LeFaive*, 262 Mich 443.

56 *Driver v Naini*, 490 Mich 239, 254; 802 NW2d 311 (2011) ("The legislative purpose behind the notice requirement [includes] reducing the cost of medical malpractice litigation ...." (citation omitted)); *Barnett v Hidalgo*, 478 Mich 151, 164; 732 NW2d 472 (2007) ("The purpose of the affidavits of merit is to deter frivolous medical malpractice claims ....").

Biomechanics: Leveraging Technology to Better Understand Human Motion and Ability

By: Peggy A. Shibata, M.S., P.E., & Manuel Meza-Arroyo, Ph.D., AHFP

Executive Summary

Biomechanics has been defined as "[t[he study of the mechanics of a living body, especially of the forces exerted by muscles and gravity on the skeletal structure."[1] Applied to the human body, biomechanics envelops subjects that include anthropometry, kinematics and kinetics, and injury mechanisms associated with external stimuli. Because the first recorded use of the term "biomechanics" was in the 1930s, some would consider the discipline of biomechanics to be a relatively new area of expertise. Biomechanics, however, has really been around for much, much longer. For hundreds, even thousands of years, man has been fascinated with his own body characteristics, capabilities, and motive abilities.

Historical Context

Anthropometry is the study of human body measurements, especially on a comparative basis.[2] Though the well-recognized Vitruvian Man sketch by Leonardo da Vinci, which depicts ideal human proportions, originated around 1490, it was based on geometry described by the ancient Roman architect, Vitruvius, around 1 BCE.[3] Through his extensive study of human proportion, da Vinci gave a clear, early, and lasting illustration of how the "centre of magnitude" could be shifted upward or downward without a corresponding change in the "centre of normal gravity," which remains passing through the "central line from the pit of the throat through the umbilicus and pubis between the legs."[4]

In other words, da Vinci explained that it is possible for the left-right and front-back balance location for the body to remain unchanged, while the height of the body center of mass moves upward, as is the case when a figure skater raises his or her arms symmetrically above the head. According to Encyclopedia Britannica online, "Leonardo envisaged the great picture chart of the human body he had produced through his anatomical drawings and Vitruvian Man as a cosmografia del minor mondo (cosmography of the microcosm). He believed the workings of the human body to be an analogy for the workings of the universe."[5] Da Vinci's contribution was not only

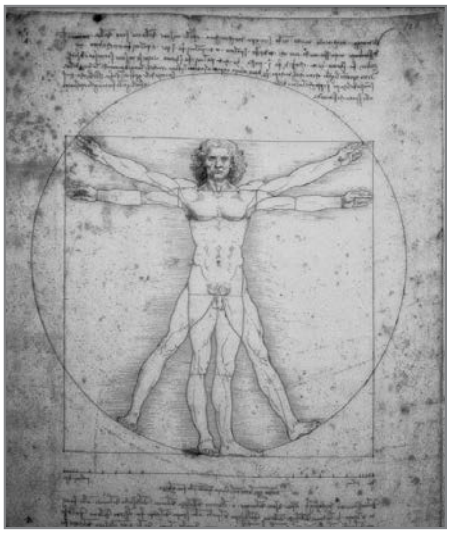

Figure 1. Leonardo da Vinci's Vitruvian Man.

Peggy A. Shibata, M.S., P.E. is a Senior Consultant at ESi and offers a broad range of specialization in mechanical engineering and biomechanics. Ms. Shibata's knowledge of rigid body dynamics, in conjunction with human anthropometry and capabilities, has aided in understanding likely accident event and injury sequences and potential contributory aspects. Her use of injury analyses and established human injury tolerances has enabled her to address the likelihood of a claimed injury being related to particular accident specifics..

Manuel Meza-Arroyo, Ph.D., AHFP is a Staff Consultant at ESi and has significant experience in the field of human factors and ergonomics. Dr. Meza often directs human-subject testing to assess human performance and behavior by employing tools such as motion capture technology, calibrated photography, tri-axial accelerometers, and custom programming for various applications.

limited to the study of body size and proportion. He also displayed a unique understanding of leverage and how the insertion site of the elbow flexors (the biceps muscle) will influence power generation ability of the arm. Da Vinci stated that "[t]he nearer the tendon which flexes the bone is to the hand so much the greater weight does this hand lift."[6] He had clearly understood and utilized principles of physics (forces, torque, equilibrium, etc.) and applied them to the human body, the basic foundation of "biomechanics."

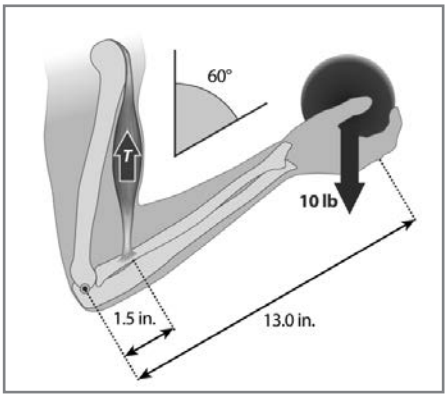

Figure 2. Principles of physics applied to the human body.

The study of human kinematics, or how people move, whether voluntary or as a result of some external stimulus, dates back even earlier than Vitruvius, to Aristotle (384-322 BCE). Early intellects relied upon observation to support their hypotheses. Aristotle did not experimentally test his theories, but he was the first to make a written reference to gait analysis, or the examination of walking: "If a man were to walk on the ground alongside a wall with a reed dipped in ink attached to his head the line traced by the reed would not be straight but zig-zag, because it goes lower when he bends and higher when he stands upright and raises himself."[7]

Figure 3. Rudimentary gait analysis; head vertical motion while walking.

The first recorded experiment in gait analysis was conducted by Giovanni Alfonso Borelli (1608-1679), who, as a result of his tests, correctly deducted that there also is medio-lateral (side to side) movement of the head during walking. It was shortly after this that Newton formulated his physical laws governing forces. Considerable advancements in scientific method, general laws of physics, and mechanics soon followed. In 1836, Ernst Heinrich Weber and Eduard Friedrich Weber published "Mechanics of the Human Walking Apparatus."[8] In this effort, they did considerable experimental work using only a stop watch, measuring tape, and a telescope. Through direct measurement they uncovered the relationship between step length, cadence, and walking speed. They were also the first to estimate in detail and develop illustrations of the orientations of the limbs at 14 different instances of the gait cycle.

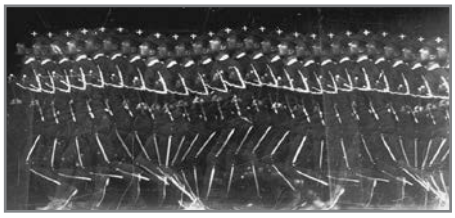

Figure 4. Photograph by Etienne-Jules Marey (1886)

Etienne-Jules Marey was the first "modern gait analyst" in that he considered the human body to be subject to the same laws as the rest of nature (Newtonian forces).[9] Marey was inspired by Eadweard Muybridge (1830-1904), who had published a series of images of a horse's trot to prove that during a trot and a gallop, there is an instant when no hooves are in contact with the ground. Marey was the first to apply similar photographic techniques to the human movement and made advancements in shutter and marker technology that allowed for multiple images with small reflective body markers to be captured on the same photographic plate. He was able to produce images that permitted meaningful measurements to be made and motion capture technology was born. For Marey, "the camera was a tool, with which he successfully tested the boundaries of what was possible with human locomotion."[10]

Technology in the Current Era

As time has passed, fascination with human movement has persisted, and as technology has continued to develop by leaps and bounds, so has the means of capturing and understanding human motion. In the current era, advancements in instrumentation and computer technology provide new and better opportunities to study human motion in a detailed fashion. Tools that are frequently used for motion analysis include accelerometers, gyroscopes, inertial measurement units (IMUs), force plates, and motion capture systems. The use of these devices and managing the data that is gathered as a result is made possible by modern computer technology.

Inertial Measurement Units (IMUs)

A "kinematic" analysis would describe a movement of an object or body in isolation of the forces that cause the motion and is most often measured as displacement, velocity, and acceleration. Inertial sensor-based systems, such as IMUs, are a promising approach for human motion capture. These devices are low-cost, miniature, and wearable, which makes it possible to attach to specific locations and segments of the human body.[11] IMUs incorporate accelerometers (device to measure acceleration), gyroscopes (device to measure angular velocity), and magnetometers (device to define orientation). The combination of all of this data can ultimately define the linear and angular orientations, speeds,

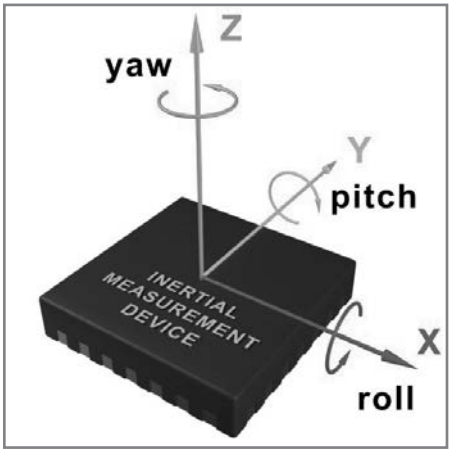

Figure 5. Inertial Measurement Unit (IMU).

and accelerations of a body and/or the components of a body. Linear output data describes the left-right, front-back, and up-down position and motion while angular output data describes the yaw (left-right rotation, like a door hinge), pitch (up-down rotation like a box lid) and roll motion (twisting such as turning a door knob). The small size of the sensors is relatively non-obstructive, which enables the sensors to acquire motion data for many different activities and real-life scenarios.

Figure 6. Ground reaction forces between feet and support surface.

Force Plates

The kinematics, or motion, of an object or body is the result of forces, internal or external, acting on that object. "Kinetics" refers to the study of the forces and moments that cause motion. Within the context of gait or human motion analysis, primary measures of interest are the ground reaction forces between the foot and the support surface. Force plates enable the reaction forces between the foot and the ground, as well as the pressure distribution beneath the foot, to be evaluated. Six component force plates, measuring vertical forces, longitudinal and lateral shear forces, and three orthogonal moments, have been commercially available and specifically designed for biomechanics since the early 1970s.

Motion Capture Systems

In basic terms, motion capture is the process of recording in detail the movement of objects and/or people. Though the motion capture system originated with and for the purpose of gait analysis, its use has expanded to areas such as sports performance, military applications, entertainment (such as in the production of video games and movies), and robotics. The entertainment industry's use of motion capture has received particular attention due to popular productions and characters such as Gallum in *The Lord of the Rings*.

Figure 7. Reflective markers applied to the foot and ankle.

