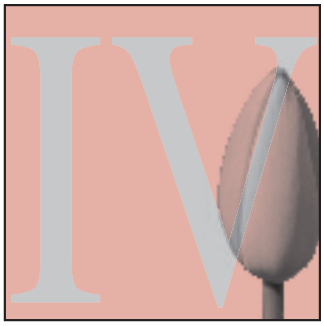
MICHIGAN DEFENSE
QUARTERLY

Volume 26, No. 4 April 2010



IN THIS ISSUE:

MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

MDTC

Michigan Defense Trial Counsel, Inc
The Statewide Association of Attorneys Representing the Defense in Civil Litigation

P.O. Box 66 • Grand Ledge, Michigan 48837
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Editor's Notes

Editor:
Hal O. Carroll
hcarroll@VGpcLAW.com

Assistant Editor: Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

Articles: All articles published in the *Quarterly* reflect the views of the individual authors. We always welcome articles and opinions 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 emphasizes analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

MICHIGAN DEFENSE QUARTERLY

Volume 26 Number 4 • April 2010

Cite this publication as 26-4 Mich Defense Quarterly.

Michigan Defense Quarterly is a publication of the Michigan Defense Trial Counsel, Inc. All inquiries should be directed to Madelyne Lawry, 517-627-3745.

President's Corner

By: J. Steven Johnston
Berry, Johnston, Stzykiel & Hunt, PC
President, MDTC

The Road Ahead (with apologies to Bill Gates)

J. Steven Johnston
Berry, Johnston, Sztykiel & Hunt, P.C.
1301 West Long Lake Rd Ste 250
Troy, MI 48098
Phone: 248-641-1800
Fax: 248-641-3845
sjohnston@berryjohnstonlaw.com

The book with this title was published by Bill Gates[1] in 1995 and discussed, among other topics, the future of the internet. I doubt that even Bill Gates could foresee where we are fifteen years later when he wrote his book on a computer the size of a small television, although he did predict the PDA. In a post 9-11 era, we are concerned about having our servers hacked and maintaining firewalls to prevent the importation of viruses. Computers now use software located in the "cloud" rather than on the local hard drives of computers, a development that threatens Microsoft and potentially benefits competitors such as Google and Oracle. Where will the information and technology industry be fifteen years from now? Which companies will survive in that market?

More to the point, **where will the legal profession be in fifteen years?** I suspect that it is as hard to accurately predict where we will be in the year 2025 as it would have been to predict where we are now from the perspective of 1995. Did anyone have any idea that we would be filing electronically in federal and state courts or would be worried about e-discovery? We use smart phones to conduct research and send text messages from the office and to clients while we are on the road in our practices. Firms located in India perform legal research and summarize medical and other records for law firms in this state. Would any of us have predicted in 1995 that we would be in the middle of a significant economic downturn that has depressed commercial and other business activity to the point where it has had a drastic impact on the volume of legal activity to this degree?

In the next few months, **the people of the state of Michigan will elect a governor, two supreme court justices, court of appeals judges and numerous circuit and district judges.** We are currently awaiting the publication of a number of opinions which may have a significant impact on the law in this state for years to come. To some degree, the choices made by the voters in this state and the politicians in Lansing and Washington will have ripple effects that we cannot predict on the economy and our profession.

Think about it. If a recent college graduate asked you if they should go to law school, how would you answer that question? What would you tell them about their prospects of finding a job, let alone paying off the debts incurred during the course of their undergraduate and law school education?

I do not pretend to have a crystal ball to look in to the future fifteen years, nor do I have the answer to the question posed by a prospective law student. I would like to think that our profession will successfully deal with the current challenges as it has in the past, changing and growing in new and unexpected directions. I would also like to think that the student would accept the challenge of law school after realistically evaluating their prospects and controlling the financial burdens of an increasingly expensive legal education. (May I suggest specializing in health care law, its rules and regulations?)

I do believe that our **MDTC has a significant role to play in the shaping of the future of the profession, hopefully to the benefit of its members,** their firms and their clients, as do similar groups such as our respected opponents in the

I would like to thank the many people who have worked tirelessly for the MDTC during my extended tenure as a board member and my brief tenure as president.

MAJ. While the direct impact MDTC has on the law through amicus briefs and the articles published in the *Quarterly* are fairly apparent, there are more subtle but important effects that the organization has on the defense bar. The organization examines pending amendments to the court rules and similar issues and makes the position of the collective membership known to the powers that be. In a state without mandatory CLE, we provide high caliber seminars that help our members stay on the cutting edge.

Consequently, I ask that our loyal members continue their economic support of the MDTC and increase their involvement in the organization. At first it may seem tough to pay the dues out of your own pocket if your firm will not pay the dues for you. Yet these dues are insignificant compared to the return on your investment, especially if you take the time to **take advantage of the benefits and opportunities available through MDTC.** We need to continue to add new members to the group as we did through our successful commercial seminar last fall. If we maintain a healthy and vibrant MDTC, we will have some positive impact on the future of our practice, wherever that might take us.

I would like to thank the many people who have worked tirelessly for the MDTC during my extended tenure as a board member and my brief tenure as president. To eliminate the risk of leaving someone out, I will not name names, but I will say thanks to those who preceded me in this position, the committee chairs for all of the seminars, section and regional chairs, the editors, the board members and the executive committee. I must mention by name and thank, however, the MDTC staff, Valerie, Susan and, of course, our executive director, the indispensible Madelyne Lawry.

One last shameless plug for our **spring seminar in Bay City, "COURTROOM PERFORMANCE-Are You Really As Good As You Think You Are?"** We have a great program coming up on May 15 and 16 at the Doubletree Hotel. I saw our two speakers, Lisa DeCaro and Leonard Matheo, present to a packed house at the DRI convention in Chicago in October. The presentation was wonderful. Not only did their program provide valuable insight on how judges and juries perceive you and your opponent, it was really funny. The location is central so that it should not take too much time away from your practice or family. If you choose to stay at the hotel, I think you will find that the price is right and will have a great time participating in the social and networking activities we have planned.

Endnotes

1. The Road Ahead was written by Bill Gates along with Nathan Myhrvold and Peter Rinearson. He predicts many of the developments in technology that we see today, but not Tweeting or texting while driving.

New Members

MDTC Welcomes These New Members

Gerald J. Andree, *Sullivan Ward Asher & Patton, P.C.,* Southfield

Ahmed Hassouna, *Law Office of Gail L. Storck,* Troy

Geoffrey Scott, *Braun Kendrick Finkbeiner, PLC,* Saginaw

Provocation And Trespass Are Viable Defenses To Dog Bites

By: Robert Abramson, *Kopka, Pinkus, Dolin & Eads*

Executive Summary

The two statutory defenses to liability for a dog bite are trespass and provocation. To be entitled to recover for a dog bite, the person must be either a licensee or an invitee.

The provocation defense is contained within the dog bite statute, but the statute does not define "provocation." The courts have held that intent is not a prerequisite to a finding of provocation. Provocation will be found to exist if the effect of a particular act was to provoke a particular dog. An act that is intentional and that causes the dog to react is a provocation even if the actor did not intend to provoke the dog. Even an act that was unintentional, such as stepping on the dog's tail, is still sufficient to meet the statutory defense of provocation when the dog reacts by biting.

Robert Abramson is an associate in the office of Kopka, Pinkus, Dolin & Eads. His practice specialties include defending dog bites, auto accidents, premises liability, contractual disputes, and construction defects. His email address is rsabramson@kopkalaw.com.

If your dog bites the mailman, Michigan's Dog Bite statute places strict liability on the owner. However, these cases are not indefensible. In fact, there are two defenses: trespass and provocation.

Trespass

A trespasser is not entitled to recovery under the dog bite statute.[1] An injured party must show that he or she was an invitee or a licensee in order to be protected by the dog-bite statute, *Alvin v Simpson*.[2] The Michigan courts have held a pretty tight line in regard to trespass and the liability imposed by the dog bite statute. In *Alvin*, a minor was bitten after he entered the dog owner's yard, over a fence, to retrieve a ball. Since the minor did not have permission to enter the yard, the dog owner's motion for summary disposition was granted on a strict liability claim.

However, in the case of *Durecki v Alcock*,[3] Mr. Durecki was responding to what he believed to be a fire on the defendant's property. He trespassed onto the defendant's property and was bitten by one of their dogs. The court held that since Mr. Durecki was a volunteer helper who entered the land without being asked to do so in order to render assistance, he was considered a licensee, rather than a trespasser.

Provocation

The dog bite statute uses the term "provocation" but fails to define it:

> (1) If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or other owner's knowledge of such viciousness.

So what constitutes provocation? The Court of Appeals in *Brans v Extrom*[4] considered this very issue. The court consulted Black's Law Dictionary (4th ed.), to determine that "provocation" is [t]he act of inciting another to do a particular deed. That which arouses, moves, calls forth, causes or occasions."[5] The *Brans* court also shed further light on the intentional versus unintentional aspects of provocation:

The court said that the definition of "provocation" does not take into account the intent of the actor. Rather, the definition focuses on the nature of the act itself and the relationship between that act and an outcome. Thus, an unintentional act could constitute provocation within the plain meaning of the statute because some actions, regardless of intent, may be more than sufficient evidence to relieve a dog owner of liability.[6]

In *Brans*, the plaintiffs visited the defendants' home to assist them in readying their backyard for a wedding. The plaintiff and defendant had removed a section of

The definition of "provocation" does not take into account the intent of the actor. Rather, the definition focuses on the nature of the act itself and the relationship between that act and an outcome.

chicken wire that was covering a dog kennel and were carrying it out of the kennel. Plaintiff was walking backward, when she stepped on defendants' Australian Shepherd, and was bitten. The court granted defendants' motion for summary disposition, concluding that a person can commit unintentional acts that are sufficiently provocative to relieve a dog owner of liability under the dog-bite statute. This has now been incorporated into the jury instructions:[7]

> When I say "provocation," I mean any action or activity, whether intentional or unintentional, which would reasonably be expected to cause a dog in similar circumstances to react in a manner similar to that shown by the evidence.

Simply put, the proper focus is the injured party's act, not on his or her intent, and whether that act was sufficient to provoke the dog's attack. For instance, attempting to retrieve a football two feet away from a dog is not an act that was sufficient to constitute provocation.[8] However, accidentally being pushed by another child and stepping on a dog's tail, though unintentional, may constitute provocation.[9]

The case of *Koivisto v Davis*[10] considered whether a plaintiff's reaction to a dog bite attack to her animals could be considered provocation. In *Koivisto*, defendants' dogs escaped from the kennel, entered plaintiff's property, and attacked her cats. In response, plaintiff stuck her fingers in one of the dog's eyes, and kicked both of them, suffering 28 puncture wounds in the process. Plaintiff argued that her "reaction" to the dog bite attack could not be considered provocation. The Court of Appeals agreed, holding that the dogs were in a provoked state before the owner reacted to their behaviors, and therefore the plaintiff's claim was not defeated by provocation.

Similarly, in *Fagan v Lomupo*,[11] the plaintiff drove to defendant's home to bring over a magazine. He stood outside the gate to defendant's fenced-in backyard, and extended his magazine over the gate. Plaintiff was subsequently bitten on his shirt and leg. The court concluded that plaintiff's action of extending the magazine over the gate was not directed toward the dog; rather, it was done to enable plaintiff to rest his arm on the gate. The court further concluded that the response of biting plaintiff's shirt and leg was not proportional to plaintiff's act of extending the magazine over the gate, since plaintiff did not enter the backyard, or make any sudden gestures that may have taunted the dog.

Thus, it appears there are three potential variations of the provocation defense: (1) the victim intentionally provoked the dog (*e.g.*, pulled the dog's ears); (2) the victim intentionally committed an act that unintentionally provoked the dog (*e.g.*, petting the dog); (3) the victim committed an unintentional act that provoked the dog (*e.g.*, accidentally stepping on the dog's tail). As the above case law indicates, whether a plaintiff's act is intentional or unintentional, succeeding on a provocation defense is rare, but possible.

The proper focus is the injured party's act, not on his or her intent, and whether that act was sufficient to provoke the dog's attack.

Endnotes

1. MCL 287.531.
2. *Alvin v Simpson,* 195 Mich App 418, 420; 491 NW2d 604 (1992)
3. Unpublished Michigan Court of Appeals decision, docket no. 253640 (Nov. 17, 2005)
4. 266 Mich App 216; 701 NW2d 163 (2000)
5. *Brans* at 219
6. *Brans* at 219
7. Michigan Civil Jury Instruction 80.03
8. *Bradacs v Jiacobone,* unpublished Court of Appeals decision, docket 215055 (January 9, 2001)
9. *Nichols v Lorenz,* 396 Mich 53; 237 NW2d 486 (1976), reh den 396 Mich 976 (1976)
10. 277 Mich App 492; 745 NW2d 824 (2008)
11. Unpublished Court of Appeals decision, docket 264270 (March 15, 2007)

New Membership Benefit

The on-line Membership Directory is now available to everyone — attorneys, non-attorneys, and the general public.

By clicking on the "Member Directory", you can search members by name, firm address, law practice area, and geographic location.

MDTC Members can view and update their own information with a simple click of the mouse.

** MDTC staff will verify any and all requests to update member's contact information.

Defending The Dog Bite Case: Avoiding Eight Common Mistakes

By: Ronald Berman, D. A. B. F. E.

Executive Summary

The success or failure of a dog bite case often depends on the quality of the expert. A qualified expert can assist in gathering important evidence through interviews of the persons involved, examinations of the dog, and inspections of the scene. The expert can also assist in framing and evaluating both written and other evidence. An expert's skill at explaining the evidence through testimony at trial can be an essential component of the successful defense of a dog bite case.

Dogs are wonderful companions and Americans are very fond of them. There are approximately 68 million dogs in the United States and pets and pet products are very big business. Living with a dog has been shown to benefit children, adults and senior citizens both physically and emotionally. At the same time, according to the Center for Disease Control and Prevention there are more than 4.7 million people bitten by dogs resulting in an estimated 800,000 injuries that require medical attention every year.

The latest numbers available show that dog bites are an increasing problem for carriers. According to the Insurance Information claims related to dog bites cost the insurance industry $317 million in 2005 and $356.2 million in 2007, a significant increase.

Typical reactions by insurers are to hike premiums and in many cases exclude specific breeds like Rottweilers, German Shepherds and "pit bulls" from coverage altogether. All in all, 32 states have instituted a dog bite statute that makes the owner "strictly" liable for any injury or property damage their dog causes. Under these statutes, the defense has to prove that the victim provoked the dog in order to minimize or even escape liability. The only other defenses are that the victim was trespassing or that the defendant is not the owner/caretaker of the dog.

This article intends to offer insights into the discovery process as it relates specifically to dog bites and other pet related injuries by examining eight common ways defense attorneys can miss vital evidence that can have a profound effect on the outcome of their case.

Mistake I – Not Evaluating the Dog

A video presentation of the defendant's dog is possibly the most powerful evidence an attorney can offer a jury. If the dog is aggressive or even vicious each member of the jury gets to fully experience that behavior and get a real sense of what the plaintiff was dealing with at the time of the incident. The same video evidence can also help to attack the credibility of a defendant who has previously said that their dog is not aggressive and that the plaintiff provoked the dog.

Of course, it is important that the evaluation be set up correctly and that no opportunity to view and record the dog's unprovoked behavior in multiple settings and situations is missed. There are many questions that have to be answered and planned for when setting up the format for an evaluation. Was another dog involved? Did the incident happen on the defendant's property or somewhere the dog would relate to as neutral territory? Has the defendant made any statements that could be tested during the evaluation? Which testing protocol should be used? The goal is to set up as fool proof and professional an evaluation, as soon as possible after the incident so that every bit of information possible is obtained.

Ron Berman is a canine and feline behavior expert specializing in the litigation of dog bites and pet related injuries. His website is dogbite-expert.com and his email address is ropaulber@earthlink.net.

32 states have instituted a dog bite statute that makes the owner "strictly" liable for any injury or property damage their dog causes.

Immediacy is a prime factor, as so often the dog is given away, disappears or dies for any of a myriad of reasons and the opportunity to evaluate the animal is gone and with it a possible turning point in the plaintiff's case. Fortunately, a solid presentation can be conducted even if the dog is no longer available but no other evidence sums it up quite as well or intensely.

The choice not to evaluate the defendant's dog, especially if the dog is alive and available, can easily backfire. If you have retained an expert, not evaluating the dog can be used to show that he or she not only did not do a complete investigation but that their opinions are based on second hand information. It can also be the case where the plaintiff's expert does an evaluation but the defense expert does not. This can be very problematic because if the plaintiff's expert actually saw and evaluated the dog, his testimony will likely carry more weight.

Mistake 2 – Failing to Inspect the Scene

If a dog living at the defendant's home also spends time inside the house it is important to inspect inside the home as well. Chewed door or window frames, scratches on the door, the dog's bed or lack of one, where the dog slept, photos of dogs on the wall — all of these give a sense of how the dog was treated, how it acted in the house. A plethora of toys in every room gives a lot of information about whether the defendants were indulgent with their dog. Inspecting leashes, collars, chains, dog houses, food bowls, kennels, yards, toys etc. also provide a wealth of information about the dog to someone who deeply understands the human/canine companion bond and how it influences behavior. Do they use a choke or prong collar? Is their leash extendable to 15 or 20 feet? Is the water in the bowl dirty?

