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EDITOR'S NOTES

The article in the last issue about the *Fultz* and *Banaszak* cases sparked some interest and **Sean Cleland**, of *Crimando & Cleland, PC*, offers a different view of how the cases fit into the duty analysis. The author of the original article then provides a reply. Other views are welcome and we would be delighted to provide a forum for continuing debate and discussion.

Now that MDTC has revamped its structure of sections, we have begun to get articles from the various sections. **David Couch**, of *Garan Lucow Miller, P.C.*, is the Chair of **MDTC's General Liability Section**, and has provided an article on the use of social networking sites as tools of discovery. **Thaddeus Morgan**, of *Fraser, Trebilcock, Davis & Dunlap, P.C.*, is Chair of **MDTC's Law Practice Management Section**, and has written an article on the use of networking website as a marketing tool for attorneys.

We continue on the vein of things electronic with an article by **Ronald Wernette** of *Bowman and Brooke LLP* on the duty to preserve electronically stored evidence.

Jamie Scripps, of *Sondee, Racine & Doren*, examines the federal Class Action Fairness Act of 2005.

We also continue or series for young lawyers, with an article by **Scott Holmes** of *Foley & Mansfield* on the use of discovery to build the case.

We also have two new **Practice Tips**. One is on the distinction between the worker compensation exclusive remedy defense as an affirmative defense and as a defense to subject matter jurisdiction. The other concerns the importance of including cell phone records in discovery, where there has been a accident.

As always, we are grateful to the broad range of authors and contributors who devote their time and energy to writing and sending articles.

Be sure to check the **Schedule of Events** to keep up to date with what MDTC and DRI are up to.

Opinion: We invite other members to send us personal opinions on topics of interest to our readers. A length of about 1000 to 2000 words would be ideal.

Articles: All articles published in the *Quarterly* reflect the views of the individual authors. We always welcome articles on any topic that will be of interest to our members in their practices. Although we are an association of lawyers who primarily practice on the defense side, the *Quarterly* always tries to emphasize analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Allison Reuter (alliereuter@comcast.net).

Hal O. Carroll, Editor • HCarroll@VGpcLAW.com

PRESIDENT'S CORNER

By: Robert H S. Schaffer, President, MDTC
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In my first President's Corner, I announced my intention to celebrate MDTC's Past Presidents for the duration of my year in office. Continuing with that purpose, I want to describe to our membership to the hard work and dedication of Past President (and current leader) James E. Lozier of Dickinson Wright. Jim Lozier was President of MDTC in 1995–1996. He served in each of the officer positions before his election as President of MDTC. Defense lawyering, and defense bar leadership, through MDTC and the DRI, have continued to be passions of his ever since.

First, the details about Jim Lozier. He is a graduate of Boston College, where he played football. To his credit, and as a testament to his competitive nature, some of his teammates went on to future NFL careers. This experience may have laid the foundation for Jim's drive and commitment to "playing" at a high level. In 1975 Lozier received his law degree from Fordham University. He is married to Renee Lozier is the father of Jim and Andy Lozier; and grandfather of Grace. Renee is clearly an angel. She is a steadfast supporter of Jim. I am confident Jim would not have achieved his laundry list of accomplishments and achievements without her.

Jim Lozier practices in the fields of commercial, personal injury, insurance coverage, products liability, employment, financial institution, environmental, school, gaming, and transportation litigation. His is a consummate professional when it comes to litigation.

Jim Lozier practices in the fields of commercial, personal injury, insurance coverage, products liability, employment, financial institution, environmental, school, gaming, and transportation litigation. His is a consummate professional when it comes to litigation. During the course of his 32 years of defending, litigating, and trying product liability, railroad, employment, environmental, personal injury, financial institution, and officers and directors liability lawsuits he has earned his reputation as a successful litigator. Over the years, a significant portion of his practice has involved general litigation and representing corporations, professionals, and others in contract lawsuits, business tort lawsuits, professional and business breakups, domestic relations disputes, and shareholder/partner disputes. It is this collection of experiences that gives him real perspective into the defense lawyer's role and practice. These experiences also give Jim the necessary background to contribute as a leader of the MDTC and the DRI.

Those who have been active with MDTC over the years personally know how important he has been to our organization since its inception.

After concluding in the executive leadership positions with MDTC, Jim Lozier assumed substantial responsibilities with the DRI, all the while maintaining a close connection with MDTC. He served as DRI's State Representative for Michigan on two occasions for 6 years (1996–1997 & 1999–2005). He earned the DRI Exceptional Performance Citation in 1996 and the DRI National Outstanding State Representative Award in 2003. Lozier has been a DRI Regional Board Member since 2005 and has developed a lengthy list of citations for this and other related roles.

I have been planning to highlight Jim Lozier's accomplishments, contributions, and achievements for some time as a Past President. Those who have been active with MDTC over the years personally know how important he has been to our organization since its inception. Most recently, I learned that Jim Lozier announced his candidacy for the Second Vice President of the DRI. I hope that by sharing this information with MDTC members, you will understand why I have supported his candidacy. A formal letter of support for Lozier was sent to the DRI election committee on behalf of MDTC in August. My words are reprinted on the next page:

Continued on page 6

Dear DRI Leadership,

- **DEDICATED TO BEING A CIVIL LAWYER FOR THE DEFENSE.**
- **COMMITTED TO THE MISSION OF THE DRI.**
- **PASSIONATE FOR ASSUMING LEADERSHIP RESPONSIBILITIES.**
- **GROUNDED BY "DO THE RIGHT THING PRINCIPLES."**

If limited to only four comments in support of James E. Lozier's Declaration of Candidacy, I would stand by the above statements. In fact, they represent the strongest attributes of leadership and perfectly describe why Jim Lozier ("Lozier") should be elected as Second Vice President of the DRI.

• Dedicated to being a Civil Lawyer "For the Defense".

I know Lozier's pedigree based upon (1) his service to the Michigan Defense Trial Counsel (MDTC) as a Past President, and (2) as an outstanding representative of the DRI committed to building relationships with MDTC as an SLDO. Lozier has been a leader of the defense bar, from my perspective since the early 1990's. After serving in each of the preliminary executive officer positions for MDTC (Secretary 92-93; Treasurer 93-94; Vice President 95-95), he was a prolific and dedicated President of the organization thereafter. Many of the polices, procedures and events MDTC enjoys today were carefully crafted or improved during Lozier's leadership years. More over, any issue(s) involving debate regarding ethics, or the standing of defense lawyers in Michigan, were resolved with Lozier's hallmarks of candid transparent discussion followed by decision while he led the organization.

As Lozier departed his role as MDTC President, I was becoming involved in the organization. While most Past Presidents disappear, Lozier remained an active participant and served as a solid advisor. At all times, Lozier's positions or recommendations were guided by this professional status as a lawyer "for the defense". I can honestly say I remember the first time I met Lozier, over a decade ago. I was young and totally green to the defense lawyer's mission. Lozier acknowledged me, was a careful listener, and imparted within me a positive image of a lawyer "for the defense". To me, it is clear Lozier "gets it". In his Declaration of Candidacy (page 5) he wrote:

> "No longer is it sufficient for DRI to be the "Voice of the Defense" with the ongoing accompanying connotation that it is a Big Insurance Industry Defense Attorney Organization." ***Rather, it has to generate a reputation for being the "Voice of Our Civil System of Justice Trial Attorneys" that would include DRI's present existing core membership but also serve as an invitation for inclusion of all other civil attorneys involved in a variety of litigation and regulatory hearing specialties serving businesses and individuals other than plaintiff personal injury attorneys.*** To also ensure that DRI's membership is well aware of the evolutionary goals, serious consideration should be given to publishing the new Strategic Plan for all members' review along with an announcement of the next evolution and the benefits it will have to existing members and DRI."

Lozier understands what it means to be "for the defense" in this new era of litigation. He will be a positive face for all DRI members and expand the membership base.

• Committed to the Mission of the DRI.

As a long term Board Member of the MDTC, I am personal witness to Lozier's consistent personal appearances at most, if not all of the SLDO's Board meetings, planning sessions, conferences and social gatherings. In each instance, Lozier communicated, with depth of knowledge, and passion the then present agenda items and initiatives of the DRI. Examples included discussion of upcoming seminars, promotion of the DRI Annual Meeting and the NFJE.

Lozier personally planned and developed Regional SLDO meetings including significant leadership attendance in three different states where little or no involvement had occurred in the past. At all times, Lozier successfully communicated and advanced the mission of the DRI.

• Passion for Assuming Leadership Responsibility.

Anyone who knows Lozier understand he assumes responsibility fully expecting to be successful based upon his 100% - plus effort. Lozier has the organizational skills and personality to see projects from idea to completion. Along the way, he is a motivator of people. He is not afraid to rebuild infrastructure that may be worn out or tired as he renews it. An example is, again, Lozier's tireless effort to take the DRI Central Region Meeting from an under attended social outing to a fully attended conference with an incredibly useful information exchange. But for Lozier's personal leadership in that regard, the recent success of the DRI Central Region Meeting(s) would not have occurred.

• Grounded by "Do the Right Thing" Principles.

Lozier is blessed with good judgment. He is ethical by nature. Accordingly, most who know him like and trust him. Those who do not (like or trust Lozier), are probably uncomfortable with the openness and transparency by which he operates. I am guessing he sleeps well at night because he always gives his best effort and is honest. I can say that as a leader of the DRI, Lozier has and will continue to lead by positive example.

Simply, there is no more qualified individual for Second Vice President of DRI than James E. Lozier. The MDTC, and myself personally, support his election. I would be delighted to discuss this strong endorsement of Lozier at any time.

Very truly yours, **RHSS**, Robert H S. Schaffer, President, MDTC

PRESIDENT'S CORNER

Continued from page 5

It gives me great pleasure to continue celebrating this "year of the MDTC Past President" by supporting my friend James E. Lozier as he seeks election to DRI leadership rotation and wish him luck while at the DRI Annual Meeting in October in New Orleans.

Finally, I want to mention that we have reorganized MDTC's sections and redesigned their functions and responsibilities. One of those is providing articles in their areas, and two of our sections have already come forth with articles. Thad Morgan, Chair of the Law Practice Management Section has written an article about attorneys' use of *LinkedIn* to market themselves, and David Couch Chair of the General Liability Section has written an article on using a litigant's social networking sites, such as *Facebook*, for discovery. Thank you Thad and David and we look forward to this type of participation from each of our great sections.

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Editor's Note: In this article, the author responds to the analysis in an article that appeared in the previous issue of the Quarterly.

THE BRAVE NEW WORLD OF TORT DUTIES: FAREWELL TO THE AGE OF FORSEEABILITY

By: Sean S. Cleland
Crimando & Cleland, PC

Executive Summary

The *Fultz* and *Banaszak* decisions should not be read as creating a contract exception to tort duties but as an expression of an analysis of tort duties based on the relationship between the parties. Under a relationship centered analysis, the court determines, as a matter of public policy, whether the relationship between the parties is such that a duty should be imposed, weighing the societal benefits versus the societal costs. If the relationship is sufficient, then the court will consider other factors, including the foreseeability of harm, the burden on the defendant and the nature of the risk presented. *Fultz* and *Banaszak* do not in fact create a form of contract immunity, but merely express the conclusion that in those cases there was not a sufficient relationship to impose a duty on a contractor in favor of the person injured by the contractor's negligence.

An article in the previous issue of this publication, "Fultz, Banaszak and Contract Immunity"[1] describes the cases of *Fultz v Union Commerce Associates*[2] and *Banaszak v Northwest Airlines*[3] as creating contract immunity that permits a contract to cancel the tort duties of one of the contracting parties to a third person. The article also suggests that this contractual immunity is the clumsy result of judicial "phrase mining" by the Supreme Court, in which the Supreme Court haphazardly plucked the phrase "separate and distinct" out of cases having nothing to do with tort liability. Neither claim is accurate.

The "separate and distinct" analysis has been used by the Supreme Court in determining whether a tort action can arise out of a contractual relationship since the 1950s. In *Hart v Ludwig*[4], which was cited by the Court in *Fultz,* the plaintiff contracted with the defendant to maintain an orchard owned by plaintiffs. Defendant abruptly stopped work on the contract, causing damages to the plaintiff. In determining whether the plaintiff could sue the defendant in tort, the Supreme Court complained of the elusive distinction between misfeasance and nonfeasance. It ultimately decided that an alternative framework of whether there is "a breach of duty distinct from contract" was best:

> But the significant similarity relates not to the slippery distinction between action and non-action but to the fundamental concept of duty: in each a situation of peril has been created, with respect to which a tort action would lie without having recourse to the contract itself.[5]

Although the Supreme Court stated that a contractor has a duty "to perform his promise in a careful and skillful manner without risk of harm to others," it ultimately found that defendant owed no such duty to the plaintiff. The defendant did not create "a situation of peril" but simply failed to complete his contractual duties.[6] Hence, the "separate and distinct" detour around the misfeasance and nonfeasance rules is based on solid common law grounds.

Back To the Future

Fifty some years after the decision in *Hart*, the Supreme Court once again examined the issue of when a tort duty exists in its response to the issue below from *In Re Certified Question from the Fourteenth District Court of Appeals of Texas*:[7]

> Whether, under Michigan law, Ford, as owner of the property on which asbestos-containing products were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court, to protect her from exposure to any asbestos

The court made it abundantly clear that forseeability of harm is now a secondary and less important factor in the analysis of whether a duty of care exists.

> fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor.

The court answered "no" on the basis that Ford owed the plaintiff no duty. In doing so, the court soundly rejected the contention (championed by dissenting Justice Cavanaugh) that, under *Clark v Dalman*,[8] duty is principally concerned with whether harm is foreseeable: "Clark does not stand for the proposition that everybody owes a duty to everyone else."[9] Rather, the court made it abundantly clear that forseeability of harm is now a secondary and less important factor in the analysis of whether a duty of care exists. The court said: "The most important factor to be considered is the relationship between the parties. A duty arises out of the existence of a relationship between the parties of such a character that social policy justifies its imposition."[10]

The court went onto explain that in some cases foreseeability is not even a factor to consider, depending on the court's determination of the "strength" of the relationship of the parties. Where there is a limited relationship, the court might not consider foreseeability at all in determining when a duty exists and will impose only a limited duty. Where there is no relationship, the court will not impose a duty.[11] The Supreme Court provides no real guidance in determining how the courts should measure the strength of a relationship but it is clear that public policy plays a role in the analysis.

