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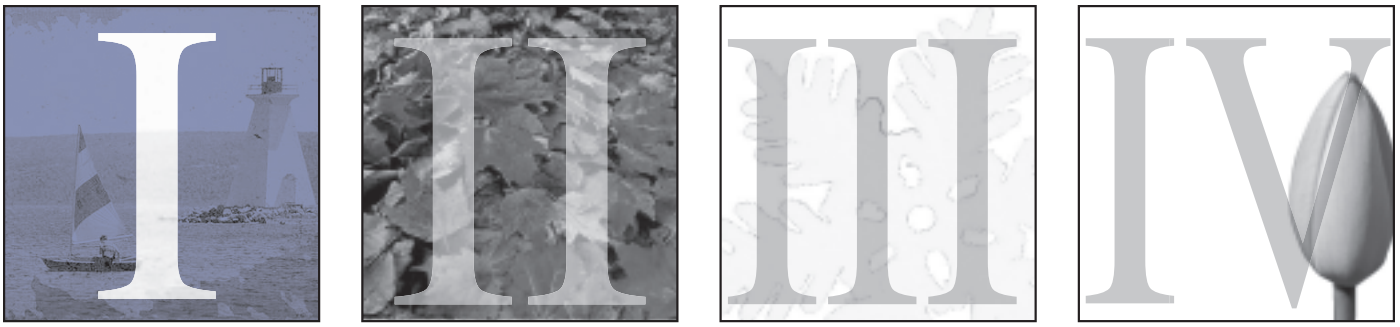

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Editor's Notes

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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).

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President's Corner

By: Lori A. Ittner
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Courtesy, Politics And The Practice Of Law

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The challenge of creating my first President's Page began en route to Michigan Defense Trial Counsel's Spring Conference in Bay City this past May. The drive gave me much time to contemplate the future of the organization and the profession, as well as the part that I would play. It is with great honor and appreciation that I put pen to paper in drafting my first of four such articles. I was reminded at a recent conference that I attended, with other members of this profession from other states, that indeed we enjoy a bench that strives to educate its lawyers and lawyers who strive to educate each other. At the same time, the membership of MDTC and its leadership share a common goal, a purposeful vision and a combined resolve to further the image of the practice of law and its civility, further the defense of people and corporations in civil litigation, offer greater benefits and opportunities to our membership and offer opportunities to our sponsors.

Michigan has seen an economic crisis not seen for many, many years and in fact, probably never in the history of this state. The stressors of this economic reality have forced many small businesses to close shop and business owners to reevaluate their future. The practice of law in Michigan has certainly not escaped, in total, this economic crisis. At the same time, Michigan is becoming increasingly political, not only with the upcoming elections, but also with the fluctuation of the state of the law. It is at this time that we must be even more vigilant and aware of the nobility of this profession. We must lead by example, not only for other practitioners in Michigan, but also for the bench and bar in other states. It has long been thought that the bench and bar of Michigan led the way with mutual courtesy that was not only mandated, but expected of practitioners and of the bench. In the increasingly political climate of this election year, and while we await the Supreme Court's decision on many cases, it is important that we hold firm to our values and that we once again not only practice, but insist upon civility and courtesy.

The basic framework of the practice of law is largely adversarial in nature. Attorneys are certainly bound to zealously represent and advocate their clients' interests. At the same time, the Code of Professional Conduct mandates certain duties of professionalism in the conduct of the bench and bar. However, most certainly, standards of professional courtesy do not stop with the letter of the rules, namely Rule 6.5, which mandates professional conduct, courtesy and respect to all persons involved in the legal process. Equally important is Rule 8.2, regarding judicial and legal officials, wherein a lawyer shall not make a statement or act with reckless disregard for the truth or falsity of the statement concerning the qualifications or integrity of a judge, judicial officer, public legal officer or candidate for election or appointment to judicial or legal office. It is critical that we proceed this year during the political and judicial elections, keeping in mind that the Rules of Professional Conduct mandate courtesy, truthfulness and integrity, not only in political or judicial ads, but also in the written and verbal product created by every member of the State Bar of Michigan, including each and every member of the bench and the bar. This obligation goes well beyond our personal conduct, and we must also demand that every other member of the bench and bar act with the same level of dignity, truthful-

In the increasingly political climate of this election year, and while we await the Supreme Court's decision on many cases, it is important that we hold firm to our values and that we once again not only practice, but insist upon civility and courtesy.

ness and professional courtesy. If we are to restore the dignity and nobility of this dear profession, we must refrain from acting like that very image of the lawyer being led down the chute to be roped, that commercials of long ago would suggest. We must lead by example.

MDTC will continue adhere to the standards of professionalism and courtesy that this great and noble profession demands, and MDTC intends to act by example. At the same time, in the upcoming year, we will continue to defend zealously, the interests of persons and corporations in civil litigation. In doing so, we will be seeking to educate our members by launching the first ever electronic newsletter, MDTC E-News, with the first issue being published in July of 2010. We will also be scheduling several teleconferences of educational foundation, including an upcoming teleconference on the *McCormick* decision on the *Kreiner* threshold as soon as it is released by the Supreme Court, in an effort to provide educational opportunities to its members, without the need of the members leaving their offices. The leadership of MDTC and its Executive Director look to the upcoming year with renewed excitement and with a commitment to provide education and resources to its members and impact the industry in Michigan and other states, by setting the example by which all others will be measured.

This year, in keeping with our pledge, MDTC is pleased to honor a member of the plaintiff's bar who best exemplifies the pursuit of the goals of zealous advocacy with professionalism and courtesy, in awarding the Respected Advocate Award to Mark Granzotto of *Mark Granzotto PC,* Royal Oak, Michigan.

New Members

MDTC Welcomes These New Members

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The Magnuson-Moss Warranty Act: 2010 Michigan Practice Guide

By: Nicole L. DiNardo & Jenny L. Zavadil, *Bowman and Brooke LLP*

Magnuson-Moss Warranty Claim

Breach of express and implied warranty claims arise under state law.[1] State law warranty statutes ensure the consumer that goods he or she purchased or leased will be as represented or as promised. The Magnuson-Moss Warranty Act[2] ("MMWA") provides added remedies to consumers for breaches of express and implied warranties and applies to all consumer goods with a value of $5.[3] The act requires that "a warrantor warranting a consumer product to a consumer by means of a written warranty fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty" and sets forth limitations on the warranty and the manner in which the warranty is to be conveyed to the consumer.[4] For example, pursuant to statute, the warrantor must meet certain federal minimum standards and set forth the full duration of the warranty and any limitations.[5]

A consumer who is damaged by the failure of a supplier, warrantor or service contractor to comply with written or implied warranties may bring suit for damages and other remedies under this act.[6] Remedies include a refund or replacement, as well as recovery of costs and attorneys fees.[7]

With respect to breaches of express warranties, "only the warrantor actually making a written affirmation of fact, promise or undertaking shall be deemed to have created a written warranty, and any right arising there under may be enforced under this section only against such warrantor and no other person."[8] The term "warrantor" means any "supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty."[9] A "written warranty" is:

> "[A]ny written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, . . . or any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event the product fails to meet the specifications set forth in the undertaking . . .."[10]

State and Federal Warranty Claims

While the state and federal statutes governing breach of express and implied warranties appear to be separate and distinct, practical analysis tends to be similar. The failure to establish breach of warranty under state law results in the failure to establish breach of warranty under federal law, and vice versa. *Computer Network v AM General Corp.*,[11] and more recently *Miekstyn v BMC Choppers*[12] are illustrative of this point.[13]

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While the state and federal statutes governing breach of express and implied warranties appear to be separate and distinct, practical analysis tends to be similar. The failure to establish breach of warranty under state law results in the failure to establish breach of warranty under federal law, and vice versa.

In *Computer Network,* the Michigan Court of Appeals summarily dismissed the plaintiff's breach of express warranty claim under the Magnuson-Moss Warranty Act claim against Pfeiffer Infiniti, Inc. regarding a Hummer vehicle manufactured by AM General and leased by the plaintiff from Pfeiffer Infiniti. The plaintiff appealed. As to the plaintiff's breach of express warranty claim under the MMWA, the court affirmed summary disposition as to Pfeiffer Infiniti because Pfeiffer Infiniti "did not give or offer a written warranty as a warrantor. It sold an extended warranty offered by General Motors, the exclusive distributor of Hummer for AM General."[14] The court further recognized that "Pfeiffer Infiniti made no express written affirmations, promises, or undertakings with respect to the quality of the vehicle or with respect to repair, replacement, or refund."[15]

Practice Tip – Obtain Dismissal of Express Warranty Claim Against Dealer

In a typical automotive warranty case, the vehicle is warranted by a written warranty provided to the consumer by the manufacturer or distributor of the vehicle. Seldom is it the case that the dealership that sold or leased the vehicle to the consumer provides an "express written affirmation, promise, or undertaking with respect to repair, replacements, or refund" of the vehicle. In cases where the consumer alleges a claim against the dealership for breach of express warranty under the MMWA, the dealer should move for summary dismissal where the manufacturer, not the dealership, provided an express written warranty to the consumer.

Disclaimer of Implied Warranties

In *Zanger v Gulf Stream Coach, Inc.*,[16] the United States District Court for the Eastern District of Michigan, applying Michigan law, confirmed the seller's ability to disclaim implied warranties, "[t]here is no dispute that a seller may disclaim implied warranties under Michigan law as long as the disclaimer is conspicuous."[17] A term or clause is conspicuous under MCL 440.1201(10) "when it is so written that a reasonable person against whom it is to operate ought to have noticed it."[18] *Zanger* provides instructive examples of conspicuous language: a printed heading in capitals and use of contrasting type or color.[19] The court determines whether or not a term or clause is conspicuous.[20] In disclaiming an implied warranty of merchantability, the language of the disclaimer must mention merchantability and be in writing.[21]

In a typical automotive warranty case, the vehicle is warranted by a written warranty provided to the consumer by the manufacturer or distributor of the vehicle. Seldom is the case that the dealership that sold or leased the vehicle to the consumer provided an "express written affirmation, promise, or undertaking with respect to repair, replacements, or refund" of the vehicle. Further, in many cases, the manufacturer or distributor repaired the vehicle each time it was presented for repair, never refusing repair. In cases where the consumer alleges claims for breach of warranty against the dealership or the manufacturer or distributor, *Computer Network* is instructive.

Zanger provides instructive examples of conspicuous language: a printed heading in capitals and use of contrasting type or color. The court determines whether or not a term or clause is conspicuous.

Practice Tip – Obtain Dismissal of Implied Warranty Claim against Dealer

Advocates for the consumer often take the position that the MMWA "prohibits the disclaimer of the implied warranty of merchantability if the vehicle is sold with a written warranty or service contract."[22] Computer Network *is also instructive on this point. In* Computer Network, *the court specifically refuted the argument that advocates for the consumer typically make against dismissal of this claim against a dealer and held: "[t]he disclaimer was not invalid under 15 USC 2308, which precludes a supplier that has offered an express warranty from disclaiming or modifying a limited warranty in any respect other than duration. [The dealer] did not provide an express warranty. Thus, there is no question of material fact with respect to plaintiff's claim against [the dealer] for breach of an implied warranty."*[23] *Relying on the fact that the dealer expressly and conspicuously disclaimed any implied warranty and did not provide an express warranty with the lease of the vehicle, the Michigan Court of Appeals dismissed plaintiff's breach of implied warranty claim. In most cases, the dealer properly disclaimed implied warranties pursuant to MCL 440.2864.*

Thus, a consumer is required to first establish a breach of warranty *under state law* before he or she can recover under the MMWA.

The disclaimer is typically clearly and unequivocally printed in bold-type on the front page of the Application for Michigan Title – Statement of Vehicle Sale and generally states that the dealership "expressly Disclaims All Warranties Either Express or Implied, Including Any Implied Warranty of Merchantability Or Fitness For A Particular Purpose."

Must Show Breach of Warranty under State Law to Succeed u nder MMWA

In *Miekstyn v. BMC Choppers,* the plaintiffs in the motorcycle breach of warranty action initiated a lawsuit alleging breach of express and implied warranties and recovery under the MMWA. The case was tried to a jury, which found that the defendants did not breach any express or implied warranties, but violated the MMWA. The trial court awarded costs and attorneys fees under the MMWA. The defendants appealed, contending that the plaintiffs could not maintain a breach of warranty action under the MMWA because there was no finding of a breach of implied or express warranties under state law. The Court of Appeals agreed and remanded to the trial court.[24]

The court stated that "the MMWA 'allows recovery of attorney fees upon successful suit under a written or implied warranty *under state law.*'"[25] Consumers are entitled to recover under the MMWA upon establishing the following: "(1) that they were damaged by defendants' failure to comply with any obligation under the MMWA; (2) that they were damaged by defendants' failure to comply with an obligation under a written warranty; or (3) they were damaged by defendants' failure to comply with an obligation under an implied warranty."[26] Thus, a consumer is required to first establish a breach of warranty *under state law* before he or she can recover under the MMWA.

While independent causes of action are recognized under the MMWA, the court in *Miekstyn* held that where a consumer only seeks to recover for breaches of implied or express warranties under the MMWA, he or she is first required to establish that the defendants breached those warranties *under state law*.[27] "[T]hese causes of action are based on state law and must meet the relevant state criteria."[28] The *Miekstyn* court was quick to point out, however, that the written warranty at issue was a limited warranty, as opposed to a "full" warranty. Limited warranties are not subject to the federal minimum standards set forth in 15 USC 2304(a), "[a] consumer would not be entitled to bring an action for violation of the standards included in section 2304(a) if he received a warranty designated as a 'limited warranty.'"[29] Thus, the plaintiffs could not predicate their MMWA claim on the defendants' alleged failure to confirm with any requirements set forth in 15 USC 2304(a). While 15 USC 2310(d) authorizes a suit against a warrantor for failure to comply with any obligations under a limited warranty, the *Miekstyn* court held that for the plaintiffs to prove that they were harmed by the defendants' alleged failure to comply with the limited written warranty, they were first required to prove that the defendants actually breached the warranty.[30] The *Miekstyn* jury determined that the plaintiffs failed to establish that the defendants breached any written warranty under state law, accordingly, "their MMWA claim [failed] as a matter of law."[31]

The Court of Appeals held that "[b]ecause the plaintiffs failed to prove that defendants breached any implied or express warranty under state law, plaintiffs could not, as a matter of law, maintain any breach of warranty action under the MMWA.

In remanding the case to the trial court, the Court of Appeals held that "[b]ecause the plaintiffs failed to prove that defendants breached any implied or express warranty under state law, plaintiffs could not, as a matter of law, maintain any breach of warranty action under the MMWA."[32]

Practice Tip – Avoid Inconsistent Verdicts

The Miekstyn *court clarifies any confusion with respect to state and federal law claims of breach of express and implied warranties. Prior to recovery under the MMWA for breaches of express and implied warranties, a consumer must first establish a breach arising under state law. In* Miekstyn, *the jury arrived at an inconsistent verdict in finding that the defendants did not breach any express or implied warranties under state law, but violated the MMWA. This inconsistency was the basis of the defendants' appellate record and could have been avoided by careful drafting of the verdict form. To avoid an inconsistent verdict with respect to state and federal law breach of warranty claims as in* Miekstyn, *the jury should not be asked to determine whether there was a breach under the MMWA unless there is a finding of breach under state law. On the verdict form, the jury should first be asked whether the defendant*

breached an express or implied warranty under state law. Only if the jury finds in the affirmative, should they go on to the question of whether the defendant breached an express or implied warranty under the MMWA. If the jury does not find that the defendant breached an express or implied warranty under state law, they should be directed to skip the MMWA question. This would effectively avoid an inconsistent verdict on this issue. An inconsistent verdict should not be upheld and failure to take steps to avoid such a verdict prior to the case being submitted to the jury could result in additional work to undo the verdict on appeal.

