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President's Corner

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From the President

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"The whole is more than the sum of its parts."
Aristotle

I remember that beautiful late summer day, September 11, 2001, in incredible detail. Perhaps we all do. A crystal clear blue sky blanketed my view as I gazed out of my office window at the Windsor skyline. In minutes, that characteristically Michigan day would transform into one of the most tragic days in many of our lives and, indeed, our nation's history. In light of the ten year anniversary, I have been thinking about that day.

While September 11, 2001 was traumatic and exposed a vulnerability of our open and free society, it also revealed in the minutes, hours, days and weeks afterward a sense of unity that I think we have overlooked in the years that have since passed. The sense I write about is where we, as a people, as a country, felt and acted as we were one, pulling in the same direction.

It showed itself later that day on September 11, 2001, later that week and later that year. Maybe you saw it or felt it like me. It showed itself in such things as somber hellos from strangers as we strove to understand what the day's events meant. It showed itself in such things as drivers graciously letting others merge, in the kind gesture of opening a supermarket door for a complete stranger and in an overall politeness and camaraderie like I'd never seen or felt before.

In later thinking about that day, I concluded that the sense of one purpose was attributable to the collective belief that when we, as Americans, shared the national tragedy that was September 11, 2001, we were reminded that together we are more than the sum of our parts. That's how we acted—as if we were all in this together. In doing so, we rose above our petty differences at whatever level, uniting for the greater good that we know we all enjoy and would fight to preserve—the freedoms our country not only provides, but guarantees.

One of the bastions that protects and preserves our freedoms is the civil justice system. That system's integrity and resulting strength is what we often count on in the fight for our rights and the rights of others. Without that system and its endurance throughout our country's existence, I hardly think that we would still have many of the rights and freedoms we have come to experience, expect and enjoy. That's why we have to keep in mind that as lawyers, regardless of which side of the "v" we find ourselves or in which county or federal courthouse in this state we land, the one thing that unites us is our understanding that the whole of the civil justice system is more than the sum of those that make it up.

We need to keep that in mind more often. In the midst of our daily grinds, it is easy to forget the significance of the legal system in which we work. It binds us together more than it divides us, no matter how heated the battles become within it. Though our views on behalf of our clients may differ from those of lawyers and clients on the other side of any given dispute, we are all looking at and for the same thing: a fair and just result. We each want to do our very best for our clients and achieve the best outcome possible. We all do. And we are all doing it in a

Though our views on behalf of our clients may differ from those of lawyers and clients on the other side of any given dispute, we are all looking at and for the same thing: a fair and just result.

legal system that is un-matched in its longevity.

There must be a reason for the durability of our system. I think there is. It works. Yes, it is easy to complain about this shortcoming or that shortcoming. However, while we have to recognize that this is the system that we have, we should also recognize that the American legal system happens to be the best that the world has ever seen.

With the tenth anniversary of the attacks of September 11, 2001 just a few days away as I write this, I would like us to remember the sense of unity and solidarity that I think many, perhaps all, Americans felt that day and the days after. We showed in our actions that we acted as one in our horror and disbelief. We acted as one in our sorrow and grief. We acted as one in our response to the attacks. We stood side-by-side, together, to pull ourselves through that trying time. In doing so, we put aside our disparate views and focused on one thing: that together we are more, so very much more, than the sum of our parts. Let's keep that in mind as we celebrate our holidays, as we honor our fallen and as we go about our daily routines in court and outside of court. If we can, we will certainly all be better off for it.

The *Fultz* Rule After *Loweke*

By: Mark Granzotto, *Mark Granzotto, PC*

Executive Summary

Mr. Granzotto, an experienced appellate practitioner, participated in a recent seminar co-sponsored by Michigan Defense Trial Counsel, the Negligence Law Section and the Michigan Association for Justice. One of the topics was the effect of the recent Loweke decision on the rule created by the Fultz case. The Quarterly invited Mr. Granzotto to provide his analysis for publication and he provided this article, which offers a thorough and insightful analysis.

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.

On June 6, 2011, the Michigan Supreme Court released its near unanimous[1] decision in *Loweke v Ann Arbor Ceiling & Partition Co*,[2] significantly clarifying the reach of its 2004 ruling in *Fultz v Union-Commerce Associates*.[3]

In *Fultz*, the plaintiff fell and was injured while walking in an icy parking lot. Plaintiff sued both the owner of the premises and Creative Maintenance Limited (CML), a company which had entered into a contract with the premises owner under which it was obligated to plow and salt the parking lot where plaintiff fell. Plaintiff's complaint alleged that CML had "a duty to remove all snow and ice from the driveways and walkways" under its contract with the property's owner. Plaintiff further claimed that CML breached its duty by failing to remove the snow and ice from the premises.

The fact situation presented in *Fultz* was unusual. Plaintiff could not claim that she was injured because CML *acted* negligently. In point of fact, CML had not acted at all; it failed to clear the snow from the parking lot allegedly in violation of its contract with the property owner. The issue that was ultimately presented to the Supreme Court in *Fultz* focused on the duty component of plaintiff's negligence claim, and the plaintiff was forced to argue that CML owed her a duty to perform the obligations imposed on it under the terms of its contract with the landowner.