Does the fence meet the standard for containing a dog of this size? Is there any evidence that the dog was aggressive at the fence and or property boundaries?

Mistake 3 – Using the Wrong Interviewer

Often times statements of witnesses are taken by people experienced in interviewing techniques but who have little experience in animal behavior. As a result the evidence they discover leaves openings that can be explored by the defense. What if a witness gives a statement that the dog was aggressive and it scared the witness? That sounds solid, but what does it really say? "Aggressive" is a general term that can mean many things. In one case, the witness who labeled the dog aggressive meant that he had a lot of energy and played really hard or "aggressively."

Also, the fact that the dog scared the witness is really based only on their perception of the dog as a non-expert, which has little meaning unless the dog actually demonstrated behaviors which were clearly threatening. A dog that barks at people passing the property may scare them but barking is not considered an aggressive behavior on its own. Even a statement from a witness that the dog barks aggressively can be challenged unless it is dissected and proved to reveal true aggressive behavior or just the witness's personal observations and reactions.

A video presentation of the defendant's dog is possibly the most powerful evidence an attorney can offer a jury.

Chewed door or window frames, scratches on the door, the dog's bed or lack of one, where the dog slept, photos of dogs on the wall – all of these give a sense of how the dog was treated, how it acted in the house.

An interviewer such as a private investigator may miss important information because he or she did not realize that a number of follow up questions were necessary to insure that the full value of the interview was realized. Also, it can be frustrating, after deciding that a second interview is necessary, to find that the previously willing witness seen by the investigator is now not so willing to cooperate and that a valuable opportunity has been lost.

Mistake 4 – Missing Important Discovery Documents

Basically the laundry list of important discovery documents needed in a dog bite case or pet related injury are well known. As far as the dog is concerned nearly always necessary are the veterinarian records, animal control records, police report, paramedic records if any, the names of any trainers and or groomers the dog has had, names of independent witnesses who are familiar with the dog including neighbors, friends, employee's people who have visited the home etc. Other related documents that may prove helpful are AKC registration certificates, breeding documents if the dog was imported as a puppy or as a trained dog and diplomas from any training schools the defendant claims the dog has had.

"Aggressive" is a general term that can mean many things. In one case, the witness who labeled the dog aggressive meant that he had a lot of energy and played really hard or "aggressively."

Mistake 5 – Depending on Documents Alone

Receipt of a veterinarian's records doesn't ensure that you have all the information contained on them. These days a lot of veterinary clinics respond to subpoenas for records with digitized or computer printouts. As most veterinarians still write initial reports by hand, it is important to get the handwritten notes and the computerized printout to help decipher the doctor's handwriting. In more than a few cases notes containing the words "reactive" or "tried to bite" were written in the top corner of some records but were not transferred to the computer version. Also, it is always good to talk to the veterinarian as well. They are a great source of information and there are always things they don't put on the charts.

Mistake 6: – Not Properly Evaluating Wounds and Photos

If a plaintiff claims that a Rottweiler bit her arm and held it in the dog's mouth for over two minutes while knocking her down and shaking his head, their wounds are "direct" physical evidence of the attack. An expert in wound evaluation can give a strong opinion based on photos of the wounds as well as specific information whether the evidence supports the plaintiff's version. Victims of dog attacks are often not clear about every detail of the incident but their wounds tell a complete story in a way that is hard to challenge. If there is too much disparity between the plaintiff's version and their actual wounds it can lead to a serious credibility issue.

An example of this is a case in which the plaintiff, a tenant on the landlord's property, filed suit against the landlord after being attacked by her male, unneutered, 125 pound Pit Bull/Rottweiler mix. The plaintiff had many wounds on his body and the photos were disturbing. The plaintiff, an actor, gave highly emotional testimony about how he thought the dog would kill him and how the dog bit down and held each arm for minutes at a time while he struggled trying to save himself. He described the dog grabbing and tearing at his flesh.

When the photos of the wounds were examined by an expert it was determined that the Plaintiff's wounds did not support his story. There were puncture wounds but none that suggested that the dog ever "clamped down" or tore flesh. In fact, one area where the plaintiff described such an attack had no puncture wounds at all, just scratches and bruising. There was also no sign of ecchymosis, the dark bruising that appears when minor blood vessels break around a wound caused by the pressure of the bite.

Originally, the plaintiff asked for more than a million dollars. Just before trial the defense offered $300,000.00. The final result was that the jury did not buy the plaintiff's story, assigned him a large percentage of comparative fault and awarded him $19,000.00.

As most veterinarians still write initial reports by hand, it is important to get the handwritten notes and the computerized printout to help decipher the doctor's handwriting.

An expert in wound evaluation can give a strong opinion based on photos of the wounds as well as specific information whether the evidence supports the plaintiff's version.

Mistake 7 – Not Consulting an Expert

It is vitally important to know as much about a case as possible before accepting it. Retaining an expert can be expensive, especially if your case goes all the way through deposition and trial. Most experts offer an initial free consultation. The attorney can give a very general set of facts and pick the expert's brain a bit. As no proprietary information is being exchanged there is no risk to either party.

If the expert is worth his or her salt, it is highly likely that most attorneys will benefit from this call. Either the expert will offer initial responses that support what the attorney thinks or the expert will bring up potential weakness not previously given much notice that need to be addressed in a timely manner. Either way the attorney will have more information and perhaps new insights. A short telephone call should be very valuable in helping you to make the right decision. The cost of retaining an expert can be reduced by having the expert do any necessary interviews on the telephone and even doing his or her deposition electronically eliminating the need for travel unless the matter goes to trial. If travel is necessary, make sure the expert does all review during the flight so the cost of travel also includes the cost of review for trial. Depending on the amount of document's involved this could save a good deal of expense.

Mistake 8 – Picking the Wrong Expert

Picking the right expert can make your case and picking the wrong expert can destroy it. Experienced, court qualified canine behavior experts are few and far between. It is imperative that a thorough examination of the expert's qualifications is made. For example, an expert with a Ph.D. in Animal Behavior sounds great but not if the animals that he or she studied weren't dogs and were in a laboratory instead of a human environment.

Veterinarians who have not had special training in the behavior of companion animals can also be problematic especially if their experience is only in the veterinary clinic and the incident happened somewhere else. People in the animal professions like trainers can be extremely knowledgeable but may not have the personality or experience to handle attacks on their professionalism and credibility in a courtroom.

The right expert should have many years of experience with a solid background specific to dogs, dog training and dog behavior. If they have testified prior to being it is important to make sure they have not testified in a conflicting manner in another case. It is good to directly ask this question as it can be quite upsetting when the opposing side impeaches your expert with their own testimony. An expert who changes their testimony based on which side they are on will think twice before answering this question dishonestly but may easily offer the opinion an attorney wants to hear and let it go at that, if he or she is not asked directly.

An expert who has been around for a while should have solid impeachment materials on many of the other experts in case one of them should be chosen by the opposition. Have they been qualified in every court they have agreed to appear in? If not, why? If they offer attorney references make sure that they have testified either at trial, mediation or arbitration for that attorney. A great question to ask prospective experts is for the names of two attorneys, one who they testified for and one who has cross examined them. That should give a very good sense of whether they are right for you.

Veterinarians who have not had special training in the behavior of companion animals can also be problematic especially if their experience is only in the veterinary clinic and the incident happened somewhere else.

Your expert should also have a great deal of experience in both the investigation and litigation of animal related cases. Knowledge is power and you want to make sure you have all that you need to fully support your case. It is also important that your expert be court qualified in wound evaluation. This will be essential, especially if your expert's opinions regarding your clients wounds are challenged.

In many cases the only witness that will tell the whole truth is the dog. Dogs are truly independent witnesses in the sense that they have no desire to control the outcome and no ability or desire to change their behavior because they are being evaluated. In a well planned and executed evaluation an aggressive dog will almost always act aggressively and a friendly dog will almost always act friendly. Taking advantage of each and every information source is the most effective way of defending your case.

The New York VideoConference Center

WON'T TAKE YOU FOR A RIDE

Connect with over 10,000 cities around the world

We are available 24/7

NYVC

NEW YORK
VIDEOCONFERENCE CENTER
39 WEST 37TH STREET
NEW YORK, NY 10018

1-888-666-1776
1-212-840-7700
1-877-FAX-FINK

Contact: Jane Tremper, Coordinator
jane@nyvideoconference.com
www.nyvideoconference.com

We Are A Proud Corporate Sponsor

Fink & Carney WORLDWIDE®

Too Early And Too Late: Medical Malpractice Notice Requirements And Judicial Interpretation

Michael D. Phillips, *Kopka, Pinkus, Dolin and Eads*

Executive Summary

The statutory notice period required in medical malpractice actions is plainly stated in the statute, but the Court of Appeals has imposed a judicial gloss that prejudice is required if the plaintiff fails to comply. The court said that the effect of the noncompliance requires consideration of "whether a substantial right of a party is implicated," and "whether a cure is in the furtherance of justice."

Michael D. Phillips is an associate in the Farmington Hills, Michigan, office of the midwest commercial litigation law firm, Kopka, Pinkus, Dolin and Eads. His email address is MDPhillips@kopka-law.com.

In law school, a professor told me that if I were to take all my outlines and put them together to create one document, and then outline that document, and then outline the outline I had just created, and then iterate this process indefinitely — eventually I would boil the study of law down to one word: Notice.

It is uncertain whether this professor overemphasized the importance of notice in the study of law, but it would be difficult to overemphasize the important role that notice serves in the practice of law. The Michigan Court of Appeals decision, *Zwiers v Growney*, is strong evidence of the importance of notice in medical malpractice cases.[1]

In a controversial published opinion, the Michigan Court Appeals has superimposed a "good faith" standard over the clear dictates of a notice requirement contained in the Revised Judicature Act pertaining to the filing of medical malpractice lawsuits.

In general, when plaintiffs' lawyers wish to file medical malpractice lawsuits in this state, they must comply with a handful of procedural requirements. One such requirement is found in MCL 600.2912(b)(1). This statute provides that any person pursuing a medical malpractice action against a health professional or facility must give that professional or facility "not less" than 182 days notice prior to filing.[2] Under certain circumstances, which were not present *Zwiers*, the period can be shortened.

Some lawyers view notice requirements such as this as unnecessary hurdles, which interfere with complete justice. Others point out that the notice requirements allow both sides to evaluate the merits of the claim, and potentially resolve the matter without engaging in needless and expensive litigation.[3] But until the decision in *Zwiers*, neither side seriously contended that the strongly worded statute might allow for a shorter notice period, so long as the plaintiff acted in good faith. Nevertheless, that is exactly what the *Zwiers* court determined.

The Plaintiff, Barbara Zwiers, eventually alleged in her complaint and affidavit of merit that on September 27, 2005, the date of loss, she was injured by Defendants when they negligently placed an intrathecal morphine pain pump. After the accident, Barbara waited well over one year to file her notice of intent, which she eventually did file on August 30, 2007. Of course, the statute of limitations for filing medmal actions is two years.[4] Therefore, under normal circumstances, the statute of limitations would have run on September 28, 2007. However, there is a tolling provision that applies, which will toll the two year statute of limitations for the requisite 182 day period.[5]

The Michigan Court Appeals has superimposed a "good faith" standard over the clear dictates of a notice requirement contained in the Revised Judicature Act pertaining to the filing of medical malpractice lawsuits.

So far, Plaintiff had done everything right, and her claim was primed to proceed without hindrance. That is until February 27, 2008, when Plaintiff filed her complaint — one day too **early** for purposes of the notice of intent statute.

Defendants, alert to the error, filed with the court a motion for summary disposition under MCR 2.116(C)(7), asserting that Plaintiff failed to comply with the statute of limitations. The fascinating aspect is that Plaintiff's complaint was filed one day too early, but Defendant was actually arguing that it was too late. This is because the tolling provision,[6] under a strict construction of the statute, does not apply to toll the limitations period if the procedural requirements for notice of intent are not followed. Thus, defendants argued that plaintiff's complaint was simultaneously too early and too late. It was too early because plaintiff did not wait for the requisite 182 day notice period. Second, Plaintiff filed the complaint too late because by filing too early, Plaintiff lost the protection of equitable tolling, and therefore was past the two year statute of limitations. Despite the logic of the argument, the appellate court was not persuaded. Preferring to rely on vague notions of "good faith" and "justice," the appellate court managed to avoid strict application of the notice of intent and statute of limitations statutes.

The Decision

How did the court decide that notwithstanding Plaintiff's failure to comply with statutory notice requirements it would allow Plaintiff's action to proceed? It started by analyzing what other courts that have considered MCL 600.2912(b)(1) decided. And it happens that the Supreme Court in *Burton v Reed City Hosp Corp*,[7] did consider the effect of failure to comply with the 182 day period. In *Burton*, the plaintiff filed his complaint, sounding in medical malpractice, before the requisite notice of intent period passed. The issue in *Burton* then became "whether a complaint alleging medical malpractice that is filed before the expiration of the notice period … tolls the period of limitations."[8] The Supreme Court found the language in the statute directing that plaintiff "shall not" file its action before expiration of the period to be unambiguous and persuasive. Applying strict construction the court ultimately determined that 182 days requires just that — and nothing less will do.

The *Zwiers* court acknowledged that *Burton*, standing alone, required it to affirm the appellate court's grant of summary disposition. However, the *Zwiers* court also recognized that the *Burton* decision did not stand alone. Subsequent to *Burton*, the Michigan Supreme Court decided *Bush v Shabahang*.[9] In *Bush,* the Michigan Supreme Court also considered the

Until the decision in *Zwiers,* neither side seriously contended that the strongly worded statute might allow for a shorter notice period, so long as the plaintiff acted in good faith.

Preferring to rely on vague notions of "good faith" and "justice," the appellate court managed to avoid strict application of the notice of intent and statute of limitations statutes.

medical malpractice notice of intent statute, but contrary to the facts in *Zwiers*, the Plaintiff in *Bush* timely submitted a substantively defective notice. During its analysis, the court in *Bush* imported MCL 600.2301, which provides that in "any action or proceeding" the court has "power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance for the furtherance of justice ...," and overlaid the statute onto the notice of intent requirements.[10]

The court went on to create a two-pronged test to determine whether the statute providing for judicial amendment of process or pleadings should apply. The first prong requires consideration of "whether a substantial right of a party is implicated."[11] The second prong asks "whether a cure is in the furtherance of justice."[12]

The *Zwiers* court took this test and extended its application by applying it to the early/late filing of the complaint in its case at hand. The *Zwiers* court wrote: "[u]nder the circumstances of this case in which a complaint was inadvertently filed *one day early on a 182-day waiting period* and in which no one was harmed or prejudiced by the premature filing, it would simply constitute injustice to deprive plaintiff of any opportunity to have the merits of her case examined and addressed by a court of law."(emphasis supplied).[13] However, what the *Zwiers* court failed to acknowledge was that its decision was not simply a routine appli-

The court went on to create a two-pronged test to determine whether the statute providing for judicial amendment of process or pleadings should apply.

cation of the law propounded in *Bush* to the facts at hand, but rather an extension of the *Bush* decision.

Recall that *Bush* imported MCL 600.2301 for *substantive* defects in a notice of intent only; whereas *Zwiers*, without any discussion or explanation, applied the rule generated in *Bush* for substantive defects to a timing irregularity. Moreover, although the *Zwiers* court acknowledged the *Burton* decision, which it admitted would require affirmation of the summary disposition, it did not determine whether *Bush* overturned or invalidated any part of *Burton*.

On December 3, 2009, the defendants filed an application for leave to appeal to the Supreme Court. The application is currently pending.

Endnotes

1. 286 Mich App 38 NW2d __ (2009)
2. MCL 600.2912(b)
3. Senate Legislative Analysis, SB 270, August 11, 1993, House Legislative Analysis, HB 4403-4406, March 22, 1993.
4. MCL 600.5805(c)
5. MCL 600.5856(c)
6. MCL 600.5856(c)
7. *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005)
8. *Id.*, 471 Mich at 747.
9. *Bush v Shabahang*, 484 Mich 156 (2009).
10. MCL 600.2301.
11. Bush, 484 Mich at 178.
12. *Id.*
13. *Zwiers, supra*.

Recovery Of Penalty Interest Under MCL 500.2006(4) By Subrogated Insurers

By: Timothy A. Diemer, *Jacobs and Diemer, P.C.*

Executive Summary

A conflicts panel of the Court of Appeals has held that the statutory 12% penalty interest for untimely payment of insurance benefits applies without regard to whether the obligation to pay was "reasonably in dispute."