Endnotes

1. MCL 440.2313 and MCL 441.2314
2. 15 USC 2301, *et seq.*
3. 15 USC 2302(e)
4. 15 USC 2301(a) and 15 USC 2303, 15 USC 2304.
5. 15 USC 2303
6. 15 USC 2310(d)(1).
7. 15 USC 2310(d).
8. 15 USC 2310 (f).
9. 15 USC 2301(5).
10. 15 USC 2301(6).
11. *Computer Network v. AM General,* 265 Mich App 309 (2005).
12. *Miekstyn v. BMC Choppers,* unpublished opinion per curium of the Court of Appeals, issued April 10, 2007 (Docket No. 266439).
13. See also *Zanger v Gulf Stream Coach, Inc.*, 2005 U.S. Dist. LEXUS 31160, 26 (dismissal of plaintiff's Magnuson-Moss Warranty Act claim because plaintiff failed to state a claim for breach of implied warranties).
14. *Computer Network*, 265 Mich App at 320.
15. *Id.*
16. *Zanger v Gulf Stream Coach, Inc.*, 2005 U.S. Dist. LEXUS 31160.
17. *Id.* at 19.
18. *Id.*
19. *Id.*
20. MCL 440.1201(10)
21. MCL 440.2316(2).
22. Dani Liblang, *A Practice Guide to New Car Warranty Cases,* Michigan Bar Journal (1999).
23. *Id.* at 316.
24. *Miekstyn* at *2.
25. *Id.*, citing *King v. Taylor Chrysler-Plymouth, Inc.,* 184 Mich App 204, 221 (1990)
26. *Id.* at *3.
27. *Id.* at *4.
28. *Id.* citing *Hines v Mercedes-Benz USA, LLC,* 358 F Supp 2d 1222 (ND GA 2005).
29. *Id.* at *4, quoting *Mydlach v. DaimlerChysler Corp,* 364 Ill App 3d 135, 138 (2005)
30. *Id.*
31. *Id.*
32. *Id.* at *5.

Voodoo Economics?

Loss Of Parental Training And Guidance: The New Battleground In Medical Malpractice Damages

By: David M. Ottenwess, Stephanie P. Ottenwess, Melissa E. Graves
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Executive Summary

One new tactic plaintiff counsel use to avoid the cap on noneconomic damages is to seek damages for diminished educational prospects resulting from "loss of parental training and guidance" and characterize those damages as an economic loss. Defense counsel should argue that the damages, even if provable, are inherently noneconomic because they are based on underlying facts that are indistinguishable from loss of society and companionship.

In addition, defense counsel must be prepared to attack the factual foundation for these damages by requiring actual proof of the activities of the deceased parent that relate to educational prospects, and by attacking any expert testimony under Daubert principles.

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Since the advent of caps on noneconomic damages[1] in medical malpractice cases in Michigan, plaintiffs' counsel have been trying to get around them, or, at the very least, fashion a theory of recovery to increase the amount of economic damages that can be awarded. The latest innovative measure we have seen from our fair brethren across the aisle is the theory that minor children of the deceased suffer ***economic*** damages through the "loss of parental training and guidance." While potentially applicable in all wrongful death tort actions, we are seeing this novel approach in medical malpractice cases as a vehicle to compensate for the "cap" on noneconomic damages by "beefing" up economic loss. It is important to be acquainted with this theory as it could result in an increase of several million dollars in requested economic damages if allowed by the court. What follows is an analysis of this theory along with some ideas about how to defend against it when it arises. The place to begin is with some background on the subject to provide context for the analysis and conclusions.

In wrongful death cases in which the heirs include minor children of the deceased, the Decedent's estates are now seeking to recover damages pursuant to the wrongful death act for the "loss of parental training and guidance" as it relates to the children's educational attainment. The theory behind a claim for damages for "loss of parental training and guidance" is that the death of the mother or father and the resulting loss of the training and guidance they provided to the children places the children at an increased risk of not attending college and, as a result, they will earn less income during their lifetime. In an effort to support this theory, plaintiff attorneys are submitting testimony from economists who calculate the expected earnings for a college graduate and compare this to the expected earnings for a high school graduate. The economist then characterizes the difference in these two levels of earning as the value of the loss of parental training and guidance suffered by the children as a result of their mother or father's death.

Although damages for loss of parental training and guidance are cognizable in Michigan, and have been for many years, there are a number of issues which arise when the estate of the deceased attempts to prove such damages, including submitting sufficient testimony from the appropriate witnesses to establish such a loss and whether testimony from an economist as to the value of the loss is sufficiently reliable to be deemed admissible. While ultimately a ***Daubert*** challenge to any proposed testimony from an economist regarding damages based on a loss of educational attainment theory is recommended, the most important issue to a potential settlement or verdict will be whether damages for "loss of parental training and guidance" are deemed noneconomic to which the damage caps apply.

The theory behind a claim for damages for "loss of parental training and guidance" is that the death of the mother or father and the resulting loss of the training and guidance they provided to the children places the children at an increased risk of not attending college and, as a result, they will earn less income during their lifetime.

Loss of Parental Training and Guidance – a Cognizable Claim in Wrongful Death Cases.

The Wrongful Death Act[2] ("the Act") provides the exclusive method for a plaintiff to seek damages for wrongful death as there is no common law right to recover.[3] In addition to damages for certain expenses and for the decedent's pain and suffering, the Act allows beneficiaries to claim damages for the loss of financial support and for the loss of society and companionship of the deceased. MCL 600.2922(6) provides:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Until 1971, the Act limited damages to the surviving spouse or next of kin as a result of the decedent's death to "pecuniary injury." With the enactment of 1971 PA 65, the legislature amended the Act by deleting the phrase "pecuniary injury," thus allowing juries to award such damages as it "shall deem fair and just, under all of the circumstances, . . . [including] recovery for the loss of the society and companionship of the deceased." Although the language of the Act specifically provides for damages for loss of society and companionship, it does not include damages for "loss of parental training and guidance."[4] However, loss of parental training and guidance as an element of damages in a wrongful death case is specifically referenced in the Michigan Civil Jury Instructions.[5] M Civ JI 45.02 provides:

> If you decide the plaintiff is entitled to damages, you shall give such amount as you decide to be fair and just, under all the circumstances, to those persons represented in this case. Such damages may include the following items, to the extent you find they have been proved by the evidence:
>
> (reasonable medical, hospital, funeral and burial expenses)
>
> (reasonable compensation for the pain and suffering undergone by *[name of decedent]* while [he / she] was conscious during the time between [his / her] injury and [his / her] death)
>
> (losses suffered by *[name of surviving spouse / name of next of kin]* as a result of *[name of decedent]*'s death, including:
>
> loss of financial support
>
> loss of service
>
> loss of gifts or other valuable gratuities
>
> ***loss of parental training and guidance***
>
> loss of society and companionship
>
> Which, if any, of these elements of damage has been proved is for you to decide, based upon evidence and not upon speculation, guess, or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment. Your verdict must be solely to compensate for the damages and not to punish the defendant. (Emphasis added).

Although not listed as an element of damages in the Act or specifically defined by case law, a claim for the loss of parental training and guidance is really no different from a claim for loss of society and companionship. The compensation provided under the Act for the loss of the society and companionship of the deceased is "for the destruction of family relationships that result when one family member dies."[6] Although specific factors to be accounted for are not identified, the Court of Appeals has stated that "the only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the

Although specific factors to be accounted for are not identified, the Court of Appeals has stated that "the only reasonable means of measuring the actual destruction caused is to assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by the time and activity shared and the overall characteristics of the relationship."

time and activity shared and the overall characteristics of the relationship."[7] These parameters for proving loss of society and companionship fit squarely within those provided by the Supreme Court and Court of Appeals when an Estate seeks damages for the children of the deceased.

Indeed, even before the 1971 amendment to the Act which specifically allowed for loss of society and companionship claims, the Michigan Supreme Court in *Sipes v Michigan Cent R. Co,*[8] recognized that the pecuniary loss suffered by an infant for the wrongful death of a parent included damages such as loss of parental training and guidance. However, the plaintiff is required to present specific evidence to establish that the deceased parent was capable of and actually did provide such training and guidance to the children. The fact that the decedent was a parent, in and of itself, does not substantiate such a loss in the children's lives. The Court held:

> The pecuniary loss to an infant, in the death of a parent, may go beyond consideration of food, shelter, clothing, and like material comforts, and include the expense of supplying such degree of nurture, and intellectual, moral, and physical training, as the evidence shows such parent was, by reason of ability, character, and temperament, capable of giving. Mere parentage, however, does not carry such a showing. Evidence relating to the nurture bestowed, and revealing the intellectual powers and moral character of the person, is available, and must be introduced to show the extent of what would have been supplied by the deceased had he lived, and, by reason of his death, need now be bought and paid for. To measure what has been lost, it is necessary to consider the capacity of the parent to bestow. Without such light, the jury would have to apply their own standards, based on their individual experiences, and these would, of necessity, 'be as various as their tastes, habits, and opinions.' . . . And the result would therefore be reached without considering the parent at all.[9]

Later, in *Berger v Weber,*[10] the Supreme Court extended these damage claims to cases in which the parent is negligently injured and further defined a child's claim for loss of society and companionship to include love, companionship, affection, society, comfort and solace as well as services. The Michigan Court of Appeals also recognized in *Westfall v Venton*[11] that "children may recover from the tort-feasor for the unlawful death of a parent where loss of love, companionship and guidance have been proven."

Ultimately then, damages for "loss of parental training and guidance" are clearly allowed in Michigan in wrongful death cases. Moreover, these damages emanate from the losses suffered by the child as a result of no longer having the nurturing and supportive parental relationship which, one would argue, helps to mold the child into the type of adult he or she will become.

Defense counsel must ensure that the trial court recognizes that such claims for damages are no different from the loss of society and companionship of the deceased parent.

Defense counsel must be careful to distinguish damages for the loss of parental training and guidance from damages for the loss of household services performed by a parent for his or her children.

Evidentiary Support is Essential

However, there must be sufficient evidence to support a claim that the relationship between the parent and child was one that included the parent supplying positive intellectual, moral and other such parental training and guidance, that the parent was capable of giving such guidance and that the death of the parent has created a void in the child's training and guidance which must now be bought and paid for. If these evidentiary burdens can be met, defense counsel must ensure that the trial court recognizes that such claims for damages are no different from the loss of society and companionship of the deceased parent. This is critical because, if so characterized, then the noneconomic damage caps in medical malpractice cases must apply.

Claims for Loss of Training and Guidance Are Noneconomic In Nature.

In *Berger,* although the Supreme Court rejected the defendants' argument that recognizing a child's independent cause of action for injury to a parent was too speculative, the court made clear that the damages were an "intangible loss" such as pain and suffering and most certainly were not economic in nature:

> We are not convinced that the injury to the child is too speculative to award damages. Courts, law review commentators and treatise writers all recognize that the child suffers a genuine loss. While the loss of society and companionship is an intangible loss, juries often are required to calculate damages for intangible loss. Awards are made for pain and suffering, loss of society and companionship in wrongful death actions, and for loss of spousal consortium.

> Evaluating the child's damages is no more speculative than evaluating these other types of intangible losses.[12]

Distilled to its essence, a claim for loss of parental training and guidance is no different from a claim for loss of society and companionship damages, which are "clearly noneconomic."[13] Indeed, each claim for damages is measured by the loss suffered as a result of losing the positive attributes of a parental or family relationship.

In order to be certain the losses are deemed noneconomic, however, defense counsel must be careful to distinguish damages for the loss of parental training and guidance from damages for the loss of household services performed by a parent for his or her children. As to the latter category of damages, and as further discussed below, the Court of Appeals has deemed certain household services performed by a parent in a wrongful death case to be economic in nature and not subject to the medical malpractice damage cap.[14] This distinction will not always be easy as there could conceivably be overlaps between the training and guidance provided by a parent and the "services" performed by a parent, including reading to or with children, helping with homework and the like. With this in mind, the defense practitioner would be well served by serving interrogatories or conducting other discovery in an effort to clarify which components of a claim for loss of household services actually comprise services performed by a parent for his or her child.

In *Thorn v Mercy Memorial Hospital*[15], the decedent's estate sought to recover damages for the economic value of the loss of household services that the decedent mother provided to her minor children. The services claimed to have been lost included services the mother "was accustomed to perform in the household; services ordinarily performed by [the mother] and special services uniquely performed by a mother."[16] Plaintiff's economist used the American Time Use Survey and the hourly rate of a live-in aide to determine the value of the loss of household services at $225 per day.[17] The services the economist considered included: "physical care for children; playing and doing hobbies with children; reading to/with children; talking to/with children; helping with homework/education-related activities; attendance at children's events; taking care of children's health care needs' [sic] and dropping off, picking up, and waiting for children." The economist also included "secondary activities" done at the same time as the primary listed activities such as cooking dinner.[18] The court determined that these specific services performed by the mother for her minor children amounted to "replacement services," a well-recognized component of damages recoverable by a person injured because of medical malpractice.[19]

The court then turned to the issue of whether the loss of these services performed by the mother constituted an economic or noneconomic loss. Notably, the plaintiff argued that the loss of these services were "quantifiable and, therefore, should not be construed as being commensurate with the noneconomic compensation available for the more esoteric damages incurred for loss of society and companionship."[20] The Court of Appeals agreed and distinguished this claim for damages for loss of services from an independent action for loss of consortium (which is precluded under the Act) and a claim for loss of society and companionship damages allowed under the Act.[21]

In so holding, the court looked to the medical malpractice damage cap statute, MCL 600.1483, "to discern the nature and character of the damages available to plaintiff."[22] After noting that the statute does not provide a definition of economic loss, the court concluded that MCL 600.1483 did not provide the answer to the question of whether loss of household services damages were economic or noneconomic "or fully delineate the components of a noneconomic loss. . ."[23] Thus, the court looked to the statutes pertaining to product liability actions relating to injury or death for guidance.[24] In particular, the *Thorn* court looked to MCL 600.2945, which distinguishes between economic and noneconomic losses:

> (c) "Economic loss" means objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.
>
> * * *
>
> (f) "Noneconomic loss" means any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages.

The court determined that the definitions contained within MCL 600.2945 were instructive in determining the nature of the claim for loss of services in *Thorn*. The court stated:

> We note that the definition of "economic loss" is consistent with prior versions of the [Wrongful Death Act], which focused on pecuniary damages. The definition of noneconomic loss under this statutory provision parallels the historical progression of the WDA, which initially precluded recovery for nonpecuniary damages, such as loss of society and companionship, grief, and mental anguish. The definition in MCL 600.2945(f) is also consistent with the definition of noneconomic loss in MCL 600.1483(3).

> Although damages recoverable under the WDA are determined by the underlying action, it is nonsensical to construe the nature or character of those damages as being variable depending on the theory of liability. What comprises an economic loss in a medical malpractice action must be the same as what constitutes an economic loss under a different theory of tort liability. To find otherwise would be not only confusing, but also would lead to inconsistent and inequitable results when an injury is fatal.[25]

The court concluded that the loss of the mother's household services to her children fit into the economic loss definition as damages for the cost of replacement services which were "separate and distinguishable from compensation for loss of society or companionship" and, as economic damages, were not subject to the damages cap.[26] In other words, the loss in *Thorn* was objectively verifiable.

Damages for Loss of Educational Attainment Are Not Objective

Although plaintiffs will rely on *Thorn* to argue that certain services performed by a parent are economic in nature, *Thorn* can be distinguished from cases with alleged damages for loss of parental training and guidance as valued by a "loss of educational attainment" in that these types of damages cannot be **objectively** verified. In *Thorn*, the damages sought were for the cost of paying someone to be physically present to perform the daily services no longer being performed by the mother – helping with homework, reading to the children, attending school/sport events, cooking dinner – all of which had objectively verifiable replacement costs.

Conversely, loss of parental training and guidance leading to loss of educational attainment damages must be measured by the detriment to the child over time as a result of not having the positive influence of a parent in their life – an esoteric computation which is incapable of being supported by the testimony of an economy expert. For example, an economist relying on a loss of educational attainment theory performs two calculations in order to determine the value of the loss of parental training and guidance. First, the economist researches what a college graduate may be expected to earn and then researches what a high school graduate would expect to earn. The difference between these two figures is then characterized as the "economic" loss suffered by the minor children because the economist's theory is that children of a single parent are less likely to go to college. We see at deposition, however, that the economist has no knowledge or real information regarding what parental training and guidance, if any, the deceased parent actually provided to his or her children. Also, the economist cannot testify that it is more likely than not that the children will **not** proceed to college as a result of their mother or father's death. Because damages for loss of educational attainment cannot be objectively verified, they **must** be classified as noneconomic in accordance with the *Thorn* decision.