The Supreme Court ruled in *Fultz* that the plaintiff could not proceed on her tort claim against CML because CML owed her no duty. The Court held in *Fultz* that, to satisfy the duty element of her negligence claim against CML, plaintiff could not rely solely on CML's breach of the contractual promise it made to the landowner. Rather, to proceed on her negligence claim, plaintiff had to establish a duty that was separate and distinct from CML's obligations under its contract:

> Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie.[4]

Applying this "separate and distinct" duty analysis, the Court in *Fultz* reversed the decision of the Court of Appeals, which had affirmed a jury verdict in plaintiff's favor:

> Applying that analysis here, the Court of Appeals erred in affirming the jury verdict and in holding that "evidence suggested that [CML] engaged in misfeasance distinct from any breach of contract." In truth, plaintiff claims CML breached

The Court held in *Fultz* that, to satisfy the duty element of her negligence claim against CML, plaintiff could not rely solely on CML's breach of the contractual promise it made to the landowner. Rather, to proceed on her negligence claim, plaintiff had to establish a duty that was separate and distinct from CML's obligations under its contract:

> its contract with [the property owner] by failing to perform its contractual duty of plowing or salting the parking lot. She alleges no duty owed to her independent of the contract. Plaintiff thus fails to satisfy the threshold requirement of establishing a duty that CML owed to her under the "separate and distinct" approach set forth in this opinion.[5]

In one respect, the *Fultz* decision represented a break from prior Michigan law in that it repudiated a small number of Michigan appellate rulings which had embraced the theory of liability set out in Restatement, Torts, 2d, §324A. That section of the Restatement, which was central to the plaintiff's argument in *Fultz*, provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The plaintiff in *Fultz* relied principally on §324A(b) in support of her argument that CML owed her a duty to clear the parking lot based on the duty that the landowner owed to her.

However, in another important sense, the *Fultz* decision was a reaffirmation of a long established common-law principle –that the common law imposes a separate duty on any party actually performing under a contract to avoid acts of negligence. Thus, the *Fultz* Court quoted with approval the following two sentences from its opinion in *Clark v Dalman*,[6] on the subject of the duty necessary to support a claim in tort:

> Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part. Moreover, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.[7]

The *Fultz* decision was a reaffirmation of a long established common-law principle –that the common law imposes a separate duty on any party actually performing under a contract to avoid acts of negligence.

As the Supreme Court explained in *Clark*, the common law imposes a separate duty of due care on *any* party actually performing under the terms of a contract. This common law duty to perform contractual obligations in a non-negligent manner is merely a specialized application of an even broader tort concept: the "basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others."[8]

When the *Fultz* decision was issued, the reach of its no-duty holding appeared to be limited. *Fultz* certainly impacted those rare cases in which the plaintiff was suing a party for their failure to act, where that failure to act represented a breach of a contractual obligation the defendant owed to another. But, when written, *Fultz* appeared to leave untouched the far more numerous cases in which a defendant, in the process of performing on a contract, committed affirmative acts of negligence.

This narrow reading of the *Fultz* decision was to change dramatically with the Supreme Court's issuance of two cryptic orders in *Banaszak v Northwest Airlines, Inc.*[9] and *Mierzejewski v Torre & Bruglio, Inc.*[10] In *Banaszak* and *Mierzejewski*, plaintiff sued the defendants for alleged affirmative acts of neg-

This narrow reading of the *Fultz* decision was to change dramatically with the Supreme Court's issuance of two cryptic orders in *Banaszak v Northwest Airlines, Inc.* and *Mierzejewski v Torre & Bruglio, Inc.*

ligence committed while they were in the process of performing under a contract. In both *Banaszak* and *Mierzejewski*, panels of the Court of Appeals found the cases distinguishable from *Fultz*, in which the defendant had failed to perform on its contract, and held that defendants owed plaintiffs a duty of care based on their affirmative acts of negligence.[11] The Supreme Court issued short orders in both cases, reversing the Court of Appeals. In both of these orders, the Supreme Court indicated that its reversal was predicated on its ruling in *Fultz*.

The orders issued by the Supreme Court in *Banaszak* and *Mierzejewski* were both unexplained and, in light of *Fultz*'s reaffirmation of the principle that the common law imposes a duty of care on any party *acting* under the terms of a contract, inexplicable. Lower courts were, however, compelled to give effect to these orders.

In the wake of the *Banaszak* and *Mierzejewski* orders, lower courts by and large abandoned the common law principles expressed in *Clark v Dahman* and *Fultz* itself, and gravitated toward what could best be described as a form of "contractual immunity." Various Court of Appeals and circuit court rulings after *Banaszak* and *Mierzejewski* recognized a special rule of nonliability for any defendant who caused injury to a third person while in the process of performing on a contract. The extraordinary expansion of the *Fultz* ruling is perhaps best reflected in the Court of Appeals decision in *Hatcher v Senior Home Health Care*,[12] in which the panel concluded that "where an injury is caused by a hazard that is even remotely connected to a contractual relationship, Michigan law bars any cause of action."[13]

In September 2010 the Supreme Court granted leave to appeal in *Loweke*, the first post-*Fultz* case that the Court agreed to review. In *Loweke*, the plaintiff, who was working for a subcontractor on a construction site, was injured when several cement boards fell on him. These boards had been placed against a wall by employees of the defendant, another subcontractor working on the site. Plaintiff alleged that defendant's employees had been negligent in the way those cement boards had been stacked.

> While recognizing with some amount of understatement that its orders in *Banaszak* and Mierzejewski "may have *understandably* caused confusion," the *Loweke* Court emphasized that these two decisions "did not purport to overrule longstanding common law."

The defendant in *Loweke* successfully argued in both the circuit court and the Court of Appeals that it was entitled to summary disposition under *Fultz* because the substance of plaintiff's negligence claim was a subject covered in defendant's contract with the project's general contractor. The Court of Appeals in *Loweke* held that, "one must look at the terms of [defendant's] contract and determine whether the defendant's action was required under the contract."[14] After finding that defendant's contract with the general contractor covered the securing of the cement boards that fell on the plaintiff, the Court of Appeals concluded that plaintiff's claim was barred by *Fultz*.

> *Loweke* breaks no new ground. To the contrary, Loweke's significance lies in its reaffirmation of basic common-law principles that have existed for decades.