The more difficult question is whether an insurer that pays a claim and thereby becomes subrogated to its insured's interest (or takes an assignment) is also entitled to the penalty interest. The better analysis is that the subrogated or assignee insurer is not allowed to receive penalty interest under the plain language of the statute. The insurer is not a party that is "directly" entitled to receive "benefits" under its insured's policy with the other insurer. Bringing suit in the same of the insured but for the actual benefit of the insurer should not succeed because the insured, having received compensation, is no longer a real party in interest, ant the insurer, which is the real party in interest, does not meet the statutory definition of a qualified third party that is entitled to receive penalty interest.

Tim Diemer is a shareholder in the firm of Jacobs and Diemer, P.C. He specializes in the areas of appellate practice and insurance coverage litigation. His e-mail address is tad@jacobsdiemer.com.

Abrogation of the "Reasonably in Dispute" Principle

After the *Griswold Properties* decision,[1] a once murky area of the law has now been settled: insurance policyholders are entitled to 12% penalty interest when an insurance carrier fails to pay insurance benefits on a timely basis under MCL 500.2006(4). It took a conflicts panel of the Court of Appeals to resolve this seemingly straightforward question of statutory interpretation that somehow managed to generate enormous confusion.

Prior to *Griswold*, courts were all over the place in trying to apply and interpret a straightforward legislative statement. Part of the confusion stemmed from whether to follow *obiter dictum* from the Supreme Court's decision in *Yaldo v Northpointe Ins Co*, 457 Mich 341, 578 NW2d 274 (1998). Consequently, some panels held that penalty interest for untimely payments was available to first parties for all untimely payments[2] while other courts held that the "reasonably in dispute" statutory language applied to the imposition of penalty interest for both third-party tort claimants as well as first-party policyholders.[3]

The recent Court of Appeals conflicts panel unanimously resolved this issue in favor of the *Yaldo* view and held that, "a first-party insured is entitled to 12% penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute."[4] That issue has now been settled.

Penalty Interest and the Subrogated Insurer

But what happens when an insurer suing on a subrogation basis seeks penalty interest from another carrier it believes should have covered the claim? Is a subrogated insurer entitled to first party penalty interest under MCL 500.2006(4) if it can successfully prove that another insurance policy applied to cover the loss? Despite the prevalence of subrogation claims, these questions have not yet been resolved by a published decision of the Court of Appeals or the Michigan Supreme Court.

Defense lawyers face this dilemma, and sometimes themselves raise these claims as plaintiffs, when there is a dispute among two or more insurers over who bears the responsibility for providing a defense and indemnity to an insured during underlying litigation, usually in defense against a personal injury suit. Often, the plan is for one carrier to cover the claim, even though it believes another carrier is ultimately liable, and to later sue the other carrier.

While the question whether a carrier is entitled to 12% penalty interest is an open one, the enormous weight of persuasive authorities support a finding that a subrogated insurer is not entitled to penalty interest. But, more importantly, the text of the statute specifically defines which entities may seek penalty interest and limits those

Is a subrogated insurer entitled to first party penalty interest under MCL 500.2006(4) if it can successfully prove that another insurance policy applied to cover the loss?

entities to "the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance." MCL 500.2006(4).

> The analysis, naturally, begins with the statute awarding penalty interest in the first place.
>
> If benefits are not paid on a timely basis, the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, **if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance**.[5]

The legislature intended for penalty interest to be awarded only in favor of two entities: the insured or an individual or entity directed entitled to insurance benefits.

Obviously, a subrogated insurer is not "the insured" under the statute and not a party to the insurance contract so it would not meet the first definition.[6] Also doubtful is a claim that the subrogated insurer is "**directly** entitled to benefits under the insured's contract of insurance" because the plaintiff insurer is suing solely because of the legal fiction of subrogation or as an assignee of the policyholder's rights to coverage.[7] That is not a direct entitlement to benefits since insurance benefits are being sought derivatively through the rights of another.

Similarly, under the assignment thesis, while the assignee acquires all the contractual rights of the assignor (and this assignment happens automatically under the "Transfer of Rights of Recovery" provisions found in almost all insurance policies), the insurer is not "directly" entitled to insurance benefits but only gets them because of a transfer of the rights from another entity, the policyholder, who is directly entitled to insurance benefits. The qualifying adverb "directly" should be held fatal to the insurance carrier's claim for penalty interest.

An argument that the insurer could use the "reasonably in dispute" provision applicable to third party claimants under MCL 500.2006(4) to receive penalty interest also violates the statutory language. That provision states:

> If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law.

Although the statute provides that penalty interest is available to third parties and strangers to the insurance contract if they can show that the denial of benefits was unreasonable, the "reasonably in dispute" standard only applies to third-party "tort claimants." Certainly, a

The enormous weight of persuasive authorities support a finding that a subrogated insurer is not entitled to penalty interest.

Also doubtful is a claim that the subrogated insurer is "**directly** entitled to benefits under the insured's contract of insurance" because the plaintiff insurer is suing solely because of the legal fiction of subrogation or as an assignee of the policyholder's rights to coverage.[7]

subrogated insurer is not a "tort claimant" and, although a third party to the insurance contract, the language does not support the award of penalty interest to an equitably subrogated insurer even if that insurer can prove that the other insurer was unreasonable in its denial.

Is the Subrogor Insured a Real Party In Interest?

Perhaps recognizing the difficulties dealing with unfavorable statutory language, many attorneys are cleverly bringing suit on behalf of the subrogated insurer but also in the name of the insureds with hopes of enhancing the recovery with 12% interest. After being made whole by one carrier, however, the insureds really have no stake in the outcome of the supplementary proceedings initiated, funded and directed by their insurance carrier; it is unanswered but doubtful that the insureds even have standing to be named as party plaintiffs. When confronted with a crafty gimmick like this, the task of the attorney defending against such a claim is to move to strike the insureds on grounds of subject matter jurisdiction.[8] If the insurer is the last plaintiff standing, its claim for penalty interest becomes even less arguable with the policyholders out of the picture.

Adding the insureds is unnecessary also because an insurance carrier who

If the insurer is the last plaintiff standing, its claim for penalty interest becomes even less arguable with the policyholders out of the picture.

pays on a claim steps into the shoes of the insured (again, either on an equitable subrogation basis or on an assignment basis under the policy) is authorized to enforce any contractual rights the insureds have against the other insurer that declined coverage. Because the insurer acquires the policyholder's contractual rights against a third party, the insured's role in the subrogation action is illusory.[9]

Furthermore, the insurer who paid on the underlying claim "owns" the subrogation lawsuit and is the only entity authorized to sue under a host of Court of Appeals decisions.[10] Under *Sivik*, *supra*, policyholders who have suffered no loss and have been provided a complete defense and total reimbursement of indemnity cannot later sue for insurance benefits from another punitive insurer because their claims have been completely extinguished: "The subrogee is generally recognized as the real party in interest. Generally, an insured, who no longer has any interest in the recovery, cannot sue."[11]

Although this point has not been crystallized by the appellate courts in this particular situation, where an insurance carrier covers a claim it believes should have been covered by another carrier and the insureds are provided a defense and full indemnity, the insurer is the "real party in interest" under MCR 2.201(B) in the subsequent coverage action and the insureds lack standing to bring such claims.[12] The insured, having suffered no damages, could not bring suit in its own behalf, obviously rendering its presence as a co-plaintiff with the insurer legally insignificant except as a means to beef up the recovery with 12% interest.

In this situation, there is nothing left for the policyholders to accomplish; all of their rights have been transferred to the insurer who did cover the claim. The subrogation claim is being pursued by the insurance carrier who pays the lawyers in the subrogation action and directs the prosecution of the claim. The policyholders are not affected in either way and are not real parties in interest under the court rules.

Where an insurance carrier covers a claim it believes should have been covered by another carrier and the insureds are provided a defense and full indemnity, the insurer is the "real party in interest" under MCR 2.201(B) in the subsequent coverage action and the insureds lack standing to bring such claims.

Penalty Interest Is Not Available to a Subrogated Insurer

While there is an argument to be made that the punitive function of penalty interest mandates that it be paid in all circumstances (equitable subrogation claims included), persuasive authority weighs against that proposition and suggests a rule limiting penalty interest to first party policyholders.

First, two non-binding decisions construing MCL 500.2006(4) prior to the *Griswold* decision hold that penalty interest is not available to the subrogated insurer. The federal bankruptcy court, construing Michigan law, rejected a claim for penalty interest under the statute and held that:

> INA [the subrogated insurer] has presented no persuasive argument that it fits within the language of the subsection which requires that INA be 'the insured or an individual or entity *directly* entitled to benefits under the insured's contract of insurance.' Such language implies some entity akin to a named beneficiary, not a co-insurer who sought contribution. INA was not *directly* entitled to benefits under the Debtor's Trans America Policy, but rather, upon settlement of its dispute with the Debtor, INA became entitled under Michigan law to contribution from Trans America.[13]

Even more on point, the Michigan Court of Appeals issued an unpublished opinion over a decade ago arriving at the same conclusion.

> Defendant correctly notes that plaintiff's claim is based on equitable subrogation relating to its payment of benefits to Sweet not on its direct entitlement to benefits "under the insured's contract of insurance." Because plaintiff is not an "entity directly entitled to benefits under the insured's contract of insurance," the trial court improperly awarded it penalty interest under the statute. We therefore reverse the penalty interest award.[14]

Both the language of the statute as analyzed above and the persuasive case law reject the award of penalty interest to subrogated insurers, but no binding authority has done so. Until finally settled by a published decision of some sort, defense attorneys should expect the opposition to use the jurisprudential vacuum for strategic financial advantage.

The broader penalty interest provision

Michigan's appellate courts have repeatedly rejected the attempts of insurers to recover penalty interest in subrogation claims arising out of motor vehicle accidents.

of Michigan's No-Fault Act, MCL 500.3142(3), is also held to limit the recovery of penalty interest to insureds only. Michigan's appellate courts have repeatedly rejected the attempts of insurers to recover penalty interest in subrogation claims arising out of motor vehicle accidents.[15] In the *Allstate* decision, the Court of Appeals held: "the model act and intrinsic evidence in Michigan's No-Fault Act suggests that the penalty-interest provision found in section 3142 was not intended to apply between insurers."[16] In another decision, the Court of Appeals held similarly: "We do not believe that the Legislature contemplated payment of such penalty interest under these circumstances inasmuch as the purpose of the penalty provisions is served by awarding attorney fees to the claimant, not the assigned claims to facility representative."[17] The fact that the No-Fault Act penalty interest provision is broader but No Fault carriers are not entitled to penalty interest certainly undercuts an argument that such interest is awardable in non-motor vehicle accident context.[18]

Punitive Nature of Penalty Interest

As hinted at above, there is one strong counter argument. Time and time again, penalty interest statutes are interpreted to be punitive as opposed to compensatory. Therefore, if the purpose of MCL 500.2006(4) is simply to punish an insurer that is wrong on its coverage analysis and fails to live up to its insurance contract, then it really makes no difference who gets the penalty interest as long as the recalcitrant insurer ponies up the 12%.[19] The Court of Appeals has held:

> The purpose of the penalty interest statute is to penalize insurers for dilatory practices in settling meritorious claims, not to compensate a plaintiff for delay in recovering benefits to which the plaintiff is ultimately determined to be entitled.[20]

If this line of reasoning controls, then it is immaterial whether the insured is a party to the action, could have been a party to the action, or was not a real party in interest. And it is immaterial who ultimately receives the penalty interest as long as the insurer who is wrong ends up paying, even if it means that an insurer is rewarded for supplying its insured a defense and indemnity as it promised to do in return for a premium.

But even this counter argument, if implemented, raises more questions. If the insured suffered no loss and was made whole by the subrogated insurer, then on what dollar amount would they be entitled to penalty interest?[21] On damages they never suffered? On insurance benefits they received from another party legally obligated to provide to them? It likewise makes little sense to reward with a windfall profit an insurer who lives up to its insurance commitments to its insureds with a 12% bonanza on top of the premiums already collected.

Conclusion

Since the subrogated carrier is not the "insured" under MCL 500.2006(4), the question is whether there is any basis for the insurer to acquire not only contractual rights of the insured but also the statutory right to penalty interest. Again, because of the qualifying adverb "directly," the language of the statute does not support an award of penalty interest that is reserved solely for policyholders.

If the purpose of MCL 500.2006(4) is simply to punish an insurer that is wrong on its coverage analysis and fails to live up to its insurance contract, then it really makes no difference who gets the penalty interest as long as the recalcitrant insurer ponies up the 12%

In the end, the carefully chosen words of the statute resolved this dilemma. The Legislature specifically limited penalty interest to policyholders and entities directly entitled to benefits: an equitably subrogated insurer is neither of those things.

Endnotes

1. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 741 NW2d 549 (2007).
2. See *Yaldo v Northpointe Ins Co*, 457 Mich 341, 578 NW2d 274 (1998) (holding that the insurance company can be penalized with 12% interest even if the claim for benefits is reasonably in dispute).
3. See *Arco Industries, Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143, 594 NW2d 74 (1998) (finding that the statement on penalty interest for first-party claimants in *Yaldo* was *obiter dicta* and rejecting that rationale to hold that insurers had the protection of the "reasonably in dispute" language for third-party tort claimants and first-party policyholders).
4. 276 Mich App 554.
5. MCL 500.2006(4).
6. MCL 500.2006(4).
7. *Frankenmuth Mut Ins Co, Inc v Continental Ins Co*, 450 Mich 429, 446, 537 NW2d 879 (1995) (subrogated insurer steps into the shoes of the insured).
8. MCR 2.201(B) "an action must be prosecuted in the name of the real party in interest...."
9. *Frankenmuth, supra*.
10. *Sinai Hospital of Detroit v Sivik*, 88 Mich App 68, 276 NW2d 518 (1979); *Milbrand Co v Lumbermens Mut Ins Co*, 175 Mich App 392, 438 NW2d 285 (1989); *Drapefair, Inc v Beitner*, 89 Mich App 531, 280 NW2d 585 (1979); *Farmers Ins Group v Progressive Casualty Ins Co*, 84 Mich App 474, 269

NW2d 647 (1978).
11. *Sivik* at 72, quoting *Waters v Schultz*, 233 Mich 143, 206 NW2d 548 (1925).
12. MCR 2.201(B) "an action must be prosecuted in the name of the real party in interest...."
13. *In re Scrima*, 119 BR 539 (1990) (Michigan law).
14. *Fortis Benefits Ins v Trustmark Ins Co,* unpublished per curiam opinion of the Court of Appeals, Docket No. 186948, released April 11, 1997.
15. *All State Ins Co v Citizens Ins Co of America*, 118 Mich App 594, 325 NW2d 505 (1982) (held reversible error to award penalty interest in favor of an insurer suing on an equitable subrogation basis for benefits it paid to its insured); *Darnell v Auto Owners Ins Co*, 142 Mich App 1, 14-15, 369 NW2d 243 (1985); *Spectrum Health v Grahl*, 270 Mich App 248, 715 NW2d 357 (2006) (rule applied to assigned claim under MCL 500.3172).
16. *All State, supra at 607.*
17. *Darnell, supra* at 14-15.
18. See MCL 500.3142(3) ("An overdue payment bears simple interest at the rate of 12% annum.")
19. See *Department of Transportation v Initial Transport, Inc*, 276 Mich App 318, 740 NW2d 720 (2007), *rev'd in part* 481 Mich 862, 748 NW2d 239; *Angott v Chubb Group Ins*, 270 Mich App 465, 717 NW2d 341 (2006); *McCahill v Commercial Union Ins Co, 179 Mich App 761, 446* NW2d 579 (1989); *Sharpe v Daiie*, 126 Mich App 144, 337 NW2d 12 (1983).
20. *Angott, supra*, 270 Mich App at 479.
21. It would be another situation entirely if the insured did bear some out-of-pocket costs in defending or satisfying the underlying action. In that instance, the insured should be held entitled to 12% penalty interest on those out-of-pocket expenses, but not on the whole amount.

JOIN AN MDTC SECTION

MDTC has revised its practice sections At right is a list of the sections, with the names of their chairpersons.

All MDTC members are invited to join one or more sections. If you are interested in joining a section, just contact the section chair.

Appellate and Amicus Curiae	Hilary Ballentine hballentine@plunkettcooney.com
Labor and Employment	Linda M. Foster-Wells lmf@kellerthoma.com
Professional Liability & Health Care	Richard Joppich richard.joppitch@kitch.com
Young Lawyers	David L. Campbell david.campbell@bowmanandbrooke.com
Insurance Law	Hal O. Carroll hcarroll@VGpcLAW.com
Municipal and Government Liability	Kari Boylan kboylan@co.wayne.mi.us
Law Practice Management	Thaddeus E. Morgan tmorgan@fraserlawfirm.com
Trial Practice	David Ottenwess dottenwess@om-law.com
Technology	Timothy Diemer tad@jpjpc.com
General Liability	David Couch dcouch@garanlucow.com
Commercial Litigation	Edward Perdue eperdue@dickinson-wright.com

Proving A Case Of Workplace Fraud

By: William J. Kowalski, JD, *Kerby, Bailey & Associates*
Michael Mayette, CPA/ABV, MST, *Rehmann Consulting*

Executive Summary

Workplace fraud, which tends to increase in difficult economic times, is a serious economic threat to businesses. To counter this, businesses need to start by cultivating a culture of ethics, starting with the top executives. Careful and thorough screening of prospective employees is also essential, along with a zero tolerance policy toward offenders and well constructed internal controls. Companies also need to be alert to warning signs, such as disorganized bookkeeping, unrecorded transactions, missing records, excessive voids or credits and unreconciled bank accounts. Identifying the fraud is the first step, but it is also necessary to identify the fraudster. A fraud investigation team can help track down the offender and prepare the ground for a successful prosecution.