> This type of claim is an intangible loss which is incapable of being computed with mathematical certainty and, therefore, is properly characterized as noneconomic in nature.

Decisions in Other States

Given the scarcity of Michigan case law regarding damages for loss of parental training and guidance, it is helpful to look to other states for guidance, a number of which treat damages for loss of parental training and guidance as noneconomic in nature. For example, the Alaska Civil Pattern Jury Instructions indicate that the jury may make an award for "the fair value of the loss of the enjoyment, care, guidance, love and protection" suffered by the child or children as a result of injury to a parent as an item of noneconomic loss.[27] Furthermore, Maryland's statute governing damages for wrongful death defines noneconomic damages as: "In an action for wrongful death, mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other noneconomic damages . . ."[28]

Additionally, the case of *Kallas v Carnival Corporation*[29] is particularly instructive when examining the legal issues regarding a damage claim for loss of parental training and guidance. Not only did the court find that the opinion of plaintiff's expert (who testified that the value of the loss of parental training and guidance was the difference in earnings between a college graduate and a high school graduate) was unreliable under Federal Rule of Evidence 702, but the court also conducted a review of case law from across the country regarding this type of damage claim and determined that there "is not any uniform standard recognized by courts for determining the value of lost parental training and guidance."[30] Notably, however, although recognizing that other courts did allow damages for loss of parental training and guidance in certain situations, the *Kallas* court was unable to find "any case in which a child's *potential* lost income due to risk of not attending college was used as a factor for determining the loss."[31] This decision should prove particularly helpful in those cases where the plaintiff's economist seeks to characterize the loss of parental training and guidance as a loss of educational attainment by the child, as opposed to those cases in which the loss of parental train-

ing and guidance is characterized by looking at the value of the household services performed by the mother or father for the benefit of their children.

Furthermore, a review of the cases identified by the *Kallas* court[32] in which damages for loss of parental training and guidance were awarded serves to highlight the fact that this type of claim is an intangible loss which is incapable of being computed with mathematical certainty and, therefore, is properly characterized as noneconomic in nature. See, e.g., *Solomon v Warren*[33] (finding that damages for loss of parental training and guidance "cannot be computed with any degree of mathematical certainty) and *Southlake Limousine & Coach, Inc v Brock*[34] (finding that testimony of economist on loss of parental training and guidance was inadmissible and that jury should be able to determine intangible losses like this based on its own experiences and through the testimony of survivors). Other cases have made similar findings. See, e.g., *Ed Wiersma Trucking Co v Pfaff*[35] (including loss of parental training and guidance as an example of emotional damages recoverable under the wrongful death act) and *Johnson Controls v Forrester*[36] (same).

Admissibility of Expert Testimony – *Daubert*

If the plaintiff is able to provide sufficient testimony to support a claim that the deceased parent provided training and guidance which has now been lost to the children, and if the trial court actually determines the nature of the claimed loss is economic, the next query is the admissibility of proposed testimony from an economy expert that the value of the loss of parental training and guidance is measured by the decreased income of the children due to their loss in educational attainment.

Once again, it is imperative that the plaintiff present **fact witnesses** to determine **if** the deceased parent furnished training and guidance and what loss, if any, the children have suffered. It is hard to imagine how an economist could have any reliable basis as to the relationship between the parent and child or the damages actually suffered by the child as a result of losing the parent's training and guidance. More importantly, it should be argued that calculations by an economist of a child's potential lost income are too attenuated and speculative to be reliable and admissible at the time of trial.

If, however, an economist is not precluded from testifying, the trial court must be forced to perform its gatekeeping responsibilities and fully examine the basis for the economist's opinions on loss of parental training and guidance at a *Daubert* hearing prior to allowing the testimony at trial.

More importantly, it should be argued that calculations by an economist of a child's potential lost income are too attenuated and speculative to be reliable and admissible at the time of trial.

The trial court's gatekeeping function stems from both MRE 702 and MCL 600.2955. MRE 702 provides that an expert may provide opinion testimony only if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." This language was added to MRE 702 on January 1, 2004. The staff comment to MRE 702 makes clear that the amendment was made in order to more closely conform MRE 702 to Federal Rule of Evidence 702 and to incorporate the United States Supreme Court's holding in *Daubert v Merrell Dow Pharmaceuticals, Inc.*,[37] requiring trial judges to act as "gatekeepers" to exclude unreliable expert testimony.[38] However,"[i]n both its former and current incantations, MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable."[39] Indeed, a trial court may admit expert opinion testimony only once it has ensured that the testimony meets MRE 702's standards of reliability.[40]

As the Supreme Court further explained, the trial court is required "to ensure that each aspect of an expert witness's proffered testimony — including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data — is reliable."[41] "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'"[42]

In addition to MRE 702, the Michigan legislature also enacted MCL 600.2955 in an "apparent attempt to codify" the United States Supreme Court's holding in *Daubert*.[43] Unlike MRE 702, which applies in all cases in which expert testimony is used, §2955 only applies "in an action for the death of a person or for injury to a person or property." MCL 600.2955(1) provides that scientific opinion testimony is not admissible unless the trial court first determines that the opinion is reliable and will assist the trier of fact. In making this determination, the trial court must examine both the opinion and the basis for the opinion and "shall" consider all of the seven specific factors set forth in the statute.

Submitting testimony from an economist that the proper measure of the loss of parental guidance and support to a child whose parent is deceased is the difference between his or her projected college degree compensation and his/her projected high school compensation assumes that the child will not attend or will not graduate from college. This opinion obviously is premised on an event that

has not even had the chance to occur yet: the child's matriculation at a post-secondary institution. Clearly, this is an assumption which could not possibly be supported by any evidence in the case and, as such, is untethered to any scientific validity, is entirely speculative and should not be admitted into evidence under MRE 702 and MCL 600.2955.

Conclusion

Although cognizable in Michigan, damages for loss of parental training and guidance in wrongful death medical malpractice cases must be supported by sufficient evidence that the parent possessed the moral, intellectual and physical capability to provide positive training and guidance, actually had such a relationship with the child and, as a result of the parent's death, the child, by no longer having that relationship, has suffered a loss. In order to be reliable and thus admissible, this evidence should be presented through the testimony of witnesses, such as family members or close friends, who were familiar with the parent and child, not a retained economy expert.

If part of the damages claimed include "loss of educational attainment," defense counsel must evaluate whether there is a need to depose the younger children. Moreover, school records, interviews with school counselors and relatives as well as discovery regarding college funds must be considered.

Next, defense counsel must argue in the trial court that these damages for the loss suffered by the child by growing up without the guidance and support of a parent is not objectively verifiable and thus noneconomic in nature to which the damage caps apply. Moreover, if plaintiff is also requesting damages for loss of services by the parent, the defense practitioner must discern through discovery the exact elements plaintiff is claiming comprise each damage claim to make certain that there is no double-dipping.

If testimony from an economist is submitted in support of this claim for damages, the litigator must be prepared to carefully cross examine the economist on the basis of his/her opinions and make certain that these opinions are tested in a *Daubert* hearing. More often than not, the expert will be ill-equipped to provide much substance to their claims and eventually will need to fall back on out-dated and unreliable research. Ultimately, we suspect that the experts will make some one-sided effort to get the children lined up to support their views, but the courts still should be very suspect of a child whose economic interest is clearly a factor in what he or she states, before even considering whether the damages are objectively verifiable. We believe there is simply no way for the plaintiff to project into the future whether the loss of a parent to an 8 year old child from, say Royal Oak, Michigan, means that child will never go to college or whether a 10 year old child from Grand Rapids, Detroit, Traverse City, Los Angeles, Atlanta — take your pick — will likewise be affected. There is no objectively verifiable monetary loss on this calculation.

Ultimately, be prepared, though, to push this as it has been our experience that judges are reluctant to address the point before trial. If these types of damages are allowed in as "economic" loss, it could mean a verdict giving millions of dollars, depending on the number of children included in the decedent's estate.

Endnotes

1. MCL 600.1483 limits noneconomic damages to either $280,000 or $500,000 depending on the nature of the injury. These caps are adjusted by the state treasurer at the end of each calendar year. The current caps for 2010 are $408,200 and $729,000.
2. MCL 600.2922.
3. *Jenkins v. Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004).
4. MCL 600.2922(6).
5. Jury instructions are entitled to some level of deference as they constitute the work of a committee created by the Michigan Supreme Court. *Taylor v Michigan Power Co.*, 45 Mich App 453, 457; 206 NW2d 815 (1973).
6. *McTaggart v Lindsey,* 202 Mich App 612, 616; 509 NW2d 881 (1993), citing *Crystal v Hubbard,* 414 Mich 297, 326; 324 NW2d 869 (1982).
7. *McTaggart, supra*, citing *In re Claim of Carr,* 189 Mich App 234, 239; 471 NW2d 637 (1991).
8. 231 Mich 404, 406-407; 204 NW 84 (1925).
9. *Id.*
10. 411 Mich 1, 14, 303 NW2d 424 (1981).
11. 1 Mich App 612, 622, 137 NW2d 757 (1965).
12. *Berger, supra,* 411 Mich 1, 16.
13. *Jenkins, supra,* 471 Mich 158, 168.
14. *Thorn v Mercy Memorial Hospital*, 281 Mich App 644; 761 NW2d 414 (2008).
15. 281 Mich App 644; 761 NW2d 414 (2008).
16. *Thorn v Mercy Memorial Hospital*, 483 Mich 1122; 767 NW2d 431 (2009).
17. *Id.*
18. *Id.*
19. *Thorn,* 281 Mich App at 660-661.
20. *Thorn,* 281 Mich App at 647.
21. *Thorn,* 281 Mich App at 663.
22. *Id.*
23. *Id.* at 664. MCL 600.1483(3) defines "noneconomic loss" as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss."
24. *Id.* at 664-665.
25. *Id.* at 665. On July 7, 2009, the Michigan Supreme Court denied the Defendants applications for leave to appeal. *Thorn v Mercy Memorial Hospital*, 483 Mich 1122; 767 NW2d 431 (2009). On January 29, 2010, the Supreme Court denied the motion for reconsideration. *Thorn v Mercy Memorial Hospital*, __ Mich __; 777 NW2d 149 (2009).
26. *Thorn,* 281 Mich App at 666-667. Notably, however, the *Thorn* court did not make any findings regarding the reliability or admissibility of the economist's opinions regarding the value of these economic damages.
27. AL Civil Pattern Jury Instructions 20.09-1 (Revised 1990).
28. Md. Rev. Stat. § 11-108(a)(2)(i)(2) (West 2009)
29. 2009 WL 901507, Docket No. 06-20115, March 30, 2009 (United States District Court for the Southern District of Florida).
30. *Id.* at * 7.
31. *Id.*
32. *Id.* at *7-8.
33. 540 F2d 777, 788 (5th Cir. 1976).
34. 578 NE2d 677, 682 (Ind. Ct. App. 1991).
35. 643 NE2d 909 (Ind. Ct. App. 1994).
36. 704 NE2d 1082 (Ind. Ct. App. 1999).
37. 509 US 579, 589 (1993).
38. Although the language of FRE 702 and MRE 702 is similar, "the trial court's obligation under MRE 702 is even stronger than that contemplated by FRE 702 because Michigan's rule specifically provides that the court's determination is a precondition to admissibility." *Gilbert v DaimlerChrysler Corporation,* 470 Mich 749, 780 n 46; 685 NW2d 391 (2004).
39. *Gilbert v DaimlerChrysler Corporation,* 470 Mich 749, 780; 685 NW2d 391 (2004).
40. *Id.* at 782.
41. *Id.* at 779-783.
42. *Id.* at 780 (citations omitted). *See also Craig v Oakwood Hospital*, 471 Mich 67; 684 NW2d 296 (2004).
43. *Greathouse v Rhodes,* 242 Mich App 221, 238; 618 NW2d 106 (2000).

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).

A Marathon in Paris

David Couch, a shareholder in the Grand Rapids office of Garan Lucow Miller, completed the 2010 Paris Marathon on behalf of The Leukemia and Lymphoma Society on April 11, 2010. Over 40,000 runners registered for the race, which wound its way through the streets of Paris, from the Arc de Triomphe, down the Champs Elysées, past the Elysées Palace, through the Place de la Concorde, past the Tuileries Gardens and the Louvre, past the location where the Bastille prison used to stand before the French Revolution, along the Seine, past Notre Dame, past the Eiffel Tower, through two large gardens on opposite ends of the city, and finally finishing back at the Arc de Triomphe again.

Through many generous contributions, David and the other 13 runners from the Michigan Chapter raised over $90,000. Nationwide, Team in Training raised over $1.3 million for The Leukemia and Lymphoma Society from this race alone. Anyone wanting additional information about this event, or in participating in a future event on behalf of this charity, can contact David at 742-5500.

Super Lawyers

Dan Steele, John Lynch, Jim Thome and **Tom Peters**, of Vandeveer Garzia, have all been named Super Lawyers for 2010.

Federation of Defense & Corporate Counsel

Charles W. Browning, of Plunkett Cooney, was recently selected for membership in the Federation of Defense & Corporate Counsel an international organization whose members dedicate their practice to the representation of corporations and insurance companies in the defense of civil litigation.

MDTC Commercial Litigation Section

Internet-r elated Litigation u pdate:
Online Terms And Conditions And Personal Jurisdiction Through Online Contacts

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

Executive Summary

An emerging legal issue in today's business environment is the effect of incorporating online terms and conditions into commercial agreements. While Michigan law is not well developed in this area, decisions elsewhere suggest a general trend toward the enforceability of such terms and conditions.

The question of courts' personal jurisdiction over a company maintaining an internet presence is handled similarly by federal and state courts in Michigan. Litigants challenging a court's exercise of personal jurisdiction must distinguish their Internet activity as merely passive and unrelated to the transaction of business. Their opponents must show instead that the internet conduct is actively engaged in transacting business – and thus the company is purposefully availing itself of the forum's laws – such that an exercise of personal jurisdiction is reasonable.

The author acknowledges and thanks Corbin Walker and Benjamin Dougherty for their valuable contributions to this article.

Ed Perdue, the chairperson of MDTC's Commercial Litigation Section, is a shareholder of Dickinson Wright, and specializes in all forms of commercial litigation including UCC sales disputes, creditor's rights and banking litigation. His email address is eperdue@dickinsonwright.com.

Businesses across the economy rely on the internet to streamline and organize a wide range of their commercial activities. Among other important business pursuits, contract formation has been deeply influenced by the predominance of electronic communications. The innovation of incorporating online terms and conditions into contracts is a prime example of technology's impact on traditional business conduct. The important legal question in this development is whether such incorporated terms will be given binding effect and enforced by courts. A second and more familiar legal issue – courts' exercise of personal jurisdiction over parties conducting online business – likewise continues to affect commercial relationships. This article addresses the current state of Michigan law in these two areas that bear on a wide range of commercial conduct within the state and elsewhere.

Incorporation of Online Terms and Conditions

Like much of a company's information, documentation of contractual provisions, whether public or private, can be made available securely and effectively on its website. Maintaining web pages documenting the common terms and conditions language to be incorporated by reference into their contracts has allowed companies to save resources and centralize data. Given the unique business environment of the Internet, especially considering the dynamic nature of web content, the question of enforcing such terms may present an opportunity for courts to make new contract law. Must courts enforce terms and conditions incorporated in this manner?