The Supreme Court in *Loweke* set out to clarify its ruling in *Fultz*. While recognizing with some amount of understatement that its orders in *Banaszak* and *Mierzejewski* "may have understandably caused confusion," the *Loweke* Court emphasized that these two decisions "did not purport to overrule longstanding common law."[15] It is this "longstanding common law" that is at the center of the Supreme Court's ruling in *Loweke*.

The *Loweke* decision reaffirmed the essence of *Fultz*'s holding that the duty necessary to support a claim in negligence must be "separate and distinct" from a defendant's contractual duties. But, *Loweke* emphasized that such a "separate and distinct" duty may emanate from a statute or the common law, including the broad common-law duty "to use ordinary care in order to avoid physical harm to persons and property in the execution of its undertakings."[16] The *Loweke* Court, therefore, expressly rejected the Court of Appeals reasoning by holding that the determination of whether a duty exists for a defendant who happens to be performing under a contract, "does not necessarily involve reading the contract, noting the obligations required by it, and determining whether the plaintiff's injury was contemplated by the contract."[17]

Thus, the *Loweke* Court found that entering into a contract "does not alter the fact that there [exists] a preexisting obligation or duty to avoid harm *when one acts*."[18] The significance of the traditional common law duty imposed on any person engaged in affirmative misconduct was described in *Loweke* as follows:

> Thus, under *Fultz*, while the mere existence of a contractual promise does not ordinarily provide a basis for a duty of care to a third party in

tort, "the existence of a contract [also] does not extinguish duties of care otherwise existing . . ." *Fultz did not extinguish the "simple idea that is embedded deep within the American common law of torts . . ." if one 'having assumed to act, does so negligently,' then liability exists as to a third party for 'failure of the defendant to exercise care and skill in the performance itself.'*[19]

The *Loweke* decision is significant in that it lays to rest the unduly expansive interpretation of *Fultz* that followed the Supreme Court's orders in *Banaszak* and *Mierzejewski*. But, as the near unanimous vote in the Supreme Court attests, *Loweke* breaks no new ground. To the contrary, *Loweke*'s significance lies in its reaffirmation of basic common-law principles that have existed for decades. The most significant of these common-law principles is that a party, whether engaged in a contractual obligation or not, has a common-law duty to perform that act in a non-negligent manner.

Loweke confirms that there are no special rules of tort liability governing those cases in which the defendant is performing under a contract. Rather, a case in which the defendant is performing under a contract is to be governed by precisely the same concepts of duty that exist in every other negligence action. *Fultz*, therefore, is to be understood not as a "contract" case, but as a duty case. The plaintiff could not pursue her cause of action against CML in *Fultz not* because the defendant's negligence happened to implicate its performance on a contract, but because defendant owed no duty in tort to the defendant.

There is one other ramification of the *Loweke* Court's return to fundamental common-law principles that is worth noting in this context. In *Fultz*, the Supreme Court engaged in a somewhat muddled critique of the "slippery" distinction between misfeasance on a contract and nonfeasance, opting instead for the view that the duty component in a case involving performance on a contract must be based on whether there is a legal duty "separate and distinct" from the contract.

Now that *Loweke* resoundingly confirms that this "separate and distinct" analysis in Fultz is to be governed by traditional common law duty concepts, the legal analysis has, in essence, come full circle.

Now that *Loweke* resoundingly confirms that this "separate and distinct" analysis in *Fultz* is to be governed by traditional common law duty concepts, the legal analysis has, in essence, come full circle. This is because the common law has always drawn a distinction between affirmative acts of negligence and the failure to act, *i.e.* between misfeasance and nonfeasance.[20] Generally, as the *Fultz* decision itself demonstrates, tort law does not impose on a party an affirmative duty to act.

One of the primary exceptions to this general rule that the tort law does not impose a duty to act arises in those situations in which a "special relationship" exists between the plaintiff and defendant or between the defendant and the third person responsible for the plaintiff's injury. Notably, the *Loweke* Court twice recognized this concept of "special relationship" as a potential source of a defendant's duty: "a separate and distinct duty to support a cause of action in tort can arise . . . by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties . . ."[21] This language in *Loweke* fairly clearly establishes that if CML, the defendant in *Fultz*, had been in a "special relationship" with Ms. Fultz, the result in that case would have been different.

Since the common law has always drawn a significant distinction between misfeasance and nonfeasance, and since *Loweke* stands for the proposition that the common law will control in these circumstances, it is clear that the *Fultz*'s rejection of the misfeasance/nonfeasance distinction, which was dubious when it was written, has even less validity now.

Endnotes

1. Five justices joined the *Loweke* opinion written by Justice Cavanagh. Justice Hathaway concurred in the result only. Justice Zahra did not participate in the case because he sat on the Court of Appeals panel in that case. It is perhaps worth noting that, before his elevation to the Supreme Court, Justice Zahra joined one of the few published Court of Appeals cases that anticipated the result reached in *Loweke*. *See Boylan v Fifty-Eight Ltd. Liability Co,* 289 Mich App 709 (2010).
2. 489 Mich 157 (2011).
3. 470 Mich 460 (2004).
4. 470 Mich at 467.
5. *Id*., p. 468.
6. 379 Mich 251 (1967).
7. *Fultz*, 470 Mich at 465, *quoting Clark,* 379 Mich at 260-261.
8. 379 Mich at 261; *Riddle v McLouth Steel Products, Corp.*, 440 Mich 85, 95 (1992); *Moody v Pulte Homes, Inc.*, 423 Mich 150, 181, n. 15 (1985); Prosser and Keeton, Torts (5th ed), §92, p. 658 ("There is a general rule of tort law to the effect that one who acts is under a duty to exercise reasonable care to avoid physical harm to persons . . .").
9. 477 Mich 895 (2006).
10. 477 Mich 1087 (2007).
11. *Banaszak v Northwest Airlines, Inc.*, 2006 WL 473848 (2006); *Mierzejewski v Torre & Bruglio, Inc.*, 2006 WL 2741991 (2006).
12. 2010 WL 3296088 (2010).
13. 2010 WL 3296088, *4.
14. *Loweke v Ann Arbor Ceiling & Partition Co*, 2010 WL 162151, *3.
15. 489 Mich at 168, n. 5.
16. *Id*. at 160.
17. 489 Mich at 169.
18. *Id*. at 170 (emphasis added).
19. *Id*. at 170-171 (emphasis added).
20. *Williams v Cunningham Drug Stores, Inc.*, 429 Mich 495, 498-499 (1988).
21. 489 Mich at 164, n. 4; 170.