William J. Kowalski, JD, is vice president, Kerby, Bailey & Associates (KBA), a subsidiary of Rehmann and is located in the Troy office. He has over 25 years experience as a Special Agent with the Federal Bureau of Investigation (FBI) and is experienced in counter-terrorism, counterintelligence and criminal/fraud investigations. His email address is bill.kowalski@rehmann.com.

Michael Mayette, CPA/ABV, MST is a principal with Rehmann Consulting and is located in the Troy office. He has more than 20 years of experience in public accounting and more than 15 years in business valuation. He is one the first CPAs in Southeastern Michigan to earn the Accredited in Business Valuation (ABV) specialty designation. His email address is michael.mayette@rehmann.com.

The High Price of Fraud

Investigative experience reveals that challenging economic conditions pave the way for a rise in fraud, and the current economic climate is no exception to the rule. With everyone — particularly small businesses — cutting back to minimize costs, the possibility of fraud is even more likely. The truth is when looking to reduce business costs, the last area small businesses should reduce is financial oversight. It is often tempting to look towards non-revenue producing business functions as an easy area to cull personnel, but such cuts often come back to cost more in the long run.

Fraud at private companies represents the greatest median loss — nearly twice as great as fraud losses in public companies. Asset misappropriation (cash, inventory and other assets) tops the list with 80 percent, followed by bribery and corruption (13 percent) and fraudulent statements (7 percent). All this can add up to quite a startling monetary loss. In fact, the median loss incurred in a typical fraud case is $175,000 (60 percent of cases reported losses in excess of $100,000 while 25 percent of all cases report a loss of $1,000,000 or more).[1]

Implementing Safeguards

So what can a company do? The best starting point is to implement proactive themes in the workplace. Creating a culture of high ethical standards and having CEOs and other executives who set an example for staff is paramount. Expecting employees to follow this example is vital. This ethical culture begins before an employee is even hired by utilizing background checks to screen applicants and carries through to a "zero-tolerance" policy when dealing with offenders. Having established procedures in place and, more importantly, implementing them is crucial. Great care must be taken to ensure legitimate, well-established internal controls are followed without exception. Internal controls are the structure management must establish to ensure responsibilities are met.

Reading the Signs

Internal controls go a long way to help, yet even with great safeguards in place, fraud can still occur. In fact, the occurrence of business fraud is sharply on the rise. The cost to a business can be staggering. According to a recent industry report, U.S. organizations lost seven percent of their annual revenues to fraud, and this translates to approximately $994 billion in fraud losses annually.[2] In light of this type of statistic, it's regrettably obvious that fraud is not merely possible, it's more than likely probable. Though detecting fraud isn't always easy, there are warning signals to look for and areas to which close attention should be paid. The first place is company records. Disorganization in the bookkeeping, unrecorded transactions, missing records, excessive voids or credits and un-reconciled bank accounts are

This ethical culture begins before an employee is even hired by utilizing background checks to screen applicants and carries through to a "zero-tolerance" policy when dealing with offenders.

some of the prime indications that things are amiss.

Once the alleged fraud is discovered, the real challenge begins: identifying and prosecuting the offender. Although a zero-tolerance policy when dealing with offenders goes a long way to deter subsequent fraud attempts, many business owners – in particular small business owners – often don't want to admit that the fraud has occurred and thus they don't pursue criminal charges. The fear is that any discovered fraud within a corporation diminishes not only the bottom line, but equally importantly, the reputation and ethical standing of the company. Many businesses don't want to risk the exposure. Additionally there's the burden of collecting and presenting the evidence that proves the damage to the business. The end result is often failure to go after the alleged perpetrator.

Taking the Necessary Steps

When a case of fraud is suspected, the first line of defense should be to retain a reputable fraud investigation team to conduct a complete investigation. A fraud investigation is a detailed examination of the wrongful activity which produces a fact based report on the players allegedly involved in the fraud, and the manner and extent of their nefarious activity. The objects of an investigation of this kind are to uncover the truth and produce evidence which can provide management with the necessary facts to make informed decisions as to future action. As uncomfortable as it may be, the best companies are cognizant of the threat of fraud, discover it early on, investigate thoroughly and deal with the issue and the offenders directly, thereby maintaining their credibility with clients and business value as a whole to a much higher degree.

Organizing Your Team

As in any case, the right evidence makes all the difference in securing a successful prosecutorial outcome. But what constitutes the "right evidence" in a fraud case? How should it be gathered? A thorough fraud investigation should include a forensic accounting of the business' records. To that end, when securing evidence for a case of fraud, one of the best weapons is often a Certified Public Accountant, particularly one who is accredited in Business Valuation (ABV). The ABV designation is given by the American Institute of Certified Public Accountants (AICPA) to CPAs who have demonstrated substantial business valuation experience and knowledge of business valuation standards, approaches and methodology. They are specially trained to assess the records of a business and determine its value – both before and after the alleged fraud – to ascertain if there has been a devaluation of the company.

Building the Case

As part of a detailed fraud investigation, an ABV's assessment can prove invaluable to the successful outcome of the case. Once brought into review the records, an ABV should be allowed to participate in discovery to make sure the correct data is gathered. The reported findings of an ABV certified CPA can determine the actual monetary extent of the business' devaluation. If it's not known what type of financial information should be requested through discovery, the request may be made for either too much or not enough information. Requesting too much information increases the time required to review it and the costs. If not enough information is requested, then additional requests become necessary and the discovery period may close resulting in the unavailability of the proper information. Allowing the CPA to review a copy of the complaint and related documents or other information related to the case – which of course varies on a case by case basis — will ensure that the right amount of information is requested.

Any discovered fraud within a corporation diminishes not only the bottom line, but equally importantly, the reputation and ethical standing of the company.

Allowing the CPA to review a copy of the complaint and related documents or other information related to the case – which of course varies on a case by case basis — will ensure that the right amount of information is requested.

If the allegation is that the value of the business is decreased by the fraud, the CPA will determine the appropriate methodology (ies) for valuing the business. This is based on the type of business being investigated and the industry in which it operates. In terms of measuring the damages, a valuation of the business as of the date before the alleged

fraud occurred is compared with a second valuation of the business as of a given date after the fraud occurred. In a very simple example, if the first valuation indicates that the business is valued at $5,000,000 and the second valuation indicates a value of $3,000,000, then the amount of the damages would equal the difference or the amount of the decline in value: $2,000,000.

Further, if the damages cited in the complaint include lost profits, the CPA would determine these based on a projection, or more likely, two projections. The first would be based on growth rates and profitability assumptions based on the facts and circumstances that existed as of the date before the alleged fraud. The second would be based on the facts and circumstances that were the result of the alleged fraud. The projected profit in both scenarios would then be discounted to present value and the difference between the two would equal the damages. How far into the future a projection of lost profits can go and still be reliable depends on many factors including the nature of the business, the type of fraud that is alleged, and the availability and reliability of the information needed to prepare the projections.

As cynical as it may seem, businesses have to expect fraud. Recognizing this probability will go a long way in preventing it. Companies should always arm themselves with strong, implemented internal controls and strict, relentless oversight. However, if those procedures fail, building a compelling case against the perpetrator is not only wise, but necessary for the future security of the company. Utilizing the unique partnership between the fraud investigators, forensic accounting experts and attorneys may prove to be the strongest recourse.

Endnotes

1. According to the 2008 Association of Certified Fraud Examiners study.
2. According to The Network, Inc., a leading provider of governance, risk and compliance solutions, third quarter 2009 findings of its Quarterly Corporate Fraud Index.

Young Lawyers Section

VIII. Brief Writing In The Court Of Appeals

By Timothy A. Diemer, *Jacobs & Diemer, P.C.*

Editor's Note

This article is the final installment in our series providing an introduction to the basics of litigation from a defense perspective. The first article discussed pleading and responding to a cause of action. The second article offered tips and tricks for raising cross claims, third party claims, and pursuing indemnity. The third article addressed seeking discovery and responding to discovery-related issues. The fourth article focused on dispositive motions while the fifth article outlined trial preparation. Parts one and two of the sixth article provided tips, techniques, and strategies for trial advocacy, and the basics of each stage of trial. The Seventh article dealt with the next stage, post-trial. This article completes the series with a look at the appellate process.

Timothy A. Diemer is a partner at Jacobs & Diemer. Before working at Jacobs & Diemer, Tim was a prehearing attorney in the research division of the Michigan Court of Appeals. Tim received his law degree from the Boston College School of Law and his bachelor of arts in Political Theory and Constitutional Democracy from James Madison College at Michigan State University. Contact him at tad@jpjpc.com or call 313-965-1900.

Introduction

This final installment of the Young Lawyers Series will focus on brief writing in the Court of Appeals, a topic too big for these few pages in all honesty. That said, important topics such as interlocutory appeals, handling oral argument in the Court of Appeals, and advocacy in the Michigan Supreme Court or federal courts are necessarily left out.

Initiating the Appeal

Now that an appeal bond is in place and an order staying execution, if necessary, has been entered, it is time to begin preparing the claim of appeal documents. In terms of putting the claim of appeal together, there is nothing this article could provide that is not provided for in the court rules and it is imperative to scour the court rules, namely MCR 7.204 and MCR 7.205, to ensure that the claim of appeal is complete and sufficient to vest the court with jurisdiction. A claim of appeal is meticulously examined by the clerk's office to ensure compliance with the court rules. As anyone who has received a defect letter from the court of appeals can attest, defects in the claim of appeal rarely, if ever, go unnoticed.

Know Your Audience

Appellate brief writing is vastly different from writing at the trial court, which, because of volume and time constraints, must grab the trial judge's attention almost immediately to be effective. Trial court briefing is often more ferocious and to the point. In the Court of Appeals, however, a brief goes through numerous levels of review, beginning with a Prehearing/Research Division Attorney, then the Prehearing/Research Supervisor, and then to the judge's chambers, where each of the three judges on your panel will also have a law clerk (or two) review your brief, your opponent's brief and the prehearing report. Obviously, this multi-faceted review allows for a more deliberate and reflective analysis of the case, making the punchy style of trial court brief writing unnecessary and, ultimately, ineffective.

These multiple levels of review also mean that misstatements of the record will be caught – so will misstatements of precedent. With what can sometimes amount to an audience of eight, as well as an opponent who will point out misrepresentations, it is nearly impossible to sneak a record or case law misrepresentation past your readers. The prehearing attorney handling your appeal will scrub the transcripts to create her own fact statement virtually ensuring that record misrepresentations will be correct-

A claim of appeal is meticulously examined by the clerk's office to ensure compliance with the court rules.

ed. Not all appeals go through the Prehearing Division, however. Complicated matters often avoid the Prehearing Division altogether, either going directly to the judges or sometimes to another, more experienced pool of research attorneys.

The Prehearing Division is a mystery to many practitioners, particularly those who do not venture into the Court of Appeals very often. The Prehearing Division is a pool of fresh attorneys, primarily first and second year lawyers, who examine your appeal before anyone else at the court. The prehearing attorneys analyze and assess your case before it is submitted to a panel of judges or even to the judge's law clerks. The prehearing review is in-depth. The prehearing attorney reads all appellate briefs, examines all trial and hearing transcripts, and conducts independent research to draft a global prehearing report, which includes a summary of the issues, a factual and procedural history, a legal analysis and a recommended disposition of the appeal. Again, this rigorous process is undertaken before the appeal is even submitted to a panel of judges or law clerks.

In most cases, the prehearing attorney also prepares a proposed opinion, especially in more straightforward and uncomplicated appeals. In other words, many of the opinions ultimately released by the Court of Appeals are initially prepared by the prehearing attorney, often a first year lawyer, before a panel of judges is even assigned to the appeal. The Prehearing opinions are reviewed by the Prehearing Supervisor, but many of the proposed per curiam opinions stemming from the prehearing division are adopted in large measure by the judges. Getting the prehearing attorney on your side is vital.

With this quick overview of the Court of Appeals structure out of the way, let's move on to the brief itself.

The Statement of Facts

Again, trial court briefing is much different from Court of Appeals briefing and this point cannot be emphasized enough. This difference is most evident in the manner an attorney presents the facts of the case; in the Court of Appeals, a brief's Statement of Facts must remain just that — a presentation of the facts of the case — and must be clearly distinct from the legal analysis. Trial court briefs typically feature a melded factual account and legal analysis.

Since the large majority of the time appellate courts resolve disputes of law and not fact, it is often assumed that the legal argument is most important in the Court of Appeals. I don't believe this is entirely accurate. Providing an accurate statement of facts is probably the single most important component of an effective brief — it goes first and the facts shape the contours of the legal discussion. Playing loose with the record will remove any credibility an attorney may have had; everything you say from them on will be met with skepticism, not only in that particular case, but also for upcoming appeals. While there are be hundreds of trial judges across the State of Michigan, there are only 28 judges on

These multiple levels of review also mean that misstatements of the record will be caught — so will misstatements of precedent.

In the Court of Appeals, a brief's Statement of Facts must remain just that — a presentation of the facts of the case — and must be clearly distinct from the legal analysis.

the Court of Appeals. And again, because the way the Court of Appeals is structured, your brief will be fact checked on a number of levels, virtually guaranteeing that any misstatement or misrepresentation will be caught.

The court rules impose a number of requirements for the brief's statement of facts to ensure a demarcation between the facts and the legal argument. And although the rules are often not followed and it is rare to see an appellate brief stricken for failure to follow these requirements, the rules provide useful stylistic suggestions, including a requirement that the statement of facts be "clear," "concise" and, importantly, that "[a]ll material facts, both favorable and unfavorable, must be fairly stated without argument or bias."[1] In addition, a brief on appeal can rely only on the record actually submitted below.[2]

Nearly every appellate practitioner has a nightmare story about a perfectly defensible appeal that was thwarted by an inadequately developed record in the trial court. A trial judge may be familiar with your case, thus removing the need to bombard the judge with deposition transcripts and loads of paper. This might succeed in the trial court, but it is immensely harmful in the Court of Appeals. Only those materials actually submitted to the trial court can be considered by the Court of Appeals.[3] Have a document or deposition transcript that may be dispositive of the appeal? It does not matter if it is not part of the record.

VIII. BRIEF WRITING IN THE COURT OF APPEALS

The court rules' repeated instructions that the statement of facts must be neutral and objective may sound like it is not possible to "argue" your client's legal position in the statement of facts, but there are still effective and ethical ways to introduce and plant the seeds of your argument in the fact statement without resorting to the trial court style brief writing, which can run afoul of effective brief writing in the Court of Appeals.

Although it is a statement of the **facts** of the case, an effective brief uses the statement of facts to frame the legal issues addressed later in the argument section. The fact statement should not only contain the underlying facts, but also the procedural history of the case, which can be used effectively to introduce the legal issues central to the appeal. If a dispositive motion was filed in the trial court, this is a prime opportunity to outline the positions of the parties and their take on the factual and legal questions involved in your appeal, *e.g.,* "Defendant moved for summary disposition arguing that the ice hazard was open and obvious, while Plaintiff argued that there were special aspects of the hazard thereby precluding application of the open and obvious doctrine." Although truly providing a factual account of your case, this technique foreshadows the central legal issues the rest of the brief will tackle.

Another method to guide the legal discussion is to insert a summary of appellate issues or statement of the case before delving into the fact statement. This is allowed under the court rules as long as the summary is clearly marked as such and is not made a part of the fact statement. Introducing the legal issues gives the court some sort of context within which to understand and analyze the facts provided. The Statement of Questions Presented can also serve this purpose of providing the reader with the appropriate background of the legal issues to understand the Fact Statement.

> Playing loose with the record will remove any credibility an attorney may have had; everything you say from them on will be met with skepticism

In presenting the statement of facts, never disparage opposing counsel or the trial judge. Few things will turn off an appellate judge more than character assassinations of the trial judge or unfair attacks of the plaintiff's attorney. Once in the Court of Appeals, it is time to let go of the fact that the plaintiff failed to timely answer interrogatories or that the plaintiff's attorney was late to a deposition. Petty personal attacks do not address the legal issues of the case, and on a more pragmatic level, many Court of Appeals judges were trial judges before taking the appellate bench. This creates a natural level of sympathy for the judge being attacked.

While it is never a good idea to unfairly disparage the trial judge or your opponents, it is effective to use their misstatements of the law or questionable legal positions asserted in the trial court to cast doubt upon their legal position on appeal. For example, if arguing for a reversal, use bizarre quotations from hearing transcripts or trial court briefs to cast doubt on your opponents or the trial judge. To use the "open and obvious"

> Nearly every appellate practitioner has a nightmare story about a perfectly defensible appeal that was thwarted by an inadequately developed record in the trial court.

issue used above as an example, suppose the trial judge ruled that a sheet of ice in a store's parking lot was not open and obvious because the plaintiff testified he could not see it when he walked past it. This reasoning conflicts with the objective standard our case law mandates for the open and obvious doctrine, and obviously, this misstatement of the law should be prominent in the procedural history of the case.