Optical marker-based motion capture systems utilize marker technology, often in the form of reflective spheres that can be attached to surfaces, fabric, skin, and so forth. Anywhere from four to more than a dozen specialized infrared cameras define a measurement volume within which the position and movement of the reflective markers can be resolved. The measurement volume can be small (e.g. the interior of a vehicle) or large (e.g. an entire research laboratory) depending on the number of cameras used. The type of camera being used will also govern whether the test volume would be best suited to be indoors or outdoors. The number of reflective markers that can be utilized is virtually limitless, only restricted by the processing power of the controlling computer. The measurement volume is calibrated so that the relative position of each marker is recorded at rates of up to hundreds of times each second. The output is highly precise 3-dimensional data that, with appropriate handling, produces biomechanically-relevant information about the activity being performed. Many motion capture systems also incorporate software to support the simultaneous use of force plate data acquisition to get a complete picture of kinematic and kinetic considerations.

Computer Processing

A major benefit to having new technology and techniques is the quantitative, highly precise and accurate, 3-dimensional data that is readily available. But without sufficient computer processing power, the data would be of no use. A single stride that used to take 250- to 500-man hours to analyze,[vii] now takes a matter of minutes. Additionally, the expanse of data can be presented in a succinct, meaningful fashion to paint a complete picture of how people move and to answer detailed questions related to very specific tasks in the general population. The accessibility of the data has promoted advancement in a broad range of specialties: there are new insights related to human capability and performance for an endless number of activities; industrial jobs are designed to be more efficient and safe; physical limits are identified and surpassed in the athletic realm; prosthetics are designed to mimic the function and replace a lost limb; and the line of distinction between cinematography and reality is blurred.

Figure 8. A modern motion capture study with cameras surrounding the test area to capture temporal-spatial and kinematic data.

Applications for the Biomechanist

Regardless of the motivation that has resulted in the vast development of technology, the biomechanist benefits from the new tools by having the means to better understand capabilities, tendencies, and motions in the general population. A biomechanist with contemporary tools at his or her disposal is not limited to only relying upon the tasks that have been previously researched, analyzed, and published. On the contrary, it is possible for specialized and relevant tests to be performed so that unique events can be more fully understood.

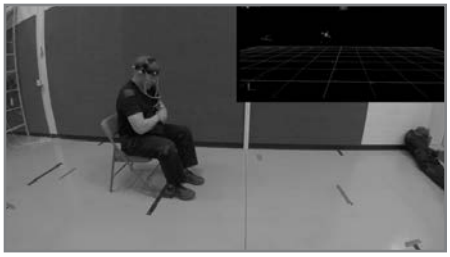

Figure 9. Use of a motion capture system to quantify daily and recreational tasks.

Biomechanists have the ability to perform full 3-dimensional motion capture and obtain acceleration, velocity, and displacement of the human body for almost any task imaginable (walking, sitting, standing up, jumping, throwing, swinging, exercise routines, etc.). Multiple quantified task analyses allow for a direct comparison of a variety of activities for a given person and present the ability to rank tasks according to magnitudes of acceleration and velocity, severity and harshness. Although human variation is expected between any set of individuals and the data may not be completely identical to that of a specific individual (such as a plaintiff) doing the same activity, it puts that activity into context relative to other, commonly encountered, daily activities.

Figure 10. Instrumentation to capture dynamics of typical vehicle maneuvers.

By applying the current measurement technology to animate and inanimate objects, the interaction between people and their environment or between people and a specific system can also be evaluated.

Figure 11. Measurement of human motion resulting from vehicle maneuvers.

Through a specific volume of space, the human body, in conjunction with the environment or elements of the surroundings, can be instrumented. It is instructive to measure and compare the accelerations, velocities, and general motions that result when a person is subjected to external stimuli from experiences such as riding a roller coaster, traveling down a zip line, going down a water slide, driving over a speed bump or pothole, or performing hard braking or other evasive vehicle maneuvers. In this final example, measuring the motion of the vehicle as well as the driver provides a link between the external stimuli and the resulting forces to which the driver is exposed. Human movement data, in conjunction with anthropometry, can also assist in identifying the capacity of a particular person to act within a described accident sequence. The data can offer limits and/or constraints to human performance that are useful in determining what happened in an accident.[12] In other words, given initial conditions, do the described intermediate and final conditions make sense? Are the human motions necessary to achieve the final conditions realistic?

A major benefit to human motion capture data is the ability to display and represent a motion with **valid** data. By using acquired data to generate a simulation of an event, it is certain that the representation of the motion abides by the laws of physics and faithfully includes the effects of real-world physical behavior. On the other hand, a generic animation could be a visual representation (or movie) of movement that may be created to make something clear but does not necessarily have a scientific basis.

Figure 12. Motion capture analysis of a ladder climbing task.

Humans have been studying biomechanics for thousands of years. Biomechanists are better positioned than ever before to apply biomechanical principles to everyday life and understand human behavior at a deeper and more complex level because of healthy measures of historical curiosity and persistence, and the wealth of current technological advancements. The usefulness of this technology and potential applications are limited only by imagination.

Endnotes

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Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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Effect of Delayed or Non-Service of a Judgment or Order on Appeal Deadline

In the age of e-filing, parties usually know right away when a judgment or order has been entered. But many Michigan courts still do not use e-filing,[1] and there may be other reasons why a party did not receive timely notice of entry of a judgment or order. Fortunately, both the Michigan Court Rules and Federal Rules of Appellate Procedure provide mechanisms for securing a timely appeal nonetheless.

State Court

The Michigan Court Rules require that an appeal of right in a civil case must be filed within 21 days of the judgment or order being appealed, 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).[2] Under MCR 7.204(A), "'entry' means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." This means that if a judge signs a judgment or order on one day, but then the court clerk delays entering the order on the court's docket for a few days, the appellant in a civil case can rely on the later date in calculating the appeal periods under MCR 7.204(A)(1).

But what if service of the judgment or order is delayed, or a party doesn't receive notice of it at all? MCR 7.204(A)(3) provides the answer. The rule instructs that the party should file its claim of appeal along with an affidavit "setting forth facts showing that the service was beyond the time stated in [the court rules]."[3] The appellee then has the right to file an opposing affidavit within 14 days of being served with the claim of appeal. *Id*. "If 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." *Id*.

Federal Court

The federal rules also provide a process for securing a timely appeal when a party does not receive timely notice of a judgment or order. 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). Under Rule 4(a)(6), however, if "a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry," the district court may "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). Alternatively, Rule 4(a)(5) provides that the losing party can seek an extension if it files a motion "no later than 30 days after the [appeal period] expires" and shows "excusable neglect or good cause." FR App P 4(a)(5).[4]

A recent decision from the Sixth Circuit Court of Appeals provides a word of caution when it comes to exercising these options. In *Martin v Sullivan*, 876 F3d 235 (CA 6, 2017), the plaintiff filed a late notice of appeal claiming "that he did not receive timely

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notice of the underlying judgment." *Id.* at 236. But he never sought relief from the district court by filing a motion under Rule 4(a)(5) or (6). The Sixth Circuit held that this was a fatal error, depriving the court of appellate jurisdiction. The court found the rule's plain text to govern, mandating that "if a losing party wants more time to file an appeal, it must file a motion in the district court asking for more time." *Id.* at 237. In reaching that decision, *Martin* specifically rejected the notion that the court could simply construe the plaintiff's late notice of appeal as a motion to reopen his time to appeal. *Id.* at 237. Because the appeal was untimely, it had to be dismissed. *Id.* at 238.

Conclusion

Although the state and federal rules are designed to provide parties with timely notice of a judgment or order, sometimes that doesn't happen. By carefully following the rules' safeguards, a losing party has ample opportunity to avoid any prejudice and ensure that a timely appeal is filed.

Endnotes

1 The Michigan Supreme Court is currently working on implementing a statewide e-filing system.

2 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.

3 MCR 2.602(D)(1) requires that a judgment or order be served within seven days of its entry.

4 Rules 4(a)(5) and (6) derive from 28 USC 2107(c).

Sharing Oral Argument Time with Co-Defendants

When you're defending civil appeals, it's not uncommon to have other parties on your side of the "v." And that means you'll find co-defendants jockeying for podium time. Usually, that's not an issue at the trial-court level. Most trial-court judges are generous about giving each defendant a chance to speak its piece. But time is a scarcer resource at the appellate level.

In the Michigan Court of Appeals, each side gets thirty minutes, unless only one side reserved the right to oral argument. In that case, the side with the right to oral argument gets fifteen minutes. (Whatever the amount of time allotted under the Michigan Court Rules, arguments at the Michigan Court of Appeals rarely take the full allowance. And you can expect encouragement from the bench to wrap up your argument as quickly as possible.)

> "If 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." *Id.*

The Michigan Supreme Court has the same rules for oral-argument time: thirty minutes per side where both sides have the right to oral argument, and fifteen minutes when only one side has the right to argument. The Court can also order oral argument on whether to grant an application, in which case each side gets fifteen minutes.

At the Sixth Circuit Court of Appeals, each side gets only fifteen minutes.

For each court, the rules allot time to each *side,* not each *party*. When there's more than one defendant, defense attorneys have to divide that time between themselves.

Of course, each court allows parties to move for additional time. But it doesn't take much experience at the appellate podium to learn that judges rarely yearn for more oral argument. Filing a motion for more time is an option that should be exercised infrequently—at least if you're interested in keeping your panel happy.

The better practice is to talk beforehand with the other defense attorneys and agree on a plan for splitting your time. A number of factors may play a role in that conversation:

- Is there a logical order to defense arguments? For instance, does one defendant's argument depend on the Court's response to another defendant's argument? Are there issues of indemnification or vicarious liability, to name two examples?
- Do you have any insight into the Court's likely questions? If there's an obvious weakness in the defense, you should anticipate that an appellate panel will pick up on it. And you should put the attorney best equipped to field those questions first.
- Do the individual attorneys have strong preferences about arguing first or last? Some attorneys will insist on going first; others prefer to hear all of the questions directed to other attorneys before stepping to the podium.
- Are any of the defense attorneys going to take a position adverse to another defendant? If so, it may make sense to have the attorney in the attacking role speak before the attorney in the defensive position.

Are there glaring differences in monetary or legal stakes? It's not unusual for one defendant to have much more at stake than other defendants. When that's the case, it may be wise to give the defendant with the most at stake the lion's share of the defense time.

Whatever your decision about splitting time, work it out beforehand and tell the Court as soon as possible. The first defense attorney at the podium should advise the Court about the order of argument. In the Sixth Circuit Court of Appeals, you'll want to share your plan with the clerk before the Court takes the bench.

Deciding these issues beforehand and notifying the Court promptly will help give the defendants an air of professionalism—which never hurts.

Endnotes

1 MCR 7.214(B)(1);

2 MCR 7.214(B)(1).

3 MCR 7.314(B)(1).

4 MCR 7.305(H)(1)

5 MCR 7.314(B)(2).

6 6 Cir. R. 34(f)(1).