Regardless, the court must find a sufficient relationship before it can go on to analyze secondary factors, which include "foreseeability of harm, the burden on the defendant and the nature of the risk presented." If these factors add up to a finding that "the social benefits of imposing that duty outweigh the social costs of imposing a duty," then a duty will be found to exist.[12]

The court found the relationship between Ford and the defendant "highly tenuous":

> In the instant case, the relationship between Miller and defendant was highly tenuous-defendant hired an independent contractor who hired Roland who lived in a house with Miller, his stepdaughter, who sometimes washed his clothes. Miller had never been on or near defendant's property and had no further relationship with defendant. Therefore, the "relationship between the parties" prong of the duty test, which is the most important prong in this state, strongly suggests that no duty should be imposed.[13]

The Supreme Court provides no real guidance in determining how the courts should measure the strength of a relationship but it is clear that public policy plays a role in the analysis.

Fultz and Banaszak are not erasing a tort duty because a contract is at issue. Rather, they hold that the relationship between contractors and third parties is too tenuous as a matter of law to justify the imposition of a tort duty unless the defendant contractor does something distinguishable from working on the contract that would justify imposing a duty.

It is within the framework of duty set forth in *In Re Certified Question from the Fourteenth District Court of Appeals of Texas* that we must analyze the *Fultz* and *Banaszak* opinions. The analysis of whether a tort duty exists is relationship-centric — it depends foremost on the relationship between the parties. In the context of a contractor and a third party, it seems obvious enough that such a relationship is often extremely tenuous and often based on chance encounters. Therefore, under the rubric of *In Re Certified Question from the Fourteenth District Court of Appeals of Texas*, this relationship "strongly suggests that no duty should be imposed." Therefore, *Fultz* and *Banaszak* are not erasing a tort duty because a contract is at issue. Rather, they hold that the relationship between contractors and third parties is too tenuous as a matter of law to justify the imposition of a tort duty *unless* the defendant contractor does something distinguishable from working on the contract that would justify imposing a duty. If a contractor fails to perform a contractual duty (by

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either total nonperformance or partial performance) or performs on it but in a negligent manner, no tort duty will arise. Working on a contract simply does not create a sufficient relationship with a third person to impose liability as a matter of law.

The Symptoms of Relation Based Tort Duty: Future Issues and a Suggested Approach

Symptoms are best treated — and predicted — when their cause is known. Likewise, the legal issues raised by *Fultz* and *Banaszak* are best anticipated and handled when the rationale for the holdings in these cases is made plain from the onset. The rationale for the holdings in *Fultz* and *Banaszak* is the relationship-centric analysis of the Michigan Supreme Court. The results of these cases cannot be explained as exceptions to otherwise applicable forseeability based tort rules of *Clark* and *Moning*, nor the clumsy result of mining legal phrases. Such thinking is largely the culprit in the somewhat varying and often mechanistic applications of *Fultz* in the Michigan Court of Appeals. Recognition of this new approach by the Michigan Supreme Court requires a change in approach when dealing with these issues.

Under the relationship-centric concept of tort duty, a contractor working on a contract, by itself, does not create a sufficient relationship with a third person to impose a tort duty on the contractor. Whether one is working on a contract is a fact issue. The clearer it is that the contractor was not working on the contract (a frolic) or doing something directly and clearly contrary to the language of the contract, the easier it will be to steer clear of the "no duty" conclusion. Likewise, the clearer it is that the harm was caused by activities or conditions created in the course of the work the easier it will be to secure the no tort duty conclusion.

Fultz does not hold that a tort duty cannot be found whenever the words contract and duty are mentioned because, as In re Certified Question states, each case involves a policy decision for the court.

Yet is *Fultz* such a mechanistic rule that requires a finding of no tort duty in every case in which the injury is the result of working on the contract? I suggest that the answer is no.

Contracts are not always as simple as snow plowing, sidewalk installation, repair of escalators or the like. Often contracts are left vague in their terms, involve long term relationships and leave the details to be sorted out over time. *Irrer v Milacronx*[14] is one such case. Milacron, acting as a "chemical manager" at several General Motors Plants, was being sued for both failing to prevent conditions and creating conditions that were alleged to have caused plaintiffs' injuries. The work was performed pursuant to purchase order contracts between the parties, but left the day-to-day obligations of Milacron vague. As the complaint in *Irrer* was filed before *Fultz*, my initial defense strategy was to establish that General Motors, not Milacron, was responsible for preventing and creating the harmful conditions in question and that Milacron had no contractual duty — and therefore no tort duty owing to the plaintiffs — to prevent the harmful conditions from occurring.

The results of these cases cannot be explained as exceptions to otherwise applicable forseeability based tort rules of Clark and Moning, nor the clumsy result of mining legal phrases.

Then *Fultz* came along. The difficult decision then became whether it was better to argue that Milacron did in fact have such contract responsibilities in order to utilize the "separate and distinct" defense of *Fultz*. Wavering on whether to admit what you had spent so much time denying was difficult, especially on the basis of one fairly new Supreme Court decision, which we are still grappling with today. The ultimate maneuver was to present the issue as an "either or" proposition: Milacron is not contractually responsible for preventing these conditions under the contract as the plaintiff alleges, but if the court believes we are, then Milacron has no duty to these plaintiffs under *Fultz*.

One method for a plaintiff to avoid this "either or" situation is to distinguish the case from those in *Fultz* and *Banaszak*. At issue in *Fultz* was whether a tort duty should be imposed on a snow plow contractor whose only relationship with the plaintiff is based on chance and consequences. Different relationships, however, require renewed analysis. *Fultz* does not hold that a tort duty cannot be found whenever the words contract and duty are mentioned because, as In re Certified Question states, each case involves a policy decision for the court.

> Thus, the ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the

> social costs of imposing a duty. The inquiry involves considering, *among any other relevant considerations*, " 'the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.' "[15]

Comparing the strength of the relationships between *Fultz* and *Irrer*, a different conclusion might be reached. *Irrer* involved a scope of work covering several years, done on a daily basis, with daily interaction with the plaintiffs, in which the contractee and the plaintiffs arguably looked to the contractee (Milacron) for guidance and expertise. Hence one might successfully argue that the social costs of imposing a duty is outweighed by the social benefit. The Michigan Supreme Court has imposed a limited duty in analogous "expertise" cases, finding that independent medical examiners have a duty "to exercise care consistent with his professional training and expertise so as not to cause physical harm by negligently conducting the examination".[16]

Regardless of the tort liability of the contractor, it should not be forgotten that the creation of a contract does not eliminate tort liability of contractees. Although "*Fultz, Banaszak* and Contract Immunity" suggests that contracts create such immunity, the suggestion that a contract creates tort immunity fails to take into consideration that the contractee has a different relationship with the plaintiff than does the contractor. The contractee's tort duty, whether it is based on his role as property owner or otherwise, exists and must also be considered. For example, the landowner in *Fultz* continued to have a duty to invitees (a fact mentioned by the majority in *Fultz*). Other avenues of liability against contractees include the retained control doctrine and inherently dangerous activities doctrines.

Nonetheless, it is not always possible to seek recovery against the contractee. For example, in *Irrer v Milacron, Inc*. the plaintiffs claimed to be injured due to the actions of a contractor hired by their employer. When the contractor was found to have no tort duty pursuant to *Fultz*, they had no cause of action against their employer due to the workers' compensation exclusion. Considering the widespread and increasing use of contractors in workplaces, this is not a minor concern. This is just another compelling policy justification for imposing a tort duty on a contractor in cases such as *Irrer*.

Another potential problem, mentioned in the *Fultz* dissent by Justice Marilyn Kelly, is that the contractors will likely be named as non-parties at fault in such cases against contractees and, therefore, the recovery against contractees would be diminished or eliminated. One way to avoid this result would be to hold the contractee directly responsible for the actions of the contractor. In the context of cases involving the liability of a property owner, courts have held that property owners have a non-delegable duty to invitees. In *Misiulis v Milbrand Maintenance Corp*,[17] a landlord who undertook to make repairs to the property was found to have a non-delegable duty to foreseeable business invitees on the premises during such repair to protect them from injury from negligence in making the repairs and was held vicariously liable for the negligent acts of the contractor.

Conclusion

The "separate and distinct" concept is firmly rooted in Michigan common law. Today, it has been joined by the Michigan Supreme Court's relationship-centric analysis of tort duty. The results of this union are the decisions of *Fultz* and *Banaszak*. The story of *Fultz* and *Banaszak* is not how contracts affect tort duties. Rather, it is about the whether the relationship between the contractor and the plaintiff justifies imposing a tort duty. Recognizing this important distinction is crucial to successful representation of clients in the post-*Fultz* relationship-centric era.

Sean S. Cleland is a partner in Crimando & Cleland P.C. His practice specialties include product liability litigation, toxic torts, personal injury litigation, litigation management and family law. His email address is SSC@crimandolaw.com.

Endnotes

1. Carroll, Hal O., "Fultz, Banaszak and Contract Immunity," *Michigan Defense Quarterly,* Vol 25, No. 1, July 2008.
2. 470 Mich 460 (2004).
3. 477 Mich 895 (2006).
4. 347 Mich 559 (1956).
5. *Hart* at 565.
6. *Hart* at 565.
7. 479 Mich 498; 740 NW2d 206 (2007).
8. 379 Mich 251 (1967).
9. *In Re Certified Question from the Fourteenth District Court of Appeals of Texas* at 509, FN 10.
10. *In Re Certified Question*, citing *Dyer v Trachtman*, 470 Mich 45 at 49 (2004), quoting Prosser & Keeton , Torts (5th ed.) Sec. 56 p. 374.
11. *In Re Certified Question* at 505-509.
12. *In Re Certified Question* at *515.*
13. *In Re Certified Question* at *515.*
14. 2007 WL677902.
15. *In Re Certified Question* at 504-505, emphasis added.
16. *Dyer v Trachtman*, 470 Mich. 45 (2004).
17. 52 Mich App 494 (1974).

Editor's Note: This article was written as a reply to points raised in the preceding article

FULTZ, BANASZAK AND CONTRACT IMMUNITY (REVISITED)

By: Hal O. Carroll

Executive Summary

The decision in *In Re Certified Question* is not a sufficient explanation for the decisions in *Fultz v Union-Commerce Associates* and *Banaszak v Northwest Airlines*. First, *Certified Question* never refers to either opinion in support of its distinction between relationship and foreseeability as two separate and independent prerequisites to the finding of a tort duty, each if which is necessary.

Second, in treating them as independent prerequisites, *Certified Question* conflicts with earlier authority, such a *Moning v Alfono*, which treated foreseeability of injury a the basis for finding a tort relationship.

Third, if relationship is an independent prerequisite, *Certified Question* never defines this critical term, so it is not possible to conclude with certainty how it might apply in the *Fultz-Banaszak* situation.

Finally, whereas *Certified Question* was concerned with whether a tort duty can come into existence, the analysis in *Fultz* and *Banaszak* was directed toward identifying situations in which a tort duty that would otherwise exist is extinguished because an identical duty is also owed by contract.

Fultz, Banaszak and contract immunity — recapitulation

The Supreme Court's decision in *Fultz v Union-Commerce Associates*[1] has been a source of some difficulty an confusion in the trial courts and the Court of Appeals,[2] as the courts have tried to apply the principle that where a contract exists, there cannot be a tort recovery unless the tort duty is "separate and distinct" from the contract duty.

In an article in the previous issue of this publication,[3] the author criticized the reasoning in Fultz, especially in the way that reasoning was, in the view of the author, completed in *Banaszak v Northwest Airlines*.[4]

The criticism was both with the method used to reach the result and with the result itself. The thesis of the article, as it related to method, was that the *Fultz* decision incorrectly relied on a case involving the procedural doctrine of "primary jurisdiction,"[5] which by its nature can apply only in a very limited set of fact situations (a customer's dispute with a company in a regulated industry), and misapplied that procedural principle as a rule of substantive law.

The article criticized the result as well. The substantive criticism was that *Fultz*, especially when combined with *Banaszak's* application, resulted in a situation where a tort duty that would otherwise exist under normal tort principles would cease to exist if a contract were found to impose the same duty. To oversimplify a bit, the criticism is that it is illogical to suggest that if A owes a tort duty to C under normal tort principles, that tort duty is canceled because A also owes a contract duty to B. If the tort rules would impose a duty based on the foreseeability of injury, the existence of that duty should not defend on the coincidental existence of a similar contract duty.

The Response Relationship and Foreseeability

Mr. Cleland, in his article in this issue, offers a critique of that analysis and the critique focuses on the core of the analysis, *i.e.*, the premise that tort duty is a function of foreseeability. The critique is a fundamental one, because it deals with the nature of the theories that underlie the concept of "duty" in tort law. Drawing on the case of *In Re Certified Question from the Fourteenth District Court of Appeals of Texas*,[6] Mr. Cleland argues that the more fundamental requirement is that there be a relationship between the parties, and that this explains the result in *Fultz*, rather than an improper concatenation of tort and contract duties.

Mr. Cleland's analysis is well-expressed and well thought out, and expresses a valuable insight. Although (in the opinion of this writer) it does not provide a definitive or satisfying answer, that is not because of any deficiency in the analysis in the article, but instead because of a deficiency in the reasoning of the case that it relies on (*Certified Question*).

In *Certified Question*, the issue was whether Ford Motor Company, "as

property owner," owed a duty to someone who was "never on or near the premises," with respect to asbestos used on the property, a duty to protect her from asbestos fibers that were "carried home on the clothing of a member of [plaintiff's] household who was working on that property." The Supreme Court held that no such duty was owed.

Relationship and Foreseeability — Supreme Court's View

In the course of an extensive analysis leading up to that result, the court discussed at length the premises on which duty was based. The Supreme Court provided an extensive analysis of the concepts of "relationship" and of "foreseeability." Unfortunately, for all its length, the analysis is incomplete and therefore ultimately not helpful.

The court's analysis was concerned with when a tort duty arises, and the majority held that there were two independent prerequisites, both of which are necessary antecedents to finding a duty. These two prerequisites are "relationship" and "foreseeability."