Under traditional contract principles, incorporation by reference of extrinsic physical documents into a contract is generally permissible. Michigan law requires that the contract clearly show the parties' intent to incorporate another document into the agreement. In *Forge v Smith*, the Michigan Supreme Court stated the fundamental rule: "Where one writing references another instrument for additional contract terms, the two writings should be read together. The court must look for the party's intent within the contract where the words of a written contract are not ambiguous or uncertain."[1]

The one court applying Michigan law that considered the enforceability of incorporated *online* terms and conditions was the U.S. District Court for the Eastern District of Michigan in *Spartech CMD, LLC v Int'l Auto Components Group North America, Inc*.[2] The court decided the question consistent with the rule repeated in

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Forge. The case involved the arbitrability of pricing disputes arising from sales agreements between the parties. International Automotive initiated arbitration proceedings based on a provision of its own purchase orders stating "[t]his purchase order … incorporates by reference [Defendant's] Purchase Order Terms and Conditions which are available through the links provided on [Defendant's] Web Site at WWW.IACGROUP.com. … The Terms apply to all purchases by [Defendant] and its affiliates under any purchase order."[3] The online terms and conditions provided the arbitration procedure ultimately at issue in that case. In analyzing whether an injunction against the ongoing arbitration was appropriate, the court preliminarily considered the validity of incorporating the online terms and conditions in the manner called for by the purchase agreement. The court applied the well established rule embodied in *Forge*, determining that International Automotive's intent to incorporate the online terms and conditions was plain. As a result, the court deemed that the terms and conditions formed an integral part of the sales contracts, and Spartech was bound to arbitrate the claims.[4] In short, the court treated the online terms and conditions just as it would provisions contained in a *physical* instrument sought to be incorporated by reference.

The *Spartech* court cited no authority, from Michigan or elsewhere, distinguishing the treatment of online terms from that of traditional separate instruments. As the only case applying Michigan law that answers this question, even in cursory fashion, *Spartech* suggests that Michigan courts may see the incorporation of online language as undeserving of any new or special legal analysis. Advocates for maintaining the traditional analysis have several policy arguments at their disposal. First, the ease and efficiency with which parties can access online terms and conditions provides an effective means of doing business. Second, a common source of terms and conditions, provided by a single web page available to all parties, reliably ensures that parties have agreed to the same provisions. Multiple or revised paper incorporations, by contrast, may lead to confusion over which provisions are controlling. Third, incorporating online provisions is a measure favorable to economic efficiency. Avoiding the cost and potential waste of relying on incorporations printed on paper promotes both business and environmental interests.

There is also significant evidence of a trend emerging in other jurisdictions toward the enforceability of online terms and conditions, which may influence the ultimate resolution of the question by Michigan courts. For instance, *Pentecostal Temple Church v Streaming Faith, LLC*

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illustrates Pennsylvania's acceptance of incorporating documents available on a company's website.[5] The plaintiff in the case argued that the defendant's terms and conditions should not govern the agreement because those provisions were available only on the defendant's website and not provided on paper. Given the accessibility of the web page containing the terms and conditions, the court concluded that failure to read the terms in that form did not excuse the plaintiff from complying with them.[6] To support its conclusion, the court cited a Pennsylvania case stating "[s]o long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties … may incorporate contractual terms by reference to a separate, unsigned document."[7] Courts in several other jurisdictions have similarly enforced online terms and conditions.[8]

Nevertheless, courts might be persuaded to invalidate online incorporations given the differences that exist between paper documents and provisions that exist in the dynamic medium of a Web site. Parties may rightly question the consistency of their content over time.[9] In this respect, static physical documents are less risky. Aside from anticipating what courts will do with these various considerations, a few lessons are clear for business planning. Satisfactory

The Michigan long-arm statute has been construed to afford courts the broadest jurisdiction over foreign defendants consistent with the Due Process Clause of the federal constitution.

notice of the incorporations must be provided. Certainty in identifying documents, such as by the dates and version numbers of separate iterations of an instrument, is critical when no physical materials are to be exchanged. Thus, careful drafting of agreements and reliable access to and organization of websites can make the difference between a party's winning and losing a case that turns on the content of those terms and conditions.

Limited Personal Jurisdiction Over Companies Conducting Internet Business in Michigan

Can a Michigan court exercise limited personal jurisdiction over a company whose only contact with Michigan is maintaining a website by which Michigan residents conduct business? Michigan's long-arm statute authorizes personal jurisdiction over a party that maintains any of seven specified relationships with the state. Relevant to conducting Internet business, acts giving rise to a sufficient relationship include "[t]he transaction of any business within the state" and "[e]ntering into a contract for services to be rendered or for materials to be furnished in the state by the defendant."[10] The Michigan long-arm statute has been construed to afford courts the broadest jurisdiction over foreign defendants consistent with the Due Process Clause of the federal constitution.[11] The *International Shoe* line of federal cases requires that the defendant have sufficient minimum contacts with the forum state such that exercise of jurisdiction would not offend traditional notions of fair play and substantial justice.[12] Michigan courts apply a three-part test in assessing minimum contacts: (1) the defendant must purposefully avail himself of the forum state's laws; (2) the cause of action must arise from his activities in the forum state; and (3) in light of those activities' connection with the forum state, the exercise of jurisdiction must be reasonable.[13]

The Michigan case of *Clapper v Freeman Marine Equipment, Inc* involved breach of contract claims against a supplier of parts used in the construction of a yacht. Among other forms of advertising, the out-of-state defendant maintained a website that Michigan residents could access. Because no one involved in the manufacture, sale, or delivery of the yacht actually accessed the site, however, there was no nexus between the causes of action and Freeman's internet activity.[14] Thus, the long-arm statute did not authorize limited personal jurisdiction, and the court analyzed the issue under the rubric of general jurisdiction based on continuous and systematic contacts with the state.[15] The court stated that "simply maintaining a Web site does not constitute a minimum contact with the state absent some evidence that it actually generated sufficient business in the state."[16] While Michigan state courts have developed no independent caselaw pertaining to limited personal jurisdiction based on Internet contacts, *Clapper* teaches that a website must "do" something in Michigan to factor into a court's jurisdiction assessment. Regarding general jurisdiction, that activity must rise to the level of continuous and systematic business conduct or, as the court put, actually generate business. On the other hand, a court can exercise limited personal jurisdiction over a defendant without continuous and systematic conduct so long as the Internet contacts in question, however isolated they may be, satisfy the three prongs of the minimum contacts analysis. The element of transacting business, which is incorporated specifically into the long-arm statute and is bound up in the purposeful availment prong of the minimum contacts test, has been the crux of these jurisdictional questions for the federal courts in Michigan.

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When a Michigan case is brought in, or is removed to, a federal district court in the state, the test for limited personal jurisdiction is consistent with the thrust of *Clapper*.[17] In determining whether purposeful availment exists, courts consider the interactivity of Web site features on the theory that engaging Michigan residents in some kind of information exchange suffices to show

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that the Web site operator acts in a deliberate manner for which he should expect to be held accountable. In *Roberts v Paulin*, the court explained that "where courts have found personal jurisdiction on the basis of an interactive website, courts generally require something more in the way of a specific, meaningful connection with the forum state in particular, as opposed to a connection with the nation as a whole." The plaintiff in that case claimed patent infringement by the California defendant, who sold merchandise through a website accessible by Michigan residents but did not maintain any other substantial contacts with Michigan.[18] Finding no "specific, meaningful connection" between the defendant and Michigan, the court declined to exercise limited personal jurisdiction.[19] By contrast, in *TC Logistics Inc v Trucking Start-Up Services, LLC*, the U.S. District Court for the Western District of Michigan determined that the Georgia defendant's websites offering the procurement of various Michigan-mandated permits to trucking companies in Michigan supported a finding of purposeful availment.[20] Because the services were "uniquely directed at Michigan" the defendant was deemed to have deliberately sought the protection of Michigan's laws.[21]

Purely passive websites, on the other hand, that do not interact with users in a manner capable of information exchange do not purposely avail their operators of the state laws' protection, and thus fall short of the minimum contacts requirement.

The Sixth Circuit Court of Appeals has affirmed the notion that active, not merely passive, website conduct is required in order to satisfy the purposeful availment prong of the minimum contacts analysis. In *Neogen Corp v Neo Gen Screening, Inc*, the plaintiff alleged, among other claims, trademark infringement and unjust enrichment caused by the defendant's activity in Michigan.[22] At the outset of its analysis, the court referred to the rule of *Zippo Mfg Co v Zippo Dot Com, Inc* that a "defendant purposefully avails itself of the privilege of acting in a state through its website if the website is interactive to a degree that reveals specifically intended interaction with residents of a state."[23] Acknowledging that maintaining a Web site, in and of itself, did not provided sufficient contacts, the court stated: "The level of contact with a state that occurs simply from the fact of a website's availability on the internet is therefore an 'attenuated' contact that falls short of purposeful availment."[24] The defendant operated a website that consisted primarily of "passively posted information" such as ads and contact information, but also provided clients interactive online access by password authentication to diagnostic test results.[25] This aspect of the website supported a finding of purposeful availment, according to the court, because it showed that the defendant "intentionally reached out to Michigan customers."[26] Moreover, some of the defendant's advertisements and other service offerings specifically showed that the company had done business in Michigan in the past and thereby served to welcome future business from Michigan residents.[27] In the end, the court did not have to decide whether the online contacts alone would be enough to justify limited personal jurisdiction, since the defendant had other non-Internet contacts with the forum. Nevertheless, the court plainly indicated that feature interactivity and audience specificity are compelling in the purposeful availment analysis.

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Thus, a court's consideration of internet contacts for purposes of limited personal jurisdiction is twofold. First, some business must be transacted in Michigan through Internet contacts to satisfy the threshold long-arm requirement. As a result, courts are unlikely to exercise limited personal jurisdiction over a defendant whose website operates in a purely passive manner. Second, once the long-arm statute has been satisfied, the test turns to the level of interactivity the website's features for a determination of whether purposeful availment exists with respect to the forum state. The more interactive a website is with the residents of Michigan, the more likely courts are to find that the website operator has availed itself of Michigan's laws.

This state of the law provides a clear and fairly definite message. In the litigation context, a company seeking to avoid limited personal jurisdiction must argue that its Internet contacts with Michigan came about through an essentially passive website. Websites that provide Michigan residents with the means of ordering products or services or other communication with the host have been deemed sufficiently interactive to warrant the exercise of personal jurisdiction.[28] In other words, whenever a website functionally invites Michigan residents to use it, such that the operator could reasonably anticipate facing a lawsuit in Michigan, the court is likely to exercise personal jurisdiction. On the other hand, a site that simply lists available products, for instance, is much less likely to qualify as an instrument of purposeful availment. For situations lying between these extremes the application of an approach like *Zippo*'s, which constitutes a more fact-sensitive determination of interactivity and purposeful availment arising from it, requires a court to weigh whether a defendant reasonably should have anticipated a lawsuit in the forum state.

Ultimately no formula of acceptable or forbidden Web site features is conclusive as to a court's exercise of personal jurisdiction. Litigants must rely on traditional arguments surrounding purposeful availment to show that the Internet contacts in question, however they are effectuated, are either sufficient or insufficient to make the exercise of personal jurisdiction reasonable under the circumstances.

Endnotes

1. *Forge v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998).
2. 2009 US Dist LEXIS 13662 (ED Mich, 2009) (J. Victoria A. Roberts).
3. *Id.* at *3.
4. *See id.* at **13–14.
5. *Pentecostal Temple Church v Streaming Faith, LLC*, 2008 US Dist LEXIS 71878 (WD Pa, 2008) (J. Lisa Pupo Lenihan).
6. *See id.* at *15.
7. *Capricorn Power Co v Siemens Westinghouse Power Corp*, 324 F Supp 2d 731, 749 (WD Pa, 2004).
8. *See* Patrick Johnson & Adam Tarleton, *Enforceability of Online Terms and Conditions Incorporated into a Written Contract*, North Carolina Bar Association <http://businesslaw.ncbar.org/newsletters/april-2010-notes-bearing-interest/enforceability-of-online-terms—and-conditions-incorporated-into—a-written-contract.aspx> (accessed June 1, 2010) (collecting cases from Indiana, Texas, Florida, and Illinois).
9. *See* Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 Alb LJ Sci & Tech 79, 105 (2008) (challenging the analogy between paper documents and electronic documents).
10. MCL 600.705(1),(5).
11. *McGraw v Parsons*, 142 Mich App 22, 25; 369 NW2d 251 (1985).
12. *See Int'l Shoe Co v Washington*, 326 US 310, 316; 66 S Ct 154; 90 L Ed 95 (1945).
13. *McGraw, supra* at 26.
14. *See Clapper v Freeman Marine Equipment, Inc*, 2000 Mich App LEXIS 661, *4 (2000) (per curiam).
15. *See id.* at *9.
16. *See id.* at *15.
17. *See, e.g., Weather Underground, Inc v Navigation Cataylst Systems, Inc*, 2009 US Dist LEXIS 106075, *14 (2009) (J. Marianne O. Battani) (observing that "a defendant cannot be subject to suit in a particular state merely because it maintained a Web site that could be viewed in the forum.")
18. 2007 US Dist LEXIS 80490, *2 (ED Mich, 2007) (J. Robert H. Cleland).
19. *Id.* at *19.
20. 2008 US Dist LEXIS 17008 (WD Mich, 2008) (J. Robert Holmes Bell).
21. *See id.* at *14.
22. *Neogen Corp v Neo Gen Screening, Inc*, 282 F3d 883 (CA 6, 2002).
23. *See id.* at 890 (citing *Zippo Mfg Co v Zippo Dot Com, Inc*, 952 F Supp 1119 (WD Pa, 1997)).
24. *Id.* at 890.
25. *Id.* at 891.
26. *Id.*
27. *See id.*
28. *See, e.g., The Sports Authority Michigan, Inc v Justballs, Inc*, 97 F Supp 2d 806 (ED Mich, 2000) (concluding that a company operating a Web site that allowed users to make online purchases and send e-mail messages to the seller maintained sufficient contacts with the forum).

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young Lawyers Series

I. STAr TING Th E CASE:
Pleading and r esponding to a Cause of Action

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.

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The methods for pleading a cause of action in Michigan are generally provided for in the Court Rules, particularly MCR 2.110, 2.111, and 2.112. These three rules provide the basic framework for pleading a cause of action, responding to a cause of action, and raising affirmative defenses.

Under the Court Rules, there are only six types of "pleadings": a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer and a reply to an answer. MCR 2.110(A). Although lawyers commonly refer to everything filed with a court as a pleading, everything other than these six (for example, a motion) is a "paper." A complaint, cross-claim, counterclaim, and third party claim all require the pleader to provide sufficient facts so as to adequately provide apprise the other party of the nature and basis of the cause of action. MCR 2.111(A) & (B). A responsive pleading is required in response to a complaint, a counterclaim, a cross-claim, a third-party complaint, and an answer demanding a reply to affirmative defenses. MCR 2.110(B).

The Complaint

Tips for drafting the complaint. There is a lot of variation in how lawyers draft complaints, but here are a few suggestions:

1. Avoid unnecessary words. It is sufficient to begin a complaint with "Plaintiff says" instead of "Now comes Plaintiff John Smith by his attorneys, Dewey Cheetum and Howe and for a cause of action represents unto this Honorable Court as follows:".

2. Many lawyers are addicted to the principle that every paragraph must begin with the word "That," as in "That Plaintiff was injured in an accident." No one knows why this particular form of bad writing is so popular but it is better to resist the trend.

3. Avoid compound allegations in a single paragraph. If the defendant answers with "Denied in the manner and form alleged," you won't know exactly what is denied.

4. Identify your causes of action clearly and separately with headings.

5. Remember to attach any written instrument you are relying on. MCR2.112(E).

6. Although an insurance policy is not required to be attached to a complaint, attaching it is a good idea in an action involving the policy. MCR 2.112(D).

r esponsive Pleading

As to each allegation to which a responsive pleading replies, the responsive pleader has four options: admit the allegation, deny the allegation, plead no contest, or state a

Certain responses, affirmative defenses, must be pleaded in a party's first responsive pleading, otherwise they are waived. However, the defenses of lack of subject matter jurisdiction and failure to state a claim on which relief can be granted can be raised at any time.

lack of sufficient information to form a belief as to the truth of the allegation. Pleading a lack of information is treated as a denial. MCR 2.111(C). The failure to deny an allegation constitutes an admission. MCR 2.111(E).

Tip for drafting an answer. Be as specific as possible as to what you are admitting and denying. You don't want to be caught with an unintended admission.