Lack Of Notice As A Bar To Suits Against Governmental Entities – A Jurisdictional Analysis

Carson J. Tucker, *Zausmer, Kaufman, August, Caldwell & Tayler, PC*

Executive Summary

There are several statutes that require that a person who intends to sue the state or a subordinate governmental entity must first give notice of the claim. These requirements have been attacked and justified on various grounds, and have often prompted judicial attempts at reducing or eliminating their effect, through theories such as "substantial compliance," "actual prejudice," "passive notice" or estoppel. Justifications for the requirement have included the need to protect public funds and the need to be able to investigate potential claims promptly.

These analyses, however, distract from a more fundamental point: the notice requirement is jurisdictional. Because governmental immunity exists as a matter of common law and can be waived only by the legislature, the legislature can impose any conditions that it considers appropriate on a statutory waiver of immunity. For the same reason, courts lack jurisdiction, i.e., power to devise alternative analyses that create paths around the statutory notice requirements that the legislature has adopted as preconditions to its waiver of immunity.

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The aftershocks of the Michigan Supreme Court's decision in *Rowland v Washtenaw County Rd Comm'n*[1] have, to some extent, subsided.[2] *Rowland* overruled *Hobbs v Dep't of State Hwys*[3] and *Brown v Manistee Co Rd Comm'n*,[4] both of which had held, consistent with previous cases, that absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception.

Much has been made of the perceived unfairness to potential plaintiffs, or harsh results arising from barring suits against governmental entities where a claimant fails to provide the timely statutory notice required to proceed in a court of law.[5] Conversely, notice provisions have been justified as being necessary to allow governmental entities sufficient time and opportunity to investigate claims, to create adequate reserves to fund potential liabilities, and to reduce the uncertainty of or prevent future demands.[6] Notice provisions are also justified as preventing these entities, which provide mass services to a large number of individuals on a daily basis, from being prejudiced by dilatory lawsuits.[7]

However, apart from the policy justifications of protecting frivolous, or at least dilatory, raids on the public treasury, another and more fundamental reason supports barring suits where a claimant fails to provide timely notice: The legal principles underlying governmental immunity adhered to in Michigan deprive- courts of subject-matter jurisdiction over suits against a governmental entity where strict compliance with the notice provision has not been satisfied.

Governmental Immunity as a Jurisdictional Defense

The common-law of governmental immunity in Michigan is, and always has been based on the *jurisdictional* principle of immunity.[8] As explained by the Michigan Supreme Court in the seminal decision in *Ross v Consumers Power Co*, the state, through the Legislature, created the courts and thus, the judiciary is subject to the conditions and restrictions placed upon it by the people (either through the Michigan Constitution[9] or by statute[10]). A court can assert no jurisdiction beyond what is authorized by the entity that created the court.[11] As noted by one jurist, "[s]overeign immunity exists in Michigan because the state created the courts and so is not subject to them."[12]

Jurisdiction is the abstract power of a court to adjudicate the merits of the dispute before it.[13] "[A] court either has or does not have subject-matter jurisdiction"[14] over

The common-law of governmental immunity in Michigan is, and always has been based on the *jurisdictional* principle of immunity

a case and thus, it has no authority to adjudicate the merits of a claim if it has no jurisdiction to consider it in the first place. If the state can deny subject-matter jurisdiction altogether, it follows that the Legislature's placement of a restriction on the state's assent to submit to the jurisdiction of its own courts by the enactment of statutory notice provisions as a condition precedent to bringing a suit against the government, is nothing more than an application of the jurisdictional principle of governmental immunity adhered to in Michigan.[15]

The notice requirement is a procedural limitation on the ability of a court to exercise subject-matter jurisdiction over the claim, because it is only through the Legislature, not the courts, that the government can submit itself, *i.e.,* consent to, jurisdiction and thereby waive its suit immunity.[16] "It assuredly is within the power of Congress to condition its waiver of sovereign immunity upon strict compliance with the procedural provisions attached to the waiver, with the result that failure to comply will deprive a court of jurisdiction."[17]

As such, there is no substantive impediment, constitutional or otherwise, to the Legislature's condition that claimants must provide notice of claims against governmental entities before the judiciary can exercise subject-matter jurisdiction over the merits of the claim. Indeed, if the jurisdictional principle of governmental immunity is adhered to, then a trial court cannot, as a matter of law, assert jurisdiction over a dispute which has not been perfected in strict compliance with the methods required by the only entity that has the authority to subject the government to that suit.