Of these two, the court said, the more important one is relationship: "The most important factor to be considered is the relationship of the parties."[7] If there is no "relationship" there can never be a duty: "when there is no relationship between the parties, no duty can be imposed."[8]

Why relationship is the "most important" of the factors is not entirely clear, because both relationship and foreseeability are necessary preconditions to the existence of a duty.

> On the other hand, even when there is a relationship between the parties, a legal duty does not necessarily exist. . . . When the harm is not foreseeable, no duty can be imposed on the defendant.[9]

The Supreme Court provided an extensive analysis of the concepts of "relationship" and of "foreseeability." Unfortunately, for all its length, the analysis is incomplete and therefore ultimately not helpful.

The opinion summarized its ruling and stated that relationship and foreseeability are independent and unrelated concepts, each is a necessary condition for a duty, and neither is a sufficient condition.

> Where there is no relationship between the parties, no duty can be imposed, but where there is a relationship, the other factors must be considered to determine whether a duty should be imposed. Likewise, where the harm is not foreseeable, no duty can be imposed, but where the harm is foreseeable, other factors must be considered to determine whether a duty should be imposed. Before a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable.[10]

The opinion summarized its ruling and stated that relationship and foreseeability are independent and unrelated concepts, each is a necessary condition for a duty, and neither is a sufficient condition.

Compare this formulation to the one the Supreme Court provided in *Moning v Alfono*:[11]

> Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. . . . [T]he question whether there is the requisite relationship, giving rise to a duty . . . depend[s] on whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.[12]

Moning expressly sees the relationship as dependent on foreseeability, whereas *Certified Question* treats them as independent. *Moning* and *Certified Question* cannot be reconciled. If *Certified Question* is correct, then relationship and foreseeability must be distinct. It "relationship" can be inferred from foreseeability alone, then, as a matter of simple logic, (1) relationship and foreseeability are not distinct, and (2) foreseeability, not relationship, is the test.

But if "relationship" really is primary, then it is crucial to know exactly what the court means by the term. Despite the opinion's long disquisition on the importance of "relationship," it says surprisingly little about what this critical term actually means. It provides a few examples. If relationship is an independent and necessary predicate, then it is necessary to define the factors that will give rise to a relationship sufficient to create a duty. *Moning* answers the question (foreseeability) but if *Certified Question* rejects that answer, it must provide a new one.

Certified Question gives examples, but no answer. Relationships suffi-

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But if "relationship" really is primary, then it is crucial to know exactly what the court means by the term. Despite the opinion's long disquisition on the importance of "relationship," it says surprisingly little about what this critical term actually means.

cient to support a duty (if foreseeability is also present) include: attorney client relationship,[13] physician-patient relationship,[14] an (undefined) "special relationship" such as will create a duty to protect from harm by a third person.[15] This is too small a sample to permit any reasonable inferences.

Nor does it help that the court pus the whole question into the broader context of a determination of "whether the social benefits of imposing a duty outweigh the social costs of imposing a duty."[16]

It is easy enough to add to the list, but not to generalize upon it. Parent-child, teacher-student, counselor-client, and accountant-client come easily to mind, but exactly what is there beyond similar relationships?

Note that all of these are relationships that have an independent existence apart from tort. If the implication of *Certified Question* is that there is no longer a general tort duty, that is, one that arises from foreseeability, then tort law is changed even more dramatically that it was changed by *Fultz* and *Banaszak*.

Consider a simple example. A tourist from Sault Ste. Marie, Ontario, bound for Kentucky, is struck by a car driven by an inebriated tourist from Ohio heading up to Mackinac Island. Is there a duty owed in this case? We can assume that an accident is a sufficiently foreseeable result of impaired driving to meet that test. But what exactly is the "relationship" between these two persons, neither of whom has met the other or ever heard of the other before the collision? Clearly there is none, unless we can, as *Moning* said, infer a relationship from foreseeability. But *Certified Question*, though not clear about what "relationship" means, is extremely clear on its fundamental importance.

Defense counsel should make use of *Certified Question* by drawing the same distinction the Supreme Court did between foreseeability and relationship, and then insist that it is the burden of the plaintiff to establish a duty by showing both factors exist independent of each other.

The criticism to be made of *Certified Question* is not that relationship is unimportant. Obviously it plays a part. One of the cases cited in *Certified Question* is *Dyer v Trachtman*,[17] in which the court held that the duty of a physician performing an IME was different from a treating physician. The nature of the relationship properly plays a part in limiting the duty in that situation. Likewise, the non-existence of an attorney-client relationship prevented creation of a duty to the opposite party in a parallel case.[18]

In *Certified Question*, the Supreme Court began a proper analysis, but is to be criticized for not finishing it.

If the implication of Certified Question is that there is no longer a general tort duty, that is, one that arises from foreseeability, then tort law is changed even more dramatically that it was changed by Fultz and Banaszak.

In Certified Question, the Supreme Court began a proper analysis, but is to be criticized for not finishing it.

Certified Question and *Fultz* Relationship and Contract Immunity

What does all of this have to do with the proposition that *Certified Question* explains *Fultz* and *Banaszak*?

First, it should be noted that *Certified Question* never referred to either *Fultz* or *Banaszak*, so there is no indication that the Supreme Court considered them to be linked. If either *Fultz* or *Banaszak* was a specific application of the general rule expressed in *Certified Question,* the Supreme Court gave no indication of it.

That fact alone is not a sufficient answer, though. The opinions need to be evaluated in terms of their reasoning. The proposition would be that *Certified Question* explains *Fultz* and *Banaszak* because in *Fultz* and *Banaszak* there was no "relationship" between the defendant and the plaintiff, and because there was no relationship, there was no duty.

This does not work. If we say that the result in *Fultz* and *Banaszak* were reached because the court found that the relationship did not justify the creation of a duty, the statement is either wrong or it merely brings us back to the question described above — what kind of relationship will be sufficient to create a tort duty.

It is wrong because the court in *Fultz* and *Banaszak* does not use those terms and *Certified Question* never refers to either case. Much more fundamentally, though, the premise in *Fultz* and *Banaszak* was the inverse of the *Certified Question* analysis.

Certified Question is about the **creation** of a tort duty, where *Fultz* and *Banaszak* are about the **extinction** of a tort duty. *Fultz* and *Banaszak* hold that that the existence of a contract relationship between A and B extinguished a tort duty to C. The person who stepped in the unguarded hole in *Banaszak* was in the classic tort situation.

But for the contract, there would have been a duty owed to the plaintiff in *Banaszak*. That is why both *Fultz* and *Banaszak* speak extensively about a tort duty that is "separate and distinct" from a contract duty. The question of separateness and distinctness can only arise if there are two duties to be compared.

But if we treat *Fultz* and *Banaszak* as having held (without articulating it) that there was not a sufficient relationship to create a duty, the question remains: What is it that is lacking, in terms of a tort relationship? Is it really the case that someone who creates a hole in a place where people are known to walk owes no tort duty? Surely injury is foreseeable. Unless the "open and obvious" rule — which has its own problems and which also played no part at all in *Banaszak* — is invoked, surely creating a hazard in a place of public travel is a breach of a tort duty.

Conclusion

If the Supreme Court has decided to abandon *Moning v Alfono's* principle and replace it with a new "relationship-centered" analysis, it ought at least to inform bench and bar what it means by a "relationship."

It is worth remembering that the genesis of this dispute is the distinction between misfeasance of a contract and nonfeasance. Granted that the distinction can be, as *Fultz* said, a "slippery" one, the problem can at least be confined, if not resolved. First, the distinction, when applied **between** contracting parties, is only a fight over statutes of limitation.

Much more fundamentally, though, the premise in Fultz and Banaszak was the inverse of the Certified Question analysis. Certified Question is about the creation of a tort duty, where Fultz and Banaszak are about the extinction of a tort duty.

When it is applied to strangers to the contract, simple nonfeasance, that is, failure to perform, can safely be treated as a no-duty case, whether the reason is lack of a relationship or lack of foreseeability. But when a person undertakes to act and those actions create a foreseeable risk of injury, then a tort duty arises.

As long as *Certified Question* remains, defense counsel should modify their no-duty arguments to distinguish between relationship and foreseeability, and where the facts support it, argue that both are required and each is lacking.

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If the Supreme Court has decided to abandon Moning v Alfono's principle and replace it with a new "relationship-centered" analysis, it ought at least to inform bench and bar what it means by a "relationship."

Endnotes

1. 470 Mich 460; 683 NW2d 587 (2004).
2. For example, *Lipp v Bruce*, unpublished Court of Appeals opinion, no. 270264 October 9, 2007 and *Churchill v J P King Auction Co*, unpublished Court of Appeals opinion, no 274461, April 10, 2008.
3. Carroll, Hal, "*Fultz*, *Banaszak* and Contract Immunity," *Michigan Defense Quarterly*, Vol 25, No 1 (July 2008).
4. 477 Mich 895; 722 NW2d 433 (2006).
5. *Rinaldo's Construction Corp v Michigan Bell*, 454 Mich 65; 559 NW2d 647 (1997).
6. 479 Mich 498; 740 NW2d 206 (2007).
7. *Certified Question* at 505.
8. *Id*. at 507.
9. *Id*. at 507-508.
10. *Id*. at 508-509.
11. *Moning v Alfono*, 400 Mich 425; 254 NW2d 759 (1977).
12. *Moning* at 439 (footnote omitted).
13. *Certified Question* at 506
14. *Id*.
15. *Id*.
16. *Id*. at 515.
17. 470 Mich 45; 679 NW2d 311 (2004).
18. *Friedman v Dozorc*, 412 Mich 1; 312 NW2d 585 (1981).

SOCIAL NETWORKING WEBSITES AS EFFECTIVE TOOLS OF DISCOVERY

By: David A. Couch, Esq.
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General Liability Section Chair

Executive Summary

Social networking sites like Facebook and MySpace can be a valuable additional tool in the discovery process. These sites can yield very valuable results with minimal effort, and this information is often better received by juries because it has the same effect but without the taint that sometimes accompanies surveillance. Personal profiles on these sites can contain a great deal of valuable information such as photographs and "blog" entries which detail their recent life experiences. The sites also contain comments posted by an individual's friends, which invariably provide additional details useful in discovery.

A review of the most common social networking sites should be a standard part of the defense counsel's investigation of a case.

Trial lawyers are constantly seeking the truth. The truth about a plaintiff, a defendant, an expert, or a lay witness can quickly turn even the best case on its head if that truth is contrary to an official position taken in court. Historically, litigators enlisted the help of private investigators or other similar research services to compile information for use in a lawsuit. After the initial advent of the Internet several decades ago, a new tool has developed over the past few years which allows unique access into the private lives of those involved in litigation in ways likely not intended. Social networking sites, which now number in the hundreds, allow users to freely share personal and professional information with others accessing the Internet. Much of that information can also prove very useful in lawsuits.

The most commonly used social networking sites today are Badoo, Bebo, BlackPlanet, Buzznet, Care2, Classmates, Facebook, LinkedIn, Muxlim, MySpace, Tagged, and Windows Live Spaces.[1] The number of registered users accessing these sites hovers in the hundreds of millions. Not to be overwhelmed, you should recognize that many social networking sites are only popular in other countries and, as such, the likelihood of a litigant posting information on Nasza-klasa.pl, a site popular with college students in Poland, is low. Rather, focusing your investigation on a shortlist of common American sites will yield the best results. For that purpose, Facebook, MySpace, and LinkedIn can prove to be the most useful.

Focusing your investigation on a shortlist of common American sites will yield the best results. For that purpose, Facebook, MySpace, and LinkedIn can prove to be the most useful.

While many profiles are public, a large number of user profiles are made private, and one must first be added as a "friend" in order to view them fully. On MySpace, Facebook, and other social networks, a user can join another member's friends list simply by asking. Many people allow new friends without a second thought. Social networking sites vary in what kind of privileges come with friendship. For the most part, it opens virtual doors to all kinds of personal information. A user can subsequently revoke friendships at any point, but many people have long lists of dozens of friends on their Web pages and do not monitor their list of friends all that closely. In the offline world, we know better than to put people from different parts of our lives into one room where they are likely to share the wrong kinds of stories about us. But online, all of the walls come down. Most social networking sites do contain privacy settings, allowing a profile to be set to private and only viewed by approved contacts, but these are not always used. Indeed, one of the big attrac-

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SOCIAL NETWORKING WEBSITES AS EFFECTIVE TOOLS OF DISCOVERY

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Once accessed, profiles contain a great deal of personal information, photos (usually of them on a recent vacation, holding a drink, and smiling while sitting on a jet ski), and weblogs, or "blogs," which detail their recent life experiences.

tions of social networking sites is the large numbers of virtual friends who can be linked from a profile.

Once accessed, profiles contain a great deal of personal information, photos (usually of them on a recent vacation, holding a drink, and smiling while sitting on a jet ski), and weblogs, or "blogs," which detail their recent life experiences. You can also see the date of their last login as well as comments posted by their friends, which invariably provide additional details useful in discovery.

One of the key benefits of social networking sites is that they encourage users to be creative, publishing content rather than being passive consumers. They express themselves with an online personality. That is perhaps the greatest advantage to utilizing these social networking sites in your discovery, *i.e.*, the simple fact that a dangerously large degree of anonymity accompanies the use of the Internet, and users are far less guarded with their personal information when they are blogging at 2:00 a.m. on MySpace than when sitting across the table from you at a deposition.

The use of social networking sites is not limited to high school or college age individuals or even those in their twenties or thirties. On the contrary, many middle age and older adults maintain profiles on websites, both the traditional social networking sites mentioned above or those dedicated to the newly single who are interested in dating, such as Match.com and eHarmony. For discovery purposes, the former is much more accessible than the latter. Match.com allows a user to immediately search for profiles and pictures, information that will quickly allow you to identify a litigant or witness. The very involved registration process, and inability to identify users by photo prior to paying a registration fee and becoming an actual member, makes eHarmony much less feasible as a discovery tool.

For a more aggressive approach, which could further compromise an opposing party and, for instance, weed out a specious loss of consortium claim or allegation of sexual dysfunction caused by an accident, adult social networking sites can offer unique insight into the very private lives of their users. The most popular site, with a reported 22,000,000 members,[2] most of whom, believe it or not, often use their partial names and post photos showing their faces, can yield results of a lifestyle which may be inconsistent with a particular position being advanced in court through conducting a simple search based upon gender, age range, and geographic location. One important caveat on this final search technique—close your office door to spare the rest of your office and let your IT director know ahead of time what you are attempting to do.