Affirmative Defenses

Certain responses, affirmative defenses, must be pleaded in a party's first responsive pleading, otherwise they are waived. However, the defenses of lack of subject matter jurisdiction and failure to state a claim on which relief can be granted can be raised at any time. MCR 2.111(F). There is no catch-all definition or authoritative list of affirmative defenses provided in the court rules, although the court rules do list some of the more common ones. For an extensive list of possible affirmative defenses, see *"What is an Answer? New Guidelines on How To Draft the Answer and Affirmative Defenses,"* 73 Mich Bar Journal 1076, by Morley Witus (1994).

Tips for the responsive pleading.

1. Although you will not waive the defense of subject matter jurisdiction if you wait until trial (or even appeal) you will annoy the court and make it unsympathetic to your argument.
2. If you are asserting the statute of frauds, be careful to avoid saying that there was a contract but it is void under the statute of frauds. The admission that there was a contract may destroy the defense.
3. If you are the plaintiff, check the affirmative defense to see if a reply is demanded. MCR 2.110(B)(5). This is not often included in an answer, but it sometimes happens, and you don't want to risk an unintended admission.

"Special Matters"

In addition to the waiver rule for affirmative defenses, attorneys should be aware of additional rules for pleading "special matters." For example, allegations of fraud or mistake must be pleaded with particularity, whereas conditions of the mind, such as malice and intent, can be alleged in general terms. MCR 2.112. This rule regarding special matters also contains particular requirements for contract actions, insurance actions, and actions on written instruments (see above). If you are pleading or responding to any of these special matters, it is a good idea to consult the court rules before filing.

Non-Party at Fault

One other special matter is the issue of fault of nonparties under MCR 2.112(K). There is also a nonparty at fault statute, MCL 600.2957, that comes into play when asserting the fault of a nonparty. In very simple terms, the nonparty at fault rules effectuate a major feature of recent tort reform legislation, *i.e.,* fair share liability and the nearly complete abolition of joint and several liability. If the fault of a nonparty could not be considered, an active defendant could ultimately be held fully liable for the injuries that were caused or contributed to by a nonparty.

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Tips for filing a notice of non-party at fault.

1. A notice of nonparty at fault must be filed within 91 days after a party files its first responsive pleading. MCR 2.112(K)(3)(c).
2. The notice must specifically describe and name the nonparty at fault and must also provide a basis for believing the nonparty was at fault.
3. The failure to comply with the court rule results in a loss of the right to have the jury assess the fault of the nonparty, MCR 2.112(K)(2), although waiving the right to assess a non-party's fault does not waive the right to argue a non-party's role in proximately causing the injury.

Amending a Complaint or Answer

You can amend a pleading without leave of court once within 14 days of being served with a responsive pleading, or within 14 days of filing your pleading is no responsive pleading is required. MCR 2.118(A)(1).

This article is the first in a series covering the basics of litigation from a defense perspective in Michigan. The next edition of the Quarterly will feature advice on drafting cross claims, third-party claims, and using indemnity to make others assume your defense and pay your obligation.

JOIN AN MDTC SECTION

MDTC has revised its practice sections At right is a list of the section, 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.

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MDTC Legislative Section

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MDTC Legislative r eport

It's been difficult to concentrate on my work this spring because of all the **noise across the street on the front lawn of the Capitol Building.** There's always been a demonstration by one group or another on most spring and summer days, but this year the volume has increased and the tone seems less tolerant, and at times, quite angry. I've heard the shouts and chants of those who are demanding change, and those who prefer the status quo. The Legislature continues its work in the midst of the uproar, and I continue to write briefs as best I can.

This election year will bring some very significant changes, in the cast of characters at least. For the first time since 2002, we will be bringing on a new Governor, Attorney General, and Secretary of State, and the entire Legislature will be up for grabs, as it is every four years. This year, 29 of the 38 Senators will be leaving, and it cannot be safely assumed that all of those eligible to continue will be re-elected to serve another term. In the House, there will be 51 open seats to fill as a flock of still relatively inexperienced but term-limited Representatives leave to make room for a new freshman class with little or no legislative experience. In this respect, there will be substantial change; what remains to be seen is whether the change will alter our course. As always, we will hope for the best.

New Public Acts

As of this writing (June 9, 2010), there are 87 Public Acts of 2010. The few worth noting include:

Texting and Driving. 2010 P.A. 58 – HB 4370 (Polidori-D), 2010 P.A. 59 – SB 468 (Kahn-R) and 2010 P.A. 60 – HB 4394 (Gonzales-D), which have amended the Vehicle Code to prohibit reading, manually typing or sending of text messages while driving. A stern slap on the wrist will be administered to those who violate these new prohibitions on or after July 1, 2010. A violation will be a civil infraction, punishable by a fine of $100 for a first offense, and $200 for subsequent offenses, but violations will not be reported to the Secretary of State, and no points will be added to the driving record of the offending party. But be forewarned; after much debate and hesitation, our Legislature finally found enough intestinal fortitude to make texting while driving a primary offense, so law enforcement officers will be permitted to pull you over if they catch you in the act.

Personal Protection Orders. 2010 P.A. 19 – HB 4222 (Ebli-D), which has amended the Revised Judicature Act, MCL 600.2950a, to expand judicial authority to issue personal protection orders for prevention of cyberstalking, threatened sexual assault, and furnishing of obscene materials to minors.

Electronically-affixed seals on documents. 2010 P.A. 56 – SB 719 (Allen-R) and 2010 P.A. 57 (Kuipers-R), which have amended MCL 565.232 and MCL 8.3n, respectively, to recognize the validity of electronically-affixed seals on documents of courts, public officers and corporations.

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New Initiatives

A few noteworthy Bills and Resolutions have been introduced since my last report. They include:

Clear and convincing evidence for emergency medical care gross negligence. HB 6163 (Meadows-D) would amend the Revised Judicature Act to add a new section MCL 600.2912I, which would require the plaintiff to produce clear and convincing evidence of gross negligence proximately causing the alleged injury in any medical malpractice action based upon provision of emergency medical care in a hospital emergency department or obstetrical unit, or emergency services provided in a surgical operating room, cardiac catheterization laboratory, or radiology department immediately following evaluation or treatment of the patient in an emergency department.

Caps on non-economic damages in medical malpractice cases. h B 6163 was introduced on May 14, 2010, and inappropriately referred to the Committee on Ethics and Elections. On June 9, 2010, the Committee reported the Bill with the recommendation that it be re-referred to the Judiciary Committee. This Bill is interesting because the subject matter is rather atypical of Democratic sponsorship. The evident motivation may be found in the Bill's tie-bar to HB 5744 (Kandrevas-D) and HB 5745 (Lipton-D). As I mentioned in my last report, HB 5744 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." HB 5745 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. HB 5744 and HB 5745 were scheduled for hearing in the Judiciary Committee in March, but neither Bill has been reported. Is there perhaps a plan for negotiation of a deal in the lame duck session? We shall see.

"r ight of Publicity." HB 5964 (Byrnes-D) would create a new "Right of Publicity Act," which would establish a new civil cause of action for unauthorized commercial exploitation of a living or deceased individual's name, likeness, or other personal attributes – his or her "right of publicity." The available remedies would include money damages, attorney fees, and equitable relief.

Expression of concern inadmissible. HB 6073 (Marleau-R) would amend the Revised Judicature Act to add a new section MCL 600.2155. The new section would provide that statements, writings or actions expressing "sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual" would be inadmissible as evidence of an admission of liability in medical malpractice cases.

Nomination of Supreme Court Justices. Senate Bills 1296, 1297, 1298, 1299 and 1300 (Cropsey-R) would amend the Michigan Election Law to replace the current system for nomination of candidates for Justice of the Supreme Court at party conventions with a new system which would select the candidates by means of a non-partisan primary election. These bills have been referred to the Committee on Campaign and Election Oversight, but have not been scheduled for hearing.

Term limit extensions - proposal. SJR X (Jacobs-D) proposes an amendment of Const 1963, art 4, § 54, to extend the current term limits for state legislators. Representatives elected in 2010 or thereafter could be elected to 6 two-year terms. Currently, Representatives are limited to 3 terms. Senators elected in 2010 or thereafter could serve 3 four-year terms. Senators are currently limited to 2 terms. This Joint resolution has been referred to the Committee on Government Operations.

Term limit extensions – another proposal. HJR EEE (LeBlanc-D), like HJR OO (Bledsoe-D), proposes a modification of the existing term limits in a different way. Each of these Joint Resolutions would amend Const 1963, art 4, § 54, to allow service as a state Representative and/or Senator for a combined total of 14 years. And like HJR HH (Rogers-R), HJR EEE would also establish a new requirement that the Legislature complete its work on all general appropriation Bills by July 1st of each year, with a loss of pay as the prescribed penalty for failure to do so.

As I mentioned in my last report, HB 5744 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."

Nullification. SJR Y (McManus-R) proposes the addition of a new § 15a to article 4 of the state Constitution. The new section would create a new "Joint Federalism Commission" within the Legislative Council. This new Commission, composed primarily of state legislators, would be charged with responsibility for monitoring and reviewing the constitutionality of all federal statutes, regulations and other actions. If any such federal action were found by the Commission to be in violation of the United States Constitution or a usurpation of authority reserved to the states, the legislative members of the Commission would be required to introduce legislation declaring the federal action null and void and unenforceable as applied to the state of Michigan. The Commission would also be given authority to review and approve or disapprove all memoranda of agreement or understanding, compacts, and similar agreements between the State of Michigan and the federal government, units of government located outside of the state, and "nongovernmental organizations." This Joint Resolution was introduced on May 26, 2010, and assigned to the Senate Judiciary Committee.

Old Business

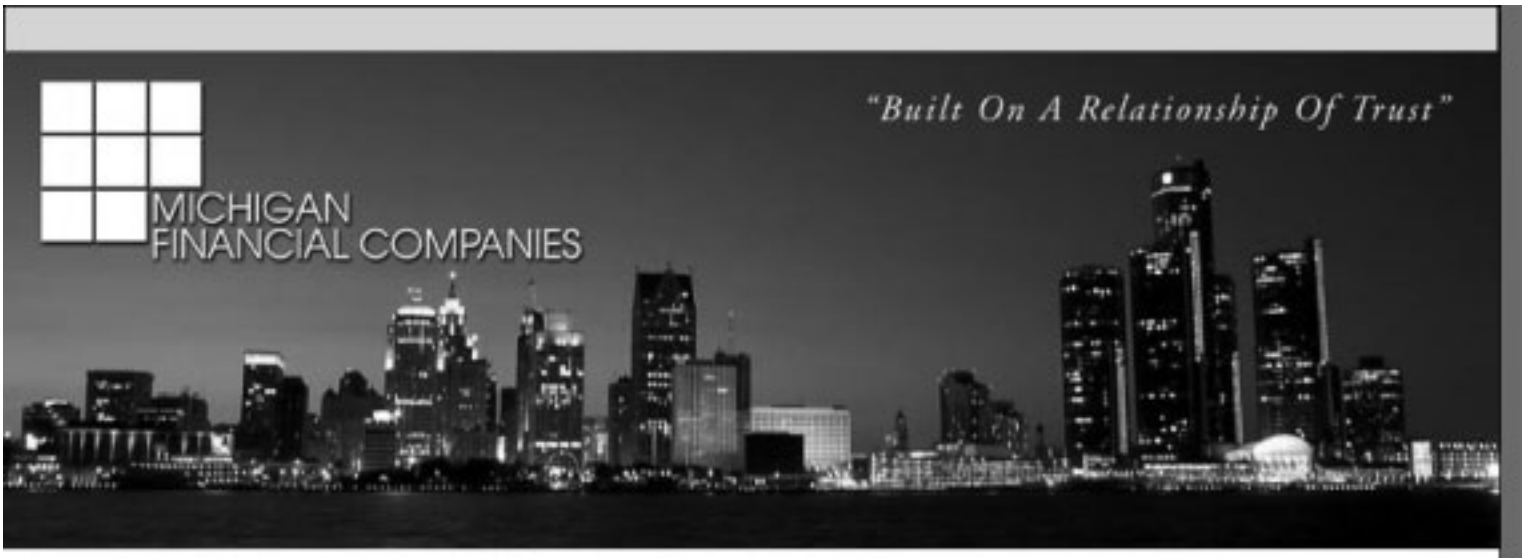
"Tort reforms." In my prior reports, I have discussed a number of bills calling for additional tort reforms, and a few others proposing what my Republican friends might call "reverse tort reforms." With the few exceptions previously discussed, there has not been any further action on any of these bills, and it seems unlikely that any of them will receive any further consideration before the election. Although the state's current economic status does not appear to be as dire as it was last year, much of the Legislature's time has been taken up with work on the budget and various measures intended to further stimulate our slowly recovering economy.

Sales tax on services. In my last report, I mentioned House Bill 5527 (Meadows – D), which proposes a sales tax on services, including legal services. The Michigan Bar has been active in its opposition to this concept, and the Bill still has not been scheduled for hearing. As I have said before, approval of this legislation seems very doubtful, as it is not favored by the leadership in either house. Recent polling suggests that the idea is not popular with the voters either. Thus, although there have been discussions about putting a sales tax proposal on the ballot for the August primary, those discussions have not produced any action. For this year at least, it appears that the budget will be finalized by means of additional cuts, without additional tax revenues.

Motorcycle helmet law. There are a few other issues that will always be with us. One such issue, addressed in every legislative session in recent memory, is the perpetual effort to repeal the motorcycle helmet law. As passed by the House on March 25, 2010, HB 4747 (LeBlanc-D) would allow a person 21 years of age or older to ride a motorcycle without a helmet if he or she maintains security in the amount of $20,000 for payment of first-party medical benefits in the event of injury in a motorcycle accident. In the Senate, the Bill has been referred to the Committee on Economic Development and Regulatory Reform. As I write this report, the bikers for helmet-free riding are once again assembled across the street en masse to present their plea for prompt action in the Senate. The Senate will probably oblige them, secure in the knowledge that Governor Granholm will likely veto this legislation, as she has on two prior occasions.

Where Do you Stand?

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



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Appellate Practice r eport

Michigan Court Of Appeals

New Internal Operating Procedure – r equired Attachments to Briefs

Effective January 2010, the Court of Appeals has adopted an Internal Operating Procedure that expresses a new policy concerning required attachments to briefs:

IOP 7.212(C)(7)-2 — Lower Tribunal Opinion or Order. MCR 7.212(C)(7) references an appellant's obligation to reproduce in or attach to appellant's brief a "constitution, statute, ordinance, administrative rule, court rule, rule of evidence, judgment, order, written instrument, or document" that must be considered to determine the issue presented. Pursuant to this rule, the Court strongly recommends that an appellant **reproduce in the brief or attach in an addendum a copy of any lower tribunal opinion** (whether in writing or in a transcript) or order that relates to the issue presented. If this recommendation is not followed, the Court may conclude that all or part of the appeal has been inadequately presented or abandoned. *(Published 1/10.)*

This new Court of Appeals policy is significant because it expressly warns that an appellant failing either to attach or reproduce in the brief "any lower tribunal opinion (whether in writing or in a transcript) or order that relates to the issue presented" faces the risk that issues arising out of such an opinion or order will be deemed "inadequately presented or abandoned."

Law of the Case Doctrine Applies to Order Denying Interlocutory r eview "for Lack of Merit in Grounds Presented"

***Hoye v DMC/WSU*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2010 (Docket No. 285780)**

Many practitioners, representing both plaintiffs and defendants, find themselves in the position of deciding whether to pursue an appeal from any number of interlocutory decisions by the trial court. A recent opinion from the Court of Appeals suggests that one consideration might be whether filing an application for interlocutory leave could result in an order denying leave "for lack of merit in the grounds presented," thus potentially precluding the issue, under the law of the case doctrine, from being later raised in an appeal as of right after final judgment.

Facts: In *Hoye*, the plaintiff, Tamisha Hoye, brought suit against Sinai Grace Hospital and Dr. Victor Adlai, an anesthesiologist, seeking to recover for injuries to her newborn baby during labor and delivery. The central issue was whether Dr. Adlai "placed plaintiff's epidural catheter in a proper location, and whether Adlai and the hospital's attending nurses appropriately monitored plaintiff's condition after the epidural's placement." (Slip op at 1) (Gleicher, J., concurring). As explained by Judge Elizabeth Gleicher in her concurrence, "computerized fetal monitoring records supplied powerful direct and circumstantial evidence illuminating both questions." *Id*.