This is why it is improper for the judiciary to create means by which notice provisions can be deemed satisfied by anything less than strict compliance.[18] There have been many of these: "substantial compliance" with the notice provision; lack of "actual prejudice" to the governmental entity; "sufficient," "adequate," or "passive" notice of circumstances that might – or might not – give rise to a claim against the governmental entity; and principles of waiver and judicial estoppel to prevent the governmental entity from asserting the lack of notice. All of these are improper considerations, and, in fact, under the jurisdictional principle of governmental immunity, completely irrelevant to the ultimate and, indeed, *prima facie* question of jurisdiction.[19]

If the circuit court has no jurisdiction to consider the claim due to lack of notice then it certainly cannot create the very jurisdiction of which it is deprived by artfully finding notice to the governmental entity where none was given. The very nature of a lack of subject-matter jurisdiction means that courts, even the highest appellate tribunals, can and should consider the defect sua sponte and dismiss the suit.[20]

Thus, a separate and more fundamental rationale that courts may turn to regardless of "substantial compliance" by the claimant with the notice provision, or "sufficient," "constructive" or "passive" notice of an occurrence by the governmental entity, or the absence of "actual prejudice" to it, or judicially contrived principles of waiver or estoppel, rests in the retained-unless-surrendered nature of governmental immunity.[21] Strict compliance with notice provisions is a condition precedent to the surrender by the state of its sovereignty in the particular case and a necessary, but not sufficient, means of pleading and proving one's cause of action in its courts of law.

The immunity of the sovereign from suit was part of the fabric of Michigan's common-law and constitutional history.[22] It was modified, to some degree, by legislative enactments,[23] it teetered on the brink of abolition by the Supreme Court,[24] and then was reinstated by the Michigan Legislature in the form of the 1964 GTLA.[25]

The modern and prevailing view is that the immunity of the sovereign as it was known and existed at common law was retained but for the statutory exceptions in the GTLA.[26] Thus, the Legislature has carved out the only instances in which the government can be said to have waived its suit immunity and subjected itself to the jurisdiction of Michigan's courts. In Michigan, the basis of governmental immunity is jurisdictional. If a claimant does not satisfy the procedural requirements enacted by the Legislature to access the court, then the court has no subject-matter jurisdiction over the suit and must, *sua sponte*, dismiss it.[27]

There is no substantive impediment, constitutional or otherwise, to the Legislature's condition that claimants must provide notice of claims against governmental entities before the judiciary can exercise subject-matter jurisdiction over the merits of the claim.

A Court's Jurisdiction is Limited as Provided by Law

If the common law or statutes of Michigan limit or preclude a court's jurisdiction over a particular class of

Strict compliance with notice provisions is a condition precedent to the surrender by the state of its sovereignty in the particular case and a necessary, but not sufficient, means of pleading and proving one's cause of action in its courts of law.

cases, then the court must yield.[28] This command is even more crucial where the legitimate scope of judicial power is concerned.[29] The Michigan Constitution confers jurisdiction in the circuit courts over "all matters not *prohibited by law*."[30] The phrase "prohibited by law" references common law and statutory law.[31]

By statute, circuit courts are given "the power and jurisdiction":

(1) possessed by courts of record at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and

(2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and

(3) prescribed by rule of the supreme court.[32]

Additionally, "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except . . . where the circuit courts are denied jurisdiction by the constitution or statutes of this state."[33] According to these provisions, therefore, Michigan courts do not have subject-matter jurisdiction over suits unless it is conferred by law, i.e., by the Michigan Constitution, its common law or statutes and in accordance with strict adherence thereto.[34]

Thus, both the Constitution and the Legislature give circuit courts jurisdiction except where prohibited by law. The phrase "by law" refers to the constitutional limitations, and those imposed by the common law or statute. Because Michigan follows the jurisdictional principle of governmental immunity, circuit courts "by law" do not have jurisdiction over cases that are not brought in strict compliance with the legislative provisions authorizing suits against the government.[35] This necessarily includes statutory notice provisions.

Thus, a waiver of immunity from suit granted by the sovereign, *i.e.,* the people (more particularly, the Legislature as their representative), presents a threshold jurisdictional question. Before a court can address the merits of a suit brought pursuant to the statutory exceptions to governmental immunity, *i.e.,* before it can exercise its constitutional authority to adjudicate the claim, it must establish that it has jurisdiction to consider it. "It is well settled that a circuit court is without jurisdiction to entertain actions against the State of Michigan unless the jurisdiction shall have been acquired by legislative consent."[36] Moreover, "[l]egislative waiver of a state's suit immunity merely establishes a remedy by which a claimant may enforce a valid claim against the state and subjects the state to the jurisdiction of the court."[37] The effective waiver of immunity is a condition precedent to the submission by the government to the jurisdiction of the court, and this condition precedent is satisfied only by strict compliance with the statutory notice provisions, the Legislature's legitimate procedural bar to the government's waiver.[38]

Conclusion

This view, although it may be seen as more rigid than the rationale supporting notice provisions reaffirmed in *Rowland* and subsequent cases,[39] is a bright-line and clear-cut way to resolve the issue once and for all and upon a basis which provides impenetrable legal justification. There is no constitutional impediment in requiring more of a party to access courts that were created by the very entity whose liability is sought to be established. Indeed, notice provisions, like their narrowly construed statutory siblings, are a natural consequence of the "social contract" entered into by the people in vesting courts with limited jurisdictional authority to adjudicate suits against the sovereign because these provisions jealously guard the public fisc from unfettered access and potentially devastating economic abuses. This line of reasoning is prevalent in jurisdictions across the country.[40]

Jurisdiction is power, and if there is no jurisdiction then there is no power to declare substantial compliance, passive notice, adequate notice, lack of actual prejudice, and the like, as a means to exercise jurisdiction where none has been given. The Legislature, as the direct representative of the sovereign (embodied by the people of the state of Michigan) is the only body with the constitutional and common-law authority to waive the government's immunity from suit. A failure to provide the required notice is a jurisdictional defect that precludes a circuit court's consideration of the merits of the claim and, indeed, one that can be raised *sua sponte* by the courts at any level.