By the end of the fact statement, the issues should be framed and hopefully by introducing the legal issues early on (either in the Statement of Questions Presented, the Table of Contents, or in a Summary of Appellate Issues), the reader is already persuaded or at least leaning your way.

The Argument Section

Giving advice on the argument section of your brief is a little tougher. The law is the law and it is up to you decide the most effective and logical way to present your argument. Some general guidelines are offered below, but to carry themes developed above, also know that your legal citations and analyses will be scrutinized in the same manner as your factual account. In fact, your legal arguments may be scrutinized even further because your audience will go beyond the authorities the parties cite in their briefs to conduct independent legal research, while there is nowhere to go for a more detailed factual account other than the record itself.

The court rules actually require boldfaced, all caps, argument headings.[4] But again, complying with what may seem like petty technicalities of the court rules is not a burden; it actually helps you write a more effective brief. Appellate briefs, including the additional components and statements required, often approach 60 pages. Argument headings are necessary to break up lengthy legal discussions. They serve as a roadmap in

VIII. BRIEF WRITING IN THE COURT OF APPEALS

the brief's table of contents, and force the writer to ensure some level of logical flow to the structure of the argument.

A couple of other requirements: every brief must have a Statement of the Standard of Review and an Issue Preservation Statement. Don't view these two requirements as mere technicalities. An unfavorable standard of review can be the death knell of a compelling legal argument. To prevail on appeal under the abuse of discretion, for example, it is necessary to show that there was only one "reasonable and principled outcome," and not two or more from which a judge could reasonably choose.[5] This is obviously a high hurdle and if you are representing an appellant, you want to get out from under this burdensome standard of review if at all possible. Evidentiary issues are reviewed under the abuse of discretion standard, but if the evidence admitted is inadmissible as a matter of law (under a *de novo* standard), an abuse of discretion is shown.[6]

Even more difficult than prevailing under the abuse of discretion standard is obtaining a reversal on an argument that was not raised in the trial court; an unpreserved issue is a virtually guaranteed loser.[7] For unpreserved errors, relief is not available absent plain error affecting substantial rights.[8] The Court of Appeals "may consider an issue not decided by the lower court if it involves a question of law and the facts necessary for its resolution have been presented,"[9] but this gives the court discretion to address the issue or not, a position no appellant wants to be in.

As for the heart of the argument section, it is somewhat difficult to offer guidance. There is no "blueprint" for effectively arguing your point; argument style and structure will vary according to the issues involved and *a priori* whether you are the appellant or appellee. An appellant's brief, naturally, will be more emphatic, screeching and argumentative

Although it is a statement of the **facts** of the case, an effective brief uses the statement of facts to frame the legal issues addressed later in the argument section.

while the appellee will try to paint the lower court result as reasonable, fair and legally accurate. Furthermore, the tenor of your brief should also correspond to the issue being addressed. There's no need to scream and rave about the trial judge's denial of $250.00 in taxable costs — this will compromise the effectiveness of those arguments where screaming and raving are called for.

One other thing to keep in mind is that the Court of Appeals handles criminal appeals, termination of parental rights cases, zoning disputes, worker's compensation claims, insurance coverage litigation, etc. Just because you understand the three different ways to prove acquiescence to boundary lines does not mean your reader does, especially given that the typical prehearing attorney is a first or second year lawyer. Although many attorneys are specialists, the chances that any random Court of Appeals judge shares your specialty are quite slim.

As for styles generally, in a very Oprah-esque sense, be yourself. Writing styles vary greatly and a good result can

Appellate briefs, including the additional components and statements required, often approach 60 pages. Argument headings are necessary to break up lengthy legal discussions.

be obtained with an explanatory style of appellate brief writing or with a bellowing diatribe about the injustice of the result below. Lastly, the sheer bulk of brief reading performed by the judges who will decide your case begs for some level of creativity or effort to make the brief an interesting read.

Conclusion

Once matters conclude in the trial court, it is only "Halftime." A victory or loss at that point is not total or final by any means. On many issues, an appellate court gives you an opportunity to prevail in your case despite a loss in front of the trial court. Conversely, this also means that a trial court victory can be squandered with an ineffective appellate court brief.

Keeping many of these themes in mind while still in the trial court can greatly enhance your chances of success in the appellate courts, principal among them is to ensure a fully developed record in the trial court and to ensure that all appellate issues are adequately preserved. The former concern can be taken care of quite easily: attach the entire transcript of the deposition, for example, even if only referring to parts of it. When taking a second look at the case in the appellate courts, it is not uncommon to refer to different or additional deposition testimony in a brief.

The second concern though, which can easily turn a winning appeal into a guaranteed loser, can be resolved by consulting with an appellate specialist early on while the case is still in the trial court. As hinted at in the last installment of this series of articles, appellate attorneys generally see cases in terms of the law, while trial attorneys primarily see cases in terms of the facts. At lunch or in the hallway, run your case by an in-house appellate attorney, who may be able to give you a different legal perspective of your case and that may help in the trial court and ultimately, in the Court of Appeals.

Endnotes

1. MCR 7.212(C)(6).
2. MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc,* 251 Mich App 41, 56; 649 NW2d 783 (2002).
3. *Reeves v Kmart Corp,* 229 Mich App 466, 481, n. 7, 582 NW2d 841 (1998).
4. MCR 7.212(C)(7).
5. *Maldonado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006).
6. *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999).
7. See *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999) (defining unpreserved error as that which was not raised in the trial court).
8. *Hilgendorf v St John Hosp & Med Ctr Corp,* 245 Mich App 670, 700; 630 NW2d 356 (2001).
9. *Michigan Twp Participating Plan v Fed Ins Co,* 233 Mich App 422, 435-436; 592 NW2d 760 (1999).

MDTC

Michigan Defense Trial Counsel, Inc.

The Statewide Association Of Attorneys Representing The Defense In Civil Litigation

14th Annual MDTC Open Golf Tournament

Friday, September 10, 2010

at the Mystic Creek Golf Club and Banquet Center

Bring a Client, a Judge, or a Guest!

Four Awesome Hole-In-One Prizes:

- **Crystal Mountain Getaway**
- **Garland Golf Getaway**
- **Las Vegas Getaway** (no airline tickets)

Above three prizes are 3 day, 2 night stay and golf for two people

- **Set of Wilson Fat Shaft Irons**

MDTC

PO Box 66, Grand Ledge, MI 48837

phone: (517) 627-3745 | fax: (517) 627-3950 | email: info@mdtc.org | www.mdtc.org

Mystic Creek Golf Club
and Banquet Center
One Champions Circle
Milford, MI 48380.
(248) 684-3333
or 1-888-467-9535

Additional Benefit this year!

Analyze your Golf Swing
With
High Speed Video

by
Gerald Jackson, P.E.
of Exponent, Inc.

Scientific and engineering services providers, one of the proud sponsors of the 2010 MDTC Golf Outing.

High speed video analysis is just one of the tools Exponent uses to provide services to our industry. Gerry, and colleagues from his office, will be on hand before, during and after the outing to help you better your golf swing. Using high speed video techniques, Exponent will record and immediately playback your swing in slow motion allowing you to view every detail and correct any deficiencies you might perceive. You will also receive a copy of the video as a memento of the 2010 MDTC Golf Outing.

- **Shotgun Start at 11 a.m.**
- **Modified Scramble format**
- **$145 per person on or before 08/26/10**
  $155 per person after 08/27/10
- **Dinner only $45 at approximately 5 p.m. at Mystic Creek Golf Club, Milford, MI**

Fee Includes: Practice Range Balls, Greens Fees, Cart, Deli Sandwich Lunch at registration and a Tenderloin / Chicken Breast Combo Plate Dinner at 5 p.m. Trophies given for Tournament Champs, Longest Drive (men / women), Closest to Pin (men / women) and Best All-Left-handed Team.

Cabin Rentals are available at Camp Dearborn for all those interested in staying overnight following the outing - Please call 313-943-2350 to make a reservation.

❑ Yes! We are interested in sponsoring the 2010 MDTC Open Golf Tournament

All sponsors will receive recognition during the event and in the association newsletter.

❑ Hole Sponsor $320 ❑ Donate Prize

Estimated Value $ _____

Please Print or Type

_____
Company Name:

_____
Prize contribution description:

_____

_____

_____
Authorized Representative:

Fax form to: **(517) 627-3950**
or mail to: **MDTC, PO Box 66, Grand Ledge, MI 48837**

❑ Check Enclosed payable to MDTC

❑ Visa ❑ Mastercard

_____
credit card number exp. date

last updated 12-9-09

To Register

Fax form to: (517) 627-3950 or mail to: **MDTC, PO Box 66, Grand Ledge, MI 48837**

❑ Check Enclosed payable to MDTC

❑ Visa ❑ Mastercard

ALL GOLF FEES
MUST BE PAID IN
ADVANCE OF OUTING

____

Credit Card Number **Exp. Date**

_______ of participants ($145 per person, $155 after 08/27/10)

❑ Dinner only $45 at Mystic Creek Golf Club, Milford, MI

❑ Please add the price of ______ Barneys (used for putting) – $10

❑ Please add the price of ______ Mulligans – $5

(Each player is limited two mulligans and one barney).

14th Annual

MDTC Open Golf Tournament

____

Signature Total $

Name on Reservation ______________________________

Firm or company name: ______________________________

Address ______________________________

City ______________ State ________ Zip __________

Email ______________ Website ______________

Phone______________ Fax ______________

Foursome participants:

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

Guest or member of your firm (circle one) Judge ❑ yes ❑ no Lefthand ❑ yes ❑ no

I am paying for this golfer ❑ yes ❑ no

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

Guest or member of your firm (circle one) Judge ❑ yes ❑ no Lefthand ❑ yes ❑ no

I am paying for this golfer ❑ yes ❑ no

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

Guest or member of your firm (circle one) Judge ❑ yes ❑ no Lefthand ❑ yes ❑ no

I am paying for this golfer ❑ yes ❑ no

Full name: ______________________________

Firm or company name: ______________________________

E-mail: ______________________________

Guest or member of your firm (circle one) Judge ❑ yes ❑ no Lefthand ❑ yes ❑ no

I am paying for this golfer ❑ yes ❑ no

*You may create your own twosome or foursome, or choose to be paired randomly by MDTC. If you already have your pair or foursome, please list all players' names on the registration form and return it, either individually or collectively to MDTC.

No guarantees you will golf with a judge, unless you bring the judge. Singles/pairings are first come basis. Encourage vendors to bring lawyers as their guests!

Payment MUST be received on or before date of event. For a refund, cancellations must be received in writing at least 72 hours in advance of the event less $20.00 administration fee.

Any questions?…call MDTC at 517-627-3745.

All golf fees must be paid on or before day of golf.

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap*
gcrabtree@fraserlawfirm.com

MDTC Legislative Report

Education Funding – "Race to the Top." In the final days of 2009, our legislators came together to pass a last-minute package of education "reforms" to support Michigan's application for a share of the federal "race to the top" funding to be divided among states with serious plans for improvement of public education. The federal money was sorely needed for funding of education in the coming fiscal year, and thus, the prospect of persuading Uncle Sam to hand it over provided a strong motivation for bipartisan cooperation rarely seen in the first eleven months of the year. Unfortunately, **the effort has not paid off – at least not yet.** Michigan was not among the states selected for further consideration in the competition for the first distribution, and will therefore need to look elsewhere for the funding it needs.

The Budget. In 2009, finalizing the budget for the current fiscal year was a daunting task which consumed much of the Legislature's attention for most of the year and left many Michigan citizens angry and disillusioned. This year, the task will be every bit as challenging, and perhaps more so. Again, **the projected revenue shortages are staggering**, and the difficult compromises must be worked out in the politically-charged atmosphere of an election year in which every position is up for grabs.

New Public Acts

In 2009, the Legislature produced 242 Public Acts. Again, there were relatively few which will be of any particular interest to civil litigators, as such. They include: **Reduction of Oakland and Macomb County Benches.** 2009 PA 228 – Senate Bill 851 (Pappageorge – R) will temporarily reduce the number of circuit court judgeships for the Oakland County Circuit Court from 19 to 18 from January 1, 2011 until January 1, 2015, and temporarily reduce the number of judgeships for the Macomb County Circuit Court from 13 to 12 from January 1, 2011 until January 1, 2017. These **temporary reductions** will result from the temporary elimination of judgeships now held by judges who are ineligible to run for re-election, and are subject to approval by the Board of Commissioners of each county.

Employment Discrimination – Pregnancy. 2009 PA 190 – House Bill 4327 (Young – D), amended Section 202 of the Elliott-Larsen Civil Rights Act, MCL 37.2202, to **prohibit discrimination in employment matters on the basis of pregnancy, childbirth or related medical conditions.** The new language specifies, however, that "a medical condition related to pregnancy or childbirth" does not include any non-therapeutic abortion not intended to save the life of the mother.

Public Smoking. 2009 PA 188 – House Bill 4377 (Gonzales – D), will amend the Public Health Code to **prohibit smoking in most public places,** places of employment and food service establishments, effective May 10, 2010. Exceptions are provided for cigar bars, tobacco specialty retail stores, gambling areas of casinos, and some home offices.

Self-Storage – Soldier's and Sailor's Relief. 2009 PA 177 – Senate Bill 204 (Olshove – D), has amended the self-service storage facility act, MCL 570.521, *et seq*., to **preclude enforcement of the owner's lien** against military service men and women serving tours of duty overseas **until 90 days after conclusion of their**

Graham K. Crabtree is a Shareholder and appellate specialist in the Lansing office of Fraser Trebilcock Davis & Dunlap, P.C.. Before joining the Fraser firm, he served as Majority Counsel and Policy Advisor to the Judiciary Committee of the Michigan Senate from 1991 to 1996, and as an Assistant Prosecuting Attorney in the Appellate Division of the Oakland County Prosecutor's Office from 1980 to 1991. He can be reached at gcrabtree@fraserlawfirm.com or (517) 377-0895.

This amendatory act will also expand the act's notice requirements to allow owners of self-service storage facilities to provide notice of lien enforcement by first-class mail and e-mail, and to advertise sale of a tenant's property by means of electronically-distributed publications.

overseas service. This amendatory act will also expand the act's notice requirements to allow owners of self-service storage facilities to provide notice of lien enforcement by first-class mail and e-mail, and to advertise sale of a tenant's property by means of electronically-distributed publications.

As of this writing (March 8, 2010), there are six Public Acts of 2010, none of which are worth discussing here.

New Legislation

There have been a few noteworthy new initiatives. They include:

Open and Obvious – Comparative Fault Only. HB 5744 (Kandrevas – D), would amend MCL 600.2959 to add a new subsection (2), providing that "whether a condition is open and obvious may be **considered by the trier of fact only in assessing the degree of comparative fault**, if any, and shall not be considered with respect to any other issue of law or fact, including duty."

Medical Malpractice Damage Caps – Altered Records. HB 5745 (Lipton – D) would amend MCL 600.1483 to add a new subsection (5), providing that the caps on non-economic damages in medical malpractice cases would not apply in any case where the trier of fact determines, by a preponderance of the evidence, that the defendant, or an individual for whose actions the defendant is responsible, has **falsified, altered or destroyed medical records** pertaining to the treatment at issue, in violation of MCL 750.492A. My sources have confirmed that this Bill will be soon be taken up in the House Judiciary Committee.

Filing Fees – Per-Defendant. SB 1125 (George – R) would amend the Revised Judicature Act, MCL 600.2959 and MCL 600.8371, to require plaintiffs to pay a **separate filing fee for each named defendant** upon filing of a civil action in the circuit court or district court.

"SLAPP" Lawsuits." HB 5036 (Ebli – D) would amend the Revised Judicature Act to add a new Section MCL 600.2977, which would provide individuals with new protection against lawsuits (sometimes referred to as **"SLAPP" suits) brought for the primary purpose of hindering their participation in the process of government.** Subject to exceptions provided to allow pursuit of legitimate lawsuits, dismissal would be required if: 1) the action is based upon the individual's communication with a governmental unit, public official, or other person in furtherance of the individual's constitutional right to petition, or other participation in the process of government; and 2) the court determines, by a preponderance of the evidence, that the action was initiated for the primary purpose of harassing or intimidating the individual, or otherwise hindering his participation in the process of government. If dismissal is found to be warranted upon satisfaction of these criteria, **the court would be required to award court costs, reasonable attorney fees, and treble damages.** The court would also be given discretionary authority to impose **punitive sanctions upon the plaintiff and the plaintiff's counsel.** Clearly, this legislation has the sharpest teeth of any that I've seen so far in this session. It was reported by the House Judiciary Committee without amendment on March 3, 2010, and now awaits consideration by the full House on the Second Reading Calendar.