One important caveat on this final search technique—close your office door to spare the rest of your office and let your IT director know ahead of time what you are attempting to do.

A plaintiff or defendant is still a represented party protected by MRPC 4.2. Any contact beyond information that a person posts for public consumption can easily violate your professional obligations.

Some sites require membership fees, but most do not. As is the case with almost all websites, the cost is borne by the advertisers who know, for instance, that there are approximately 80,000,000 registered users of Facebook, the sixth most trafficked website in the world.[3] Regardless of the type of site, a vast amount of information about a user is available if you only know where and how to look.

Once you have located the information, how do you best use it? For starters, you are still precluded from doing anything on a social networking site that you would not otherwise do with regular email, the telephone, or in person. A plaintiff or defendant is still a represented party protected by MRPC 4.2. Any contact beyond information that a person posts for public consumption can easily violate your professional obligations. Arguably, asking to become a friend, even though you are not contacting them directly, still constitutes contact in violation of the rules.

Downloading, printing, or saving posted information, though, is no different from reading an article written by or about someone in a newspaper and can be offered into evidence at trial using the same techniques. Blog

entries posted by a litigant are by definition, not hearsay, and should be deemed an admission by a party opponent under MRE 801(d)(2). Information posted on a website which may otherwise implicate the hearsay rule can be argued to constitute present sense impressions; excited utterances; then existing mental, emotional, or physical conditions; recorded recollections; or records of regularly conducted activity. Photographs are perhaps the easiest proofs for which to lay a foundation and have admitted into evidence, assuming they are deemed to be relevant. In the event that any of this evidence is ruled to be not relevant, you should still mark the proofs and preserve them as part of the overall record in the event of an appeal.

What do you do in the predictable situation where a person, in anticipation of litigation, has changed or deleted the content of their pages or, worse yet, canceled their account and taken down the postings? The simple answer usually lies within the Terms of Use and Privacy Policy of the social networking site. To illustrate, Facebook's user agreement reads as follows:

Facebook Terms of Use

When you post User Content to the Site, you authorize and direct us to make such copies thereof as we deem necessary in order to facilitate the posting and storage of the User Content on the Site. By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to the Company an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing. ***You may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, however you acknowledge that the Company may retain archived copies of your User Content.*** (emphasis added).

Facebook Privacy Policy

When you use Facebook, you may set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels. We collect this information so that we can provide you the service and offer personalized features. ***In most cases, we retain it so that, for instance, you can return to view prior messages you have sent or easily see your friend list. When you update information, we usually keep a backup copy of the prior version for a reasonable period of time to enable reversion to the prior version of that information.***

You understand and acknowledge that, even after removal, copies of User Content may remain viewable in cached and archived pages or if other Users have copied or stored your User Content.

We share your information with third parties only in limited circumstances where we believe such sharing is 1) reasonably necessary to offer the service, 2) legally required or, 3) permitted by you.

We may be required to disclose user information pursuant to lawful requests, such as subpoenas or court orders, or in compliance with applicable laws. We do not reveal information until we have a good faith belief that an information request by law enforcement or private litigants meets applicable legal standards.

Access and control over most personal information on Facebook is readily available through the profile editing tools. ***Facebook users may modify or delete any of their profile information at any time by logging into their account. Information will be updated immediately. Individuals who wish to deactivate their Facebook account may do so on the My Account page. Removed information may persist in backup copies for a reasonable period of time but will not be generally available to members of Facebook.*** [Emphasis added.]

In short, if a person alters or removes content from their page, you can subpoena the social networking site directly and seek copies of their back up or archived information.

Utilizing social networking sites as an additional tool in your discovery process can oftentimes yield very valuable results with minimal effort. The evidence is also better received by juries, because it still contains the same "gotcha" effect but without the negative feelings that sometimes accompany surveillance.

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accompany surveillance. More than one juror has commented after a trial how, while they were swayed by surveillance of a litigant, they were also somewhat put off by the intrusive nature of, for instance, following someone who was out boating with their minor children, etc. Discovering videos, photographs, or written accounts of the very same activities on the person's own social networking site tips the scale back in your favor. In the end, you were just clever enough to find what they freely made available to the entire world.

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Law Practice Management Section

LEGAL MARKETING THE SOCIAL NETWORKING WAY: LINKEDIN

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Executive Summary

An online presence has become a crucial element of marketing for lawyers and law firms alike. Hosting a website, by itself, however, is not the only – or, as some suggest, the best – way to maintain an internet presence. Instead, many attorneys are turning to social networking sites as an effective way of marketing themselves and their practices, and the most popular of these sites is proving to be LinkedIn.

LinkedIn: What is it and how does it work?

Launched in May, 2003, LinkedIn is a business-oriented social networking site mainly used for professional networking. According to the site, it has 25 million registered users from around the world spanning 150 industries and professions, including attorneys. It cultivates business connections in much the same way that Facebook creates personal connections.

LinkedIn allows attorneys who are registered users to create a professional profile similar to lawyer bios found on most firms' websites. Registration is free, and every user has his or her own network which can be used to import business and legal contacts. Contacts with LinkedIn accounts are then invited to become "connected" with the user. These links or "connections" allow for direct communication with everyone in the network. Once connected, users have the opportunity to make contacts in other people's networks, and a contact network is built consisting of direct connections, the connections of connections and so on.

The object of LinkedIn is to facilitate introductions through mutual and trusted contacts. The site gives users the option of revealing their connection to all other connections. This allows users to be introduced to people in other networks through mutual connections. Access is "gated," meaning that contact is limited to a preexisting relationship, i.e., a "link," or introduction by a mutual contact.

LinkedIn allows attorneys who are registered users to create a professional profile similar to lawyer bios found on most firms' websites. Registration is free, and every user has his or her own network which can be used to import business and legal contacts.

Getting started on LinkedIn is relatively simple, and those with web proficiency will find it very intuitive. However, as detailed below, a good deal of thought should be devoted to developing your professional profile to ensure that it is targeted and effective. Once registered, users have the option of joining LinkedIn Groups, which allows users to establish new contacts by joining alumni, professional, or industry groups. There are a number of law-related groups, but don't plan on creating one from scratch: the site cautions that LinkedIn Groups is designed for groups with an existing affinity between its members, and group applications can be rejected if there is not an existing member base. Group membership is by invitation only as determined by a group's manager.

How to use LinkedIn as a legal marketing tool

Like all legal marketing efforts, the efficacy of using LinkedIn as a legal marketing tool depends upon how one chooses to use it. Some lawyers use LinkedIn to enhance existing

business relationships by directly connecting only with people they already know or have represented. Others may prefer an open networking approach by connecting with people they have never met personally and who work in a particular industry or practice areas. The key is that the connection is made through an intermediary known to both.

Regardless of which networking approach is taken, social media sites are amenable to being text searchable. This means that care should be taken to anticipate terms and phrases in formulating a professional profile. For instance, instead of simply listing "product liability defense" as a practice area, an attorney may wish to include those particular products with which he or she has experience such as "tires" or "airbags." Similarly, "insurance coverage" could be accentuated with "first party no-fault" or "environmental."

Another beneficial feature offered by the site is LinkedIn Answers. It allows users to ask questions for the professional network to answer. The identity of the people asking and answering the questions is known, and it allows network members to recommend other contacts who may have the answer. In using this feature, lawyers should exercise the same caution as in other forums by disclaiming any attorney-client relationship and making clear that any opinions should not be treated as legal advice.

All is not golden in the LinkedIn world, and it does not take much of an internet search to find naysayers. The biggest complaints stem from unwanted contacts or connections that turn out to be more sales-call oriented rather than potential clients. It also takes time, and success will necessarily depend upon each person's commitment. As one former LinkedIn user groused: "If you want to contact a friend of a friend, just ask, and I'll put you in touch directly. No need for an intermediary."

Some lawyers use LinkedIn to enhance existing business relationships by directly connecting only with people they already know or have represented. Others may prefer an open networking approach by connecting with people they have never met personally and who work in a particular industry or practice areas.

Still, there are many who extol the virtues of LinkedIn and its possibilities as it relates to business development, and time will tell whether LinkedIn becomes a common — or even preferred — method of lawyer referrals. There is much to be said, however, about the potential of having a constant internet presence that encourages direct communication with prospective clients through mutual contacts, all without leaving your desk.

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THE CLASS ACTION FAIRNESS ACT OF 2005

By: Jamie Scripps
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Executive Summary

The federal Class Action Fairness Act was intended to assert federal jurisdiction over certain class actions and provide a federal forum for class actions, thereby decreasing forum shopping for plaintiff-favorable state court jurisdictions. Although it was not expected, some plaintiffs have chosen to use the federal forum over the state forums. The federal act applies when the class has more than 100 members, the amount in controversy exceeds $5 million, and there is "minimal diversity" (at least one plaintiff diverse from at least one defendant). Because of the unexpected popularity of the federal act, lawyers who defend class actions may find themselves in federal court more often than they expect.

For many in the Michigan defense bar, class action litigation is terra incognita. This article will explore the basics of class action procedure in Michigan, and discuss the effects of the Class Action Fairness Act of 2005.[1]

In Michigan, a class action is appropriate where a class is so numerous that the joinder of all class members would be impracticable. There must be questions of law or fact common to all members of the class, and the claims or defenses of representative parties must be typical of the claims or defenses of the rest of the class. Representative parties must be able to fairly and adequately assert and protect interests of class. Finally, pursuing the matter as a class action must promote the convenient administration of justice.[2]

A plaintiff wishing to bring a class action lawsuit must move for certification of a class within 91 days after filing the complaint. If he or she fails to do so, the defendant may file a notice of failure, causing the class action allegations to be stricken. Once a class has been certified, class members must be given reasonable notice of the action. The plaintiff bears the expense of this notification.[3]

Passed in February of 2005, the federal Class Action Fairness Act ("CAFA") gives federal courts jurisdiction over class actions in which:

1. the class has no fewer than 100 members,
2. the amount in controversy exceeds $5 million, and
3. there exists minimal diversity.

Congress passed CAFA in an attempt to reduce forum-shopping by plaintiffs in friendly state courts. Before CAFA, abuse of the class action procedure was rampant in "magnet jurisdictions" such as Madison County, Illinois.

Securities matters and local controversies, or actions in which more than two-thirds of the plaintiff class and at least one primary defendant are residents of the state where the action is brought, are excepted.[4]

Purpose of the act — forum shopping

Congress passed CAFA in an attempt to reduce forum-shopping by plaintiffs in friendly state courts. Before CAFA, abuse of the class action procedure was rampant in "magnet jurisdictions" such as Madison County, Illinois. Because federal courts are seen as less friendly than state courts, it was expected that CAFA would make it more difficult for plaintiffs to bring successful class action lawsuits. Opponents of CAFA argued that once a case was removed to federal court, it would take much longer to resolve due to clogged federal dockets.

A study by researchers at the Federal Judicial Center ("FJC") confirmed that the enactment of CAFA was followed by an increase in the number of class actions filed in or removed to the federal courts based on diversity jurisdiction. However, much of the increase in diversity class actions was driven by an increase in original filings in federal courts, sug-

Continued on page 26

Continued from page 25

gesting that more plaintiffs had begun to voluntarily choose the federal forum than expected.[5]

Minimal Diversity

One of the major changes created by CAFA was the conferral of federal jurisdiction where there is only minimal diversity, rather than complete diversity. Complete diversity means that all named plaintiffs are domiciled differently from all defendants. Normally, federal courts have jurisdiction over cases with complete diversity. By contrast, the diversity required by CAFA is minimal diversity, which exists if any member of the plaintiff's class is a citizen of a different state than any defendant. Generally speaking, CAFA confers on federal courts jurisdiction over cases with minimal diversity, a class of 100 members or more, and a $5 million-plus amount in controversy. Under CAFA, a corporation is still deemed to be a citizen of both its state of incorporation and the state in which it maintains its principal place of business.

Since its enactment, CAFA has presented interesting questions of timing, diversity, and damages. First,

One of the major changes created by CAFA was the conferral of federal jurisdiction where there is only minimal diversity, rather than complete diversity.

defendants wishing to remove a case to federal court generally bear the burden of proving each of the CAFA requirements, including diversity. However, in determining whether minimal diversity exists for the purposes of CAFA jurisdiction, a plaintiff will be bound by judicial admissions in his or her complaint. For example, if a plaintiff lists a corporation in its complaint as being a Delaware corporation with its principal place of business in Michigan, the corporation is deemed a citizen of Delaware and Michigan. The defendant need not also prove that it is not a citizen of the other states.[6]

Damage limits — plaintiff bound by complaint

Second, plaintiffs wishing to avoid CAFA jurisdiction will often estimate damages at just under $5 million. However, in order to avoid game-playing with the amount in controversy requirement, a court may hold such a plaintiff to his or her word. Where a plaintiff attempted to avoid CAFA jurisdiction by placing a limitation on damages in the complaint, the federal court remanded because the amount in controversy requirement had not been met — but it also barred plaintiffs from recovering a penny more than $5 million.[7]

Second, plaintiffs wishing to avoid CAFA jurisdiction will often estimate damages at just under $5 million. However, in order to avoid game-playing with the amount in controversy requirement, a court may hold such a plaintiff to his or her word.

Commencement of the action

Finally, as mentioned above, for cases in which there is no basis other than CAFA upon which to assert federal jurisdiction, timing is crucial. CAFA applies to actions commenced on or after February 18, 2005, but does not define the term "commence."

In *Hall v State Farm*,[8] the Sixth Circuit Court of Appeals applied Michigan law in deciding whether amendment of the complaint substituting the named plaintiff in a class action "commences" a new suit. In that case, the original complaint was filed on December 29, 2004, before CAFA's effective date.

The court first looked to MCR 2.101(B), which provides that "a civil action is commenced by filing a complaint with the court." However, the question remained as to whether the original filing of the complaint had "commenced" the suit as to the newly substituted plaintiff. The court analyzed the Michigan class action rule, MCR 3.501, and explained that under Michigan law, an unnamed member of a class does not become a party to an action until certification of the class.

The court then analyzed the amended complaint substituting the

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named plaintiff under Michigan's relation-back principles. Under MCR 2.118(D), "a[n] amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." However, according to established Michigan case law, "the relation back doctrine does not extend to the addition of new parties."[9] The court in *Hall v State Farm* noted that Michigan law differs from other jurisdictions in this respect.