Any judicial determination that something less than strict compliance with the plain language of the notice provision suffices to hail governmental entities into courts of law is a direct usurpation of the constitutional hierarchy and separation of powers inherent in our state's jurisdictional basis for governmental immunity.[41] Any judicial interference with the Legislature's strict conditions and limitations in this regard would be the disposition of a claim that has already been refuted by failure to

provide the statutory notice and therefore unacceptable.[42]

The logical extension of the jurisdictional principle of sovereign immunity and the narrow construction given to those exceptional circumstances in which the sovereign waives that immunity and consents to be sued in its own courts, thereby vesting jurisdiction in the latter which would not otherwise exist, is to conclude *a priori* that claims not properly perfected by a failure of notice are not cognizable in a court of law. Such a failure would necessarily mean that a court does not have jurisdiction to consider the substantive merits of the claim, its authority to adjudicate being premised on the strictly observed method by which the Legislature deemed necessary to vest the court with that power.[43]

Endnotes

1. 477 Mich 197 (2007).
2. See e.g., *Ward v Michigan State University (On Remand)*, 287 Mich App 76, 80-83 (2010) (citing and agreeing with *Rowland* that "substantial compliance" with statutory notice provisions is irrelevant and prejudice or lack thereof is not to be considered when determining whether the claimant complied with the respective notice provision), lv den'd at 489 Mich 970 (June 28, 2011); *Nuculovic v Hill*, 287 Mich App 58, 68 (2010) (rejecting dissent's reliance on Supreme Court order denying leave to appeal in an unpublished Court of Appeals opinion that rejected *Rowland's* refusal to recognize a "prejudice analysis" in considering sufficiency of notice of claims against governmental entities), lv den'd 489 Mich 970 (June 28, 2011); *Jakupovic v City of Hamtramck*, 489 Mich 939 (June 1, 2011) (summarily reversing Court of Appeals decision which relied on "prejudice" analysis rejected by *Rowland*). See also *Pollard v SMART*, Unpublished Opinion of the Michigan Court of Appeals, dated December 14, 2009 (Docket No. 288851), slip op at 2-3, lv den'd at 489 Mich 854 (March 18, 2011). Remarkably, the subsequent histories of these cases reveal that reconsideration of whether and to what extent prejudice should factor into the analysis of compliance with statutory notice provisions has been rejected by the Michigan Supreme Court.
3. 398 Mich 90, 96 (1976).
4. 452 Mich 354, 356-57 (1996).
5. The "public building" and "highway" exception to governmental immunity require notice of an injury or occurrence to be served upon the governmental entity with 120 days. See MCL 691.1406 and MCL 691.1404(1), respectively. A similar provision exists in the Metropolitan Transportation Authorities Act (the MTAA), see MCL 124.419 (a claimant must serve written notice of a claim upon a transportation authority (a governmental entity as defined in MCL 691.1401)) within 60 days of the occurrence giving rise to the claim).
6. See *Rowland*, *supra* at 210-14, citing *Ridgeway v Escanaba*, 154 Mich 68, 72-73 (1908) (notice provisions protect governmental entities from "unjust raids upon their treasuries by unscrupulous prosecution of trumped up, exaggerated, and stale claims"), and the consolidated cases of *Lisee v Secretary of State* and *Howell v Lazaruk*, 388 Mich 32 (1972) (notice provisions afford the governmental entity an opportunity to investigate claims, determine liability, create reserve funds, reduce uncertainty of future demands and force the claimant to an early choice regarding how to proceed).
7. See *Ridgeway*, *supra*.
8. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596-97 (1984). See also *Ballard v Ypsilanti Twp*, 457 Mich 564, 567-69 and 573-76 (1998) (explaining the common-law history of sovereign immunity, the Legislature's exceptions, and the fact that under the jurisdictional notion of governmental immunity it must be expressly waived by statute).
9. See, e.g., MICH CONST 1963, Art 6, § 13.
10. MCL 600.601 and MCL 600.605
11. *People ex rel Ayres v Bd of State Auditors*, 42 Mich 422, 427 (1880) (CAMPBELL, J.), citing *Michigan State Bank v Hastings*, 1 Doug 225, 236 (1844).
12. *Pohutski v City of Allen Park*, 465 Mich 675, 681 (2002). See also *Detroit v Rabaut*, 389 Mich 329, 331 (1973) and *Sanilac County v Auditor General*, 68 Mich 659, 665 (1888) (stating that "[t]he state is not liable to suit except as it authorizes a suit, and this authority can be revoked at pleasure. This is such an elementary doctrine that it only needs statement.").
13. *Bowie v Arder*, 441 Mich 23, 39 (1992), citing *Joy v Two-Bit Corp*, 287 Mich 244, 253-54 (1938) ("jurisdiction over subject matter is the right of the court to exercise judicial power over that class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending").
14. *Travelers v Detroit Edison*, 465 Mich 185, 204 (2001), citing *Bowie*, *supra* at 39.
15. *Mack v City of Detroit*, 467 Mich 186, 197-203 (2002) (reaffirming the inherent jurisdictional nature of governmental immunity and holding that such immunity cannot be *waived* by a governmental entity). See also *Ross*, *supra* at 596-607 and *Ballard*, *supra* at 567-69 and 573-76.
16. *Henderson v United States* 517 US 654, 672-73 (1996) (Scalia, J., concurring).
17. *Id*.
18. "[C]ourts may not fashion or manufacture ways or words to get around [governmental immunity legislation] without offense to that exalted principle of constitutional law which separates the judicial power from the legislative power." *Trbovich v City of Detroit*, 378 Mich 79, 85 (1966).
19. Courts are obligated, always, to question their own jurisdiction to preside over a dispute. *Maxwell v Dep't of Envt'l Quality*, 264 Mich App 567, 574 (2004).
20. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 399 (2002), citing *Straus*, *supra* at 532 and *Fox*, *supra* at 243 (once a court determines that it has no jurisdiction over the claim, it should proceed only to dismiss the action). See also *In re Fraser's Estate*, 288 Mich 392, 394 (1939) (citing authorities).
21. See *Greenfield Constr Co v Mich Dep't of State Hwys*, 402 Mich 172, 193, 194 (1978), accord *Pohutski*, *supra* at 688. See also *Ross*, *supra* at 596-97 and *Ballard*, *supra* at 567-69 and 573-76.
22. *Hastings*, *supra* at 236 (stating that while the "state may sue, it cannot be sued in its own courts, unless, indeed it consents to submit itself to their jurisdiction" and that "an act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary").
23. See e.g., *Manion v State of Michigan*, 303 Mich 1, 19-20 (1942) (citing the Court of Claims Act, No. 135, PA 1939, Michigan Stat Ann § 27.3548(1-24) and *United States v Sherwood*, 312 US 584 (1941) and stating that "[t]he terms of the State's consent to be sued in any court *define that court's jurisdiction to entertain the suit*.") (emphasis added).
24. *Williams v City of Detroit*, 364 Mich 231, 250, 278 (1961), but see *Ross*, *supra* at 603-04 (explaining that the abolition of immunity only really occurred for municipalities and then only by a 4-4 hopelessly split opinion and that the state's sovereign immunity was in fact reaffirmed and later adopted by a majority of the Court in *McDowell v State Highway Comm'n*, 365 Mich 268, 270-71 (1961). See also *Myers v Genesee County Auditor*, 375 Mich 1 (1965) and *Keenan v County of Midland*, 377 Mich 57 (1966) (abolishing the common-law of governmental immunity for counties, townships and villages).
25. This article does not intend to explore the historical evolution of governmental immunity in Michigan, but it is appropriate to point to Justice Riley's observation in *Reardon v Dep't of Mental Health*, 430 Mich 398, 411 (1988) that "prior to *Ross*, [*supra*,] the law regarding governmental immunity may only be described as chaos, with a number of definitions at different times gaining various degrees of acceptance." Suffice it to say that the GTLA intended to bestow uniform immunity upon all governmental entities and individual governmental employees save for the statutory exceptions therein.
26. "Michigan courts have also recognized that immunity from suit can only be waived by an act of the Legislature, or through a constitutional provision". *County Rd Ass'n*, *supra* at 119, citing *Ballard*, *supra* at 568 and *Durant v Michigan*, 465 Mich 175, 205 n 31 (1997).
27. *Maxwell*, *supra* at 574, citing *Phinney v Perlmutter*, 222 Mich App 513, 521 (1997) and *Straus*, *supra*. See also *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev*