Proposed Constitutional Amendments

And of course, there have been a few more bills and resolutions introduced in recognition of the mounting feelings of outrage against the government. They include:

SJR Q (Patterson – R) proposes an amendment of Const 1963, art 6, § 24, to **eliminate the ballot incumbency designation in judicial elections**.

HJR HH (Rogers – R) proposes amendments of Const 1963, art 4, which would require the Legislature to **complete its work on the budget by the first of July**. If the Legislature should fail to do so, **every legislator would forfeit his or her pay for each day thereafter**, until all general appropriation Bills have been presented. Some pretty impressive teeth in this proposal as well.

HJR OO (Bledsoe – D) proposes an amendment of Const 1963, art 4, § 54, **modifying the legislative term limits** adopted in the general election of 1992. The current individual limits on the number of terms which may be served by state Senators and Representatives – three 2-year terms for Representatives and two 4-year terms for Senators – would be replaced by **a single combined limit of 14 years** to be apportioned between service in both Houses. Thus, for example, a legislator would be permitted to serve 7 terms in the House or one term in the House followed by 3 in the Senate.

MDTC's Board of Directors regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. **Your comments and suggestions are appreciated,** and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

Old Business

Sales Tax on Services. House Bill 5527 (Meadows – D) **proposes a sales tax on services, including legal services,** with numerous exceptions. The Michigan Bar has been active in its opposition to this concept, and the bill has not been scheduled for hearing. Approval of this legislation seems doubtful, as it is not favored by the leadership in either house. Nonetheless, attorneys will want to keep an eye on this proposal since all options are on the table for resolution of this year's budget crisis.

Reduce Court of Appeals Judgeships. As I mentioned in my last report, Senate Bill 947 (Cropsey – R) is noteworthy for its proposal to **reduce the number of Court of Appeals judgeships from 28 to 24,** in accordance with the recent recommendations of the State Court Administrative Office. The purpose, of course, is to reduce the costs of court operations in these lean times. The Senate Judiciary Committee has had one hearing on this bill (together with some other cost-cutting proposals) since my last report, but it was not reported from the Committee, and has not been scheduled for further consideration.

Drug Immunity Bills. There has not been any further action on any of the other bills mentioned in my last report, except as previously discussed. Well, hardly any; I nearly forgot to mention that further consideration of the pending **motions to discharge the drug immunity bills** – House Bill 4316 (Brown – D) and House Bill 4317 (Kennedy – D) – from the Senate Committee on Government Operations and Reform has been **postponed again**, this time until December 31, 2010, when the chance of meaningful consideration will be less than promising.

The political dynamic hasn't changed since last time. The democrats simply do not have the votes needed to pass these, or any of their other "reverse tort reform" bills in the Republican-controlled Senate, so they are going nowhere for now. But I'll renew my prediction that some of these initiatives may receive a more favorable consideration during this year's lame-duck session. As I've mentioned before, there are a few republicans who see a need for some fine-tuning of the existing tort reform measures, and the political stars will be particularly well-aligned for last-minute reforms after the November election, when Governor Granholm and numerous term-limited senators and representatives will be saying farewell.

Where Do You Stand?

As I've mentioned before, MDTC's Board of Directors regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. **Your comments and suggestions are appreciated,** and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

By: Hilary Ballentine
Plunkett Cooney

Amicus Committe Report

Hilary A. Ballentine is a member of the firm's Detroit office who specializes in appellate law. Her practice includes general liability and municipal appeals focusing on claims involving the Michigan Consumer Protection Act, the Open Meetings Act, Section 1983 Civil Rights litigation, among others. She can be reached at hdullinger@plunkettcooney.com or 313-983-4419.

Elliott-Larsen - Venue

MDTC has submitted an amicus curiae brief in *Brightwell v Fifth Third Bank of Michigan*, a case involving interpretation of the venue provision of Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2801. The Michigan Supreme Court granted leave in *Brightwell* to determine where an alleged violation of the act "occurs," where the decision to terminate an employee is made in one county, but the employee works and is informed of the termination decision in another county. The brief was authored by **Matthew T. Nelson, Gregory M. Kilby, and Amanda M. Fielder** of **Warner Norcross & Judd LLP.** MDTC's amicus brief argues that the "violation" of the act is the discriminatory decision, and that therefore the Court of Appeals correctly concluded in *Barnes v International Business Machines* Corp, 212 Mich App 223; 537 NW2d 265 (1995), that the term "violation" in § 2801(2) refers to an adverse employment situation motivated by unlawful actors. The brief further argues that the Court of Appeals properly determined that the plaintiffs failed to carry their burden of establishing venue in Wayne County. Oral arguments were held on January 12, 2010. The decision remains pending.

Medical Malpractice – Loss of Opportunity

Oral argument was also held on June 12, 2010 in *O'Neal v St John Hospital & Medical Center*, a medical malpractice action involving proper application of MCL 600.2912a(2). MDTC's amicus brief, authored by **Stephanie P. Ottenwess, David M. Ottenwess, and Melissa E. Graves** of **Ottenwess & Associates, PLC**, argues that § 2912a(2) should be read to apply, in its entirety, to all medical malpractice actions, and to require proof of traditional, "more probable than not," but-for causation, regardless of how the claim is characterized. Alternatively, MDTC's amicus brief argues that the instant case is one for loss of opportunity, to which the second sentence of § 2912a(2) applies, and that the court should adopt the following rule – the second sentence of § 2912a(2) requires a lost-opportunity plaintiff to establish that this pre-malpractice opportunity to survive or achieve a better result must be above 50% and that the first sentence requires that in order to recover for such a claim, the plaintiff must prove through expert testimony that, more likely than not, the defendant caused a substantial loss of an opportunity. Finally, the brief reminds the court that damages for a claim of loss of opportunity must be limited to the percentage of the lost opportunity to ensure that a plaintiff is compensated only for the opportunity lost. The court's decision in *O'Neal* also remains pending.

Governmental Immunity – Highway – Notice

In other matters, MDTC will file an amicus brief in *Mawri v City of Dearborn*, a case involving the highway exception to governmental immunity and, more particularly, the degree of specificity that must be given to comply with the notice provision of MCL 691.1404. Further, the Michigan Supreme Court in *Mawri* will resolve what is required to comply with that portion of § 1404(1) requiring the plaintiff to describe the "nature of the defect." The amicus brief in *Mawri* will be authored by **Sandra J. Lake** of **Hackney, Grover, Hoover & Bean, PLC**.

Rules Update

By: M. Sean Fosmire
Garan Lucow Miller, P.C., Marquette, Michigan

See http://michcourts.blogspot.com for more information and additional proposals. Some of the entries at that site are mirrored at http://www.mdtc.org

Michigan Court Rule Amendments
Michigan Evidence Rule Amendments

ADOPTED

Page Limits on Appeal Briefs
Admin no.: 2009-14
Date: February 2, 2010
Effective: May 1, 2010
Rules affected: 7.101 and 7.105

These rules were amended to apply the 50-page limit on briefs to appeals to the circuit court from a judgment of the district court, and to appeals to the Court of Appeals from a decision of a state agency, board, or commission.

Notice of Intent and Affidavit of Merit - Medical Malpractice Cases
Admin no.: 2009-13
Date: February 16, 2010
Effective: May 1, 2010
Rules affected: MCR 2.112 and 2.118

Another amendment dealing with notices of intent and affidavits in medical malpractice cases. This one adds a new subsection (L) to MCR 2.112, requiring that:

- Any challenge to the sufficiency of a notice of intent must be filed by a defendant on or before the date of filing the first response (answer or motion)
- Any challenges to an affidavit of merit or affidavit of meritorious defense, including challenges to the qualifications of the affiant, must be filed within 63 days of the filing of the affidavit. If the court finds the affidavit deficient, it shall allow it to be amended unless it finds that amendment would not be justified.

It also adds language to 2.118(D) specifying that an amendment of an affidavit of merit or meritorious defense will relate back to the date of the original filing.

Like the previous proposal, this one is designed to neutralize an entire series of rulings from the Supreme Court which have led to dismissals for failure to comply with the notice or affidavit rules.

PROPOSED

Federal: Use of Electronic Communications by Juries During Trial

The Committee on Court Administration and Case Management of the Judicial Conference of the United States has issued a new recommended jury instruction on "Juror Use of Electronic Communication Technologies".

The recommended instruction before proofs begin:

> "You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.
>
> "Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell

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

You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube."

phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube."

And at the close of proofs, just before deliberations:

"During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict."

By: Susan Leigh Brown and Miles L. Uhlar *Schwartz Law Firm P.C.*
sbrown@schwartzlawfirmpc.com/muhlar@schwartzlawfirmpc.com

No Fault Report — March 2010

Quick Notes

Kreiner still the law? *The Supreme Court has yet to publish its opinion in McCormick v Carrier although oral argument was heard.*

Out-of-state carriers primary for uninsured Michigan resident and an insured "non-resident" snowbird. *The Court of Appeals has reiterated and clarified the earlier decision in Tevis v Amex 283 Mich App 76 (2009) (No Fault Column-July 2009) holding an out-of-state insurer responsible for PIP benefits to a Michigan resident injured while operating her mother's New Mexico-registered vehicle and also found another out-of-State carrier liable to its insured, a Florida resident who spent 5 months a year in Michigan.*

Susan Leigh Brown is an associate at Schwartz Law Firm P.C. in Farmington Hills. She has 19 years of experience in the No Fault arena as well as an active practice in insurance law in general, employment law counseling and litigation, commercial litigation and appellate law. She is a member of the Michigan Defense Trial Counsel, and the Labor and Employment and Insurance and Indemnity Law Sections of the State Bar of Michigan as well as the Oakland County Bar Association. She can be contacted at 248-553-9400 or by email at sbrown@schwartzlawfirmpc.com. Ms. Brown was ably assisted in the preparation and writing of this column by Schwartz Law Firm associate Miles Uhlar who can be contacted at muhlar@schwartzlawfirmpc.com.

Out-Of-State Carriers Found Liable In Two Suits

Court of Appeals

Geico v. Goldstein, (*Docket no. 288418 January 19, 2010)* Wilder, O'Connell and Talbot

- Goldstein, a Michigan resident, was injured while driving a vehicle owned by and registered to her mother, a New Mexico resident. Her mother had asked her to drive the car, which had only New Mexico insurance, to Michigan and keep it for her so that that mother could use it when she visited Michigan. Goldstein was not insured in Michigan and did not own a car. The accident occurred in Michigan.

- Although the provisions of MCL 500.3163 are most often applied when the injured party is the insured of the out-of-state carrier, **this case makes it clear that out-of-state carriers are also liable to Michigan residents injured in Michigan while occupying the insured vehicle which is not registered in Michigan.** The injuries to Goldstein arose out of the *ownership* of the motor vehicle by a non-resident, Goldstein's mother. Therefore, Geico, the mother's New Mexico insurer, was liable for Goldstein's Michigan PIP benefits where Goldstein did not have her own insurance instead of the assigned claims insurer, Farmers.

- The court did, however, remand the case for trial on the question of whether Goldstein was a constructive owner of the vehicle and, consequently, ineligible for PIP benefits because she had failed to register or insure the vehicle in Michigan when the vehicle was going to be, but had not yet been, in Michigan for more than 30 days under MCL 500.3102 and MCL 500.3113. The Court of Appeals found that reasonable jurors could disbelieve the claims that Goldstein could not use the vehicle without getting her mother's permission for each use, and that the sole purpose of moving the vehicle to Michigan was it being available when the mother visited, not for Goldstein to use where the vehicle was kept outdoors at Goldstein's apartment instead of in an enclosed storage facility, Goldstein and her live in boyfriend had no other means of transportation, and Goldstein got permission to use the vehicle every time she asked.

- The Court also re-iterated that, although Farmers, the assigned claims insurer which was stuck with the claim when the trial court ruled dismissed Geico, had not filed a complaint, cross-claim or counterclaim against Geico, Farmers had standing to appeal the ruling on the declaratory action between Goldstein and Geico because it was an aggrieved party with a pecuniary interest in the outcome of the claim between Geico and Goldstein.

Titan v Brotherhood and State Farm (Docket no. 283050 February 23, 2010) Wilder, Meter and Fort Hood

In a primer on out of state coverage and priorities which is the flip-side of the issue considered in *Geico v Goldstein*, this panel found that the insurer for a "snowbird," rather than either the insurer of the involved Michigan vehicle (Brotherhood) or the assigned claims carrier (Titan) was liable for PIP benefits to Plaintiff.

- The court found Plaintiff to be a non-resident of Michigan although he lived in Michigan 5 months each year, his wife owned property in Michigan, and he maintained bank accounts in both Florida and Michigan, because he considered Florida his primary residence, paid taxes from the Florida address and had a Florida drivers license.
- As a non-resident who operated his own vehicle in Michigan for more than 30 days in a year, Plaintiff was required to register the vehicle in Michigan and obtain Michigan no fault insurance *but* because he was not operating his own car at the time of the injury, his failure to obey MCL 500.3102 did not disqualify him from receiving PIP benefits under 500.3113.
- **MCL 500.3113 only renders non-residents ineligible for PIP benefits if they are occupants of a vehicle not registered in Michigan *and* they are not insured by an insurer which has filed its certificate in Michigan.** Plaintiff was not an occupant of any motor vehicle and he had insurance with State Farm in Florida-State Farm has filed its certificate under MCL 500.3163.
- MCL 500.3163 does not require that the involved vehicle be registered in another State, in order to trigger coverage from an out-of-state insurer.
- A non-occupant of a vehicle injured in an accident involving the use of a motor vehicle obtains PIP benefits from his own insurer. Here, although Plaintiff did not have Michigan insurance, he did have Florida insurance issued by a certified insurer in Michigan. Therefore, the normal priority rule for non-occupants applied.
- Although Plaintiff was not in or operating the involved vehicle at the time of the accident, the injury arose out of a use of the vehicle 'closely related to its transportational use' and, therefore, the injury arose of the out the use of a motor vehicle as a motor vehicle as required by MCL 500.3105. Plaintiff had been loading the truck just before it starting rolling away without him in it. He was injured while trying to re-enter the truck to "operate it" long enough to stop it and therefore he was "entering the vehicle with an intent to travel."

The operative statute in both cases, MCL 500.3163, requires all insurers authorized to issue no fault insurance in Michigan to file a certification stating that 'any accidental bodily injury or property damage occurring [in Michigan] arising from the ownership, operation, maintenance or use of motor vehicle as a motor vehicle by and out-of-state resident" insured by the carrier is subject to Michigan no fault recovery. Goldstein's injury arose from the *ownership* of the vehicle by a non-resident whereas State Farm was responsible for injuries arising from the *use* of a motor vehicle by a non-resident.

Beware insurers authorized to write in Michigan…many of your policies issued in less generous States than Michigan will magically become Michigan No Fault policies, even though you didn't collect the premiums us Michigan residents pay for our expansive (or expensive) no fault benefits!

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell & Ulanoff P.C.*
Michael.Sullivan@ceflawyers.com; David.Anderson@ceflawyers.com

Case Reports: Legal Malpractice Update

PROXIMATE CAUSE – SPOLIATION OF EVIDENCE
Webber v Lawyer Defendant, 2009 Mich App Lexis 2722 (December 2009) (unpublished)

The Facts: Defendant represented plaintiff in a wrongful death product liability action against a manufacturer. The plaintiff's decedent died in an automobile accident when the truck that she was riding in crashed into an oncoming vehicle because the accelerator pedal allegedly broke off and fell under the brake pedal. In the legal malpractice action, Plaintiff alleged that she would have succeeded in the product liability action if defendant had prevented the truck's destruction or not withdrawn from the case after its destruction. In a prior appeal, the Michigan Supreme Court remanded the case to the trial court to determine if an amendment to the complaint would be futile.

Defendant moved for summary disposition under MCR 2.116(C)(8) after plaintiff filed a second amended complaint containing two separate counts: "legal malpractice – spoliation of evidence" and "legal malpractice – failure to pursue the product liability cause despite the failure to preserve evidence". Defendant argued that summary disposition was proper because the second amended complaint failed to state a claim for legal malpractice, among other things. The trial court granted summary judgment and plaintiff appealed. Plaintiff contended that summary disposition was inappropriate because plaintiff alleged sufficient facts to support that but for defendant's alleged malpractice, she might have prevailed in her underlying lawsuit against the manufacturer.

The Ruling: The Court of Appeals reversed the grant of summary disposition, holding that plaintiff's allegations were sufficient to put defendant on notice regarding the basis for the legal malpractice claim. The court reiterated its observation in *Teel v Meredith*, 284 Mich App 660 (2009) that Michigan does not recognize spoliation of evidence as a cause of action. However, **the court concluded that the plaintiff may pursue a theory based on spoliation of evidence to assert that the lawyer-defendant's failure to preserve the evidence equated to negligence in the plaintiff's legal representation.** Therefore, even though a cause of action for spoliation of evidence does not exist in Michigan, the fact that an attorney failed to preserve evidence may serve as the basis for proving proximate cause in a legal malpractice claim.

Practice Tip: Preserve, preserve, preserve.