In the end, the court in *Hall v State Farm* found that the newly substituted plaintiff could not be considered to have been a party to the uncertified class action prior to being named as the plaintiff. This substitution constituted the "commencement" of a new action under CAFA, and therefore federal jurisdiction could apply.

Conclusion

Overall, CAFA provides an increased opportunity to get into federal court — and surprisingly, plaintiffs are voluntarily taking advantage of CAFA jurisdiction more frequently than had been anticipated. For those in the Michigan bar, it is important to remember that the effective date of CAFA was February 18, 2005, and post-filing acts, such as the addition of new parties, may constitute the commencement of a new action for the purposes of CAFA. Fair or not, for your next class action adventure, you may just end up in federal court after all.

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Endnotes

1. 28 USC Sec 1332(d), 1453, and 1711-1715.
2. MCR 3.501(A).
3. MCR 3.501(B).
4. See 28 USC Sec 1332(d)(4)(A).
5. *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.
6. *See Korn v Polo Ralph Lauren Corp*, 536 F Supp 2d 1199, 1202 (ED Cal 2008).
7. *See Brooks v GAF Materials Corp*, 532 F Supp 2d 779, 780 (DSC 2008).
8. *Hall v State Farm Mut Auto Ins Co* , 215 Fed Appx 423, 424-25, 2007 WL 215662, 2 (6th Cir 2007).
9. *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57 (1991).

YOUNG LAWYERS' BREAKFAST

Scott Holmes, Howard Wallach, Hilary Dullinger, Dennis Day, and David Campbell

Photo credit: Legal News

MDTC's First Young Lawyer's Breakfast took place August 13, 2008 at Bowman and Brooke in Troy. We had fourteen young lawyers from seven different firms in attendance, plus two experience speakers, Dennis Day — Plunkett & Cooney & and Howard Wallach — Foley and Mansfield.

The event was a great success and we are already starting to plan for the next seminar! Beyond a great breakfast and networking opportunity, our attendees learned a lot from Dennis and Howard about discovery motions and served as judges for a mock discovery motion hearing. The young lawyers were very attentive, particularly given the hour, and asked some great questions during our panel discussion.

THE DUTY TO PRESERVE, COLLECT, AND PRODUCE ELECTRONICALLY STORED INFORMATION HELD BY THIRD PARTIES

By: Ronald C. Wernette
Bowman and Brooke LLP

Executive Summary

Electronically stored documents and information are subject to discovery, and the failure to produce discoverable information will subject the client, and the attorney to sanctions. This obligation is not limited to documents and information on the clients own premises or equipment, and counsel must be diligent in ensuring that all discoverable documents are produced.

The requirement that the client produce all information in its "possession, custody or control" includes documents and information held by legally related entities, such as corporate subsidiaries or sister corporations. It may also include independent entities with whom the client has a contractual relationship, such as suppliers or joint venturers. It can also extend to former employees. Defense counsel should be certain that all of these sources have been considered as a part of responding to discovery requests.

Introduction

The legal landscape is now littered with parties — and their attorneys — who have been sanctioned by courts for electronic data discovery failures. Most of the litigation dealing with the loss of digital information addresses the failure of a party to preserve and collect the data after it was under a legal obligation to do so. The scope of that legal obligation is still not fully understood by many attorneys and their clients: it includes electronically stored information (ESI) held by third parties in many circumstances. Which circumstances? Consider the following scenarios.

> Scenario 1: A global chemical and cleaning products company has some products manufactured by third-party suppliers. Some data concerning product formulation, manufacturing processes and quality control, testing, and compliance resides with those contractors.

Scenario 2: An automotive manufacturer has significant CAE and CAD work done for a new vehicle program by a joint venture partner in India. The data and other software iterations used in the product development process reside with the joint venture partner in India.

Scenario 3: A national trucking transportation company has some of its tractor and trailer mechanical maintenance requirements performed by a wholly-owned subsidiary that specializes in such activity. Some data concerning the Department of Transportation required inspections, repairs, and maintenance resides with the subsidiary.

Scenario 4: An American consumer products company markets and distributes its products throughout the United States and Canada. Product manufacturing is performed in China by a number of suppliers, to the American company's specifications. Data concerning manufacturing, quality control and inspection processes and second-tier suppliers and purchased components resides with the various Chinese suppliers.

These are real-world situations, and the variations are endless. It is a business reality that our client organizations use related legal entities (*e.g.*, parent, sister, or subsidiary) and numerous other third-parties to help achieve their operational goals. As a result, there is likely to be relevant client business information in the possession of those other entities. These realities are obvious. What is not so obvious is that information in the hands of those related legal entities parties is likely to be deemed within the "possession, custody *or* control" of the client organization under applicable discovery law. If so, a host of legal obligations attach, which can be especially challenging

where electronically stored information is involved and where independent third parties and cross-border relationships are involved.

Scope of the duty
What is "possession, custody or control"?

Federal Rule 34 (and its state rule counterparts including MCR 2.310) governs the production of documents and electronically stored information in civil discovery. The rule permits a party to serve on any other party a request for the production of documents and electronically stored information within that party's "possession, custody *or* control." The scope of a party's obligation is clearly broader than information in its "possession," but the rule raises the question of what is within a party's "control" for purposes of Rule 34. The answer to that question has profound implications because it also governs the scope of a party's duty to preserve (*e.g.*, through litigation hold procedures), a party's duty to search for potentially responsive information, and a party's duty to collect and produce information.

Although the rule itself does not define when a party has "control" of documents or electronically stored information, the case law has filled in the gaps. Federal courts have consistently held that documents and electronically stored information may be in the "control" of a party for purposes of Rule 34 even when the documents and the information are in the physical possession of another entity that is not a party. In other words, "control" does not require that a party have actual physical possession or even legal ownership of the documents or ESI at issue. "Control" has been construed broadly by the courts as "the legal right, authority, or practical ability to obtain the materials sought on demand."[1]

Federal courts have consistently held that documents and electronically stored information may be in the "control" of a party for purposes of Rule 34 even when the documents and the information are in the physical possession of another entity that is not a party.

Information in the hands of those related legal entities parties is likely to be deemed within the "possession, custody or control" of the client organization under applicable discovery law

The standard is really "practical control," which is not susceptible to easy bright-line determinations by in-house or outside counsel trying to decide how far their obligations extend. The reality is that the "practical control" test is a fact-bound and context-specific determination, and is not a simple bright-line rule. Thus, the "control" issue tends to require case-by-case analysis by knowledgeable counsel familiar with the law in this area, the details of the relationship between the client and a third party, and the specific nature of the information held by a third party.

Common third party "control" situations

Based on experience and a review of the cases concerning the meaning of "control" for purposes of Rule 34, there are three frequent scenarios that your clients are most apt to encounter:

1. Information in the possession of legally related third parties
2. Information in the possession of independent third parties
3. Information in the possession of former employees

Information in the possession of legally related third parties

Steele Software Systems v Dataquick Information Systems[2] concerned whether, and to what extent, the reach of Rule 34 extends to data in the physical possession of a party's non-party corporate affiliates. Steele argued that it was not obliged to produce documents not in its own possession, but that were in the physical possession of non-party corporate affiliates. Steele's argument was two-fold: (1) the related entities were not "parties" and so Rule 34 did not apply, and (2) the information in the possession of the non-parties was not within Steele's "control" under Rule 34.

The *Steele* court recognized that information in the possession of a non-party is not automatically subject to discovery simply because the non-party has a corporate relation-

Continued on page 30

Thus, the "control" issue tends to require case-by-case analysis by knowledgeable counsel familiar with the law in this area, the details of the relationship between the client and a third party, and the specific nature of the information held by a third party.

Continued from page 29

ship to a party in the litigation. However, the court rejected Steele's threshold "non-party" argument, relying on well established case law ordering production of information in the possession of related non-parties and holding that "[t]he specific form of the corporate relative involved does not matter, *i.e.*, whether it is a parent, sister, or subsidiary corporation. Courts are able to disregard corporate form" where appropriate.

The *Steele* court next turned to the "control" issue, observing that case law provides for several relevant factors in making the determination whether a party is deemed to have "control" over information in the possession of related non-parties: (1) the corporate structure of the party or non-party, (2) the non-party's connection to the transaction at issue in the litigation, (3) whether the related party and non-party entities exchange information in the ordinary course of business, (4) the degree to which the non-party will benefit from the outcome of the litigation, and (5) whether the non-party has participated in the litigation. Concerning the first factor, the focus is on common relationships between a party and its related non-party entity. Critical factors include the ownership of the non-party, overlap of directors, officers, and employees, shared management, and the financial relationship between the two entities. The *Steele* court applied the aforementioned test and found that the requested information was deemed to be under the practical "control" of *Steele*, and ordered the information to be produced.[3]

What does this mean? Given the current legal test being applied, it is likely that responsive electronically stored information in the possession of a party's non-party corporate affiliates (e.g., parent, sister, subsidiary) will be found to be under the "control" of the party in many situations. To the extent that your clients do not include non-party corporate affiliates in their ESI preservation, search, and collection process, they do so at their peril.

Information in the possession of independent third parties

Columbia Pictures Ind v Bunnell[4] concerned whether the reach of Rule 34 extends to data in the possession of an independent third party under the "control" prong of the Rule. In that case the data at issue was routed to a third party entity under contract to the defendant, and stored by the third party. The court found that the data was within the defendant's "control" by virtue of the defendants' choice about where the data resided (*i.e.*, the ability to manipulate at will how the data was routed) and by virtue of defendant's contractual relationship with the third party entity. The court observed that courts have long held that one aspect of "control" is "the legal right to obtain documents on demand" and a contractual relationship with the third-party obliged the defendant to, at a minimum, make reasonable inquiry of the third party entity for the data at issue.[5]

Given the current legal test being applied, it is likely that responsive electronically stored information in the possession of a party's non-party corporate affiliates (e.g., parent, sister, subsidiary) will be found to be under the "control" of the party in many situations.

Flagg v City of Detroit[6] concerned whether the City of Detroit was required to produce, or consent to allow a third party to produce, electronic text messages in the possession of non-party SkyTel. The court observed that "a party has an obligation under Rule 34 to produce materials within its control, and this obligation carries with it the attendant duty to take the steps necessary to exercise this control and retrieve the requested documents." Noting that the Sixth Circuit has held that documents are deemed to be within the "control" of a party if it "has the legal right to obtain the documents on demand," the court found that the City of Detroit had the "legal right to obtain" the messages in the possession of non-party service provider SkyTel and hence the messages were within the city's "control" within the meaning of Rule 34. The city was ordered to obtain the text messages from SkyTel and produce them to plaintiff. While the case did not concern the issue of data preservation, it stands to reason that if a party has an "attendant duty" to take steps necessary to retrieve documents deemed to be within its control, it also has an "attendant duty" to take the steps necessary to exercise its control and preserve the information that it knows, or should have known, may be relevant. You can expect the reasoning of the Flagg case to be applied in the preservation context.

What does this mean? Given the current legal test being applied, it is likely that responsive ESI in the possession of an independent third party with whom there is a contractual business relationship (*e.g.*, joint venturer, supplier, contractor, dealer) will be found to be under the "control" of the party in many situations. To the extent that your clients do not include such third parties in their ESI preservation, search, and collection process, they do so at their peril.

Information in the possession of former employees

Cache La Poudre Feeds, LLC v Land O' Lakes, Inc[7] raised the issue of whether, and to what extent, a party may be obliged to contact former employees who the party had reason to believe possessed responsive information, under the "control" prong of Rule 34. The court recognized that "[u]nder some circumstances, a court could determine that an employer has control over documents maintained by a former employee," for example, suggesting that an employer may have "control" over information in the possession of a former employee if that individual is still receiving economic benefits from the employer.

Several courts have required an employer to contact former employees to determine whether they took responsive documents under certain circumstances. For example, *Export-Import Bank of the United States v Asia Pulp & Paper Co, Ltd*[8] holds that a corporation must exhaust the practical means at its disposal to obtain relevant documents in the possession of former employees. *McCoy v Whirlpool Corp*[9] required the defendant to contact former employees to determine whether they were in possession of responsive documents. *Lintz v Am Gen Fin, Inc*[10] suggests that the defendants' obligation to undertake a reasonable investigation for relevant documents included contacting former knowledgeable employees.

What does this mean? Your clients should consider whether one or more former employees (*e.g.*, a specific manager, supervisor, or engineer) would be considered to be a "key player" who may have had, and may still have, information relevant to a particular claim at issue. The current legal test may be applied to hold that your client has "control" over relevant information in the possession of such former employees in some situations. To the extent that your clients do not include consideration of former employees in their response to requests for electronically stored information, they are at risk of sanctions.

Conclusion

The scope of a party's legal obligation to preserve, search for, and produce electronically stored information is broader than what a party has in its own "possession" or "custody." But that too narrow scope — confined to an inward look at the client organization itself — is typically assumed by most inside and outside counsel, who are obliged to ensure that all ESI within the "control" of a party is preserved, searched, and produced.

Several courts have required an employer to contact former employees to determine whether they took responsive documents under certain circumstances.

Your client organizations' ESI preservation, retention, collection, and production policies and procedures must be developed – or modified if necessary – to ensure the inclusion of all ESI deemed to be within the organization's "control" even where in the actual possession of third parties. As the discovery sanctions decisions of the past several years teach, failing that means significant legal risk and sanctions exposure, for both the client organization as well as the inside and outside attorneys charged with satisfying the clients' discovery obligations.

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Endnotes

1. *See Columbia Pictures Ind v Bunnell*, 2007 US Dist LEXIS 46364 (CD Cal 2007); *In re NTL Inc Securities Litigation*, 2007 US Dist LEXIS 6198 (SD NY 2007); *Cache La Poudre Feeds, LLC v Land O' Lakes, Inc*, 2007 US Dist LEXIS 15277 (D Colo 2007); *Steele Software Systems v Dataquick Information Systems*, 2006 US Dist LEXIS 74987 (D Md 2006).
2. 2006 U.S. Dist. LEXIS 74987 (D Md 2006).
3. *See also Evenflo Co, Inc v Hantec Agents Unlimited*, 2006 US Dist LEXIS 36342 (SD Ohio 2006).
4. 2007 US Dist LEXIS 46364 (CD Cal 2007).
5. *See also A. Farber and Partners, Inc v Garber*, 234 FRD 186 (CD Cal 2006).
6. 2008 WL 3895740 (ED Mich Aug 22, 2008).
7. 2007 US Dist LEXIS 15277 (D Colo 2007).
8. 233 FRD 338 (SD NY 2005).
9. 214 FRD 637 (D Kan 2003).
10. 1999 Dist LEXIS 12572 (D Kan 1999).