7 MCR 7.214(B); MCR 7.314(B); 6 Cir. R. 34(f)(2).

Legal Malpractice Update

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Res Judicata & Collection Actions against Former Clients[1]

Bass v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued October 26, 2017 (Docket No. 332217); 2017 WL 6417594.

Facts:

Attorney defendants represented the plaintiff in post-divorce litigation. The plaintiff didn't pay her bill, and attorney defendants filed a collection suit in district court. The plaintiff didn't answer the collection complaint, so the district court entered a default judgment against the plaintiff.

Shortly thereafter, the plaintiff filed a legal-malpractice complaint against the defendants. The defendants filed a motion for summary disposition, arguing that the district court collection suit constituted res judicata as to all claims arising out of their representation of the plaintiff. The trial court agreed.

On appeal, the defendants argued that by failing to file her malpractice suit as a counterclaim to their district court collection action, the plaintiff lost the opportunity to do so. But the Court of Appeals disagreed, finding res judicata inapplicable in this circumstance.

Ruling:

Res judicata protects parties from the cost and frustration of multiple lawsuits arising from the same transaction. This common-law principle works to conserve judicial resources and prevent inconsistent decisions. But the Court of Appeals held that the purposes underlying res judicata didn't apply in this case because: 1) the parties weren't engaged in multiple lawsuits, and 2) judicial resources would not be extended a second time, as the parties didn't litigate the malpractice claim before.

The Supreme Court addressed this specific issue in *Leslie v Mollica*, 236 Mich 610; 211 NW 267 (1926). In *Leslie*, the Supreme Court held that when a professional files a collection case against a former client, the client is not required to plead his or her malpractice claim at that time and may do so later without being barred by res judicata. The Court of Appeals relied on *Leslie*, and confirmed that—despite its age—the opinion remains good law.

Practice Note:

Michigan's res judicata doctrine is generally broad. That does *not* mean, however, that res judicata will bar all claims that could have been raised as a counterclaim in a prior case. If a party files a counterclaim they must join all their claims that arise out of the same transaction. But a party may also have the option to maintain its counterclaim in an independent action.

Follow-up Activities do not Extend Accrual Date of Legal Malpractice Claims

Rigoni, et al v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued October 19, 2017 (Docket No. 334179); 2017 WL 4700041.

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Facts:

Attorney defendants prepared an estate plan for plaintiff in 2001. A decade later, a dispute arose between plaintiff and his son-in-law (a beneficiary of the estate), and attorney defendants summarized the estate plan, explained why it might be difficult to alter the plan, and made suggestions for how the plaintiff might change the plan. The plaintiff then filed a legal-malpractice action (in 2015, pursuant to a tolling agreement), alleging that the defendants failed to explain various aspects of the estate plan that was executed in 2001.

The trial court granted summary disposition in favor of the defendants, holding that the plaintiff's claim was time-barred because the defendants completed estate planning services for plaintiff in 2001. The plaintiff appealed, arguing that the defendants' response in 2011 to the plaintiff's questions about changing the estate plan demonstrated the existence of an ongoing attorney-client relationship. So, the plaintiff argued, the defendants' representation did not end until 2011.

Ruling:

Relying in part on *Bauer v Ferriby & Houston, PC*, 235 Mich App 536; 599 NW2d 493 (1999), the Court of Appeals affirmed the trial court's decision, holding that the defendants' actions in response to the plaintiff's inquiry in 2011 were "follow-up actions" regarding an otherwise completed legal service. Because these follow-up actions did not demonstrate an ongoing attorney-client relationship between the plaintiff and the defendants, the plaintiff's legal-malpractice claim accrued at the time he signed the estate plan in 2001. Consequently, the plaintiff's legal-malpractice claim was time-barred under Michigan's two-year statute of limitation, MCL 600.5805(6).

Practice Note:

Courts distinguish between actions taken by counsel as part of an ongoing attorney-client relationship, and "remedial efforts concerning past representation." See *Bauer*, *supra*. While not required, disengagement letters can be useful to define the scope of a representation.

Endnotes

1 David Anderson and Michael Sullivan would like to thank James J. Hunter for his contributions to this article.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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In the first three months of this year – the second of the current legislative session – our state legislators have proceeded with diligence to continue their work on initiatives introduced last year and some others of more recent vintage. Most of the legislation enacted so far has been uncontroversial, and passed with bipartisan support. There was cheering when legislation reducing the sales and use tax for new vehicle sales involving a trade-in was passed over the Governor's veto. (2018 PA Nos. 1 and 2). Legislation was quickly approved to compensate for the elimination of personal exemptions in the recently enacted federal tax reform legislation and increase the amount of personal exemptions for the Michigan income tax. (2018 PA Nos. 38 and 39). New laws were enacted to end the assessment and collection of driver responsibility fees, and the Legislature came up with an additional $175,000,000 for badly needed road repairs. (2018 PA Nos. 43-50 and 82). And then, having accomplished all of this by March 22nd, our legislators adjourned for their spring recess until April 10th, to rest and prepare for the sessions leading up to the longer summer recess.

The climate at the Capitol has been relatively serene so far this year while our attention has been distracted by the steady stream of scandals, atrocities, and sporting events that have been so much in the news, but that will be changing shortly, as the customary election year shenanigans will soon be in full swing. In this year's general election, we will be electing a new Governor, and all of the seats in the State House of Representatives will be up for grabs. There is some serious campaigning to be done, and this will probably mean, as it usually does, that there will be little legislative activity between the end of June and Election Day. Experience has taught that the party in control of the White House is often at a disadvantage in midterm elections, and this year's election may well follow the same pattern if it becomes a referendum on President Trump's performance, as many are expecting. I will not make any predictions at this time except to say that it promises to be a wild ride.

New Public Acts

There are now a total of 267 Public Acts of 2017 – 75 more than when I last reported on December 8th – and as of this writing on March 26th, there are 82 Public Acts of 2018. In addition to those previously mentioned, the new Public Acts that may be of interest include the following:

2017 PA Nos. 246 – 255 (House Bills 4403, 4406, 4407 and 4408; Senate Bills 47, 166, 167, 270, 273 and 274) This package of bills has amended the Public Health Code, the Social Welfare Act, and the Revised School Code to provide new measures to combat opioid abuse and addiction.

2018 PA No. 71 – House Bill 4430 (Howrylak – R), which will create a new "Fourth Amendment Rights Protection Act" providing that the state and its political subdivisions shall not assist, participate with, or provide material support or resources to a federal agency to enable it to collect, or to facilitate its collection or use, of a person's electronic data or metadata, unless: 1) the person has given informed consent; 2) the action is taken pursuant to a validly issued search warrant or a recognized exception to the warrant requirement; 3) the action will not infringe on a reasonable expectation of privacy; or 4) the state or a political subdivision thereof has legally collected the data or metadata. This new act will take effect on June 17, 2018.

2018 PA No. 66 – House Bill 4536 (Lucido – R), which will amend the Code of Criminal Procedure to require that an individual's arrest record be removed from the Internet Criminal History Access Tool (ICHAT) when the charges are dismissed before trial. The new provisions will also require that the arrest record, all biometric data,

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and fingerprints be expunged or destroyed when charges are dismissed before trial, and that any entry concerning the charges be removed from the LEIN, unless the prosecutor or the court object within 60 days after entry of the order of dismissal. In the absence of an objection, DNA samples or profiles must also be expunged or destroyed unless retention by the State Police is authorized or required under § 6 of the DNA Identification Profiling System Act. **2018 PA Nos. 67 and 68 – House Bills 4537 and 4538 (Lucido-R)** will make corresponding amendments to the C.J.I.S. Policy Council Act and 1925 PA 289. These amendatory acts will take effect on June 12, 2018.

2018 PA Nos. 54 – House Bill 5216 (Kesto – R), which will amend the Revised Judicature Act to repeal MCL 600.5529, effective June 4, 2018. Section 5529 has required the State Court Administrative Office to compile and maintain a list of civil actions concerning prison conditions brought by a prisoner that have been dismissed as frivolous, and to include in that list an account of the unpaid fees and costs associated with each dismissed case. Courts in which civil actions concerning prison conditions have been brought have been directed by this provision to refer to that list to determine the number and existence of civil actions concerning prison conditions previously filed by a prisoner and any associated unpaid fees and costs.

This package of bills has amended the Public Health Code, the Social Welfare Act, and the Revised School Code to provide new measures to combat opioid abuse and addiction.

New Initiatives of Interest

In Michigan, the story that has eclipsed nearly all others this year is the sordid tale of former MSU team doctor Larry Nassar and his long history of sexually abusing girls and young women referred to him for medical treatment. Dr. Nassar will have a long time for self-evaluation, as he has received sentences in both state and federal court that should assure that he will never again walk free. This has not ended the story, however, as there are many civil lawsuits remaining to be resolved, and legislators on both sides of the aisle are determined to make sure that this will never happen again. Documents have been sought and obtained from MSU, investigations have been undertaken, and legislation proposing sweeping changes has been introduced, with more to come.

The opening round of legislative activity addressing the Nassar scandal and related issues has come in the form of a broad-reaching package of bills introduced in the Senate with bipartisan support on February 27th. Those bills were quickly passed by the Senate on March 14, 2018, and now await further consideration in the House Committee on Law and Justice. The bills, as passed by the Senate, include:

Senate Bill 871 (O'Brien – R), which would amend the Code of Criminal Procedure to extend the statutory limitation period for bringing charges of second-degree and third-degree criminal sexual conduct in cases where the victim is under 18 years of age. Under current law, charges for these offenses may be brought within 10 years of the offense or by the victim's 21st birthday, whichever is later. The bill would amend the statute to eliminate the limitation entirely for charges of second-degree criminal sexual conduct (sexual contact under specified circumstances) where the victim is under 18, and thus, charges for that offense, like all charges of first-degree criminal sexual conduct (sexual penetration under specified circumstances) could be brought at any time. Charges of third-degree criminal sexual conduct (sexual penetration under other specified circumstances) involving a victim under 18 years of age could be brought within 30 years after the offense, or by the victim's forty-eighth birthday, whichever is later.

Senate Bill 872 (Knezek – D), which would amend the Revised Judicature Act, MCL 600.5805, and add a new § 5851b. Section 5805 would be amended to provide a ten-year period of limitation for civil actions based upon conduct that would constitute criminal sexual conduct under MCL 750.520b through MCL 750.520g (first, second, third and fourth-degree criminal sexual conduct and assault with intent to commit any of those offenses). For purposes of this new provision, it would not be necessary for a criminal prosecution or other proceeding to have been brought as a result of the conduct in question, or that a conviction result if any such prosecution or proceeding is brought.