Authority, 468 Mich 763, 776 (YOUNG, J., concurring) ("lack of subject-matter jurisdiction is a challenge that can be brought at *any* time, even *after* a case is concluded") (emphasis in original).

28. *Nawrocki v Macomb Co Rd Comm'n,* 463 Mich 143, 181 (2000) (the strongest justification exists for adherence to constitutional provisions and statutes), accord *Robinson v City of Detroit*, 462 Mich 439, 463-68 (2000).
29. *Warda v Flushing City Council*, 472 Mich 326, 330 (2005).
30. Mich Const 1963, Art 6, § 13 (emphasis added).
31. See *Champion v Secretary of State*, 281 Mich App 307, 313 (2008), citing *Cheeseman v American Multi-Cinema, Inc*, 108 Mich App 428, 433, 441 (1981) (the term "law" in a statute or constitutional provision refers to "the entire body of law including but not limited to the constitution, the statutes, administrative rules and regulations, and the common law as embodied in decisions and judgments of courts."). See also *American Youth Foundation v Benona Twp*, 8 Mich App 521, 529 (1967) (the phrase "by law" in constitutional provisions references existing statutory and common law and the framers are presumed to have knowledge of this existing law and act in accordance therewith), citing *Hall v Ira Twp*, 348 Mich 402, 407 (1957).
32. MCL 600.601.
33. MCL 600.605.
34. *Greenfield Constr Co*, *supra* at 193-97. See also *Manion*, *supra* at 19 (any relinquishment of the sovereign's immunity from suit must be strictly interpreted).
35. Michigan has "as we have always, a state Constitution, the fundamental law. By it, now as formerly, the legislative power of the state, and all of it, is reposed for exercise in a Legislature, save only as reserved by referendum and initiative proceedings, which are not here involved." *Kalamazoo v Titus*, 208 Mich 252, 261-62 (1919), citing Cooley's Const. Lim. (7th ed), p. 163, wherein it was stated that "[w]here the sovereign power of the state has located the authority, there it must remain, and by constitutional agency alone the laws must be made until the Constitution itself is changed."
36. *Id*. at 194.
37. *Id*. at 193.
38. *Henderson*, *supra* at 672-73 (Scalia, J., concurring).
39. See note 2, *supra*.
40. See e.g., *Harris v Cochise Health Systems*, 160 P3d 223, 231 (Ariz. 2007) (compliance with notice of claim provision is mandatory and an essential prerequisite to an action against a public entity and failure to comply with the statute is not cured by actual notice or substantial compliance); *California Restaurant Management Systems v City of San Diego*, 195 Cal App 4th 1581, 1590-92 (Cal App 2011) (citing *Shirk v Vista Unified School Dist*, 164 P3d 630 (Cal 2007) and *City of San Jose v Superior Court*, 525 P2d 701 (Cal 1974) and holding that statutory notice of claim was necessary and condition precedent to right to bring suit, despite government entity's notice of prior, similar claim arising out of same circumstances and neither "substantial" nor "sufficient" compliance was adequate, nor was government entity's knowledge of the claim enough to invoke "waiver" or "estoppel" of governmental entity's right to deny claim); *City and County of Denver v Crandall,* 161 P2d 627, 632 (Colo 2007) (interpreting COLO REV STAT § 24-10-109(1) (2006) of the Colorado Governmental Immunity Act and stating that "[a]bsent compliance with the 180-day notice requirement, governmental immunity bars suit against the public entity because the trial court lacks subject-matter jurisdiction over the complaint seeking relief"); *Salgado v Comm'r of Transp*, 942 A2d 546, 549-50 (Conn App 2008) (failure to comply with statutory notice provision's time limits for notice of a defective highway claim was a jurisdictional bar to consideration of the suit); *Sylvester v Dep't of Transportation*, 555 SE2d 740, 741 (Ga App 2001) (compliance with statutory notice provision is a condition precedent to subject-matter jurisdiction over suit); *Allied Bail Bonds Inc v County of Kootenai,* ___ P3d ___; 2011 WL 2652475, ** 2-3 (Idaho 2011) (timely notice of claim against governmental entities under statute allowing suit against government "is a mandatory condition precedent to bringing suit, the failure of which is fatal to a claim, no matter how legitimate" and trial court correctly dismissed claim for lack of subject-matter jurisdiction because plaintiff failed to provide timely notice) (emphasis added); *Brown v Alexander*, 876 NE2d 376, 380 (Ind App 2007) (notice provision in statute allowing suits against the government "operates as an unequivocal statement of Indiana's consent to be sued in tort provided certain qualifications – including notice – are fulfilled"); *Dodge City Implement Inc v Bd of Comm'rs, County of Barber,* 205 P3d 1265, 1281 (Kan 2009) (filing of proper notice of claim against governmental entity is a prerequisite to the filing of an action in