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Hoye is the latest in a line of decisions, usually unpublished, in which the Court of Appeals has applied the law of the case doctrine to perfunctory orders denying interlocutory leave "for lack of merit."

When it was discovered during trial that the hospital had previously withheld critical fetal monitoring records, the plaintiff moved for entry of the hospital's default and thus a finding of professional negligence as a discovery sanction. The trial court agreed to enter a default of the hospital and, at the plaintiff's election, the case proceeded to verdict as to both the hospital and Dr. Adlai. Although the jury awarded the plaintiff $850,000 against the hospital, it found no professional malpractice on the part of Dr. Adlai. *Id*. at 2. After entry of a judgment on the jury's verdict, the trial court granted the hospital's motion to set aside the default and for a new trial, "ruling that it had improperly entered the default instead of declaring a mistrial." *Id*.

In response, the plaintiff sought a new trial against Dr. Adlai as well, arguing that "the hospital's discovery abuse had deprived her of the ability to prove Adlai's professional negligence." When the trial court denied the plaintiff's motion, she filed an application for leave to appeal in the Court of Appeals. While her application was pending, the plaintiff reached a settlement with the hospital, resulting in entry of a final judgment. She then filed a claim of appeal with respect to the trial court's denial of a new trial as to Dr. Adlai, as well as the court's award of case evaluation sanctions to Dr. Adlai. Shortly thereafter, the Court of Appeals denied the plaintiff's prior application for leave to appeal "for lack of merit in the grounds presented." The plaintiff's appeal as of right, however, remained pending.

h olding: In deciding the plaintiff's appeal as of right, a majority of the Court of Appeals declined to address whether the plaintiff was entitled to a new trial concerning Dr. Adlai. According to the majority, "[the] plaintiff raised precisely the same issue and arguments with regard to the trial court's denial of her motion for new trial with regard to Dr. Adlai in her interlocutory appeal." Slip op at 1. The Court further observed that it had denied the plaintiff's application for leave to appeal "for lack of merit in the grounds presented." *Id*. Therefore, the Court reasoned, "because this Court expressed an opinion on the merits of plaintiff's arguments in denying the application for leave to appeal . . . the law of the case doctrine precludes this Court from readdressing the arguments." *Id*. Judge Gleicher concurred, stating that she ultimately agreed with the result reached by the majority because, in her view, the plaintiff had elected to proceed to verdict against Dr. Adlai and thus waived her right to seek a new trial. However, Judge Gleicher would not have applied the law of the case doctrine, explaining that "this Court's prior expression of an unexplained conclusion entirely lacking any legal analysis should not effectuate application of the law of the case doctrine." *Id*. at *4 (Gleicher, J., concurring).

Significance: *Hoye* is the latest in a line of decisions, usually unpublished, in which the Court of Appeals has applied the law of the case doctrine to perfunctory orders denying interlocutory leave "for lack of merit." See, e.g., *Sidhu v Farmers Ins Exchange*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2008; 2008 WL 4180347 (Docket No. 277472) (declining to address issue regarding timeliness of action by Farmers Insurance Exchange to recover no-fault benefits mistakenly paid to the plaintiff, who was injured in a bicycle-motor vehicle accident, because the Court had previously denied Farmers' application for leave to appeal from the trial court's partial grant of summary disposition to Allstate, which insured the driver of the vehicle involved in the accident).

Such decisions would appear to be inconsistent with the established principle that the denial of an application for leave to appeal does not constitute a decision on the merits. See *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328; 57 NW2d 901 (1953). It also is not clear that orders denying leave for "lack of merit" comport with the Michigan court rules. In relevant part, MCR 7.205(D)(2) provides that the Court of Appeals may "grant or deny [an] application; enter a final decision; [or] grant other relief." It seems questionable whether this language allows for an order that "denies" an application but yet purports to decide the merits of the arguments presented. In addition, MCR 7.215(E)(1) expressly provides that "[a]n order denying leave to appeal is not deemed to dispose of an appeal."

Yet the Court of Appeals, as demonstrated by its recent decision in *Hoye*, apparently has concluded that orders denying interlocutory leave "for lack of merit in the grounds presented" are not only authorized by the court rules, but

Such decisions would appear to be inconsistent with the established principle that the denial of an application for leave to appeal does not constitute a decision on the merits.

that they provide a sufficient expression of "an opinion on the merits of the case" such that the law of the case doctrine should apply. See, e.g., *Contineri v Clark*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2003 (Docket No. 237739) ("Despite case law holding that orders denying leave to appeal do not express an opinion on the merits of the case, Michigan courts have not held that this case law applies to orders denying leave to appeal 'for lack of merit.'").

Of course, a fundamental flaw in this rationale is that it is difficult, if not impossible, to determine what exactly is being decided by an order that, as Judge Gleicher put it in *Hoye*, is "entirely lacking any legal analysis." *Hoye*, slip op at 3 (Gleicher, J., concurring). Indeed, as the United States Supreme Court observed in *Halbert v Michigan*, 545 US 605, 618 (2005), "[w]hen the court denies leave using the stock phrase 'for lack of merit in the grounds presented,' its disposition may not be equivalent to a 'final decision' on the merits, *i.e.,* the disposition may simply signal that the court found the matters asserted unworthy of the expenditure of further judicial resources." See also *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118, 127; 346 NW2d 911 (1984) ("[T]he phrase 'lack of merit in the grounds presented' refers merely to the grounds presented for immediate appellate review of the interlocutory order; no resolution of the substantive issue presented is expressed.") (Gage, J., dissenting in part).

In any event, the Court of Appeals' decision in *Hoye* suggests that it fully intends to continue its practice of applying the law of the case doctrine to orders denying leave to appeal "for lack of merit in the grounds presented." Indeed, in her concurrence in *Hoye*, Judge Gleicher went so far as to specifically warn that "[t]he well-advised litigant seeking interlocutory review should think carefully before invoking this Court's jurisdiction by leave, since a request for appellate consideration before final judgment may result in only a one-sentence decision, forever foreclosing the right a future opportunity to full, or even memorandum-style, legal analysis." Slip op at 4, n 3 (Gleicher, J., concurring). As a result, it is important for practitioners to at least be aware of *Hoye* and its predecessors when deciding whether to seek leave to appeal from an interlocutory order.

Post-Judgment Order Entered After a Cross Appeal is Filed Can Only Be Challenged by Way of a Separate Appeal

***Mossing v Demlow Products, Inc,* ___ Mich App ___; ___ NW2d ___ (2010) (Docket No. 287643)**

Practitioners seeking to challenge post-judgment orders should be aware that the timing of the entry of such orders dictates whether they may be challenged as part of a cross appeal from the judgment itself, or whether a separate appeal must be filed. In a recent published opinion, the Michigan Court of Appeals held that where a party files a claim of cross appeal from a judgment and the trial court later enters a post-judgment order denying or awarding attorney fees and costs, the aggrieved party cannot challenge the post-judgment order by means of the already-filed claim of cross appeal. Instead, a separate claim of appeal must be taken.

Facts: *Mossing* involved a dispute over the payment of commissions to the plaintiff, an independent manufacturer representative. The plaintiff alleged causes of action for breach of contract, conversion and violation of MCL 600.2961. (Slip op at 2). The defendants filed a counterclaim and raised various affirmative defenses, including accord and satisfaction. *Id.* The defendants filed a motion for summary disposition on the plaintiff's claims. *Id.* The trial court held that there was no genuine issue of material fact on the issue of accord and satisfaction, and that this issue disposed of all of the parties' claims and counterclaims. *Id.* The plaintiff then filed a claim of appeal from the order granting summary disposition, and the defendants filed a claim of cross appeal as to the order, based on the dismissal of their counterclaim. *Id.*

After the plaintiff's claim of appeal and the defendants' claim of cross appeal had been filed in the Court of Appeals, the trial court separately decided the defendants' motion for attorney fees and costs under MCL 600.2961(6). *Id.* The trial court determined that the defendants were not entitled to attorney fees and costs and entered a post-judgment order to that effect. *Id.* The defendants did not file a separate claim of appeal as to the post-judgment order denying attorney fees and costs. *Id.* Instead, the defendants attempted to challenge that order as part of their cross appeal. *Id.* The plaintiff argued that the Court of Appeals lacked jurisdiction to consider the defendants' challenge to the post-judgment order because the defendants did not separately claim an appeal from that order. *Id.*

h olding: In holding that it did indeed lack jurisdiction to hear the defendants' challenge to the post-judgment order denying their request for attorney fees

Where a party files a claim of cross appeal from a judgment and the trial court later enters a post-judgment order denying or awarding attorney fees and costs, the aggrieved party cannot challenge the post-judgment order by means of the already-filed claim of cross appeal.

and costs, the Court of Appeals first noted that a post-judgment order awarding or denying attorney fees and costs is a "final order" under MCR 7.202(6)(iv) that may be appealed by right. *Id.* at 3. However, the Court observed, "it is less than clear that such an order must be separately appealed, or whether an issue involving the awarding or denying of fees and costs that is covered in a post-judgment order may be raised as part of the appeal, or in this case, cross appeal, from the actual final judgment itself." Id.

Noting the dearth of precedent examining this particular issue, the Court of Appeals acknowledged *Costa v Community Emergency Medical Services, Inc*, 263 Mich App 572; 689 NW2d 712 (2004), which held that pursuant to MCR 7.207(A)(1), there is a general right to claim a cross appeal, and that this court rule does not restrict a cross-appellant from "challenging whatever legal rulings or other perceived improprieties during the trial court proceedings." *Mossing*, slip op at 4, quoting *Costa*, 263 Mich App at 584. This broad language notwithstanding, the *Mossing* Court distinguished *Costa* on three grounds. First, it held that *Costa* was decided under a different sub-rule of MCR 7.202(6) – subsection (v) relating to the denial of summary disposition based upon governmental immunity. *Id.* at 4. Second, *Costa* dealt with the denial of summary disposition, an order which is "inherently interlocutory," rather than a post-judgment order. Finally, the *Mossing* Court noted that the order challenged in *Costa* had been entered before the appeal and cross-appeal were claimed, whereas in *Mossing*, the "defendants challenge on their cross appeal an order that did not even exist at the time they claimed the cross appeal." *Id.* Thus, the Court of Appeals concluded that "it would be reading *Costa* and the court rules too broadly to conclude that a claim of cross appeal invokes this Court's jurisdiction to challenge an order entered in the trial court after the claim of cross appeal was filed with this Court." *Id.* Rather, "a separate appeal from such a post-judgment order must be filed when that order is entered in the trial court after the claim of cross appeal is filed in this Court." *Id.* at 4.

As a result, the Court of Appeals held that in order to challenge the post-judgment order denying attorney fees and costs, the defendants had to have filed a separate claim of appeal from that order or, having failed to do that in a timely manner, filed an application for leave to appeal from that order. *Id.* at 5.

Significance: In addition to *Costa*, the Court of Appeals' decision in *Mossing* provides further guidance concerning the proper scope of cross appeals, at least as they relate to orders granting or denying attorney fees and costs entered after a cross appeal has already been filed from the underlying judgment itself. It is, however, important to note that *Mossing* expressly declined to decide whether a post-judgment order granting or denying an award of attorney fees and costs that is entered *before* a claim of cross appeal is filed must still be separately appealed. *Id.* at 4.

By: Hilary Ballentine
Plunkett Cooney

MDTC Amicus Activity March 2010–May 11, 2010

O'Neal v St. John h ospital (MSC No. 138180)

- Issues: whether claims in this medical malpractice case constitute loss of opportunity to which MCL 600.2912a(2) applies, whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002) was correctly decided, and whether different approach is required to correctly implement § 2912a(2)
- Author: Ottenwess & Associates (S. Ottenwess)
- Stage: leave granted on 9/30/09,
  currently on briefing in Michigan Supreme Court
- Status: amicus brief filed 12/15/09; oral argument held 1/12/10; decision pending.

Brightwell v Fifth Third Bank of MI (MSC No. 138920)

- Issue: in Elliott-Larsen Civil Rights Act case, what is the proper place where the alleged violation "occurred"
- Author(s): Warner Norcross & Judd (M. Nelson, G. Kilby, A. Fielder)
- Stage: leave granted 9/3/09; currently on briefing in Michigan Supreme Court
- Status: amicus brief filed 12/16/09; oral argument held 1/12/10; decision pending.

Pellegrino v Ampco System Parking (MSC No. 137111)

- Issue: whether defendant is entitled to a new trial based on trial court's violation of MCR 2.511(F)(2) where the trial court denied defendant's peremptory challenge to a prejudiced juror because of its desire for a racially balanced jury
- Author: Clark Hill (J. Brenner)
- Stage: leave granted in 5/09, currently on briefing in Michigan Supreme Court
- Status: brief filed 10/23/09; oral arguments held 3/9/10
- On March 31, 2010, the MSC issued an order indicating its denial of the disqualification motions seeking recusal of Justices Markman, Corrigan, and Young.
  - Chief Justice Kelly authored a concurrence to respond to Justices Corrigan's and Young's decisions not to participate on the basis that amended MCR 2.003 (which for the first time sets forth a formal procedural for the disqualification of Supreme Court Justices) is unconstitutional. Chief Justice Kelly indicated that amended MCR 2.003 is "clothed in a presumption of constitutionality," and that Justices Corrigan and Young have an affirmative duty to sit.
  - Justice Hathaway also authored a separate concurrence, both agreeing with Chief Justice Kelly's concurring statement, and opining that the newly adopted

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amendments to MCR 2.003 are constitutional and appropriate.

- Both Justices Corrigan and Young authored additional opinions discussing again their decision not to participate in the orders issued under the new version of MCR 2.003.

Colaianni v Stuart Frankel Development Corp (MSC No. 139350)

- Issue: whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007) (which essentially eliminated the common-law discovery rule) was correctly decided
- Author: Plunkett Cooney (M.M. Ross)
- Stage: leave granted on 1/29/10, currently on briefing in Michigan Supreme Court
- Status: amicus brief to be filed by 5/24/10.

Mawri v City of Dearborn (MSC No. 139647)

- Issue: case involves MCL 691.1402(1) (the highway exception to governmental immunity), the degree of specificity that must be given to comply with the notice provision of § 1404, and particularly, "nature of the defect"
- Author: Hackney Grover Hoover & Bean PLC (S. Lake);
- Stage: leave granted 12/18/09; currently on briefing in Michigan Supreme Court
- Amicus brief filed: 3/29/10
- Non-unanimous order issued on 4/30/10 vacating Court's prior grant of leave and denying leave on the ground that "we are no longer persuaded that the questions presented should be reviewed by this Court."
- Justice Hathaway dissented on basis that the "Court of Appeals erred in its decision and that this case warrants review by this Court." Hathaway would vacate the decision of the Court of Appeals and remand case to trial court for further proceedings.

Recommendations Pending

- ***Singer v Sreenivasan (MSC No. 139799)*** (dealing with proper construction of MCR 2.302 and whether prevailing parties should be entitled to recovery "reasonable" attorney fees as opposed to "actual" attorney fees)

By: Terry Durkin & Richard Joppich, *Kitch, Drutchas, Wagner, Valitutti & Sherbrook*
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Professional Liability r eport

Furtherance Of Justice Condones Failure To Follow Medical Malpractice Notice Of Intent Waiting Period

Barbara Zwiers v Sean Growney, MD, et. al.,___ Mich App ___ (2009)

In a published opinion, the Michigan Court of Appeals has held that a court may disregard the defect in complying with the notice period required under MCL 600.2912b(1), and permit amendment of it when a substantial right of a party is implicated and it is in the furtherance of justice.

The Decision

In *Zwiers v Growney,* the Court of Appeals reversed the trial court's ruling out of Kent County that the premature filing of the complaint and affidavit was ineffective to commence the action and that the statute of limitations had subsequently expired.