The new section 5851b would provide that a person who is a victim of criminal sexual conduct while a minor may commence an action to recover damages sustained as a result of that conduct at any time before the victim reaches the age of 48 years. This extension of the limitation period would apply retroactively to December 31, 1996, but for all such claims accruing more than 3 years before the effective date of this amendatory legislation, the claim would have to be filed within one year after the effective date of the legislation. The new section 5851b would not apply in specified circumstances involving consensual conduct.

Legislation was quickly approved to compensate for the elimination of personal exemptions in the recently enacted federal tax reform legislation and increase the amount of personal exemptions for the Michigan income tax.

Senate Bill 873 (O'Brien – R), which would amend § 3 of the Child Protection Law, MCL 722.623, to expand the list of persons required to report suspected child abuse or neglect. The additional persons who would be required to report would include: persons employed in a professorial or counseling capacity at a postsecondary institution; school bus drivers and school bus aides; and individuals 18 years of age or older who are paid or volunteer to conduct or assist in conducting K-12 or postsecondary interscholastic athletic activities or youth recreational activities, including coaches, assistant coaches and athletic trainers. Persons who employ individuals required to report would be required to notify those individuals of their obligation to do so. And in cases where the suspected child

abuse would constitute criminal child abuse, child sexually abusive conduct (child pornography), human trafficking or criminal sexual conduct, and the person who committed the suspected child abuse or neglect is a licensed medical professional, the Department of Health and Human Services would be required to refer a complaint believed to be factually supported to the appropriate licensing authority, together with the results of its investigation.

Senate Bill 874 (Jones – R), which would amend § 13 of the Child Protection Law, MCL 722.633, to increase the criminal penalties for failure to report as required. Currently, a person who is required to report but knowingly fails to do so is guilty of a misdemeanor, punishable by imprisonment for up to 93 days and/or a fine of up to $500. The new penalty provisions would reserve greater punishment for those persons whose duty to report is based upon paid employment. For those persons, a willful and knowing failure to report would be a felony, punishable by imprisonment for up to 2 years and/or a fine of not less than $1,000 and not more than $5,000. For volunteers required to report, a willful and knowing failure to do so would be a misdemeanor, punishable by imprisonment for up to 1 year and/or a fine of up to $1,000. For those persons who are obligated to report by virtue of paid employment, a second or subsequent offense would be a felony, punishable by imprisonment for up to 7 years and/or a fine of up to $15,000.

Senate Bill 875 (O'Brien – R), which would amend the Revised Judicature Act, MCL 600.6431, to modify its existing provisions regarding the filing of claims and notices of claims against the state and its various departments and agencies in the Court of Claims, with respect to claims of sexual misconduct committed against an individual who is less than 18 years of age. As amended, the statute would: 1) allow the filing of those claims or notices at any time after the event or events giving rise to the claim; and 2) excuse compliance with the usual requirement that claims or notices of claims be signed and verified by the claimant, and allow the claimant to bring his or her claim in such cases "in a manner that protects his or her identity throughout the proceedings" in accordance with implementing rules adopted by the Supreme Court. For purposes of these new provisions, which would be applied retroactively to January 1, 1997, "sexual misconduct" would include female genital mutilation, accosting or soliciting a minor for immoral purposes, child sexually abusive conduct, and all degrees of criminal sexual conduct and assault with intent to commit criminal sexual conduct, regardless of whether the conduct in question resulted in a criminal conviction.

Senate Bill 876 (Horn – R), which would amend the Revised Judicature Act, MCL 600.6452, to provide, consistent with the amendments of MCL 600.6431 proposed in Senate Bill 875, that the time limitations normally applied to claims filed against the State in the Court of Claims would not apply to cases involving claims for sexual misconduct committed against an individual less than 18 years of age. Like the amendments proposed in Senate Bill 875, the change proposed by this bill would be applied retroactively to January 1, 1997, which presumably means that these changes would be applied to claims for sexual misconduct committed on or after that date.

Most of the legislation enacted so far has been uncontroversial, and passed with bipartisan support.

Senate Bill 877 (Knollenberg – R), which would amend the Governmental Tort Liability Act to add a new § 7d. The new section would provide that a member, officer, employee or agent of a governmental agency, or a volunteer acting on behalf of a governmental agency, who engages in sexual misconduct while in the course of employment or service or while acting on behalf of the governmental agency, is not immune from tort liability under the act. The new section would provide, further, that a governmental agency is not immune from tort liability under the act for sexual misconduct that a member, officer, employee or agent of the governmental agency engages in during the course of employment or service or while acting on behalf of the governmental agency, if the governmental agency was negligent in the hiring, supervision or training of the member, officer, employee or agent, or knew or should have known of the sexual misconduct and failed to report it to an appropriate law enforcement agency. The new section would include the same definition of "sexual misconduct" used in the provisions amended by Senate Bills 875 and 876, and as in those bills, the new provisions would be applied retroactively to conduct occurring after December 31, 1996.

Senate Bill 878 (Hertel – D), would amend the Penal Code to provide increased penalties for child pornography, including a mandatory minimum prison term of not less than 5 years for a second offense.

These bills have generated substantial opposition from state universities, state agencies, and other entities that have expressed grave concerns about the very substantial, and in many cases unfunded and uninsurable liability which may result from the extension of liability and retroactive application of changes proposed therein. They have not yet been scheduled for hearing in the House Committee on Law and Justice, but House Speaker Leonard has pledged a prompt consideration of the package, and thus, it is anticipated that they will be scheduled for hearing within a short time after the spring recess.

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 which 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 Andrea S. Nestert, *Henn Lesperance PLC*

The Discovery Rule: Practice Pointers for Hitting A Moving Target

The Issue

Even when medical-malpractice defendants obtain a hard-fought dismissal based on the statute of limitations, the battle often continues on appeal. In the Court of Appeals or Supreme Court, a trial court "win," may turn into a published opinion reversing the intial ruling as a matter of law, or a remand holding that the issue cannot be decided without more discovery. With regard to the latter, we have seen the circuit court then become reluctant to grant post-discovery motions to dismiss, and portions of the appellate opinion result in unforseen difficulties on remand, e.g., if opposing counsel contends that unlitigated portions of the case were nevertheless "decided" by the appellate court. As litigators, we become accustom to identifying the grey areas and continuing the good fight (glass half full). However, opaque holdings from the appellate courts can be exceedingly difficult for our clients, whose professional and private lives are profoundly affected by any claim. In this article we discuss how to try to avoid those pitfalls.

Recent Developments in the Case Law

Relevant to this article, the Court of Appeals and Supreme Court recently addressed the timeliness of a complaint filed under the "discovery rule." Unfortuntunately, however, the status of the law is trending toward subjective (and ostensibly conflicting) results. By way of brief background, generally, the statute of limitations (without calculating NOI tolling, if any) for a medical-malpractice claim is two years from the date of accrual *or* within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.[1] Pursuant to the statute, "the burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff."[2]

In *Jendrusina v Mishra*,[3] the Michigan Court of Appeals considered an appeal from dismissal of a medical-malpractice complaint based on the discovery rule. The facts of that case, as provided by the majority in a split opinion, are as follows: the plaintiff brought a suit against his primary care physician of 20 years following a diagnosis of kidney failure, alleging that his physician failed to timely refer him to a specialist, resulting in further injury. Specifically, routine labs which were kept in the medical record by the defendant physician, Dr. Mishra, revealed increasingly abnormal results with regard to two markers of kidney function beginning in 2007. The medical record contained a note from defendant Mishra in 2008 stating that the plaintiff had "chronic renal failure;" however, the office note did not explicitly indicate if or how this information was communicated to plaintiff. Nevertheless, defendant did refer the plaintiff for an ultrasound related to his kidney levels following the visit. The ultrasound results were "normal."

In January 2011, the plaintiff reported to the hospital with flu-like symptoms. ER staff diagnosed him with acute end-stage renal failure and he began dialysis at that time. On September 20, 2012, the plaintiff was seen by a nephrologist who, according to the plaintiff's deposition testimony, "ranted" about the delay saying that he could have prevented full kidney failure and avoided dialysis. Plaintiff testified that he "was

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shocked" and "dumbfounded" to learn this. He further testified that he did not know his kidney failure had developed over the course of years and could have been avoided with earlier referral and treatment. Based on the September 2012 visit, the plaintiff contacted an attorney and pursued a medical-malpractice claim.

On March 18, 2013, the plaintiff sent his PCP a notice of intent to sue. After the complaint was filed, defendants (the primary care physician and his PC) moved for summary disposition based on the statute of limitations. In response, the plaintiff argued that he did not "discover" the existence of his claim until September 20, 2012, during the visit with his nephrologist. The Circuit Court dismissed the action, agreeing with defendants.

In reversing the dismissal, two of the three Judges on the Court of Appeals panel, Judge Shapiro and Judge Gleicher, held that the correct inquiry regarding applicability of the discovery rule "is not whether it was **possible** for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was **probable** that a reasonable lay person would have discovered the existence of the claim."[4] Plaintiff testified in deposition that Dr. Mishra never told him that he had kidney disease or that he may develop kidney disease. The Court concluded that the notes in the chart were insufficient to prove any discussion with plaintiff regarding kidney failure or the high creatinine level found in those tests, and that plaintiff "did not visit [defendant] specifically for kidney problems." The Court further reasoned that:

> Defendant suggests that because he once ordered a kidney ultrasound for plaintiff after an episode of edema and one slightly elevated lab report in 2008, plaintiff should have realized upon diagnosis of kidney failure that he had kidney disease back in 2008. However, the ultrasound was reported as normal. Assuming that a reasonable, ordinary person would even recall a normal ultrasound performed years earlier, there is no reason that such a person would consider a *normal* ultrasound result as evidence that Dr. Mishra was at the time simultaneously committing malpractice in some manner. Rather, the normal ultrasound rationally supported that Dr. Mishra had made no errors at all. The mere *performance* of a non-invasive, commonly-administered kidney imaging study yielding a normal result, does not constitute an "objective fact" from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure.
>
> It was **possible** for plaintiff to have discovered the existence of a possible claim shortly after presenting to the hospital and being told that he had kidney failure. To have done so, however, he would have had to have undertaken an extensive investigation to discover more information than he had. Presumably, plaintiff could (1) studied the various causes and speeds of progression of kidney disease, (2) requested copies of his previous years' blood test reports, and (3) considered whether there were signs of progressive kidney disease in those reports. However, there is no basis in statute, common law, or common sense to impute such a duty to people who become ill.[5]

Therefore, the majority reversed and remanded the case to the Circuit Court.