YOUNG LAWYERS SERIES

III. BUILDING THE CASE — DISCOVERY

By: Scott S. Holmes
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Executive Summary

This article is the third installment in our series providing an introduction to the basics of litigation from a defense perspective. In the first article, we discussed pleading and responding to a cause of action. In the second article, we offered tips for raising cross claims, third party claims, and pursuing indemnity. This article focuses on the basics of interrogatories and deposition practice.

I. INTERROGATORIES

A. General Pointers

1. Remember who you represent! When answering interrogatories, draft your response in a manner which makes your client comfortable to sign his or her name to it. It will save valuable time and costs. Also, make sure you have written confirmation from the signer that the answers are approved for filing and serving. This will protect the client from undesirable admissions and protect you from undesirable (is there any other kind?) malpractice suits.
2. Remember your audience! When answering interrogatories, ask yourself if you would be comfortable having your response enlarged and highlighted for a judge, jury, or witness to read at the time of trial.
3. Remember your position! Never answer a question for which a privilege is asserted. The privilege is then waived.
4. Remember the Alamo! If the time comes where you are cornered and must take a stand against a motion to compel, you should be confident that the responses you provided are truthful and complete.

B. Objections to Requests for Production and Privileges

In a deposition scenario, if a party wishes to protect specific information that is believed to be privileged, that privilege must be asserted at the time of the deposition or it is lost forever.

> *When you are dealing with a witness, particularly one who has never participated in a deposition before, no detail is too insignificant to discuss.*

MCR 2.306(D)(4). As a result, knowing what privileges may be relevant to your case is essential when preparing for and participating in a deposition. When reviewing key information or weaknesses in your case, consider the type of information it is and the means by which it was created. Ask yourself if it falls under any privileges and be prepared to explain the basis for your assertion of that privilege, both to opposing counsel and the presiding judge.

C. Motions to Compel

Do not use the courts as a means of negotiating discovery requests. Many attorneys fall into the habit of issuing overbroad discovery requests or resisting reasonable discovery requests before actually considering whether the information should be produced. Judges' dockets are overwhelmingly filled with various discovery related disputes which are usually resolved by the parties shortly before the hearing date or immediately prior to the actual hearing. If the issue can be resolved by the parties prior to the hearing, then it can be resolved without filing a motion with the court, and with considerable savings to your calendar and client.

II. DEPOSITIONS

A. Preparing

Deposition testimony can make or break your case at trial. As a result, it is essential to be prepared. "Prepping" the witness is an often over-looked and rushed part of the deposition process. Prepping is important to keep your witness informed and to put him or her at

ease before deposition time. Although prepping your witness is essential to further your factual theories and trial strategy, it is also an important part of the attorney-client relationship. Let your witness know exactly what to do and expect by telling her all the seemingly "minor" details such as where to park, what to wear, who will be in the room, how much time it should take, and the likely demeanor or personalities of those who will be asking questions. When you are dealing with a witness, particularly one who has never participated in a deposition before, no detail is too insignificant to discuss. Proper preparation puts your witness at ease which will likely lead to successful deposition testimony (and an extremely grateful witness!).

B. Objections

Making and responding to objections can be an exciting and challenging part of practicing the law. However, at depositions, not all objections are equal. Objections to the form of the question must be made at the time the issue is raised. Form objections include questions that are: leading, compound, ambiguous, speculative, argumentative, compound, cumulative or repetitive, assume facts not yet established, and improperly characterize the witness' testimony. Objections to the admissibility of evidence or testimony need not be made during depositions. They are issues properly addressed to the presiding judge and raising them during the deposition may tip off opposing counsel as to your strategy at trial. *See also Trial Techniques* (4th Ed.) by Thomas Mauet, at p. 426.

C. Deposition Time

Before cross-examining a witness, develop a strategy for what you believe will be the most effective examination style. Different witnesses respond to different types of examination styles, and the proper style may be the key to eliciting the testimony most beneficial to your case. Age, education, and health are just some of the factors to be considered before asking your first question.

Different witnesses respond to different types of examination styles, and the proper style may be the key to eliciting the testimony most beneficial to your case.

A common mistake made by inexperienced attorneys is also one of the most basic — failing to listen to the answers provided. It is easy for young attorneys to get wrapped up in their notes and prepared questions causing them to miss important admissions or other facts that may require follow-up questions. Another important tip for examining attorneys is to know when to move on to another question or topic. Often, attorneys do not notice when they have received an answer that is beneficial to their case, particularly when they are expecting difficulty in reaching that answer. When you get the answer you are looking for, move on! Continuing to address the topic rarely improves the substance of the answer and can give the witness or opposing counsel the opportunity to contradict or "fix" the testimony.

Finally, remember to relax and take your time during the deposition. You usually only get one opportunity to depose a witness, so make sure you address all the topics necessary to your case. If you need a moment to look over your notes, take it. Do not rush from one question or topic to another. If you are feeling confused or overwhelmed, take a five or ten minute break to clear your mind. You have an obligation to your client and employer to perform your best and simply remembering to take your time can go a long way towards successfully deposing a witness. However, remember that there is no substitute for proper preparation.

When you get the answer you are looking for, move on!

The author acknowledges and thanks Gary Sharp, John Mark Mooney and Jana Berger for their assistance in preparing this article.

Recent Case Note:
Shawl v Spence Brothers, Inc, ___ Mich ___; ___ NW2d ___ (August 19, 2008)

NEGLIGENCE OF INSURER IS NOT ATTRIBUTED TO INSURED FOR PURPOSES OF GOOD CAUSE ANALYSIS TO SET ASIDE DEFAULTA DOCTRINE

By: Hal O. Carroll
Vandeveer Garzia

Facts. The defendant, the insured, was defaulted when the insurer failed to plead by an agreed extension to the deadline. The insurer had negotiated the extension and was aware of it, but failed to comply. The trial court refused to set a side the default, relying on authority that the negligence of the insurer was attributed to the insured.

Decision. Reversed. The Court of Appeals noted that "we initially conclude that Spence Brothers' default was clearly caused by Amerisure's negligence in failing to answer the complaint. . . . The salient question, however, is whether Amerisure's negligence should be imputed to Spence Brothers." The court stated that the insured himself was not guilty of any negligence.

The Court of Appeals reviewed a conflict of opinions on the issue of attributing the insurer's negligence to the insured. All of the cases were decided before the "first-out" date of November 1990.

The court concluded that it should adopt "the well-reasoned rule that an insurer's negligence should not be conclusive on the procedurally non-negligent defendant. A defendant who diligently turns over a case to an ultimately negligent insurer should not be denied his or her day in court. The defendant is not 'obligated to call daily to see whether the insurer did what it had contracted and accepted a premium to do.'" [Footnote deleted.]

The court went on to say that: "we specifically reject the rule . . . that the negligence of the insurer should be presumptively imputed against the defendant. To hold otherwise may result in the unfavorable consequence of denying defendants who "might have a good and valid defense" a chance at meritorious determination of the issues.

The court went on to say that: "we specifically reject the rule . . . that the negligence of the insurer should be presumptively imputed against the defendant. To hold otherwise may result in the unfavorable consequence of denying defendants who "might have a good and valid defense" a chance at meritorious determination of the issues. "[T]he law favors the determination of claims on the merits." [Citation deleted].

Implications.The opinion will increase the chances of getting a default set aside, whenever the insured can show that he or she gave notice of the lawsuit to the insurer. MCL 500.3008 provides that notice to the insurance agent is notice to the insurer, so any negligence of either should not be attributed to the insured. The opinion should also reduce the frequency of disputes between the insured and the insurer over who was at fault, because the insurer's fault will have no effect on setting aside a default.

REVIEW OF SIGNIFICANT SUPREME COURT DECISIONS

By: Joshua K. Richardson
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Potential Harm to Firefighter Safety Insufficient to Establish Irreparable Harm for Preliminary Injunction Purposes

On July 23, 2008, in *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, __ Mich ___; 753 NW2d 595 (2008), the Michigan Supreme Court held that potential harm to firefighter safety was insufficient to support a finding of irreparable harm for preliminary injunction purposes.

Facts: The City of Pontiac proposed laying off 28 local firefighters to alleviate significant budget deficits. In response, the Pontiac Fire Fighters Union filed an unfair labor practices complaint with the Michigan Employment Relations Committee. The union also sought a preliminary injunction against the city in circuit court during the pendency of the unfair labor practices charge. To support their request for preliminary injunction, the union alleged that the layoffs would "necessitate a dramatic reorganization of the fire department and that this reorganization threatened firefighter safety." The union further alleged that the layoffs would decrease overall emergency response times, allowing fires to escalate and increasing the risk to firefighters and the public. The trial court agreed, and issued a preliminary injunction in the union's favor. The Michigan Court of Appeals affirmed the trial court's decision, and the defendants appealed to the Supreme Court.

Holding: The Supreme Court reversed, and held the union failed to demonstrate "how the remaining firefighters faced *real* and *imminent* danger from the layoffs." The court noted that "mere apprehension of reduced safety … is insufficient grounds for a court to grant equitable relief." Because the union failed to establish that irreparable harm would result if the injunction did not issue, the preliminary injunction was improper.

Significance: This ruling solidifies the extraordinary nature of preliminary injunctions by limiting their issuance to cases where real and imminent harm is established. In other words, a plaintiff's claimed harm must not be merely speculative.

Pharmacies May Not be Held Directly Liable for Medical Malpractice

On June 11, 2008, in *Kuznar v Raksha Corp*, 481 Mich 169; 750 NW2d 121 (2008), the Michigan Supreme Court held that pharmacies are not licensed health facilities or agencies, and may not be held directly liable for medical malpractice.

Facts: Plaintiff, Joseph Kuznar took his wife's prescription for 0.125 mg tablets of Mirapex, used to control symptoms of restless leg syndrome, to be refilled at Crown Pharmacy. An unsupervised Crown Pharmacy employee, who was not a licensed pharmacist, refilled the prescription with 1 mg tablets of Mirapex, eight times plaintiff's prescribed dosage. After consuming three of the tablets, Mr. Kuznar's wife became dizzy, agitated, and nauseated. Eventually, she lost consciousness. After being taken to the emergency room, it was determined that her symptoms resulted from the excessive dosages of Mirapex. Almost three years later, plaintiffs filed a negligence action against the pharmacy for, among other things, breach of duties to exercise reasonable care in dispensing medication. Defendants moved for summary disposition, arguing that the pharmacy was a licensed health facility or agency and, therefore, plaintiffs' claims were barred by the two-year medical malpractice statute of limitations. The trial court denied defendants' motion, and the Court of Appeals affirmed.

Holding: The Supreme Court also affirmed, holding that plaintiffs' claims were for ordinary negligence, not for medical malpractice. In so holding, the court held that pharmacies could not be held liable for medical malpractice under MCL 600.5838a, because pharmacies simply dispense medication and do not provide "in- or out-patient or residential or emergency medical care or treatment." Accordingly, the two-year statute of limitations for medical malpractice claims did not bar plaintiffs' claims, which were otherwise timely filed under the three-year statute of limitations for claims of ordinary negligence.

Significance: Plaintiffs raising claims against pharmacies need not comply with the stricter medical malpractice notice and limitation provisions typically afforded to other health facilities, agencies, and professionals.

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Lessors Have Duty to Remove Natural Accumulations of Snow and Ice in Common Areas Only if Such Accumulations Render Common Areas Unfit for Intended Uses

On June 25, 2008, in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008), the Michigan Supreme Court held that the natural accumulation of snow and ice is not a defect under MCL 554.139(1)(b) for which lessors must keep premises in reasonable repair, but is subject to lessors' duty under MCL 544.139(1)(a) to keep premises and common areas fit for their intended uses.

Facts: Plaintiff sustained injuries after he slipped and fell while walking on approximately two inches of snow and ice in the parking lot in front of his apartment complex. As a result, plaintiff filed suit against his apartment's property management company, alleging negligence and failure to maintain and repair the premises. The trial court granted defendants' motion for summary disposition, holding that the snow and ice was an "open and obvious" danger. The Court of Appeals reversed the trial court's ruling, and held that "one of a parking lot's intended uses entails persons walking on it, and that a parking lot covered with ice is not fit for that purpose."

Holding: The Supreme Court held that, while the natural accumulation of snow and ice is not a defect that must be repaired under MCL 554.139(1)(b), parking lots constitute common areas that must be kept fit for their intended use under MCL 554.139(1)(a). As such, "a lessor may have a duty to remove snow and ice under MCL 554.139(1)(a) … when the accumulation is so substantial that tenants cannot park or access their vehicles in a parking lot." However, because plaintiff failed to show that two inches of snow and ice rendered the parking lot unfit for its intended use, summary disposition for defendants was proper.

Significance: Though snow and ice has been held an "open and obvious" danger under general negligence principles, lessors may still be held liable under MCL 554.139(1)(a) if they allow excessive amounts of snow and ice to accumulate in common areas.

Fraud Claims Not Subject to One-Year-Back Rule Under MCL 500.3145(1), Even if They Arise From No-Fault Insurance Claims

On June 25, 2008, in *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008), the Michigan Supreme Court held that fraud claims are not subject to the one-year-back rule, which limits recovery of no-fault personal protection insurance benefits to losses incurred within one year prior to filing suit.