ATTORNEY-CLIENT RELATIONSHIP – HARM NOT REQUIRED TO OCCUR DURING REPRESENTATION
Zerbo Mullin & Associates, P.C. v Lawyer Defendant, 2010 Mich App Lexis ____ (February 2010) (unpublished)

The Facts: Defendant represented plaintiff during negotiations to purchase an accounting practice. In a prior and separate legal matter, the owners of the accounting practice sued plaintiff and other parties when the deal to sell the accounting

Michael J. Sullivan and David C. Anderson are partners at Collins, Einhorn, Farrell & Ulanoff P.C. in Southfield. They specialize in the defense of professional liability claims against lawyers, insurance brokers, real estate professionals, accountants, architects, and other professionals. They also have substantial experience in product and premises liability litigation. Their email addresses are: Michael.Sullivan@ceflawyers.com and David.Anderson@ceflawyers.com.

The court further held that defendant did not absolve himself of responsibility for plaintiff's alleged damages simply because the attorney-client relationship may have ended before the closing date.

practice fell through. Plaintiff later filed a legal malpractice claim against defendant. Plaintiff asserted that defendant was negligent because he acted outside of the scope of authority when he agreed to a closing date that did not provide his client with sufficient time, and without his knowledge.

Defendant moved for summary disposition under MCR 2.116(C)(10). Defendant argued that summary judgment was proper because the trial court in the prior matter concluded that (1) the parties agreed to a June 3 closing date, (2) collateral estoppel prevented Plaintiff from relitigating the closing date issue, (3) Plaintiff terminated defendant's representation before the closing date, and (4) Plaintiff replaced defendant with other counsel before the closing date. The trial court granted summary disposition and plaintiff appealed. Plaintiff contended that the doctrine of collateral estoppel did not apply because defendant was not a party to the prior action, defendant was not bound in the prior action, and plaintiff did not have a full and fair opportunity to litigation the issue of defendant's alleged legal malpractice. Further, Plaintiff contended that defendant is liable even if plaintiff terminated his representation before the closing date.

The Ruling: The Court of Appeals reversed the grant of summary disposition, **holding that the issue in the instant matter is not the closing date but whether defendant's action related to setting the closing date was legal malpractice. Therefore, the doctrine of collateral estoppel cited in *Monat v State Farm Ins Co*, 469 Mich 679 (2004) did not apply.** The court held that plaintiff did not have a full and fair opportunity to litigate the issue of defendant's alleged legal malpractice. The court further held that defendant did not absolve himself of responsibility for plaintiff's alleged damages simply because the attorney-client relationship may have ended before the closing date.

Practice Tip: Communicate, communicate, communicate.

PROXIMATE CAUSE – SETTLEMENT CONTEXT

Hall v Lawyer Defendant, 2010 Mich App LEXIS _____ (February 2010) (unpublished)

The Facts: Plaintiff alleged that defendant negligently represented her in a divorce action by failing to enforce prejudgment orders and threatening to withdraw. Plaintiff further alleged that defendant's negligent actions exacerbated her financial situation and caused her to settle the divorce action.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff could not establish that the alleged negligence was a proximate cause of the alleged damages. Defendant argued that plaintiff's statements under oath at the settlement hearing established that the alleged negligence was not a proximate cause of the Plaintiff's damages.

The Ruling: The Court of Appeals affirmed summary disposition in favor of the defendant. The court noted that **"[w]hen a settlement is compelled by the mistakes of the plaintiff's attorney, the attorney may be held liable for causing the client to settle for less than a properly represented client would have accepted."** *Espinoza v Thomas*, 189 Mich App 110, 123 (1991). However, in this case, the Plaintiff, while under oath, indicated on the record at the underlying settlement hearing that "she knowingly and voluntarily entered into an agreement with her husband to settle the divorce action based on a prior mediation proceeding, with some modifications, and to submit certain issues still in dispute to binding arbitration." As a result, there was no causal connection between the alleged negligence and Plaintiff's decision to settle.

Practice Tip: Putting a settlement on the record through the testimony of your client may protect you against a claim based on "settlement-remorse."

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, Jenny Zavadil (Jenny.Zavadil@det.bowmanandbrooke.com).

Julie Fershtman, of counsel to the firm of Zausmer, Kaufman, August, Caldwell & Tayler, P.C., has been elected **Vice President of the State Bar of Michigan**, and was also selected as one of the 2010 Michigan Lawyers Weekly "**Leaders in the Law**." In 2008 and 2009, Fershtman was named a Michigan "Super Lawyer." She has authored three books on the law and over 200 published articles. She has also lectured in 27 states.

Supreme Court

By: Joshua K. Richardson
Foster, Swift, Collins & Smith, P.C.
jrichardson@fosterswift.com

Supreme Court Update

Joshua K. Richardson graduated from Indiana University School of Law, 2007. His areas of practice include; Commercial Litigation, Construction Law, IT, Insurance Defense and Litigation. He can be reached at jrichardson@fosterswift.com or 517-371-8303.

Statute Of Limitations Tolled By Timely, But Otherwise Defective, Notice Of Intent

On February 17, 2010, the Michigan Supreme Court issued an order, in lieu of granting leave to appeal, vacating the Court of Appeals judgment and remanding a medical malpractice action to the trial court for reconsideration in light of *Bush v Shabahang* and *Potter v McLeary*. *Griesbach v Robert R Ross*, PA-C, --- NW2d --- (2010).

FACTS: In July of 2002, the plaintiff, Sara Griesbach, took her 13-year-old son, Patrick Griesbach, to see Defendant, Robert R. Ross, P.A.-C., after Patrick complained of severe pain in his right leg. After running tests, Mr. Ross diagnosed Patrick with a pulled muscle and prescribed Tylenol. Approximately one week later, Patrick was diagnosed with osteomyelitis, a bone infection that caused irreversible damage to Patrick's leg. The plaintiff filed her Notice of Intent and subsequent lawsuit suit against Walled Lake Medical Center, P.C. ("Walled Lake") where Mr. Ross practiced and against Frank L. Fenton, D.O., a board-certified family practice physician who supervised Mr. Ross at Walled Lake. The plaintiff later added Mr. Ross as a defendant and stipulated to the dismissal of Walled Lake and Dr. Fenton. The plaintiff's claims against Mr. Ross proceeded to trial, where the jury found in favor of the plaintiff. Afterward, Mr. Ross moved for judgment notwithstanding the verdict. The trial court denied the motion and Mr. Ross appealed.

On appeal, the Court of Appeals reversed the trial court's order denying Mr. Ross' motion. The court held that the plaintiff's claims against Mr. Ross were barred by the two year statute of limitations under MCL 600.5805(6), despite the fact that the lawsuit was timely filed against Walled Lake and Dr. Fenton. Specifically, though the Notice of Intent tolled the statute of limitations with respect to Walled Lake and Dr. Fenton, the Notice of Intent did not identify Mr. Ross. Thus, the complaint against Mr. Ross was time barred when it was filed more than two years after the alleged malpractice occurred.

HOLDING: The Michigan Supreme Court, in lieu of granting leave to appeal, vacated the Court of Appeals decision and remanded the case to the trial court for reconsideration in light of *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), and *Potter v McLeary*, 484 Mich 397; 774 NW2d 1 (2009). In *Bush*, the Michigan Supreme Court clarified that even a defective Notice of Intent will act to toll the statute of limitations so long as it is timely filed because the 2004 amendments to MCL 600.5856(d) (now MCL 600.5856(c)) required only that Notices of Intent be timely filed. In *Potter*, the Supreme Court held that a plaintiff's timely filed Notice of Intent against an agent will likely be sufficient against the principal even if it fails to identify the principal "because they share a practical identity for purposes of that claim."

Allegedly Intoxicated Person's Nebulous Deposition Testimony Creates Question Of Fact In Dramshop Action

On February 2, 2010, the Michigan Supreme Court issued an order, in lieu of granting leave to appeal in this dramshop action, reversing the part of the Court of Appeals decision that granted summary disposition in favor of defendant, Bennigan's, for the reasons stated in the Court of Appeals dissenting opinion. *Salt v Gillespie*, 777 NW2d 430 (2010).

FACTS: On August 23, 2004, defendant Andrew Gillespie was driving southbound on Hagadorn Road in East Lansing when he collided head on with the plaintiffs' vehicle. At the time of the accident, Andrew Gillespie had a blood alcohol content of 0.15 grams. Two people were killed and four people were injured as a result of the accident. Mr. Gillespie, an admitted alcoholic, believed he had obtained alcohol at three separate locations before the accident: Quality Dairy, Mason Jar Pub & Grub, and Bennigan's. The plaintiffs filed suit against Mr. Gillespie and the three businesses. The trial court denied the three businesses' motions for summary disposition, holding that sufficient evidence existed to create a genuine issue of material fact regarding whether Mr. Gillespie was visibly intoxicated when the businesses allegedly served him alcohol. The businesses appealed.

On appeal, the Court of Appeals affirmed in part and reversed in part the

The Michigan Supreme Court issued an order, in lieu of granting leave to appeal, vacating the Court of Appeals decision and remanding the case to the trial court for reconsideration in light of *Henry v Dow Chemical*.

trial court's ruling with respect to Quality Dairy, holding that summary disposition was properly denied because a question of fact exists as to whether Mr. Gillespie consumed alcohol he allegedly purchased from Quality Dairy. With respect to Mason Jar Pub & Grub, the Court of Appeals reversed the trial court's ruling and held that summary disposition was proper because the plaintiffs failed to present evidence that Mr. Gillespie was served alcohol at Mason Jar Pub & Grub while visibly intoxicated. Finally, the court reversed the trial court's ruling with respect to Bennigan's and held that summary disposition should have been granted because the plaintiffs failed to produce sufficient evidence to demonstrate that Bennigan's served Mr. Gillespie alcohol while he was visibly intoxicated. Specifically, although Mr. Gillespie testified that he believed he had been to and was served a drink at Bennigan's on the night of the accident, he admitted this knowledge came from what he had been told by others.

HOLDING: The Michigan Supreme Court, in lieu of granting leave to appeal, reversed the portion of the Court of Appeals decision granting summary disposition with respect to Bennigan's for the reasons stated in the Court of Appeals dissenting opinion. The Court of Appeals dissenting opinion provided that a fact-finder could reasonably conclude Mr. Gillespie was served alcohol at Bennigan's while visibly intoxicated. The dissenting opinion, issued by Judge Shapiro, was based largely on Mr. Gillespie's own deposition testimony, in which he stated that he believed he had been at Bennigan's for approximately two hours and ordered at least one drink while there. The dissenting opinion further provided that Mr. Gillespie's testimony created a question of fact as to whether Bennigan's served him alcohol while he was visibly intoxicated. The dissenting opinion noted that issues relating to the veracity of Mr. Gillespie's testimony go to its weight, not its admissibility.

Trial Court Ordered To Reconsider Class Certification In Light Of *Henry V Dow Chemical*

On January 29, 2010, the Michigan Supreme Court issued an order, in lieu of granting leave to appeal, vacating the judgment of the Court of Appeals and remanding the action to the trial court for reconsideration of its decision to certify a proposed class of plaintiffs in light of *Henry v Dow Chemical Co*, 484 Mich 483; 772 NW2d 301 (2009). *Duskin v Department of Human Services*, 777 NW2d 168 (2010).

FACTS: The plaintiffs, approximately 616 African-American, Hispanic, Arab, and Asian males, filed suit and sought class certification for their claims that the Michigan Department of Human Services ("DHS") discriminated against male minorities by denying them promotions to supervisory and management positions. DHS opposed certification of the proposed class by arguing that the plaintiffs had failed to satisfy the requirements for class certification under MCR 3.501. The trial court ultimately granted the plaintiffs' request for class certification, finding that the plaintiffs had satisfied the requirements of MCR 3.501(A)(1). DHS appealed.

The Court of Appeals held that the trial court "clearly erred" by certifying the proposed class because the "plaintiffs plainly did not meet their burden of satisfying the rigorous requirements of MCR 3.501, especially the commonality and typicality requirements." The court clarified that the plaintiffs could not meet the commonality and typicality requirements because their claims were too general in nature and failed to identify any policy or practice of the DHS that affects only male minorities. As such, the court held that the questions presented by the plaintiffs' claims "demand individual treatment" and are ill-suited for class treatment.

HOLDING: The Michigan Supreme Court issued an order, in lieu of granting leave to appeal, vacating the Court of Appeals decision and remanding the case to the trial court for reconsideration in light of *Henry v Dow Chemical*. In *Henry*, the Supreme Court held that a court may "only certify a class in circumstances where the court has actually been *shown* that the prerequisites for class certification [under MCR 3.501] are satisfied." The *Henry* court further noted that to meet this requirement, a court may need to go beyond the pleadings and will be allowed to "base its decision on the pleadings alone *only if* the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met … such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party."

Despite Adverse Effect On Innocent Third Party, Insurance Policy May Be Reformed Retroactively To Cure Mutual Mistake Made By Insured And Insurer

On January 22, 2010, the Michigan Supreme Court issued an order, in lieu

The Michigan Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals decision and ordered the reinstatement of the trial court's declaratory judgment in favor of Farm Bureau.

of granting leave to appeal, reversing the judgment of the Court of Appeals and reinstating the trial court's declaratory judgment in favor of the insurer for the reasons stated in the Court of Appeals dissenting opinion. *Couture v Farm Bureau Gen Ins Co*, 776 NW2d 911 (2010).

FACTS: Defendant, Rodney Daniels, purchased an automobile insurance policy with Farm Bureau General Insurance in January of 2006. The policy provided primary medical and bodily injury coverage of $20,000. Over the course of several months after purchasing the policy, Mr. Daniels frequently asked his insurance agent, Brian Lansky, to modify the policy in an effort to lower the monthly premiums. Mr. Lansky made several adjustments to the policy during that time, which ultimately lowered the premiums. In July 2006, Mr. Daniels received an amended policy that again lowered his monthly premium. The amended policy, which was not originated by Mr. Lansky, replaced the primary medical coverage with excess medical coverage and raised the bodily injury coverage from $20,000 to $300,000. Mr. Daniels testified that he did not review the amended policy, but was pleased that it lowered his monthly premiums. Less than a month later, Mr. Daniels' wife was involved in a motor vehicle accident that killed a motorcyclist, Thomas Couture. Shortly after the accident, Thomas Couture's wife, Tracie, received a statement from Farm Bureau indicating that the policy included $300,000 worth of coverage. Realizing that the policy limit had been raised by mistake, Farm Bureau retroactively changed the policy limit back to $20,000. Tracie Couture then sued Farm Bureau for declaratory relief, seeking a declaration from the court that the policy provided $300,000 worth of bodily injury coverage. Farm Bureau filed a cross claim against Mr. Daniels arguing that the policy should be retroactively reformed to provide only $20,000 worth of coverage, given that the increase in coverage was made by mutual mistake. The trial court agreed and entered an order reforming the policy and declaring that it provided only $20,000 worth of bodily injury coverage. Ms. Couture appealed.

On appeal, the Court of Appeals reversed, holding that Farm Bureau failed to demonstrate that the mistake was mutual, rather than unilateral. The court noted that Mr. Daniels was not mistaken as to the policy limits, but simply did not care, since his main concern was lowering his monthly premiums. Accordingly, the court determined that Mr. Daniels accepted the amended policy as written and no mutual mistake occurred.

HOLDING: The Michigan Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals decision and ordered the reinstatement of the trial court's declaratory judgment in favor of Farm Bureau. The Supreme Court held that its decision was based on the reasons stated in the Court of Appeals dissenting opinion, written by Judge Zahra. In his dissenting opinion, Judge Zahra determined that the trial court "properly found a mutual mistake in the execution of the insurance policy." Judge Zahra clarified that Mr. Daniels never requested the increase in bodily injury coverage and, in fact, continued to believe that the policy provided only $20,000 in such coverage. Although Mr. Daniels had authorized Mr. Lansky to make any changes to his policy that would lower the monthly premium, neither Mr. Daniels nor Mr. Lansky initiated the increase in coverage. Accordingly, the amended policy was executed as a result of a mutual mistake and retroactive reformation was appropriate.

Golden Gavel Award

Andrew J. Blodgett, an attorney with the law firm of Smith Haughey Rice & Roegge, has been selected by the Michigan Defense Trial Counsel to receive the organization's Golden Gavel Award.

The annual award is presented to a Michigan attorney who has been in practice for less than 10 years and has demonstrated significant professionalism and courtesy in the practice of law; significant achievement in charitable endeavors, community involvement, and pro bono representation; leadership and advancement of young attorneys; and achievement within one's area of practice.

Andy focuses his practice on insurance defense and representing businesses in general civil litigation. He is active in both his profession and community. He has participated in Leadership Grand Traverse and currently serves as a member of the Board of Directors of the Great Lakes Children's Museum.

By: Todd W. Millar
Smith Haughey Rice & Roegge

DRI Report — April 2010

Todd W. Millar is a shareholder in the Traverse City office of Smith, Haughey, Rice & Roegge. Mr. Millar graduated from Purdue University with a Bachelors of Science in agricultural education in 1988 and an Masters of Science in agricultural economics in 1990. He earned his Doctor of Jurisprudence from Indiana State University in 1993, earning the Order of the Barrister. His areas of practice include insurance defense, commercial and general civil litigation. He can be reached at tmillar@shrr.com, or 231-929-4878.