The dissent by Judge Jansen, however, noted that according to the plaintiff's own complaint, the defendant diagnosed plaintiff with renal insufficiency in 2007. As such, defendant began testing the plaintiff's kidneys on a regular basis at least as early as 2007. Additionally:

> Plaintiff admits that he was aware that Dr. Mishra was testing his kidneys and that Dr. Mishra never said anything was wrong. He testified in his deposition that in 2008, Dr. Mishra told him that his "kidneys [were] a little bit elevated but not to the point where there was anything to worry about...." In 2009, Dr. Mishra ordered an ultrasound test for plaintiff's kidneys, and Dr. Mishra informed plaintiff that the ultrasound indicated that plaintiff's kidneys were "fine." On January 3, 2011, when plaintiff became aware of this diagnosis that was so plainly contradictory to everything Dr. Mishra had said up until that point, he became "equipped with sufficient information to protect [his] claim." Therefore, the limitations period expired six months after this date.
>
> Plaintiff argues that he was not able to make the connection between the new diagnosis and Dr. Mishra's alleged negligence until September 20, 2012. The Michigan Supreme Court has stated, however, that this connection is not necessary: "The 'possible cause of action' standard does not require that the plaintiff know that the injury ... was in fact or even likely caused by the [doctor's] alleged omissions." Further, this Court has previously held that "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform [him] of its existence." Considering this, it is plain that plaintiff should have discovered his potential claim on January 3, 2011. Therefore, the period of limitations in MCL 600.5838a(2) expired six months after January 3, 2011.[6]

In other words, plaintiff knew that he had elevated kidney test levels and knew that defendant performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there may be an issue with his kidneys. However, notwithstanding the elevated kidney levels and the ultrasound test, the defendant allegedly informed plaintiff that his kidneys were fine and that there was nothing to worry about. As such, the dissent concluded that, the plaintiff should have known he had a possible cause of action when he learned that he had kidney disease, especially in light of Dr. Mishra's alleged statements to the contrary. The dissent also disagreed with the majority's conclusion that plaintiff was unaware he had a **progressive kidney disease** and therefore he should not have known of a possible cause of action. To this point, the dissent noted that the majority conducted its own research regarding the pathophysiology of kidney failure and failed to limit its review to the

medical evidence in the record. Therefore, the dissent would have affirmed.

Of note, the parties did not discuss the causes or progression of kidney failure in their briefs on appeal, and the majority's discussion of the pathophysiology of kidney disease contains medical conclusions that require expert testimony and that are outside the expertise of the majority. In fact, all advocates should be somewhat concerned that the majority opinion defined, without equivocation or credit to the source, medical terminology, concepts, and diagnosis. The declarations of medicine read as though these matters had been conclusively decided in the (published and binding) opinion.

The Supreme Court granted oral argument on the application; however, it ultimately reversed its order granting leave, finding that the issue did not warrant review.[7] Of note, Chief Justice Markman dissented from the order denying leave, and was joined by Justices Zahra and Wilder. Specifically, Chief Justice Markman aptly noted that plaintiff's deposition testimony indicated that: (1) defendant had been monitoring his "kidney numbers" for years, (2) plaintiff's numbers were slightly elevated, and (3) defendant ordered an ultrasound of his kidneys in 2009. Quoting *Solowy*,[8] he stated that the "six-month discovery rule period begins to run in medical malpractice cases when the plaintiff, on the basis of objective facts, is aware of a **possible** cause of action," which "occurs when the plaintiff is aware of an injury and a **possible** causal link between the injury and an act or omission of the physician."[9] Thereafter, Chief Justice Markman detailed numerous reasons why the plaintiff should have been aware of the existence of his claim much earlier, stating:

> as of January 3, 2011, plaintiff was aware that defendant had been monitoring his numbers for years, that his numbers were "way out of whack" upon admission to the hospital, and that his kidneys had apparently failed, despite the fact that defendant had regularly assured him that his kidneys were "fine." These facts should have aroused at least some modicum of suspicion in a reasonable person that defendant had provided deficient care, and they also suggest that plaintiff should have been aware of a kidney problem and a possible causal linkage between that problem and some negligent act or omission on defendant's part. See *id*. at 222 (stating that a "plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin"). Thus, as the Court of Appeals dissent concluded, plaintiff should reasonably have discovered the existence of his claim on January 3, 2011, and his action was barred by the limitations period in MCL 600.5838a(2) because he failed to commence the action within six months after this date. I am aware that the immediate reaction of any person to what plaintiff learned on that date would not have been to assess what was required to preserve a medical malpractice action but rather to seek out treatment, but legal claims are not of indefinite duration; in this instance they must be brought within two years of the malpractice or within six months of when a person discovers or should have discovered the existence of the claim, whichever date is later.[10]

As such, Chief Justice Markman would have reversed for the reasons stated in the Court of Appeals' dissent.

While it would have been optimal for the defense bar generally had the Supreme Court decided to reverse the published Court of Appeals decision, the dissent, in conjunction with the fact that the Michigan Supreme Court's decision in *Solowy* remains good law, are upsides—particularly where a defendant can point to objective facts in the record indicating that a reasonable person should have been aware of a potential ("possible") claim.

Application of the "objective standard" post- *Jendrusina v Mishra* Court of Appeals' Opinion

There have been two unpublished opinions issued following the *Jendrusina* Court of Appeals decision that have nevertheless found that the plaintiff's claim fell outside of the statute of limitations (i.e., the discovery rule did not apply). First, in *Harris v Owens*,[11] the Court of Appeals upheld a dismissal in favor of defendants where the plaintiff claimed her complaint was timely pursuant to the discovery rule. In *Harris*, the plaintiff was referred to the defendant physician, Dr. Owens, for the removal of her wisdom teeth. During the March 5, 2011 procedure, an instrument broke and a small piece of metal was allegedly left in plaintiff's right jaw. However, following the procedure and after he suctioned plaintiff's mouth and rinsed it with fluid, the defendant believed that the broken instrument piece was "gone." Dr. Owens did, however, inform the plaintiff that an instrument broke during the procedure. Less than a week after the surgery, the plaintiff experienced pain and sensitivity in her mouth, particularly where her wisdom tooth was removed. The plaintiff further testified that shortly after the surgery she began experiencing migraines, which she never had before 2011, as well as pressure, tenderness, sensitivity to hot and cold drinks or food, and earaches in the area of the removed tooth. However, she never informed the defendant of these other symptoms, and she did not seek treatment aside from a single hospital visit for a migraine.

In March 2012, the plaintiff went to her dentist's office for a regular cleaning. An x-ray was taken at the appointment, but it did not show the embedded instrument piece. In August 2013, the plaintiff went to a different dentist for a cleaning. During this appointment, it was "discovered" that the instrument piece was lodged in the upper, right side of plaintiff's jaw from an x-ray image. On September 12, 2013, the plaintiff mailed a notice of intent to file a claim, and the Complaint was filed on February 24, 2014.

The Circuit Court granted the defendants' MCR 2.116(C)(7) motion, and the Court of Appeals affirmed, stating:

> In this case, there is no material factual dispute that plaintiff "should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim," or March 5, 2013, two years after the accrual date. MCL 600.5838a(2). Plaintiff does not contest that she was aware that an instrument broke

during the surgery and that she experienced symptoms of physical discomfort after the procedure that she did not experience before it. Plaintiff testified that she was aware that her condition changed for the worse "shortly after" the extraction, which should have indicated to her that something was wrong and that Dr. Owens' treatment was a possible cause. See *Solowy*, 454 Mich. at 232. Thus, plaintiff was "equipped with the necessary knowledge to preserve and diligently pursue [her] claim," shortly after the surgery, id. at 223, yet she did not do so until she filed the notice of intent on September 12, 2013, and the complaint on February 24, 2014. Plaintiff should have recognized the possible causal link between her injury and Dr. Owens's treatment at least six months before the filing of the notice of intent and even six months before the expiration of the two-year limitations period. MCL 600.5838a(2). Therefore, plaintiff did not timely file the action, and summary disposition under MCR 2.116(C)(7) was appropriate.[12]

In a separate unpublished Court of Appeals opinion, *Sciortino v Najarian*,[13] the Court of Appeals recognized that a plaintiff does not have to be able to prove every element of the cause of action before the statute of limitations is implicated. The *Sciortino* Court, quoting *Solowy,* also clarified that the "possible cause of action" standard does not require the plaintiff to be aware that his or her injury was caused, or likely caused, by his or her physician's alleged malpractice by omission or mistake.[14] In fact, as the *Sciortino* Court noted, the *Solowy* Court instructed that lower courts ought to follow a "flexible approach," in applying the possible cause of action standard, and described this approach, in pertinent part, as follows:

> In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition.[15]

The Court of Appeals discussed in *Sciortino*, the Michigan Supreme Court in *Solowy* instructed that the "possible cause of action" standard is to be applied with "a substantial degree of flexibility[,]" and lower courts must remain guided by "the doctrine of reasonableness and the standard of due diligence ... [.]"[16] Quoting extensively from the *Solowy* Court, in *Sciortino* the Court of Appeals also cautioned that lower courts are to take care to apply the "possible cause of action" standard in a manner that furthers the "legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions ... [.]"[17]

Turning to the evidence of record, the Court of Appeals in *Sciortino* found that the plaintiff, by his own admissions, was aware that there was a problem shortly following his December 8, 2011, surgery, and he in fact confronted and questioned the defendant physician about his concerns. Plaintiff also acknowledged in his deposition testimony that, at the request of a subsequent treater, he returned to the defendant's office on April 24, 2013 to obtain a copy of his operative note, which included information regarding the complication that took place during his December 8, 2011 surgery. As such, plaintiff's own words confirmed that he was aware he was experiencing physical discomfort and pain and lack of progress following the December 8, 2011 surgery, he first discussed his concerns with defendant, and unsatisfied, he returned to the referring physician, who sent him to yet another physician. The record evidence also confirms that plaintiff was having serious misgivings regarding the course of treatment for his hand, discussing his concerns with both of the other physicians. Thus, the record evidence strongly confirmed a nexus between the December 8, 2011 surgery, and the pain and discomfort that plaintiff was experiencing for a significant period of time afterward. Accordingly, using an objective standard and duly considering the surrounding circumstances, the Court found that the record evidence confirmed that plaintiff should have known of the potential existence of his claim more than six months before his notice of intent was filed in April 2014.

Practice Note:

Considering *Solowy*, *Jendrusina*, *Harris*, and *Sciortino* together, the defense bar can take away a few practice pointers when dealing with a discovery rule statute of limitations claim:

- First, consider waiting to file your motion for summary disposition until after the plaintiff's deposition is taken. Make sure all relevant conversations and communications with the plaintiff, implied and express, are contained within the record.
- Scour the medical and other records for objective evidence that would or could have placed the plaintiff on notice of his or her claim.
- Look for circumstantial objective evidence, such as visits to other medical practitioners, which have captured proof of the plaintiff's medical and other history.
- Continue to utilize *Solowy* (a binding Michigan Supreme Court case—which remains good law) and distinguish *Jendrusina* (a split Court of Appeals opinion with a strong Supreme Court dissent).