Facts: In 1987, plaintiffs suffered severe brain injuries as a result of a near-fatal automobile accident. Plaintiffs' medical and 24-hour attendant care expenses were paid by their no-fault insurer, Auto Club Insurance Association. Approximately two years after the accident, at the suggestion of an Auto Club's claims representative, plaintiffs' mother quit her job and began taking care of plaintiffs herself. She was compensated for providing the attendant care at a rate of $50 per day. By October of 2000, this rate was eventually raised to $10 per hour. In 2003, plaintiffs filed this lawsuit alleging that Auto Club underpaid plaintiffs' mother for the attendant care services she provided her daughters since 1989. Plaintiffs thereafter amended their complaint to assert a fraud claim, alleging, among other things, that Auto Club fraudulently induced plaintiffs' mother to quit her job and accept reduced compensation for the attendant care she provided. Auto Club filed a motion for summary disposition, arguing that plaintiffs could not recover for attendant care services rendered more than one year before the action was filed. The trial court denied Auto Club's motion. On appeal, the Court of Appeals reversed, and held that plaintiffs' claims were subject to the one-year-back rule of MCL 500.3145(1). The Court of Appeals also held that plaintiffs' fraud claim was subject to the one-year-back rule because it "was nothing more than a no-fault claim couched in fraud terms." Plaintiffs appealed to the Supreme Court.

Holding: The Supreme Court reversed, holding that plaintiffs' fraud claim was "a distinct and independent action brought under the common law" for losses incurred as a result of the insurer's fraudulent conduct, rather than for damages arising out of accidental bodily injury. Accordingly, plaintiffs' fraud claim was not subject to the one-year-back rule of MCL 500.3145(1). The court cautioned, however, that trial courts should be mindful of future plaintiffs adding fraud claims to their no-fault insurance actions as a way of evading the one-year-back rule.

Significance: Despite the court's cautionary note, plaintiffs will likely add fraud claims to future no-fault insurance actions, requiring trial courts to determine whether those claims are, in fact, distinct and independent to avoid the one-year-back rule.

MDTC LEGISLATIVE REPORT

By: Graham K. Crabtree
Fraser, Trebilcock, Davis & Dunlap
Prepared September 8, 2008

"Reform Michigan Government Now" Proposal

As I mentioned in my last report, the quality of our representation in the state Legislature seems to have improved substantially in the current year — a change probably brought about by awareness of the public's anger over last year's very disappointing performance. But it seems that this welcome improvement may have been too little, too late. The full depth and intensity of the public's anger did not become known until June of this year, when rumors of a crudely-fashioned ballot proposal calling for sweeping changes to the state Constitution began to surface. That proposal, circulated by an obscure organization calling itself Reform Michigan Government Now! (RMGN) proposes a substantial re-write of the 1963 Constitution which would effect numerous changes punishing politicians in all three branches of state government.

Sold to the public by petition circulators as an effort to reduce the size of government and cut costs, this proposal flew in under the political radar, and did not become known in Lansing until mid-June. But in the first week of July, those who had discounted the significance of this effort sat up to take notice when RMGN turned in nearly half a million signatures in support of its proposal.

The most notable changes proposed by the RMGN ballot proposal include the following:

1. **Reduction of the size of the Legislature** (from 38 Senators and 110 Representatives to 28 Senators and 82 Representatives);
2. A new process for legislative apportionment, with **jurisdiction for review of apportionment plans specifically withheld from all state courts;**
3. **Reduction of the size of the Supreme Court** from 7 members to 5 (Justices Markman and Young being eliminated as of December 20, 2008);
4. **Reduction of the size of the Court of Appeals** from 28 Judges elected from 4 election districts to 21 Judges elected from 3 districts (eliminating 6 Republican Judges and Judge Helene White's judgeship as of December 20, 2008) and elimination of the Legislature's authority to add or delete judges of that court;
5. Requiring **the addition of 10 new circuit judgeships,** with no indication as to where they would be assigned;
6. **Reduction of the number of principal executive departments** from 20 to 18, and limitation of the number of state boards and commissions;
7. **Substantial reduction of salaries** and limitation of benefits for the Governor, Lieutenant Governor, Secretary of State, Attorney General, all legislators, and all judges;
8. **Creation of a new Judicial Performance Commission** to replace the current Judicial Tenure Commission.

That proposal, circulated by an obscure organization calling itself Reform Michigan Government Now! (RMGN) proposes a substantial re-write of the 1963 Constitution which would effect numerous changes punishing politicians in all three branches of state government.

The foregoing list of proposed changes is not exhaustive. Other important but less disruptive changes would include:

1. Requirement of specific legislation for prevention of election fraud;
2. A constitutional right to absentee voting without explanation of reason;
3. Requirement of specific legislation requiring financial disclosure for all legislators, judges, elected state executive officers, and all candidates for these offices;
4. Prohibition of lobbying activity within 2 years after completion of service as a legislator or executive department head;
5. Requirement of specific legislation requiring that jury lists be representative of the population from which they are drawn;

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6. Requiring the Supreme Court to adopt rules requiring disqualification of Supreme Court Justices in certain circumstances; and
7. Declaring that any Michigan citizen shall have standing to seek injunctive relief and other remedies for protection of the environment.

Again, this list is not exhaustive; it is impossible to address the entire content of this proposal in the space allowed for this discussion. It will suffice to say that the proposed changes are numerous and extensive. And although it may be acknowledged that the proposal includes a few sensible ideas, it is difficult to imagine how many of them could have been considered beneficial. In my humble opinion, it is fair to say that many of the proposed changes — most notably, the sweeping changes in the structure of our court system — would have truly catastrophic consequences if adopted by the voters.

It appears that the courts have saved us from this peril, at least for the time being. On July 24, 2008, a group of plaintiffs opposing the RMGN ballot proposal filed a Complaint for Mandamus in the Court of Appeals, requesting an order preventing its submission to the voters in the upcoming general election. On August 20, 2008, after denying RMGN's motion for disqualification of the judges who would be removed from office, the Court of Appeals granted the plaintiffs' request for a writ of mandamus against the Secretary of State and the Board of State Canvassers, precluding submission of the proposed amendments to the voters. The court's decision was based upon its finding that constitutional changes of this magnitude can only be proposed by a duly convened constitutional convention. *Citizens Protecting Michigan's Constitution, et al. v Secretary of State and Board of State Canvassers,* ___ Mich App ___ (Docket No. 286734 rel'd 8-20-08). As another commentator has aptly put it, the state Constitution wasn't written in a supermarket parking lot, so it shouldn't be rewritten that way either.

It will suffice to say that the proposed changes are numerous and extensive. And although it may be acknowledged that the proposal includes a few sensible ideas, it is difficult to imagine how many of them could have been considered beneficial.

The Supreme Court heard oral arguments on RMGN's application for leave to appeal on September 3, 2008. On September 8th, the Court wrote the last act of this peculiar drama by affirming the decision of the Court of Appeals 6 to 1.

New Public Acts

To date, there are 268 Public Acts of 2008. Most of the new acts filed since my last report have involved budgets, economic development initiatives, fine-tuning of the new business tax, and the usual potpourri of measures addressing new criminal penalties, licensing, fees and economic regulation. Few of these will be of any particular interest to civil litigators, as such, but the more productive pace is noteworthy for its great improvement over last year's session.

As another commentator has aptly put it, the state Constitution wasn't written in a supermarket parking lot, so it shouldn't be rewritten that way either.

New Bills and Resolutions

Prohibition of retroactive reversal of precedent. A few noteworthy Bills and Resolutions have been introduced since my last report. These include two additional Bills proposing erosion of the Engler tort reforms. **House Bill 6372 (Cushingberry – D)** would amend the Revised Judicature Act to add a new Section MCL 600.231, which would provide that, in a wrongful death action or an action alleging medical malpractice, "the Supreme Court shall not apply a decision overturning established precedent retroactively."

Damage Caps and gross negligence. In addition to this obviously problematic infringement of the judicial power, the Bill would amend MCL 600.1483, to provide that the statutory caps on non-economic damages in medical malpractice cases would not apply in any case involving the plaintiff's death or an injury caused by gross negligence of one or more defendants. In the case of injury caused by gross negligence, the exception precluding application of the caps would only apply to a defendant found to have been grossly negligent. In an ironic twist, the amendments to § 1483 would be made retroactive to April 1, 1994, the effective date of the 1993 medical malpractice tort reforms.

Affidavits of Merit and Meritorious Defense. House Bill 6277 (Meadows – D) would greatly relax the qualifications for expert witnesses and the requirements for filing of notices of intent and affidavits of merit in medical malpractice cases. The requirements for an affidavit of meritorious defense would become somewhat more stringent to the extent that the defense would no longer be permitted to submit an affi-

davit of meritorious defense signed by the defendant physician. Any defects in a notice of intent or response thereto, an affidavit of merit, or an affidavit of meritorious defense, would have to be raised promptly or be considered waived, and the trial court would be required to allow the filing of an amended notice, response, or affidavit, which would relate back to the filing of the original notice, response, or affidavit. In short, the Bill goes about as far as can be imagined to diminish the significance of these requirements without eliminating them altogether, and the relaxed qualifications for experts would greatly expand the pool of experts available to plaintiffs and defendants alike.

Although House Bill 6277 has been promptly scheduled for hearing in the House Judiciary Committee, it is highly unlikely that either of these bills will see the light of day in the Senate during the remainder of the current session. But as I've said before, one must never say never about a bill's prospects for movement in the lame duck session.

Zoning Act – Sanctions. House Bill 6394 (Elsenheimer – R) would amend the Zoning Enabling Act to add a new Section MCL 125.3409, which would allow a trial court to impose sanctions – including treble damages, costs of the action, reasonable attorney fees or the sum of $5,000, whichever is greater – if the court determines that an individual has been made a defendant in an action for the purpose of harassing or intimidating the individual or otherwise hindering his or her participation in government processes intended to influence governmental or electoral action under the act.

Proposed Repeal of Term Limits. House Joint Resolution FFF (Cushingberry –D) proposes the repeal of Const 1963, art 4 § 54, the constitutional provision establishing term limits for state senators and representatives.

Proposed Property Tax Relief. House Joint Resolution III (LeBlanc – D) proposes an amendment of Const 1963, art 9, § 3, pertaining to assessment of property taxes. The proposed amendment would provide property tax relief to homeowners who have seen their assessments continue to increase as property values have fallen, by requiring proportional decreases in assessments corresponding to decreases in assessed value. **House Joint Resolution JJJ (Moore – R)** proposes an amendment of Const 1963, art 4, § 37 to require that any rule adopted by a state agency be approved by the Joint Committee on Administrative Rules (JCAR) before taking effect.

It is too late for any of these proposals to be approved for submission to the voters in the upcoming general election. They are mentioned here because these ideas could yet be approved for submission to the voters in the next general election, and could also serve as a basis for future proposals to be introduced in the next session.

Old Business

Motorcycle Helmet Law Vetoed. House Bill 4749 (Farrah – D), which would have amended the Vehicle Code to create exceptions to the current motorcycle helmet law, has been vetoed as expected. In her veto message, Governor Granholm cited the increase in deaths and serious injuries likely to be sustained by unhelmeted riders, the vast disparity between the long-term cost of treatment of head injuries and the minimal personal protection insurance required by the enrolled legislation, and the need to save lives and avoid serious injuries.

Partial Birth Abortions Ban Vetoed. Senate Bill 776 (Brown – R), which would have amended the Penal Code to add a new section MCL 750.90h prohibiting partial birth abortions, has also been vetoed by Governor Granholm, based upon her finding that the legislation failed to protect the life and health of mothers.

"Kreiner Fix." Senate Bill 124 (Patterson – R), known in Lansing as "the *Kreiner* fix," would amend MCL 500.3135, to substantially broaden the statutory definition of "serious impairment of body function." This bill was introduced in January of 2007 and referred to the Senate Judiciary Committee, where it has not been scheduled for hearing. On June 19, 2008, during a temporary absence of two Republican members, a bold coup staged by Senate Democrats and the Republican sponsor succeeded in discharging the bill from committee and advancing it to the Order of Third Reading of bills over the strenuously voiced objections of the Republicans present. The planned vote on final passage did not occur, however, and the bill was subsequently re-referred to the Government Operations Committee on June 24, 2008. As I've noted before, the House has passed its own, substantially broader, "*Kreiner* fix" Bill – House Bill 4301 (Condino – D). That Bill was passed by the House on March 14, 2007 and referred to the Senate Judiciary Committee, where it has received no further consideration.

Smoking in Public Places. House Bill 4163 (Clack – D) would have a substantial impact on smokers, their employers, and all who seek their business. This bill would amend several sections of the Public Health Code to prohibit smoking in nearly all public places, including places of employment and food service establishments. The bill was passed by the House by the narrowest margin last December. A stronger version, eliminating a number of exceptions allowing smoking in limited circumstances, was passed by the Senate on May 8, 2008. The Senate Substitute has remained on the

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House Calendar under the Order of Messages from the Senate since May 14, 2008.

Mini-Tort Increase. House Bill 5838 (Melton – D) would amend MCL 500.3135 to increase, from $500 to $1,500, the amount of "mini-tort" damages which may be recovered for damage to motor vehicles that is not covered by insurance. The Bill was passed by the House without amendment on June 18, 2008, and now awaits consideration in the Senate Committee on Economic Development and Regulatory Reform. Senate Bill 1185 (Anderson – D), which would increase the same limit to $1,000, has also been referred to the Senate Committee on Economic Development and Regulatory Reform, but has not been scheduled for hearing.

Jury Boards. House Bill 4859 (Cushingberry – D) would place jury boards under the oversight of the circuit courts and provide new procedures for compilation of jury lists designed to promote greater diversity of jury pools. Names of potential jurors would be drawn from a broader base, which would include driver license and state identification card holders, voter registration lists, and lists of persons who have filed state income tax returns. This Bill was passed by the House on June 10, 2008, and now awaits consideration by the Senate Judiciary Committee.

More Information

Those who wish to know more may find all of the Michigan Legislature's Bills, analyses, and journals on the Legislature's website at www.michiganlegislature.org. Legislative materials for Bills in the U.S. Congress are available at www.congress.org.

Practice Tip

WORKER'S COMPENSATION EXCLUSIVE REMEDY —AFFIRMATIVE DEFENSE AND SUBJECT MATTER JURISDICTION

By: Hal O. Carroll
Vandeveer Garzia, P.C.

The workers compensation exclusive remedy defense is often thought of and asserted as an immunity. It is not incorrect to describe the defense as an immunity, but the problem with this approach is that an immunity is waived if it isn't raised in the first responsive pleading. The better approach is to treat it as defeating subject matter jurisdiction, because the statute gives sole jurisdiction to the Workers Compensation Bureau once the employment status is established. MCL 418.841(1). The advantage, of course, is that subject matter jurisdiction can never be waived. *Harris v Vernier,* 242 Mich App 306 (2000) and *Herbolsheimer v SMS Holding Co,* 239 Mich App 236 (2000).