For those of us who may have let our focus stray from the search for value over the past decade, the economy is reminding us of an important lesson. Everyone, particularly those in Michigan, is looking for value in all they spend money on, including memberships in organizations. MDTC and DRI have so much to offer in terms of value but it takes a commitment from each member to realize that benefit. Both MDTC and DRI enjoy broad membership that includes some of the greatest defense oriented minds in every field of law.

How do you get to know, become friends with and hopefully share referrals with these fine folks? It is simple, **you need to get involved**. Both MDTC and DRI have committees and substantive law sections that are always looking for members. Joining and becoming active in these groups is as simple as visiting the organization web site, signing up for a committee or sending an email to the committee chair and asking to be involved. Trust me, you will be surprised how willing these groups are to get you involved. If you get involved, both you and the organization will benefit.

Another way to get involved is to **attend one of the many seminars offered by MDTC and DRI.** By doing so, you can meet attorneys from Michigan or across the country that share a similar practice to your own. If you are a member of a committee sponsoring a seminar, you may have an opportunity to help organize or present at the seminar. Finally, each committee has responsibility for drafting articles to be included in various newsletters and publications. What a perfect way to express your expertise. While each organization proves value in its membership, true value is had by becoming involved.

As for the upcoming calendar, Michigan will host **DRI's Central Region meeting April 16-17 in Dearborn at The Dearborn Inn**. Leaders from Michigan, Ohio and West Virginia, along with DRI leadership will gather for a weekend of brainstorming and sharing of ideas as to how to improve each state organization.

As always, please do not to hesitate to contact me if you have any questions regarding DRI or any of its programs.

New Co-Chair of Amicus Curiae Committee:
James E. Brenner, Clark Hill, PLC

The Michigan Defense Trial Counsel is pleased to announce that James E. Brenner, of Clark Hill in Detroit, has agreed to serve as the Co-Chair of the MDTC Amicus Curiae Committee.

James specializes in appellate practice and heads Clark Hill's Appellate Practice Department. James is listed in The Best Lawyers in America for his appellate practice work, and was recently selected as a Michigan Lawyer of the Year for 2007 by Michigan Lawyer's Weekly, one of only 12 so chosen out of some 40,000 Michigan lawyers.

MEMBER TO MEMBER SERVICES

This section is reserved for the use of MDTC members who wish to make services available to other members.
The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email hcarroll@VGpcLAW.com.**

ALTERNATIVE DISPUTE RESOLUTION

- Negligence
- Professional Liability
- Commercial
- Contract Disputes

Peter L. Dunlap
Fraser Trebilcock Davis & Dunlap, P.C.
4332 Barton Rd.
Lansing, MI 48917
(517) 321-6198
pdunlap@fraserlawfirm.com

ADR ARBITRATION/MEDIATION

JOHN J. LYNCH has over 30 years' experience in all types of civil litigation. He has served as a mediator, evaluator and arbitrator in hundreds of cases, is certified on the SCAO list of approved mediators and has extensive experience with

- Complex Multi-Party Actions
- Negligence and Product Liability
- Construction
- Commercial & Contract Disputes

John J. Lynch
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2800
jlynch@VGpcLAW.com

APPELLATE PRACTICE

I am one of eight Michigan members of the American Academy of Appellate Lawyers, and have litigated 400-500 appeals. I am available to consult (formally or informally) or to participate in appeals in Michigan and federal courts.

James G. Gross
Gross & Nemeth, P.L.C.
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200
jgross@gnsappeals.com

LAW & ADR OFFICES OF CHRISTOPHER J. WEBB, J. D., PLC

248-245-0022
cwebb@webbadr.com
www.webbadr.com

Former General Counsel of Fortune 1000 Global Firm
Michigan Supreme Court
State Court Administrative Office
6th Judicial Circuit Court Civil Mediator
Over 175 Mediations 70% Success Rate
American Arbitration Association
National Roster of Neutrals
Institute for Conflict Prevention & Resolution
CPR Panel of Neutrals
ADR resolution experience relating to
Complex Civil & Business Cases,
Intellectual Property, Real Estate,
And Construction Disputes

Conflict Resolution Through
Evaluation, Mediation, Arbitration & Facilitation
Serving Individuals, Businesses, Organizations, Communities and the Courts

MUNICIPAL & EMPLOYMENT LITIGATION: ZONING; LAND USE

Over 20 years litigation experience.

Employment: ELCRA, Title VII, Whistleblower, PWDCRA.

Land Use Litigation: Zoning; Takings; Section 1983 Claims.

Thomas R. Meagher
Foster, Swift, Collins & Smith, PC
313 S. Washington Square
Lansing MI 48933
(517) 371-8100
tmeagher@fosterswift.com

FACILITATED MEDIATION

Trained at the University of Windsor Faculty of Law/Stitt Feld Handy Group in facilitated mediation. Certified by the U. S. District Court for the Western District of Michigan. Available to conduct facilitated mediation in the Upper Peninsula and the Northern half of the Lower Peninsula.

Keith E. Swanson
Swanson & Dettmann, P.C.
419 W. Washington St
Marquette, MI 49855
(906) 228-7355
keswanson@charterinternet.com

INDEMNITY AND INSURANCE ISSUES

Co-Founder and first Chairperson of the **Insurance and Indemnity Law Section** of the State Bar is available to consult for insureds or insurers on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

Hal O. Carroll
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2909
hcarroll@VGpcLAW.com

ADR - ARBITRATION/ MEDIATION/FACILITATION

Thomas M. Peters has the experience, background and ability to assist you in the arbitration, mediation and resolution of your litigation or claim disputes.

- Indemnity and insurance
- Construction
- Trucking
- Commercial and contract disputes
- Employment

Thomas M. Peters
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2800
tmp-group@VGPCLaw.com

ADR

ALTERNATIVE DISPUTE RESOLUTION

• Mediation • Case Evaluation
• Arbitration • Private Dispute Counseling
• Medical/Legal Malpractice
•Product Liability • Premises Liability
• Insurance (coverage disputes)

EDMUND M. BRADY, JR.
(313) 886 3281 fax (313) 886 5826
edmundbrady@comcast.net
Past President, State Bar of Michigan
AV® Rated Litigator
Over 42 Years trial experience
Michigan Super Lawyer® 2006

MDTC LEADER CONTACT INFORMATION

Board

J. Steven Johnston
President
Berry, Johnston, Sztykiel & Hunt, P.C.
1301 West Long Lake Rd Ste 250
Troy, MI 48098
248-641-1800 • 248-641-3845
sjohnston@berryjohnstonlaw.com

Lori A. Ittner
Vice President
Garan Lucow Miller, PC
300 Ottawa Ave., NW, 8th Floor
Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
littner@garanlucow.com

Phillip C. Korovesis
Treasurer
Butzel Long
150 W. Jefferson Ste 900
Detroit, MI 48226
313-983-7458 • 313-225-7080
korovesis@butzel.com

Timothy A. Diemer
Secretary
Jacobs & Diemer P.C.
500 Griswold St. Ste 2825
The Guardian Building
Detroit, MI 48226
313-965-1900 • 313-965-1919
tad@jacobsdiemer.com

Robert H S. Schaffer
Immediate Past President
Robert H.S. Schaffer, PC
2325 Stonebridge Drive, Building C
Flint, MI 48532
810-496-4465 • 810-230-9225
schafferlaw@comcast.net

Jana M. Berger
jberger@foleymansfield.com
248-721-4200 • 248-721-4201
Foley & Mansfield PLLP
130 East Nine Mile Road
Ferndale, MI 48220

Karie H. Boylan
tkboylan@comcast.net
313-224-8577 • 313-967-3532
Wayne County Corporate Counsel
500 Griswold, Ste. 1126
Detroit, MI 48226

Lawrence G. Campbell
lcampbell@dickinsonwright.com
313-223-3703 • 313-223-3598
Dickinson Wright P.L.L.C.
500 Woodward Ave., Ste 4000
Detroit, MI 48226

Hal O. Carroll
HCarroll@VGpcLAW.com
248-312-2800 • 248-267-1242
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098

Mark A. Gilchrist
mgilchrist@shrr.com
616-774-8000 • 616-774-2461
Smith Haughey Rice & Roegge
250 Monroe Ave., NW, Ste. 200
Grand Rapids, MI 49503

Catherine D. Jasinski
cdj@runningwise.com
231-946-2700 • 231-946-0857
Running Wise & Ford PLC
326 E. State Street
Traverse City, MI 49684

Richard J. Joppich
richard.joppich@kitch.com
517-381-7196 • 517-381-4427
Kitch Drutchas Wagner Valitutti & Sherbrook
2379 Woodlake Dr., Suite 400
Okemos, MI 48864-6032

Diana Lee Khachaturian
dkhachaturian@dickinsonwright.com
313-223-3128 • 313-223-3598
Dickinson Wright PLLC
500 Woodward Ave., Ste 4000
Detroit, MI 48226

Scott L. Mandel
smandel@fosterswift.com
517-371-8185 • 517-371-8200
Foster Swift Collins & Smith PC
313 South Washington Square
Lansing, MI 48933

Raymond Morganti
rmorganti@siemion-huckabay.com
248-357-1400 • 248-357-3343
Siemion Huckabay Bodary Morganti & Bowerman P.C
One Towne Square Ste 1400
Southfield MI 48076

Dean F. Pacific
dpacific@wnj.com
616-752-2424 • 616-752-2500
Warner, Norcross & Judd LLP
111 Lyon St NW Ste 900
Grand Rapids, MI 49503

Allison C. Reuter
areuter@hopenetwork.org
616-301-8000 • 616-301-8010
General Counsel, Hope Network
P.O. Box 890, 755 36th St., SE
Grand Rapids, MI 49518-0890

MDTC LEADER CONTACT INFORMATION

Section Chairs

Amicus Committee Co-chair:
Hilary A. Ballentine, Co-Chair
hdullinger@plunkettcooney.com
313-983-4419
Plunkett Cooney
535 Griswold Ste 2400
Detroit, MI 48226

Amicus Committee Co-chair:
James E. Brenner
jbrenner@clarkhill.com
313-965-8335 • 313.965.8252
Clark Hill PLC
500 Woodward Suite 3500
Detroit, MI 48226

Commercial Litigation: Edward P. Perdue
eperdue@dickinsonwright.com
616-458-1300 • 616.458.6753
Dickinson Wright PLLC
200 Ottawa Avenue, N.W. Suite 1000
Grand Rapids, MI 49503

General Liability: David A. Couch
dcouch@garanlucow.com
616-742-5500 • 616-742-5566
Garan Lucow Miller PC
300 Ottawa Ave NW, 8th Floor
Grand Rapids, MI 49503

Insurance: Hal O. Carroll
HCarroll@VGpcLAW.com
248-312-2800 • 248-267-1242
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098

Labor & Employment:
Linda M. Foster-Wells
lmf@kellerthoma.com
313-965-7610 • 313-965-4480
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

Law Practice Management:
Thaddeus E. Morgan
tmorgan@fraserlawfirm.com
517-482-5800 • 517-482-0887
Fraser, Trebilcock, Davis & Dunlap PC
124 W. Allegan, Ste 1000
Lansing, MI 48933

Municipal & Governmental Liability:
Karie H. Boylan
kboylan@co.wayne.mi.us
313-224-8577 • 313-967-3532
Wayne County Corporation Counsel
600 Randolph 2nd Floor
Detroit, MI 48226

Professional Liability & Health Care:
Terence P. Durkin
terence.durkin@kitch.com
313-965-6971 • 313-965-7403
Kitch, Drutchas, Wagner, Valitutti & Sherbrook
1 Woodward Ave., Ste. 2400
Detroit, MI 48226

Trial Practice: David M. Ottenwess
dottenwess@ottenwesslaw.com
313-965-2121 x 211 • 313-965-7680
Ottenwess Allman & Taweel PLC
535 Griswold St., Ste 850
Detroit, MI 48226

Young Lawyers: David L. Campbell
david.campbell@det.bowmanandbrooke.com
248-687-5300 • 248-743-0422
Bowman and Brooke LLP
50 W. Big Beaver Rd., Ste 600
Troy, MI 48084

Regional Chairs

Flint: Ridley S. Nimmo, II
Plunkett Cooney
111 E. Court St. Ste 1B
Flint, MI 48502
810-342-7010 • 810-232-3159
rnimmo@plunkettcooney.com

Grand Rapids: Michael D. Wade
Garan Lucow Miller, P.C.
300 Ottawa Avenue, NW Avenue, Flr 8
Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
mwade@garanlucow.com

Kalamazoo: Tyren R. Cudney
Lennon, Miller, O'Connor & Bartosiewicz PLC
900 Comerica Bldg.
Kalamazoo, MI 49007
269-381-8844 • 269-381-8822
cudney@lennonmiller.com

Lansing: Dean Altobelli
Miller Canfield
One Michigan Ave Suite 900
Lansing MI 48933
517-487-2070 • 517-374-6304
altobelli@millercanfield.com

Marquette: Keith E. Swanson
Swanson & Dettmann, P.C.
148 West Washington Street,
Marquette, MI 49855
906-228-7355 • 906-228-7357
keswanson@chartermi.net

Saginaw / Bay City: Jeffrey C. Collison
Collison & Collison P.C.
5811 Colony Drive North, PO Box 6010
Saginaw, MI 48638
989-799-3033 • 989-799-2969
jcc@saginaw-law.com

Southeast Michigan: Scott S. Holmes
Foley & Mansfield PLLP
130 East Nine Mile Road
Ferndale, MI 48220
248-721-4200 • 248-721-4201
sholmes@foleymansfield.com

Traverse City / Petoskey: John Patrick Deegan
Plunkett Cooney
303 Howard Street
Petosky, MI 49770
231-348-6435 • 231-348-6435
jdeegan@plunkettcooney.com

General Committee Chairs

DRI State Representative: Todd W. Millar
Smith Haughey Rice & Roegge PC
202 E. State St, PO Box 848
Traverse City, MI 49685
231-929-4878 • 231-929-4182
tmillar@shrr.com

DRI Diversity Representative: D. Lee Khachaturian
Dickinson Wright P.L.L.C.
500 Woodward Ave., Ste 4000
Detroit, MI 48226
313-223-3128 • 313-223-3598
DKhachaturian@dickinson-wright.com

Editor, *MDTC Quarterly:* Hal O. Carroll
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098
248-312-2800 • 248-267-1242
HCarroll@VGpcLAW.com

Asst. Editor, *MDTC Quarterly:* Jenny Zavadil
Bowman and Brooke LLP
50 W. Big Beaver Rd., Ste 600
Troy, MI 48084
248-687-5300 • 248-743-0422
jenny.zavadil@bowmanandbrooke.com

Government Affairs Chair: Graham K. Crabtree
Fraser Trebilcock Davis & Dunlap PC
124 W. Allegan, Ste 1000
Lansing, MI 48933
517-377-0895 • 517-482-0887
gcrabtree@fraserlawfirm.com

Judicial Relations Chair: Raymond Morganti
Siemion Huckabay Bodary Morganti &
Bowerman P.C
One Towne Square Ste 1400
Southfield MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

MAJ Liaison: Terry Miglio
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226
313-965-7610 • 313-965-4480
tjm@kellerthoma.com

Ministers of Fun: James G. Gross
Gross & Nemeth P.L.C.
615 Griswold Ste 1305
Detroit, MI 48226
313-963-8200 • 313-963-9169
jgross@gnsappeals.com

Mark Gilchrist
Smith Haughey Rice & Roegge
250 Monroe Ave., NW Ste. 200
Grand Rapids, MI 49503
616-774-8000 • 616-774-2461
mgilchrist@shrr.com

Past Presidents Committee: John P. Jacobs
Jacobs & Diemer P.C.
The Dime Building Ste 600, 719 Griswold Street
Detroit, MI 48232
313-965-1900 • 313-965-1919
jpj@jacobsdiemer.com

Technology Chair: Alan J. Couture
Sondee, Racine & Doren, P.L.C.
acouture@sondeeracine.com
440 W. Main, Ste. A
989-732-1152 • 989-732-4843
Gaylord, MI 49735

Michigan Defense Trial Counsel, Inc.
P.O. Box 66
Grand Ledge, MI 48837

Schedule of Events

2010

March 18	Board Meeting – Okemos Conference Center, Okemos
May 14–15	Annual Meeting & Conference- Double Tree, Bay City
September 10	Open Golf Outing – Mystic Creek, Milford

2011

January 10	Excellence in Defense Nomination Deadline
January 10	Young Lawyers Golden Gavel Award Nomination Deadline
January 21	Future Planning Meeting – City Flats Hotel, Holland
January 22	Board Meeting – City Flats Hotel, Holland
May 19–22	Annual Meeting & Conference – Soaring Eagle Casino & Resort

MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far reaching and well respected Quarterly publication and through its timely and well received seminars. Membership in MDTC also provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.