Endnotes

1 MCL 600.5805; MCL 600.5838a(2).

2 MCL 600.5838a(3).

3 *Jendrusina v Mishra*, 316 Mich App 621; 892 NW2d 423 (2016).

4 *Id.* at 626.

5 *Id.* at 632-634.

6 *Id.* at 639 (Jansen, J., dissenting).

7 *Jendrusia v Mishra*, order of the Michigan Supreme Court, entered January 12, 2018 (Docket No. 154717).

8 *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997).

9 *Jendrusia v Mishra*, order of the Michigan Supreme Court, entered January 12, 2018 (Docket No. 154717). (emphasis added)

10 *Id*. at 2.

11 *Harris v Owens*, unpublished per curiam opinion of the Court of Appeals, issued September 15, 2016 (Docket No. 327186); 2016 WL 4954295.

12 *Harris*, unpub op at 2.

13 *Sciortino v Najarian*, unpublished opinion per curiam of the Court of Appeals, issued August 29, 2017 (Docket No. 331892); 2017 WL 3721997.

14 See *Solowy*, 454 Mich at 224.

15 *Id.* at 227 (footnote omitted).

16 *Id.* at 230.

17 *Id.*

No-Fault Report

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What Is … and Is Not … a Motor Vehicle Under the No-Fault Act?

Imagine the following scenario:

> *Mike, a recent college graduate, lives in an apartment in Midtown Detroit. He has no need for a car, because everything he needs is within walking distance or available by hopping aboard the new M-1 Rail System, commonly known as the "QLine" which runs on Woodward Avenue. Mike and his friends hop aboard the QLine to take in an exciting Detroit Tigers baseball game. (Okay . . . humor me, this is an imaginary scenario.) While occupying the QLine trolley, the driver of a motor vehicle traveling southbound on Woodward Avenue slams into the rear of the vehicle in front, causing that vehicle to be propelled into the QLine trolley occupied by Mike and his friends. Mike sustains injuries and, because he does not own a motor vehicle, and does not reside with any relatives who own a motor vehicle, he wonders from where he will get his no-fault benefits?*

Practitioners in this area are well aware of the general rule for determining no-fault priority – one generally turns to his or her own no-fault insurer, or that of a spouse or relative domiciled in his or her household. However, in the scenario posited above, Mike has no insurance in his household.

For purposes of this article, note that the M-1 Rail System is essentially a trolley, powered by electrical power (whether by battery or by overhead wires), and because it runs on rails along Woodward Avenue, it may not be required to be registered and may not be required to be insured for no-fault benefits. As there is no insurance in Mike's household, the issue of where he turns to for no-fault benefits hinges upon whether he is deemed to be an occupant or a non-occupant of a "motor vehicle." If he is an occupant of a "motor vehicle," Mike will receive his no-fault benefits from the insurer of the owner, registrant or operator of the "motor vehicle" he was occupying at the time of the accident. See MCL 500.3114(4); *Shinn v Secretary of State*, 314 Mich App 765, 887 NW2d 635 (2016). On the other hand, if Mike is deemed to be a non-occupant of a "motor vehicle," he will receive his no-fault benefits from the insurer of the owner, registrant or operator of the other motor vehicles involved in the accident; i.e., the insurers of owners of the two vehicles involved in the first collision, which resulted in the second vehicle colliding with the QLine. This, however, still begs the question – was Mike occupying a "motor vehicle" at the time of this accident?

No-Fault Act's Definition Of "Motor Vehicle"

Certainly, the QLine trolley is not the type of vehicle that one would consider to be a "motor vehicle." After all, it runs on rails along a limited route from Midtown Detroit to Downtown Detroit and back. It is powered by powerful lithium batteries or by the overhead electrical wires that run along Woodward Avenue. It cannot change lanes. Furthermore, because it may not be required to be registered, it may not be required to carry no-fault insurance. Does this mean, however, that it is not a "motor vehicle," as that term is defined under no-fault?

The no-fault insurance act provides its own definition of the term "motor vehicle." While other Michigan statutes likewise provide a definition for what is or is not a "motor vehicle" (see, for example, the Motor Vehicle Code, MCL 257.33), the Michigan Court of Appeals, in recent years, has repeatedly emphasized that where a statute contains

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its own definitional section, those definitions, and only those definitions, are to be used when interpreting provisions of that particular statute. See *People v Shami*, 318 Mich App 316, 897 NW2d 761 (2016); *Coalition Protecting Auto No-fault v Michigan Catastrophic Claims Ass'n*, 317 Mich App 1, 894 NW2d 758 (2016); *People v Schultz*, 246 Mich App 695, 635 NW2d 491 (2001).

MCL 500.3101(2)(i) provides:

> (i) 'Motor vehicle' means a vehicle, including a trailer, that is operated or designed for operation on a public highway by power other than muscular power and has more than 2 wheels.

Well, the QLine is undoubtedly being operated on a public highway; i.e., Woodward Avenue. Furthermore, it is undoubtedly powered by something other than muscular power; i.e., the lithium batteries and the overhead wires that run along Woodward Avenue. Each car of the QLine trolley also has more than two wheels. Therefore, at first blush, it certainly appears as if the QLine trolley car is, in fact, a "motor vehicle."

But, you might say, the QLine may not be required to be registered and therefore may not be required to be insured. How could it qualify as a motor vehicle? In fact, there are lots of things traveling on our roadways that are not required to be registered in this state, and therefore do not have to be insured under the no-fault insurance system, but which still constitute "motor vehicles," for purposes of the no-fault insurance act. See e.g., *Lee v DAIIE*, 412 Mich 505, 315 NW2d 413 (1982) (U.S. Postal Service truck still considered to be a "motor vehicle," even though not required to be registered in this state and therefore not insured for no-fault benefits.). Other vehicles may be "improperly" moved on a highway and as a result may be subject to the registration and insurance requirements under the no-fault act, yet there is simply no way to get insurance on these "motor vehicles." *Coffey v State Farm*, 183 Mich App 723, 455 NW2d 740 (1990) (go-cart being operated on a public highway deemed to be a "motor vehicle."); *Citizens Ins Co v Detloff*, 89 Mich App 429, 280 NW2d 555 (1979) (forklift being operated on a public highway deemed to be a "motor vehicle.") Therefore, the mere fact that the QLine may not need to be registered is irrelevant for determining whether it is a "motor vehicle."[1]

Does this mean, however, that it is not a "motor vehicle," as that term is defined under no-fault?

EXCEPTIONS TO THE STATUTORY DEFINITION

As originally enacted, the no-fault act did not contain any exceptions to the statutory definition of the term "motor vehicle." This was probably because there were only two types of "motor vehicles" that were operated back on the highways in 1973 – motorcycles (which only had two wheels) and cars, trucks, buses and the like – all of which had more than two wheels and would therefore be considered "motor vehicles." Over the years, however, the Legislature has added various exceptions to the statutory definition of the phrase "motor vehicle." Let us examine these statutory exceptions in more detail.

Motorcycles

Since the earliest days of no-fault, motorcycles have not been considered to be "motor vehicles" for purposes of the act. As such, motorcyclists were not required to carry no-fault insurance on their motorcycles. Initially, motorcycles only had two wheels. Starting in the late 70s, though, some mopeds and motorcycles actually had three wheels – not two. (The Can-Am Spyder comes to mind.) As presently drafted, the no-fault act defines the term "motorcycle" in MCL 500.3101(2)(g):

> 'Motorcycle' means a vehicle that has a saddle or seat for the use of the rider, is designed to travel on not more than 3 wheels in contact with the ground, and is equipped with a motor that exceeds 50 cubic centimeters piston displacement. For purposes of this subdivision, the wheels on any attachment to the vehicle are not considered as wheels in contact with the ground. Motorcycle does not include a moped or an ORV.

Accordingly, a Harley Davidson or Honda Goldwing trike, or a Can-Am Spyder, are considered to be "motorcycles," not motor vehicles, for purposes of the no-fault act.

So does the QLine qualify as a "motorcycle"? Obviously not. Let's move on.

Mopeds

The no-fault act exempted mopeds from the definition of a "motor vehicle" back in 1977. The no-fault act definition of the term "moped" takes us back to the Motor Vehicle Code definition, found at MCL 257.32b. This statute currently defines the term "moped" as follows:

'Moped' means a 2- or 3-wheeled vehicle to which both of the following apply:

> (a) It is equipped with a motor that does not exceed 100 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.
>
> (b) Its power drive system does not require the operator to shift gears.

Prior to 2012, this statute indicated that the engine of a moped could not exceed 50 cubic centimeters, and could produce no more than 2 horsepower. However, effective December 21, 2012, the Legislature increased the engine size to 100 cubic centimeters and removed the 2 horse power limit. Significantly, though, the Legislature kept the 30 mile per hour speed limit intact. Therefore, to the extent that a "moped" or a scooter has an engine size of 100 cubic centimeters or less, but is capable of traveling faster than 30 miles per hour, it may not be considered a "moped," contrary to what the salesman may tell you!

So is the QLine a "moped"? Obviously not. Let's move on.

Farm Tractors

Like motorcycles and mopeds, farm tractors have long been exempt from the statutory definition of the term "motor vehicle" set forth in the no-fault act. The present exception is found at MCL 500.3101(2)(i)(iii), and provides that the following do not constitute "motor vehicles" for purposes of the no-fault insurance act:

> A farm tractor or other implement of husbandry that is not subject to the registration requirements of the Michigan vehicle code . . . MCL 257.216.

So is the QLine a "farm tractor or other implement of husbandry"? Again, obviously not.

ORVs

Off-road vehicles, or ORVs, were specifically exempted from the definition of the term "motor vehicle" effective July 17, 2008. See 2008 PA 241. For purposes of the no-fault insurance act, the term "ORV" is defined in MCL 500.3101(2)(k) as follows:

> 'ORV' means a motor-driven recreation vehicle designed for off-road use and capable of cross-country travel without benefit of road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. ORV includes, but is not limited to, a multitrack or multiwheel drive vehicle, a motorcycle or related 2-wheel, 3-wheel, or 4-wheel vehicle, an amphibious machine, a ground effect air cushion vehicle, an ATV . . . or other means of transportation deriving motive power from a source other than muscle or wind. ORV does not include a vehicle described in this subdivision that is registered for use on a public highway and has the security required under section 3101 [pertaining to motor vehicles] or section 3103 [pertaining to motorcycles] in effect.

Therefore, the mere fact that the QLine may not need to be registered is irrelevant for determining whether it is a "motor vehicle."

Obviously, the Legislature meant to exclude ORVs from the definition of the term "motor vehicle," so that if an ORV rider, operating his ORV on a public highway, overturns his ORV and is injured, he or she would be excluded from recovering no-fault benefits. However, if that same ORV rider, illegally operating his ORV on a public highway, is involved in an accident with an automobile, he or she will still recover no-fault benefits because, after all, there is a "motor vehicle" involved in the accident – the automobile that hit him.