Plaintiff alleged that Dr. Sean Growney negligently placed an intrathecal morphine pain pump on September 2, 2005. The two year period of limitations for an action alleging medical malpractice expired on September 2, 2007. Plaintiff served her notice of intent on August 30, 2007, three days prior to the period of limitations expiration. Following from this service, the notice of intent period (182 days from the date the notice of intent was served) was to expire on February 28, 2008. However, plaintiff filed her complaint and affidavit of meritorious claim on February 27, 2008, one day before the Notice period expired. The record indicated that the error in filing the complaint and affidavit early (which is in contravention of the statutory time allotment), was "entirely inadvertent" because plaintiff's counsel interpreted his file note on the expiration of the NOI period incorrectly.

> The court reviewed the statutory mandates of MCL 600.2912b(1) which provides:
>
> "Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced."

MCL 2912b(3) and (8), which shorten the 182 day notice period, were not applicable in this case.

The Court of Appeals further reviewed MCL 600.2301, which provides:

> "The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceedings shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties."

Defendant's argument for dismissal was based on the Michigan Supreme Court's holding in *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005). In *Burton*, the

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The Court of Appeals reversed the trial court's ruling out of Kent County that the premature filing of the complaint and affidavit was ineffective to commence the action and that the statute of limitations had subsequently expired.

Court held that Section 2912b(1) was unambiguous in expressing that a person "shall not" commence an action until the notice period has expired; therefore, a complaint that is filed before the notice period expires "is ineffective to toll the limitations." *Burton* at 747. In this case, the Michigan Court of Appeals indicated that standing alone, *Burton* required dismissal of plaintiff's action. However, in *Burton*, the Court was not presented with an argument under MCL 600.2301.

In *Bush v Shabahang*, 484 Mich 156 (2009), the Supreme Court held that MCL 600.2301 applied to the requirements under MCL 600.2912b. Furthermore, the Court set forth the following two prong test when determining the applicability of Section 2301:

1. Whether a substantial right of a party is implicated;

2. Whether a cure is in the furtherance of justice.

   Only after both of the prongs are satisfied, a cure will be allowed "on such terms as are just". *Id* at 176-178.

Applying the two prong test as set forth in *Bush*, the Court of Appeals indicated that both prongs of the test were satisfied. With regard to the first prong, the defendants' substantial rights were not implicated or affected as they were not prejudiced by plaintiff filing her complaint one day early in that there was no evidence of ongoing settlement negotiations and earlier filing of the complaint did not cause an increase in litigation costs.

With regard to the second prong, there was no evidence that plaintiff acted in bad faith in filing her complaint early in order to gain some unfair advantage. Absent any bad faith, the furtherance of justice demanded relief under MCL 600.2301

The Effect of the Decision

At its foundation, this ruling further solidifies the judicial common law trend in Michigan to give more leeway to the strict express mandates of the legislative tort reform in medical malpractice matters. Failure to comply with MCL 600.2912b will now always be open to justification arguments and no longer will be strictly guided by the language of the statute itself that an action shall not be commenced if the statutory mandates are not met.

While this decision further erodes the statutory requirements of the Michigan medical malpractice tort reform protections afforded by the legislature, it may have far broader implications to the astute practitioner. This permissive ruling recognizing attorney error or miscalculation and condoning statutory violation to "further justice" if it is not "prejudicial" through the use of MCL 600.2301 is likely to be a precursor to many other applications of this "forgiveness provision". This is a dangerous proposition as it could extend beyond the legislative mandates of tort reform and may impart some degree of judicial oversight over any state statute that is not complied with so long as some argument may be made as to the absence of injury or prejudice to another. There may be a large potential for increased litigation over such issues using this argument in many scenarios and may be used defensively as well so watch for the opportunity.

The bottom line this far is that now, in Michigan, under this decision and that of Bush, there is no prejudice to a defendant (whose liability has not been determined through our justice system) in a medical malpractice action by allowing an action to proceed despite the failure of a plaintiff attorney to follow the strict guidelines of the statutory notice of intent period. It is not prejudice for a defendant to have the right to be free from suit alleging malpractice where the statute guiding bringing such and action is violated.

Practice Tips

Such use of forgiveness statutes and decisions upholding their use may be available in other areas where one party asserts entitlement to statutory enforcement where the other party has not strictly complied with the terms of the legislative directives. It is another tool for argument that may be persuasive in the correct situation. In medical malpractice matters, it now is our common law and if there is a violation of the timing requirements of the tort reform statutes, counsel should be sure to look at the details of the reasoning behind the violation and evaluate the possibility that it may not be prejudicial to the defense if a motion is brought to enforce the sanctions that had been condoned in the past. Find arguments to demonstrate the serious prejudice to the defendant if such strict enforcement is not awarded by the court for such violations. Emphasize the alternate sources of relief for the aggrieved plaintiff to assert the right of action where such violations occur through no fault of the accused defendant.

Rules Update

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

Further information on these and other proposals and orders may be found at the Supreme Court web site: http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm and at the Michigan Lawyers Weekly subscribers-only web site: http://www.milawyersweekly.com/subscriber/mi/mitreas.cfm. More detail on these and other proposals: http://michcourts.blogspot.com/

Michigan Court Rules Proposed Amendments

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Time
Admin no.: 2009-30 | Date: May 18, 2010 | Rules: 1.108
To change "holiday" after reference to weekends to "day", to account for other days on which courts may be closed. Comments open to 9-1-10.

Filings
Admin no.: 2005-32 | Date: April 27, 2010 | Rules: 8.119 and several others
Several rule changes are proposed to require court personnel to review filings to ensure that they meet the requirements of court rules. Comments open to 8-1-10.

Direct Examination

By: Kathleen A. Lang
Dickinson Wright, PLLC

An effective direct examination that will not only persuade a judge or jury, but is interesting, is one of the most challenging tasks for a trial attorney. Unlike opening statements, cross examinations, or closing arguments, the focus in direct examinations is not on the attorney, but on the witness; therefore, the attorney doesn't have the same control or influence over the presentation. However, by knowing the purpose and basic rules for direct examinations, the trial attorney can achieve the optimal value from direct examinations.

There are four principal purposes of direct examinations. First, the testimony during direct examination is one building block in telling the client's side of the story. In other words, what is this case about. Second, the direct examination establishes the basic elements necessary for the case. Primarily through the direct examination, the elements essential to avoid a directed verdict are presented. Third, the direct examination must be persuasive and convince the trier of fact to believe the witness. Finally, direct examination is used to diffuse or refute the evidence that is presented by the other side.

Keeping in mind the purposes for direct examinations, there are basic rules that the examiner must follow when conducting a direct examination. Generally, except for foundational questions, only non-leading questions are allowed (who, what, when, where, why, and how). The questions should be simple and straightforward, with enough specificity to guide the witness toward the area of inquiry, but not so much detail as to suggest the answer. Questions should not call for long narrative answers. Not only are questions that call for narrative answers impermissible under the rules of evidence, but narratives are hard for the jury to follow and can be boring to the listener. The lawyer should strive to have a conversation with the witness. It is important to look at the witness and listen to the answers. If the lawyer doesn't appear interested in the testimony, why should the jury or judge? Moreover, if the lawyer isn't listening to the witness, but just asking questions from a prepared outline, the examination can appear rehearsed and insincere. Keep in mind that during direct examination, the focus is on the witness and the lawyer is merely the facilitator to help the judge and jury understand and believe that testimony.

Appellate Practice
The "other court rules" — the IOPs

By: Hal O. Carroll

There are two sets of court rules for appeals, in the Court of Appeals and in the Supreme Court. The official ones are at MCR 7.201 et seq. and 7.301 et seq. The unofficial ones are the Internal Operating Procedures, available at each court's website.

The IOPs amplify the court rules by providing valuable information on what the courts will do in specific cases. For example, the court rules provide that in the Court of Appeals the appellant and appellee can get one 28 day extension by stipulation and another by motion. The IOPs make it clear that if there is no stipulation the court will grant a total of 56 days by motion. IOP 7.212(A)(1)-2.

On the other hand the IOPs for the Supreme Court indicate a different attitude toward extensions. They are not automatic, and "[i]n the summer and fall, extensions are generally granted liberally, but in the winter and spring, when the Court is trying to get the cases submitted for decision before the end of the term, a more stringent standard may be applied." IOP I.F.2.

The IOPs contain a wealth of other detailed information for every stage of the appeal, and they should be consulted regularly.

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No Fault r eport — June 2010

Quick Notes

Providers have to pay a portion of PIP judgment to Plaintiff's attorney but are also stuck with adverse ruling in a separate but earlier suit by the injured party. *The Court of Appeals in a published case Miller v Citizens Insurance Company, ___ Mich App ___ (May 13 2010) held that the attorney for an injured party was entitled to one third of the amount awarded by a jury on bills from a provider although the provider had not hired or authorized the attorney to act on its behalf. On the flip side, in an unpublished opinion, TBCI, Inc v State Farm, (Docket No. 288853- April 27, 2010) the provider suit was barred by res judicata due to a prior judgment in a PIP suit brought by the injured party due to fraud committed by the injured person in his application for benefits.*

u ninsured Motorist policy provisions enforced by Court of Appeals and Supreme Court. *The Supreme Court applied a policy damages limitation holding that plaintiff had no right to uninsured motorist benefits where her settlement with at fault drivers exceeded the highest policy limit for any involved policy-reversing the Court of Appeals. The Court of Appeals has clarified that 1 year contractual limitations periods for filing uninsured motorists suits are still viable provided the policy was initially issued before OFIS issued its order prohibiting such limits.*

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.

Pr OVIDEr S Dr AW Th E Sh Or T STr AW TWICE

Court of Appeals

***Miller v Citizens Insurance*, (For publication, docket no. 290522, May 13, 2010) Cavanagh, Wilder, and O'Connell**

- Plaintiff's son was rendered a paraplegic and incapacitated by a closed head injury in a roll over accident.
- Citizens, as the PIP carrier, ultimately paid PIP benefits after having denied coverage entirely, leaving only the issue of attorney fees to be decided by the Court.
- The Court ordered Plaintiff's counsel to notify all providers of the motion for attorney fees.
- The Detroit Medical Center appeared at the hearing and opposed Plaintiff's attorney's claim to one third of the benefits to be paid by Citizens on bills submitted by the DMC stating it had no notice of the litigation prior to settlement, had no opportunity to engage its own counsel on the claim, and had no agreement with Plaintiff's counsel to pay him a contingent fee on amounts paid by Citizens as a result of the suit.
- After evidentiary hearing, the Court found that DMC knew before the settlement that Plaintiff had a lawyer and that Citizens was denying coverage. The Court also found that, had Citizens not provided PIP benefits after suit was filed, DMC would have received far less compensation had Plaintiff qualified for Medicaid (about 1/3 of the amount paid by Citizens), which was questionable, or would have had to pursue the incapacitated Plaintiff for payment.
- Plaintiff sought to limit DMC's recovery to the amount it would have received from Medicaid but the trial court ordered that DMC was entitled to all but the 1/3 attorney fee.
- The Court of Appeals affirmed stating that, because Plaintiff's counsel had created a "common fund" by forcing Citizens to pay PIP benefits, including DMC's bill, counsel was entitled to a common law, equitable charging lien on those funds. The Court also found that Plaintiff's contingent fee agreement with his counsel was enforceable as to the amount of the fee, 1/3 of the recovery and, because Plaintiff, as a party to the fee contract was not disputing its reasonableness, DMC had no authority to challenge the fee arrangement.

***TBCI, Inc. v State Farm* (unpublished, docket no. 288853, April 27, 2010) Jansen, Cavanagh, and K.F. Kelly**

- Injured party filed suit in Wayne County Circuit Court seeking PIP benefits unrelated to TBCI's bills for services. State Farm defended on the basis that injured party made false statements in his claim for benefits thereby rendering him ineligible for benefits pursuant to a contractual exclusion.
- During the pendency of that action, a provider, TBCI, Inc., filed a separate suit in

Oakland County Circuit Court seeking reimbursement on bills for treatment rendered to the injured party.

- The jury in the Wayne County case found that the injured party had committed fraud in his application for benefits thereby barring his claim, and judgment was entered in favor of State Farm.
- State Farm then argued in the Oakland case, which was still pending at the time the judgment was entered in the Wayne case, that TBCI's claim was barred by *res judicata*; that is, because TBCI's patient was ineligible for coverage, TBCI had no derivative claim for coverage. The trial court agreed and entered judgment dismissing the case.
- TBCI argued that the policy provision was void as against public policy because it eliminated all statutorily mandated PIP benefits for the injured party and that the provision was ambiguous.
- The Court of Appeals decided neither of TBCI's assertions instead finding that the entire case was barred by *res judicata* because TBCI was a privy to the injured party who had been found ineligible for PIP benefits due to his fraud.

CONTr ACTu AL LIMITATIONS ON u NINSur ED MOTOr IST CLAIMS u Ph ELD

Michigan Supreme Court

***Berkeypile v Westfield Insurance Company,* 485 Mich 1115 (March 12, 2010)**

- Plaintiff was injured in a multicar accident in which several involved vehicles were uninsured. She sued the three insured drivers and settled with them all for a combined amount of $332,500.
- Plaintiff then sued the insurer of the car in which she was a passenger (Westfield) seeking uninsured motorist benefits.
- The Westfield policy had an "other insurance" provision which limited the "maximum recovery under all coverage forms or policies provided" to an amount not in excess of the policy limits of the available policy with the highest limits.
- The Court of Appeals did not consider the "other insurance" limitation and held that Plaintiff was entitled to a trial to determine the total amount of her damages and that Westfield would be responsible, up to its policy limit of $300,000, any amount awarded *in excess* of the $332,500 Plaintiff obtained in settlement with the other drivers.
- The Supreme Court reversed holding that the "other insurance" limit applied and that Plaintiff could not recover more than a total of $300,000 (the highest limit for one of the insured defendants) in uninsured motorist benefits and that the $300,000 which Westfield may have owed was satisfied by the settlements with the insured drivers which exceeded $300,000. Therefore, there was no need for a determination of the total amount of Plaintiff's damages.

Court of Appeals-For publication

***Ulrich v Farm Bureau*, ___ Mich App ___, April 29, 2010 (docket no. 289467) Saad, h oekstra and Murray**

- Plaintiff had been insured with Farm Bureau since at least 2005. Her policy, which contained a one year limitation period in which to sue for uninsured motorist benefits had been renewed in September, 2006, but no new policy had been issued.
- In December 2005, with statutory authority, the Office of Financial and Insurance Services issued an order indicating that no policy issued after December 16, 2005 could require that such suits be brought before the three year *statutory* limitations period.
- Plaintiff argued that the renewals constituted a new issuance of the policy after December 16, 2005 and, therefore, the one year limitation period was unenforceable. The Court of Appeals disagreed, holding that the OFIS directive expressly grandfathered all policies already in effect as of December, 2005 and the one year limitation remained enforceable.
- Plaintiff also argued that, because she had filed suit against the at fault driver within a year of the accident, later amending the suit to add Farm Bureau as a defendant on the UM claim, the amendment related back to the initial filing date and, therefore, Plaintiff had complied with the one year limitation. Again, the Court of Appeals disagreed stating that the relation-back doctrine only applied to arguments related to *statutory* limitations periods, not contractual limitations periods and application of the doctrine would be inconsistent with the policy of courts not re-rewriting contracts.

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Supreme Court u pdate

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Supreme Court Finds Black Ice Open And Obvious As A Matter Of Law

On May 28, 2010, in lieu of granting leave to appeal, the Michigan Supreme Court reversed and held that the Court of Appeals failed to adhere to governing precedent that renders "black ice" an open and obvious condition where there are "indicia of a potentially hazardous condition." *Janson v Sajewski Funeral Home, Inc*, ___ Mich ___; ___ NW2d ___ (2010).

Facts: The plaintiff slipped and fell while attempting to walk across the defendant funeral home's parking lot in early March. As a result of the fall, the plaintiff fractured his right ankle. Though most of the snow had been cleared from the lot, light precipitation and below freezing temperatures existed prior to the plaintiff's fall. A witness testified that black ice was "everywhere in the parking lot." Thereafter, the plaintiff filed suit against the defendant funeral home.