Practice Tip

CELL PHONE LOGS AND DISCOVERY

By: Peter Dunlap
Fraser, Trebilcock, Davis & Dunlap

It is extremely important to determine whether the plaintiff driver was using a cell phone when the accident occurred. It may also be useful to determine who the driver called immediately after the accident. Useful admissions may have been given to the recipient, whose phone number will appear on the cell phone records. Accordingly, you should consider the following interrogatory:

1. Did you have a cell phone with you at the time of the incident herein. If you did, please state:

(a) The name and address of your cell phone carrier

(b) Your cell phone number; and

(c) Your account number with your cell phone carrier.

2. Were you using your cell phone just prior to or at the time of the incident, including the one hour subsequent to the accident? If so, set forth

(a) The name, address and telephone number of the person you were talking with at that time, and

(b) The reason for the call(s).

MEMBER NEWS — WORK, LIFE, AND ALL THAT MATTERS

Member News *is a member-to member exchange of news of* ***work*** *(a good verdict, a promotion, or a move to a new firm),* ***life*** *(a new member of the family, an engagement, or a death) and* ***all that matters*** *(a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to the editor, Hal Carroll (hcarroll@VGpcLAW.com) or the Assistant Editor, Allison Reuter (acreuter@varnumlaw.com).*

MDTC's President, **Robert Schaffer** and his wife **Laura** are the proud parents of a baby girl Georgie Kaye, born July 27, 2008 at 1:40pm, 5.5 pounds, 19 inches.

Alan Couture of Sondee, Racine & Doren reports that he and his son, Nathan, have both attained the level of black belt in Karate (and sent a photo as proof).

Hal Carroll of Vandeveer Garzia has been re-elected as Chair of the Insurance and Indemnity Law Section of the State Bar of Michigan.

Timothy Casey of Kelley, Casey & Moyer has been re-elected as Chair-Elect of the Insurance and Indemnity Law Section of the State Bar of Michigan.

Elaine Murphy Pohl of Kupelian, Ormond & Magy, has been re-elected as Treasurer of the Insurance and Indemnity Law Section of the State Bar of Michigan.

Boyd Chapin, Jr. of the Detroit office and a shareholder of Garan Lucow Miller, P.C., has received the 2008 American Podiatric Medical Association's Meritorious Service Award, an award given to persons who demonstrate outstanding accomplishments of the local, state, or regional level in scientific, philanthropic, or other professional or public service endeavors that have had a profound impact on podiatric medicine.

John E. McSorley, a senior shareholder in the Detroit office of Garan Lucow Miller, P.C., has been elected as President of the Association of Defense Trial Counsel (ADTC) effective June 1, 2008 through May 31, 2009.

Mark R. Mueller, of the Traverse City office, and a shareholder of Garan Lucow Miller has been nominated to a subcommittee of the Grand Traverse-Leelenau-Antrim Bar Association's Alternative Dispute Resolution Committee.

PEOPLE IN THE LAW SUBMISSION FOR MICHIGAN LAWYERS WEEKLY — MDTC

Elections

Lawrence G. Campbell of Dickenson Wright was elected to the Board of Directors of the Michigan Defense Trial Counsel.

Mark A. Gilchrist of Smith Haughey Rice and Roegge was elected to the Board of Directors of the Michigan Defense Trial Counsel.

Dean F. Pacific of Warner, Norcross and Judd was elected to the Board of Directors of the Michigan Defense Trial Counsel.

Dean Altobelli of Miller Canfield was selected as the Regional Chairperson for the Lansing Area by the Michigan Defense Trial Counsel.

David A. Couch of Garan Lucow was selected as the General Liability Section Chair by the Michigan Defense Trial Counsel.

Hal O. Carroll of Vanderveer Garzia was selected as the Insurance Law Section Chair by the Michigan Defense Trial Counsel.

Linda M. Foster-Wells of Keller Thoma was selected as the Employment Law Section Chair by the Michigan Defense Trial Counsel.

Richard J. Joppich of Kitch, Drutchas, Wagner, Valitutti & Sherbrook was selected as Professional Liability & Health Care Section Chair by the Michigan Defense Trial Counsel.

Thaddeus E. Morgan of Fraser, Trebilcock, Davis & Dunlap was selected as the Law Practice Management Section Chair by the Michigan Defense Trial Counsel.

David L. Campbell of Bowman and Brooke was selected as the Young Lawyers Chair for the Michigan Defense Trial Counsel.

Scott Holmes of Foley & Mansfield was selected as the Regional Chairperson for the Southeast Michigan Area by the Michigan Defense Trial Counsel.

Honors

Robert H S. Schaffer of Robert H S. Schaffer, P.C., received the outstanding service award from the Negligence Section of the State Bar for his work as Michigan Defense Trial Counsel President.

MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

MDTC Winter Conference 2008
Friday, November 7, 2008
8:30 a.m. – 4:15 p.m.

Future Shock:

How evolving trends in legislation and the incoming generation of lawyers will change the legal landscape in Michigan

Troy Marriott
200 West Big Beaver Road, Troy MI 48084
(248) 680-9797

MDTC
PO Box 66
Grand Ledge, MI 48837
phone: (517) 627-3745 | fax: (517) 627-3950
email: info@mdtc.org | www.mdtc.org

MDTC
Winter Meeting
Friday, November 7, 2008
Troy, Marriott

Future Shock:

How evolving trends in legislation and the incoming generation of lawyers will change the legal landscape in Michigan

8:00 a.m. - 8:30 a.m.:
Registration

8:30 a.m.:
Opening comments
Robert H S. Schaffer, MDTC President

8:35 a.m.:
Program Overview - Committee Chairs:
Timothy A. Diemer, John P. Jacobs, P.C.
Phillip C. Korovesis, Butzel Long

8:45 a.m. - 10:15 a.m.
Re-Tooling Your Practice - Helping Lawyers and Law Firms Prepare for Changes in the Practice of Law
Timothy D Batdorf, The Batdorf Firm PC, Troy, MI

10:15 a.m.:
Break

10:30 a.m. - 11:45 p.m.
Re-Tooling Your Practice - Helping Lawyers and Law Firms Prepare for Changes in the Practice of Law
James R. Old, Jr., Germer Gertz, LLP, Beaumont, TX

11:45 p.m.:
Luncheon with 2008 Respected Advocate Awards Recipients

1:00 p.m. - 2:30 p.m.
Inter-Generational Issues in the Practice of Law (Traditionalists, Boomers, GenX and GenY)
Arin N. Reeves, J.D., Ph.D.; The Athens Group, Chicago, IL

2:30 p.m.:
Break

2:45 p.m. - 4:15 p.m.
Retaining Female Litigators:
Panel Members:
Martha Mary Rabaut, Miller Canfield Paddock & Stone PLC
Sue Zitterman, Kitch, Drutchas, Wagner, Valitutti & Sherbrook P.C.
Ann Stuursma, Garan Lucow Miller PC
Erin Stovel, Dickinson Wright PLLC
Moderator: Arin N. Reeves, J.D., Ph.D.; The Athens Group, Chicago, IL

4:15 p.m.: Meeting Adjourns

MDTC Events qualify for CLE in Ohio, Indiana and Wisconsin and other upon request.

Who Should Attend:

- Those practicing in law firms, corporations, and insurance companies
- Anyone involved in litigation or whose job is to manage litigation will benefit from these presentations.

MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

MDTC Winter Conference 2008—Friday, November 7, 2008
Troy Marriott, Troy, MI

Full Name _____ Preferred First Name (as you want it to read on badge) _____

Company Name (Please print EXACTLY how you would like company name to appear) _____

Address _____

City _____ State _____ Zip _____

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Emergency Contact _____ Phone Number _____

Special Dietary Requirements _____ Special Considerations _____

- ❑ MDTC Member $195
- ❑ Group (up to 3 Members from your firm) each additional person (over 3) $50.00 each $345
  Please list those who will be attending on a separate sheet
- ❑ MDTC Senior Member (Defense Attorneys 70 years and older) $85
- ❑ New Member SPECIAL: Cost of meeting and 1 year of membership $270
- ❑ Non-Member. $220
- ❑ Lunch only $60
- ❑ Handout only $220

TOTAL AMOUNT TO BE CHARGED: _____

❑ Check enclosed payable to MDTC ❑ Paying by credit card (Complete information below)

❑ Visa ❑ MasterCard Credit Card Number:_____

Expiration Date _____ Authorized Signature _____

Registration fee includes program, lunch, breaks, and social hour. If you have any questions, please contact Madelyne Lawry at (517) 627-3745.

PLEASE COMPLETE THIS FORM AND RETURN IT TO:

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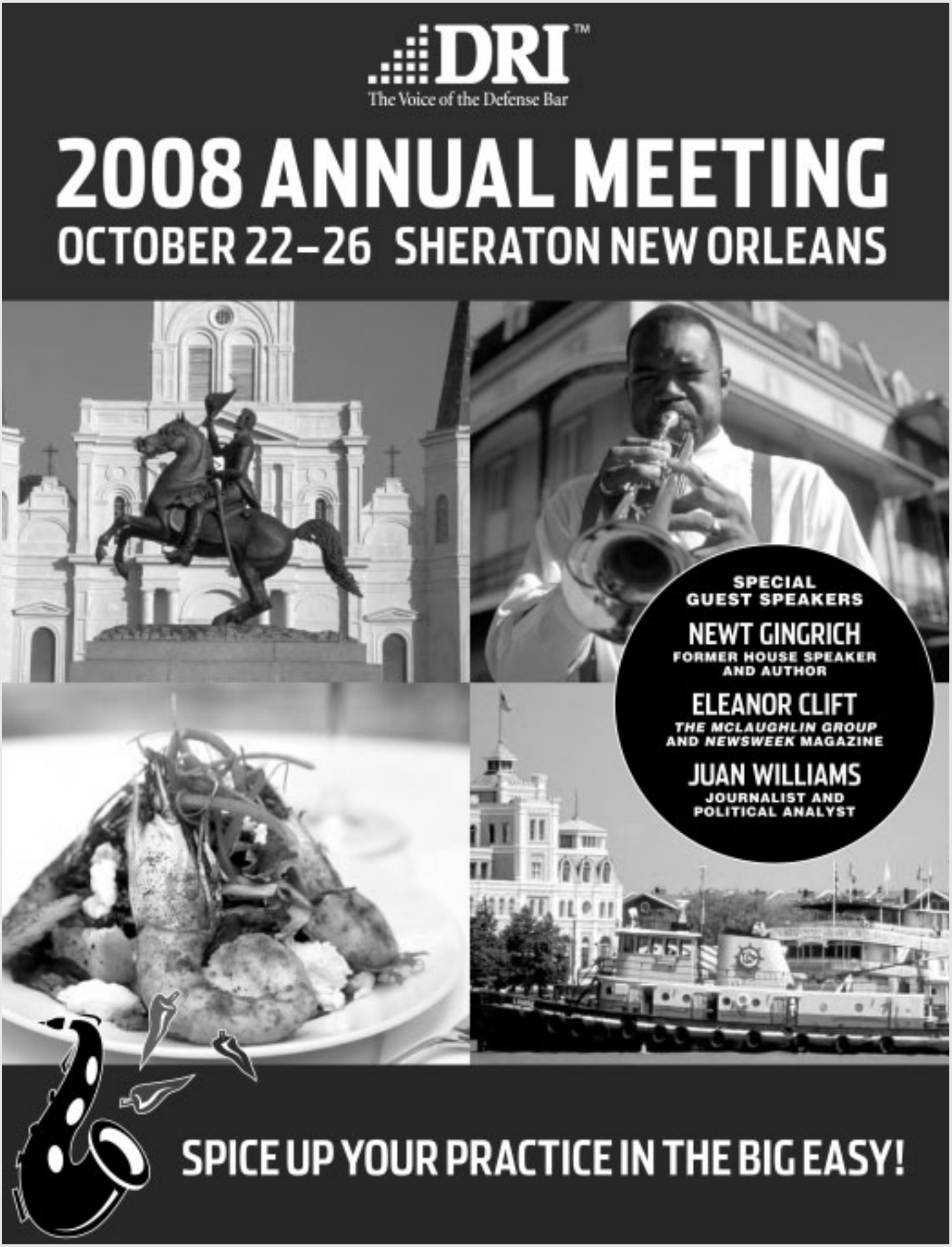
Cancellations will be accepted 48 hours prior to the event less a $20.00 administrative fee.

Date Rec'd Check # Amount CC Proc Auth # Date Entered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MDTC

MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

Michigan Defense Trial Counsel is proud to invite you to:

Third Annual Meet The Judges

Michigan Supreme Court Justices, Court of Appeals Judges & Federal Judges

Wednesday, October 15 2008

6:00 p.m. – 8:00 p.m.

The Turner – Dodge House & Heritage Center

100 East North Street

Lansing MI 48906

517-483-4220

Event Attendance Fees:

Member $85.00

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Hors d' oeuvres will be served and an Open Bar will be provided.

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MDTC SCHEDULE OF EVENTS

2008–2010

2008

September 17, 3:00–5:00	Board Meeting, Hyatt Regency, Dearborn
September 17, 6:30–9:30	Respected Advocate Award Presentation, Hyatt Regency
September 17–19	State Bar Annual Meeting – Hyatt Regency, Dearborn
October 2	Civil Defense Basic Training Seminar – Troy Marriott
October 15	Meet the Judges, Turner Dodge House, Lansing
October 22–26	DRI Annual Meeting – Sheraton, New Orleans
November 6, 4:00–6:00	Board Meeting, Troy Marriott
November 6, 6:00–9:00	Past Presidents Dinner, Troy Marriott
November 7	Winter Meeting, Troy Marriott

2009

January 14, 2009	Excellence in Defense Nomination Deadline
January 22, 2009	Future Planning Meeting, Shanty Creek
January 23, 2009	Board Meeting, Shanty Creek
March 5, 2009	Board Meeting, Okemos
March 31, 2009	Young Lawyers Golden Gavel Award Nomination Deadline
June 13–14, 2009	Summer Meeting, Boyne Highlands
November 5, 2009	Winter Meeting, Troy Marriott

2010

May 14 & 15, 2010	Summer Meeting, Double Tree, Bay City