But for purposes of our discussion, is the QLine an "ORV," and thereby exempt from the no-fault act's definition of "motor vehicle". Obviously not! Let's move on.

Golf Carts

One of the most recent statutory exceptions to the term "motor vehicle" involves golf carts. Prior to January 13, 2015, golf carts were considered to be "motor vehicles" – just like the go-cart in *Coffey, supra*. Therefore, a person who was operating a golf cart on a public highway (such as a subdivision adjoining a golf course) would have been barred from recovering no-fault benefits if they were involved in a motor vehicle accident, because like the go-cart in *Coffey, supra,* the golf cart would have been required to be registered in the State of Michigan and therefore required to be insured. A "golf cart" is defined in the no-fault act as:

> 'Golf cart' means a vehicle designed for transportation while playing the game of golf. [MCL 500.3101(2)(d).]

Therefore, a person who is injured while driving a golf cart on a public highway, without the involvement of some other "motor vehicle," will not be entitled to recover no-fault benefits. However, if a person operating a golf cart on a public highway in a community that adjoins a golf course is struck by an automobile, he will be entitled to recover benefits as a result of the involvement of the "motor vehicle" in the accident; i.e., the automobile.

So does the QLine qualify as a "golf cart"? Clearly, the answer is no.

Power Driven Mobility Device

This exception likewise was enacted on January 13, 2015. This term is defined in the no-fault act as follows:

> 'Power-driven mobility device' means a wheelchair or other mobility device powered by a battery, fuel, or other engine and designed to be used by an individual with a mobility disability for the purpose of locomotion. [MCL 500.3101(2)(m).]

However, as matters now stand, it is the humble opinion of the author that, in fact, the QLine trolley may very well be considered a "motor vehicle" for purposes of the no-fault insurance act

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Interestingly, the legislation that added this section specifically stated that it should apply **retroactively**. What happened?

The author understands that there were a number of cases where persons who were utilizing powered wheelchairs were crossing the street when they were struck by a motor vehicle. Because the powered wheelchair had more than two wheels, was powered by something other than muscular power, and was being operated on a public highway, it qualified as a "motor vehicle" for purposes of the no-fault act. The no-fault insurer argued that, because this "motor vehicle" was being operated on a public highway, it was required to be registered under MCL 257.216. Because it was required to be registered, it was required to be insured, just like the go-cart in *Coffey, supra*. Because the powered wheelchair was not insured (and indeed could not be insured), the person occupying the power-driven wheelchair would be disqualified from recovering no-fault benefits. Clearly, the Legislature intended to put a quick end to such cases by adding this provision and expressly making it retroactive.

With that said, does the QLine qualify as a "power-driven mobility device"? Obviously not.

Commercial Quadricycles

The author had no idea what these even were until the Legislature passed this statute in late 2014. For those who frequent sporting events in downtown Detroit, one sees a number of these devices, which are essentially "rolling

bars." There are a number of people seated on this contraption, peddling away and consuming a few adult beverages. These are "commercial quadricycles."

The no-fault act contains six separate requirements for what constitutes a "commercial quadricycle," including the following:

- The vehicle has at least 4 wheels and is "operated in a manner similar to a bicycle";
- The vehicle must have "fully operative pedals" so that it can be propelled by human power;
- The vehicle has at least 6 seats for passengers;
- The vehicle is occupied by a driver and powered either by passengers who provide the pedal power, as noted above, or by a motor which is capable of moving the vehicle when there are no passengers to pedal it;
- The vehicle must be used for commercial purposes; and
- The vehicle is operated by the owner of the vehicle or an employee of the owner of the vehicle.

So does the QLine qualify as a "commercial quadricycle"? Again, the answer is clearly no, so let's examine the last exception to what is a "motor vehicle."

Certainly, the QLine trolley is not the type of vehicle that one would consider to be a "motor vehicle."

Electric Bicycles

Effective October 30, 2017, the Michigan Legislature amended the no-fault act to exclude "electric bicycles" from the definition of the term "motor vehicle." The amendment also defines the term "electric bicycle" by referencing section 13e of the Motor Vehicle Code, MCL 257.13e. The Motor Vehicle Code defines the term "electric bicycle" and references three separate categories of "electric bicycles", depending upon how much assistance is provided to the rider and whether or not the motor kicks in while the operator is peddling. The operator of an electric bicycle is subject to the same requirements as an individual riding a bicycle. Furthermore, when operating on a public highway, the operator would have the same rights and duties as a vehicle driver under the Michigan Vehicle Code. For purposes of the no-fault act, therefore, the operator of an electric bicycle is treated no differently than the operator of a moped.

SO WHERE DOES MIKE GET HIS NO-FAULT BENEFITS?

Using the statutory definition of the term "motor vehicle," as indeed we must, it certainly appears that Mike was occupying a "motor vehicle" (the QLine trolley) at the time he was injured. MCL 500.3114(4)(a) then directs us to the insurer of the "owner" or "registrant" of the "motor vehicle" occupied at the time of the accident.

If the M-1 Rail System owned, say, a number of company vehicles which were provided to its officers and high-ranking management personnel, then the insurers of those motor vehicles would be responsible for providing no-fault benefits to Mike because, once again, the actual "motor vehicle" occupied by Mike (the QLine trolley) may not be required to be registered in the State of Michigan and therefore may not be required to be insured for no-fault benefits. See *Titan Ins Co v American County Ins Co*, 312 Mich App 291, 876 NW2d 853 (2015) (insurer of other commercial vehicles responsible for paying benefits to person injured while occupying one of the owner's uninsured motor vehicles.)

If, however, the M-1 Rail System does not own any "motor vehicles," the next level of priority is with the "insurer of the operator of the motor vehicle occupied." The QLine does have actual drivers. Therefore, the driver's personal no-fault insurer is next in line to pay no-fault benefits to Mike. This undoubtedly will come as a surprise to the QLine operator's motor vehicle insurer, once it is placed on notice of the loss!

Finally, if neither the "owner," "registrant" or "operator" of the "motor vehicle" occupied by Mike (the QLine trolley) have insurance, then Mike will turn to the Michigan Assigned Claims Plan for payment of his benefits.

CONCLUDING REMARKS

The QLine only recently became operational. As the Midtown and Downtown areas of Detroit continue to be developed, it is anticipated that more and more people will utilize the QLine and, as a result, the odds of a QLine trolley being involved in a motor vehicle accident, such as the one described above, will undoubtedly increase. It will be interesting to see if the Legislature takes any steps to alter the status of the QLine. However, as matters now stand, it is the humble opinion of the author that, in fact, the QLine trolley may very well be considered a "motor vehicle" for purposes of the no-fault insurance act, because it is:

- A vehicle operated on a public highway;
- Moved by power other than muscular power;
- Has more than two wheels;
- And does not qualify under any of the statutory exceptions to the term "motor vehicle."

Endnotes

1 The author is aware of only one Court of Appeals decision that even remotely touches on this issue, *Michigan Northern Railway Co v Auto-Owners Ins Co*, 176 Mich App 706, 440 NW2d 108 (1989). That case involved a freight train which derailed as a result of a pile of dirt left on the tracks by a snowplow. That case was dismissed because there was no evidence that the loss even arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle; i.e., the snowplow. It hardly seems logical to equate the movement of a train, which only incidentally crosses a public highway, with that of the QLine which, as noted above, is designed to operate on a public highway, and with a driver who is fully obligated to obey the "rules of the road."

Supreme Court Update

By: Daniel A. Krawiec, *Clark Hill PLC*
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A Plaintiff is Not Permitted to Move For Change of Venue Under MCR 2.223(A)

On January 3, 2018, the Michigan Supreme Court held a plaintiff is not permitted to move for change of venue under MCR 2.223(A) because the court rule expressly states that only a defendant and the court can effect a change in venue and includes no similar provision for a plaintiff. *Dawley v. Hall*, 501 Mich. 166, 168 (2018).

Facts: In July 2013, decedent James Armour II and defendant Rodney W. Hall were involved in a fatal automobile collision in Lake County. The police ticketed Hall for failing to yield at a stop sign, and in August 2014 plaintiff Joanne O. Dawley, Armour's spouse, sued Hall in Wayne County. Hall, who alleged he owned and operated the Barothy Lodge resort in Mason County, moved to transfer venue to Mason County or to Lake County. The motion was granted in March 2015 and the case was transferred to Mason County.

Dawley moved to transfer venue back to Wayne County on January 8, 2016, after claiming discovery proved Hall did not own the resort personally but was merely a member of a limited liability company which owned the resort, Hall Investments, LLC. The trial court denied the motion but the Court of Appeals reversed. The Court of Appeals held that, because Hall did not personally conduct business in Mason County, and because no party had requested transfer to Lake County, venue was proper in Wayne County, where Dawley resided. *Dawley v. Hall*, 319 Mich. App. 490 (2017).

Ruling: The Michigan Supreme Court vacated the Court of Appeals decision and remanded to the Mason Circuit Court. The Court of Appeals' decision was based upon whether Hall's membership in Hall Investments, as well as his management of the lodge, meant he personally "conducted business" under MCL 600.1621(b) in Mason County. The Supreme Court did not address this argument because it found another question was dispositive—whether Dawley, as a plaintiff, could move for change of venue under MCR 2.223(a)—and held she could not. The Supreme Court noted MCR 2.223(A) & (B) permit a court to order a venue change in two circumstances, "on timely motion of a defendant" and on the court's "own initiative," meaning the plaintiff made an erroneous choice of court. Further, MCL 600.1651 contemplates only a defendant moving to transfer venue. Applying the maxim *expression unius est exclusion alterius*, or the express mention in a statute of one thing implies the exclusion of other similar things, the Supreme Court concluded the rule and statute must be read to exclude a plaintiff from its ambit. That this exclusion was a purposeful choice, the Supreme Court continued, is bolstered by the fact that other rules are drafted differently, such as MCR 2.222, which allows a court to transfer "on a motion of a party" on a basis such as convenience of the parties.

Practice Note: This decision does not leave plaintiffs helpless when a court transfers venue. The Supreme Court noted Dawley could have, but did not, file a timely motion for rehearing or reconsideration of the order transferring venue. The Supreme Court also remarked that MCR 2.223(A)(2) gives a trial court broad discretion to transfer venue on its own initiative, even if it is prompted by a party. Finally, although the Supreme Court expressed skepticism that this more general rule would apply in light of the more specific MCR 2.221(B), the Supreme Court left open the possibility that a plaintiff may be able to seek relief from an order transferring venue under MCR 2.612(C)(1)(b) on the basis of newly discovered evidence.

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MDTC Schedule of Events

2018

May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant
September 14	Golf Outing – Mystic Creek
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

Amicus Report

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

Two cases in which the MDTC has participated as amicus remain pending in the Supreme Court after oral argument. This article briefly reiterates the facts of these cases, but focuses on oral argument.