The trial court granted the defendant's motion for summary disposition, holding that the ice in the parking lot was an open and obvious danger that contained no special aspects. The Court of Appeals reversed and held that "it would be inappropriate to apply the open and obvious danger doctrine" because the record contained no evidence of snow in the area or other signs that a hazardous condition existed. The Court of Appeals further rejected the defendant's argument that black ice is open and obvious as a matter of law in Michigan. Instead, the Court of Appeals quoted past precedent in noting that the "overriding principle behind many definitions of black ice is its invisibility, which is inherently inconsistent with the open and obvious danger doctrine." The defendant sought leave to appeal to the Supreme Court.

h olding: In lieu of granting leave to appeal, the Supreme Court reversed the Court of Appeals decision, holding that it "failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483 (2008), which renders alleged 'black ice' conditions open and obvious when there are 'indicia of a potentially hazardous condition,' including the 'specific weather conditions present at the time of the plaintiff's fall.'" Applying *Slaughter*, the Supreme Court held that the black ice was open and obvious since, among other things, the plaintiff's fall occurred in winter, when temperatures were below freezing, and where snow was present around the defendant's premises. According to the court, "[t]hese wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection."

Significance: This much-awaited decision demonstrates the Supreme Court's continued willingness to uphold and enforce the open and obvious doctrine with respect to icy conditions in Michigan. This decision is of particular importance given the court's change in ideological makeup and recent discord between Justice Weaver and Justices Markman, Young and Corrigan. Despite apparent tensions, Justice Weaver sided with Justices Markman, Young and Corrigan to make up the court's 4-3 majority.

Two-Inch r ule u nder Mcl 691.1402a(2) Applies Only To Sidewalks Adjacent To County h ighways

On April 8, 2010, the Michigan Supreme Court reversed the Court of Appeals and held that the two-inch rule under MCL 691.1402a(2) applies only to sidewalks that are adjacent to county highways. *Robinson v City of Lansing*, 486 Mich 1; ___ NW2d ___ (2010).

Facts: The plaintiff tripped and fell, sustaining injuries to her wrist, while walking on a brick sidewalk adjacent to a state highway in Lansing, Michigan. The plaintiff sued the City of Lansing under the highway exception to governmental immunity, alleging that the City failed to reasonably maintain the sidewalk in accordance with MCL 691.1402(1). The City of Lansing moved for summary disposition, arguing that the plaintiff failed to rebut the inference under MCL 691.1402a(2) that the sidewalk was reasonably maintained since the continuity defect was less than two inches. The trial court denied the City's motion, holding instead that the "two-inch rule" as written applies only to sidewalks adjacent to county highways. Since the sidewalk at issue was adjacent to a state highway, the two-inch rule was inapplicable. The Court of Appeals reversed the trial court's decision and held that nothing within MCL 691.1402a(2) specifically limits the

The Supreme Court held that the black ice was open and obvious since, among other things, the plaintiff's fall occurred in winter, when temperatures were below freezing, and where snow was present around the defendant's premises.

two-inch rule's application to county highways. The Court of Appeals then remanded the case back to the trial court.

h olding: The Supreme Court reversed. In so doing, the court held that the two-inch rule under MCL 691.1402a(2) is limited to sidewalks adjacent to "county highways." Though suits against municipalities are typically barred by governmental immunity, there are several exceptions to that immunity, including MCL 691.1402(1), which "imposes liability on municipalities for injuries resulting from defective sidewalks." The court clarified that because subsection (1) of MCL 691.1402a is expressly limited to "county highways," and because nothing in subsection (2) "suggests that its scope is any different than that of subsection (1)," the two-inch rules under subsection (2) applies only to county highways. Notwithstanding the fact that subsection (2) makes no explicit reference to "county" highways, the court noted that when read as a whole, the most logical conclusion is that both subsections (1) and (2) of MCL 691.1402a apply only to county highways.

In their concurring opinions, Justices Young and Weaver urged the Legislature "to clarify its intent with regard to the scope of the 'two-inch rule' of the highway exception to governmental immunity."

Significance: As Justice Young noted, this holding solidifies a rather arbitrary distinction whereby a municipality is subject to liability for sidewalk defects adjacent to some, but not all highways. Given the majority's interpretation of MCL 691.1402a(2), municipalities must take extra care to ensure that sidewalks adjacent to state and city highways are in reasonable repair.

The Statutory Duty To Warn Or Protect u nder MCL 330.1946 Does Not entirely Abrogate A Mental h ealth Professional's Common Law Duty Of r easonable Care

On March 30, 2010, the Supreme Court held that MCL 330.1946, which imposes a duty on mental health professionals to warn or protect third parties from harm by their patients, does not completely abrogate a mental health professional's common law duty of reasonable care to protect his or her patients. *Dawe v Dr Reuven Bar-Levav & Associates, PC*, 485 Mich 20; 780 NW2d 272 (2010).

Facts: The plaintiff was seriously injured while attending a group therapy session at the defendant mental health professionals' offices when a former group therapy patient entered the offices with a gun and opened fire. After shooting and killing a psychiatrist, the former patient opened fire on members of the group therapy session, killing one patient and wounding others, including the plaintiff. The former patient then committed suicide. The plaintiff filed suit against the psychiatrists and their practice, alleging common law medical malpractice and a failure to warn or protect under MCL 330.1946. Specifically, the plaintiff alleged that the defendants were aware of the former patient's dangerous tendencies since he had made threats and brought a gun to the defendants' offices on a prior occasion. Given these facts, the plaintiff alleged that the defendants breached their duty to warn or protect third parties under MCL 330.1946 and their common law duty of reasonable care by negligently placing the former patient in the plaintiff's group therapy session.

The trial court denied the defendants' motion for summary disposition prior to trial, their motion for directed verdict during trial, and their motions for judgment notwithstanding the verdict and for new trial after the jury returned a verdict in the plaintiff's favor. The Court of Appeals reversed the trial court's denial of the defendants' motion for directed verdict with respect to the failure to MCL 330.1946. The court held that MCL 330.1946 expressly limited a mental health professional's duty to warn or protect third parties and, in doing so, abrogated common law failure to warn or protect claims.

h olding: Reversing the Court of Appeals decision, the Supreme Court held that the Legislature did not intend to entirely abrogate a mental health professional's common law duty of reasonable care to protect his or her patients. The court noted that the psychiatric-patient relationship is a "special relationship that places on psychiatrists a duty of reasonable care to protect their patients." This duty "not only requires a psychiatrist to protect his or her patients but also to warn third persons or protect them from harm by a patient under certain circumstances …" In contrast, MCL 330.1946 "is expressly limited to warning or protecting third persons under very limited circumstances …" The court explained that, while a patient may also constitute a third person under MCL 330.1946, a psychiatrist remains at all times subject to the common law duty to warn or protect his or her patients. Because a psychiatrist is subject to both the statutory and common law duties to warn or protect third parties, as well as his or her patients, MCL 330.1946 did

The Supreme Court held that the Legislature did not intend to entirely abrogate a mental health professional's common law duty of reasonable care to protect his or her patients.

not entirely abrogate a psychiatrist's common law duties.

Significance: This holding clarifies that, although a psychiatrist's duty to warn or protect third parties is statutorily imposed, the psychiatrist remains subject to the common law duty of providing reasonable care to his or her patients. The common law duty includes the duty to protect a patient from harm.

Despite Improper Mailing, Notice Of Intent Continued To Toll Medical Malpractice Statute Of Limitations

On May 27, 2010, the Michigan Supreme Court held that a notice of intent (NOI) in a medical malpractice action tolls the statute of limitations despite a plaintiff's failure to send it to the defendants' "last known professional business address" within the two year limitations period. *DeCosta v Gossage*, ___ Mich ___; ___ NW2d ___ (2010).

Facts: The plaintiff sought treatment with the defendant doctor beginning in 2002 and continuing through 2004. In February 2004, the defendant's medical office moved to a new location. The plaintiff continued her treatment with the defendant at his new location and, on June 3, 2004, underwent cataract surgery to her left eye. After the surgery, the plaintiff began experiencing several complications, including loss of vision. The defendant referred the plaintiff to a retina specialist, who performed a second surgery. On November 20, 2006, the plaintiff filed a medical malpractice action against the defendant doctor and his practice, alleging that the doctor performed unnecessary cataract surgery in unsanitary conditions. On June 1, 2006, prior to filing suit but only two days before the two year limitations period to serve a NOI expired, the plaintiff sent a NOI by mail to the defendants' former business address. Shortly after the limitations period expired, she re-sent the notice of intent (NOI) to the defendants' new location.

In addition to denying that any malpractice occurred, the defendants argued that the plaintiff's NOI was improper since it was not sent to his "last known professional business address" during the limitations period, as required under MCL 600.2912b(2). The trial court agreed and granted the defendants' motion for summary disposition. The Court of Appeals affirmed and held the statute of limitations barred the plaintiff's medical malpractice claim.

h olding: The Supreme Court reversed and remanded. Relying on its decision in *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009), the Supreme Court held that the statute of limitations in a medical malpractice suit will be tolled despite defects in the underlying notice of intent, so long as the notice was timely. The court further held that the improper mailing was not, itself, a defect because there was no evidence demonstrating that the defendants no longer used the former address. Additionally, even if the improper mailing was a defect, the court held that it was a "minor technical defect in the proceedings because defendants actually received the NOI." The court further noted that "[t]he advance-notice requirement encourages settlement of a dispute in lieu of costly litigation, and rigid interpretations of MCL 600.2912b do not foster or encourage the statute's goal of advancing settlement and reducing litigation costs." Because the substantial rights of the parties were not affected by the NOI's improper mailing, the court determined that the trial court and Court of Appeals erred in failing to allow the plaintiff's malpractice action to proceed.

Significance: This decision solidifies and, in some respects, expands the Supreme Court's prior holding in *Bush v Shabahang* to allow a defective, and perhaps untimely, NOI to toll the statute of limitations, so long as the "substantial rights of the parties are not affected."

By: Todd W. Millar, DRI State of Michigan Representative
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Dr I r eport — July 2010

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On April 16 and 17, Michigan hosted the **Dr I Central r egion Meeting** at the Dearborn Inn. Leaders from the Michigan, Ohio and West Virginia defense organizations focused their attentions on increasing each organization's value to its members. This included extensive discussions and brainstorming about how to expand services to members, increasing membership in a down economy, and how to foster diversity. The meeting ended with a discussion on how the three states can work together help promote each state's organization and DRI. The 2011 meeting will be hosted by Ohio at a yet to be determined location.

Annual Meeting, October 20–24, San Diego

Dr I's 2010 Annual Meeting, October 20–24, in San Diego promises to be an exciting event!

Featured blockbuster speakers include **Marcus Luttrell**, navy seal, lone survivor and compelling author; **Soledad O'Brien**, *CNN* special correspondent and powerful advocate of mentoring young people; **Matt Miller**, author, columnist and public radio host of *Left, Right & Center*; and **Mara Liasson**, political correspondent for *NPR* and contributor at *Fox News Channel*. With its great weather, miles of sandy beaches, and major attractions, San Diego is known worldwide as one of the best tourist destinations. The **Gaslamp Quarter** is Southern California's premier dining, shopping and entertainment district, where you'll find a truly eclectic blend of food and fun all within one of San Diego's most historic areas. At the world-famous **San Diego Zoo** located in **Balboa Park,** you will see some of the world's rarest wildlife including giant pandas and koalas. World-renowned Balboa Park is home to 15 museums, making it one of the nation's largest cultural complexes. San Diego is also home to SeaWorld where visitors will be entertained, amazed and educated, creating memories that last a lifetime. Don't miss this opportunity to explore an exciting and interesting city, attend stellar education programs, visit with friends and colleagues, new and old, and kick off DRI's next 50 years as the Voice of the Defense Bar. **Save $200 off the regular registration fees of $895 member / $995 non-member when you register by September 22.**

Michigan Defense Trial Counsel

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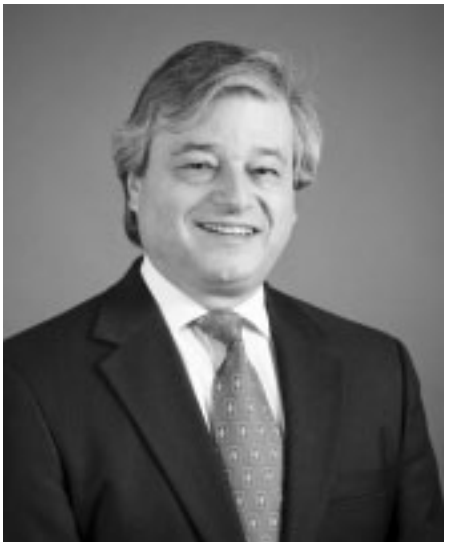

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2010 r espected Advocate Award

Every year the MDTC and MAJ each present a "Respected Advocate Award." The MDTC annually gives the award to a member of the plaintiff's bar for the purpose of recognizing and honoring the individual's history of successful representation of clients and adherence to the highest standards of ethics. The MAJ does the same annually for a defense practitioner. In so doing, we promote mutual respect and civility.

Paul J. Manion

Mark r . Granzotto

Mr. Manion is primarily engaged as a trial attorney in the areas of medical-dental malpractice, legal malpractice, product liability, property and general civil liability. He has been a member of the Representative Assembly of the State Bar of Michigan, State Bar of Michigan Committee on Character and Fitness and is a current panelist for the State Bar of Michigan Attorney Discipline Board and a member of the State Bar of Michigan Negligence Section and a current council officer. He is a past member of the Detroit Bar Association Volunteer Lawyers Committee and is a current member of the American Bar Association as well as its Committee on Torts and Insurance Practice. He is the first recipient of the ProNational Insurance Company's Platinum Award for achieving thirty No Cause verdicts in professional liability trials.

Mark r . Granzotto practices in the area of civil appellate work. He is a member of the committee on Model Civil Jury Instructions. Mr. Granzotto is also a member of the Appellate Practice and Negligence Law Sections of the State Bar of Michigan. He is a frequent speaker on civil appellate issues, particularly those related to personal injury. He is a former adjunct professor of law at Wayne State University School of Law. Mr. Granzotto is a fellow of the American Academy of Appellate Lawyers.

Current ICLE Contributions:

Michigan Law of Damages and Other Remedies. Third Edition
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Established in 1992, the Annual Michigan Defense Trial Counsel (MDTC) "Excellence in Defense Award" is designed to honor those civil defense counsel who have over a number of years through their professionalism, intelligence, creativity, judgment, personality, sensitivity, civility, advocacy skills, community involvement and efforts to educate younger attorneys, promoted the practice of the defense bar and the representation of their clients both in and outside of the courtroom. It also recognizes contributions beyond their normal roles as an advocate.

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MDTC Annual Meeting

May 14 -15, 2010 • Doubletree Hotel

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Judge William J. Caprathe of Bay County Circuit Court (on the left), Judge Michael J. Kelly of the Michigan Court of Appeals (center) Lori Ittner MDTC President 2010–2011, and Judge Thomas L. Ludington of the U.S. District Court for the Eastern District of Michigan (on the right).

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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.

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Schedule of Events

2010

August 12	Young Lawyer Section Breakfast Your First Oral Argument in the Court of Appeals
September 10	Open Golf Outing, Mystic Creek
September 16	Commercial Litigation – Teleconference – Fraud Investigation
September 22	Board Meeting, Okemos Holiday Inn Express
September 29	State Bar of Michigan -- Awards Banquet – Respected Advocate Award
October TBA	Bi-annual Judges Event (date/location TBA)
October 20–24	DRI Annual Meeting
November 4	Board Meeting, Troy Marriott
November 4	Past Presidents' Dinner, Troy Marriott
November 5	Winter Meeting, Troy Marriott

2011

January 11	Excellence in Defense Nomination Deadline
January 11	Young Lawyers Golden Gavel Award Nomination Deadline
January 21	Future Planning, City Flats Hotel, Holland MI
January 22	Board Meeting, City Flats Hotel, Holland, MI
February TBA	Bi-annual Movie Night (date/location TBA)
March 16	Board Meeting, Okemos Holiday Inn Express
May 18–20	Annual Meeting, Soaring Eagle Casino & Resort

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