To recap, in *Illiades v Dieffenbacher North America, Inc,*[2] the plaintiff, a press operator, was injured while using a press manufactured by defendant and equipped with a safety device called a "light curtain" that was supposed to halt the machine's operation. 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. On April 7, 2017, the Michigan Supreme Court granted mini oral argument on the application. 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.

Justice Bernstein was particularly concerned about the fact that if the press were shut down to retrieve a part, it would slow production and penalize the worker. He thus opined that use of the safety device called a "light curtain" to halt the press to retrieve the part was reasonably foreseeable. Defense counsel explained that the machine needed to be shut down to retrieve a wayward part. At the end of the automatic cycle, the machine pauses so that the worker can put his hands in to retrieve a finished part. The light curtain was designed as a safety measure to protect the worker in case there was an inadvertent insertion of a body part. In the instant case, this was not a matter of production. The plaintiff was trying to get wayward parts that were off to the side of the machine. He did not wait until the end of the automatic cycle. The previous guard on the machine was changed because workers were bypassing it and it was not safe. The light curtain was intended to protect workers while standing in front of the machine. Workers were not supposed to retrieve fallen parts during the automatic cycle. Workers were instructed to never rely on the light curtain to stop the press. They were trained to never put any body part inside without putting the machine into manual mode first. The instant case did not involve an inadvertent breaking of the light curtain. The plaintiff intentionally climbed in. It was undisputed that nobody had done that before. Everyone testified that this was an entirely unheard of practice. There was no evidence that defendant was aware of it, and it was contrary to the intent of the manufacturer and training by the owner.

Justice Wilder asked whether the Court should use the criminal law to define foreseeability, and whether this was the standard used in the common law before the statute. Counsel for plaintiff stated no, but asserted that the difference between gross negligence (which would not be foreseeable) and negligence (which would be foreseeable) was an apt way to define a difficult concept. The reality of factory work on presses was that there were great productivity demands. While the testimony was that ideally, the machine would be shut down, in practice, the workers would only shut down the machine in emergencies.

Justice McCormack remarked that while workers regularly relied on the light curtain to stop the machine, she did not see any testimony that they would know somebody would climb inside. The plaintiff's counsel responded that the plaintiff did not climb inside. He only reached in. His foot was outside, and he was reaching to get parts being ejected. He opined that it did not matter whether one was reaching partway

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in and getting an arm chopped off or reaching all the way in and injuring his back. Justice McCormack was not so sure. She noted that it might make a difference. She explained that if the information is that people regularly reach an arm in, and the plaintiff's complaint was that his arm was crushed, that would be reasonably foreseeable. She was not saying that the plaintiff's injury here was not reasonably foreseeable, but she wanted to know what evidence there was in the record that made this particular kind of misuse reasonably foreseeable.

Justice Wilder sought clarification regarding how manual mode worked on the machine. Both plaintiff's counsel and defense counsel provided an explanation. Defense counsel again reiterated that there was no need to retrieve wayward parts. The plaintiff worked second shift, and parts were routinely removed at the end of the shift through the side door. When the doors were opened, the machine could not run. When the plaintiff climbed into the machine, he put his entire upper torso inside while a machine part was being made, to retrieve other parts. She asserted that this did not even involve production because it was not a matter of trying to remove a finished part. She also pointed out that it was the light curtain that saved the plaintiff's life. If his foot had not triggered the operation of the light curtain while he was being crushed, the machine would not have stopped and allowed fellow employees to extract plaintiff.

In *Bazzi v Sentinal Ins Co,*[3] the plaintiff's mother set up a shell company, obtained a commercial policy, and listed the plaintiff as a driver on the policy in order to obtain cheaper auto insurance for the plaintiff, who had previously been involved in a serious car accident. Shortly after the policy was issued, the plaintiff was involved in another serious accident and sought no-fault benefits. The insurer sought to rescind on the basis of fraud. On May 17, 2017, the Supreme Court granted leave to appeal.[4] 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 was held January 11, 2018. The Court appeared to be struggling with how to handle the equitable remedy of rescission, and whether rescission should be permitted in face of the no-fault act. A good deal of the argument focused on footnote 17 of *Titan Ins Co v Hyten*,[5] which states in context:

> Should Titan prevail on its assertion of actionable fraud, it may avail itself of a traditional legal or equitable remedy to avoid liability under the insurance policy, notwithstanding that the fraud may have been easily ascertainable. However, as discussed earlier in this opinion, the remedies available to Titan may be limited by statute. *Rohlman,* 442 Mich at 525 n 3; 502 NW2d 310.[17]
>
> . . .
>
> [17]For example, MCL 500.3009(1) provides the policy coverage minimums for all motor vehicle liability insurance policies.

In response to the plaintiff's argument that rescission is an equitable remedy, and that the insurer has the legal remedy to sue the fraudulent insured, Chief Justice Markman noted that in these cases there is more than one innocent party, and the question is which innocent party should be harmed, the insurer who sold the policy or the family member who benefited from the fraudulent representations of another member of his family.

In response to the plaintiff's argument that Bazzi would not have any recourse, whereas the insurer could sue the fraudulent insured, Justice Zahra asked why the third party could not sue the fraudulent insured. In response to the plaintiff's assertion that the third party could not sue because there was no reliance, Justice McCormack noted that there could be reliance by the third party on the representation that there was coverage. Justice Zahra mentioned it seemed like there was more dirt on the third-party member's hands than on the insurance company, and that the insurance company should be able to assume that truthful information is provided in an application for insurance.

Chief Justice Markman asked whether the plaintiff himself could be an owner required to obtain coverage. Justice Wilder followed up with whether this could be a factor that weighs on reliance interest, i.e., if one is driving a vehicle for more than 30 days, how can that person rely on the presumption that the vehicle is insured.

With regard to footnote 17, Justice Zahra posited that the answer is the distinction between PIP and mandatory minimum liability coverage. Sentinel agreed, but asserted that this had nothing to do with contract formation. If coverage is mandatory, one looks to the statute. If coverage is optional, one looks to the policy. But that there is another line of cases pertaining to contract formation and rescission. Chief Justice Markman disagreed, noting that optional benefits may be limited by statute, and that this might be what footnote 17 was referring to. Sentinel's secondary argument was that MCL 500.3131 dealt with residual liability for tort, not PIP. Chief Justice Markman noted that *Titan* may not be as supportive of Sentinel's position. Sentinel asserted that it was. When one walks through the steps of *Titan*, one must reach the result that there is no coverage. Insurance policies are contracts interpreted according to the plain language. When the Legislature dictates, then courts must look at the statute. In *Titan*, the statutory provision applied only to Chapter 5 (not no-fault). So then one must look to see if there is another legislative dictate that abrogates common-law defenses. When the Legislature wanted to make a policy incontestable, it did so. It did not do so here.

Justice Bernstein asked what happens to people in his position (blind, no policy of their own, relying on others to give them rides). What are their responsibilities. Sentinel responded the MACF. Justice Bernstein stated that there is only one year to bring a claim. Sentinel disagreed. Under MCL 500.3174, the claimant shall notify the MACF within the time for filing an action. The claimant then has 30 days for filing suit from either the date that the claim is assigned to an insurer or from the last date the claimant could have filed suit against an identifiable insurer, whichever is later. So the claimant has one year from the last payment or denial to file suit. Justice Zahra noted that a claimant would have notice of the need to place the MACF on notice because bills are not being paid. There was some discussion about who has responsibility to notify MACF.

Justice Bernstein then asked if this incentivizes insurers to be dilatory in investigating fraud. Sentinel asserted no under *Titan*. Justice Bernstein posited that an insurer should have to determine at the outset whether there is fraud, and that insurers are getting a windfall by being able to accept premiums and not rescind until there is a claim. Sentinel asserted that there is some investigation at the outset, but that *Titan* recognized that the obligation to investigate cannot be unending. Justice Zahra asked whether Sentinel was taking the position that if an insurer had actual knowledge of fraud the insurer could still rescind. Sentinel of course said no.

Justice Viviano opined that Sentinel was asserting inconsistent positions. On the one hand, Sentinel was asserting that the statute does not abrogate the common law, but on the other hand, Sentinel was asserting that balancing of the equities did not apply because of statute.

Justice Wilder asked whether, because rescission is a matter of equity, should the balancing of equities be decided by a factfinder rather than as a matter of law, and did it matter that Sentinel offered in escrow all premiums. Someone noted that equities would be decided by a court of equity without a jury. Sentinel asserted that this would result in inconsistent decisions.

Sentinel asserted that upholding the Court of Appeals decision would drastically reduce the incentive to defraud. Justice McCormack asked why it mattered, i.e., the insurer has to participate in the MACF, so the insurer is going to get hit either way. Sentinel argued that the MACF provisions have cost containment provisions not available to insurers generally.

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.

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

3 315 Mich App 763; 891 NW2d 13 (2016).

4 Supreme Court Docket No. 154442.

5 *Titan Ins Co v Hyten*, 491 Mich 547, 572 n 17; 817 NW2d 562 (2012).

Meet the MDTC Leaders

Angela Emmerling Shapiro
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Michigan State University College of Law – 18 years of experience

Q: *Why did you become involved in MDTC?*
A: Phil Korovesis (past president) introduced me to the organization.

Q: *What inspired you to become an MDTC Leader?*
A: The opportunity to work with people from across the state who share a vision for achieving and maintaining excellence in our profession.

Q: *How would you describe your leadership style?*
A: Collaborative.

Q: *How has your MDTC involvement enhanced your personal/professional life?*
A: I've been introduced to new people, new ideas, and new places; my first visit to Crystal Mountain was for an MDTC conference and it is now one of my favorite destinations in Michigan. Also, I'm always in the know about developing issues of interest to the defense bar thanks to the Quarterly.

Q: *Why would you encourage other MDTC members to seek leadership roles?*
A: We are always in need of new points-of-view and new energy to make sure the organization continues to grow along with its membership.

Q: *Are you involved in other organizations or activities?*
A: Interests include all things related to electronic discovery (I'm not kidding – I love E-Discovery); trying to stay one step ahead of a three-year-old; community theater; and learning about the "forgotten history" of the Toledo and Detroit areas as told by remaining architecture.

I moved to the Toledo area three years ago for family and now commute to Detroit (and Ann Arbor) to keep working at Butzel Long. I've been with the firm for more than 15 years and have loved (almost) every minute of it.

Q: *If you weren't a legal professional, what type of career would you choose?*
A: Librarian in a small town.

Q: *What advice do you have to new MDTC members? To new attorneys?*
A: Figure out what you love about practicing law. For me, I love solving litigation challenges and handling complex electronic discovery projects. Because I love what I do it is never – well, almost never – a chore. It sounds trite but is actually very important: find what you love and do it.

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