court and "if the statutory notice requirement is not met, the court cannot obtain jurisdiction over the municipality"), accord *Myers v Bd of County Comm'rs of Jackson County*, 127 P3d 319, 325 (Kan. 2006) (failure to provide statutory notice required to bring suit against governmental entities is jurisdictional; "if the statutory requirements are not met, the court cannot acquire jurisdiction over the municipality"); *Hanson v City of Laurel*, ___ A3d ___, ___; 2011 WL 2731920, * 4-5 (Md 2011) (since the Legislature can withhold the right to sue governmental entities compliance with notice provision in statute was a condition precedent to the right to bring suit); *James v Southeastern Pennsylvania Transportation Authority*, 477 A2d 1302, 1304-1305 (Pa 1984) (provision of the Metropolitan Transportation Authorities Act requiring notice to transportation authority within six months of the injury or accrual of a cause of action was a legislative choice expressing a condition precedent to the sovereign's consent to be sued); *Prout v City of Providence, Rhode Island*, 996 A2d 1139, 1142 (RI 2010) (explaining that compliance with statutory notice requirements to bring claim against government is a condition precedent to maintaining suit, the condition cannot be waived, and that the legislature may condition access to the courts upon the provision of written notice of a claim against governmental entities); *University of Texas Health Science Center at San Antonio v Stevens*, 330 SW3d 335 (Tex App 2010) (citing *Dallas Area Rapid Transit Authority v Whitley*, 104 SW3d 540, 542 (Tex 2003) and TX GOV'T CODE ANN, § 311.034 (Vernon 2005), which provides: "Statutory prerequisites to a suit, including the provision of notice, are *jurisdictional requirements* in all suits against a governmental entity"); *Suazo v Salt Lake City Corp*, 168 P3d 340 (Utah 2007); *Greene v Utah Transit Authority,* 37 P3d 1156, 1159 (Utah 2001) (stating that "[c]ompliance with the Immunity Act is necessary to confer subject-matter jurisdiction upon a trial court to hear claims against governmental entities"; "[j]urisdictional questions are threshold questions and must be addressed before a trial court can consider other arguments"; "failure to comply with the Immunity Act requires a trial court to dismiss a complaint"; and holding that a bus passenger's failure to strictly comply with the statutory notice provision of Utah's governmental immunity act deprived the trial court of jurisdiction to hear her claims in a suit to recover injuries she sustained while boarding a bus); *Motto v CSX Transp Inc,* 647 SE2d 848, 854-55 (W Va 2007) (discussing authorities in multiple jurisdictions and courts and concluding that mandatory notice provisions in statutes waiving the governmental immunity exist for the express purpose of protecting the public's interest and are jurisdictional in nature in light of principles of sovereign immunity); *Bell v Schell*, 101 P3d 465, 475 (Wyo. 2004) (notice provision in governmental tort liability act is a non-claim statute, provides broader defense to governmental entities than statute of limitations, and "presentment of a notice of a claim is a condition precedent to suit, is jurisdictional and cannot be waived").
41. *Trbovich*, *supra* at 85.
42. The judiciary must conduct the utmost introspection where the issue raised has constitutional implications regarding the legitimate scope of its own power. *Warda*, *supra* at 330.
43. *Greenfield Constr Co*, *supra* at 193, 194.

E-Discovery Update

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Executive Summary

E-discovery law continues to develop and evolve, driven in part by changes in the information available. Social media websites such as Facebook, Twitter, and LinkedIn have become more popular and serve as significant repositories of information, such that courts are beginning to confront several issues related to this new form of evidence.

The duty to preserve information extends to information that is under a party's "possession, custody, or control." Courts are continuously refining the definition of "control" and there is often a duty to seek and preserve information held by other entities. To avoid the risk of spoliation sanctions, counsel should ensure that information is preserved at the first sign of potential litigation.

Authentication of social media postings can be a challenge because of the possibility of manipulation or alteration by someone other than the subject of the posting, but there are several methods of authentication at counsel's disposal.

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This article focuses on recent developments in e-discovery law, including recent state and federal court decisions from Michigan and across the country. While there have been relatively few Michigan court decisions discussing e-discovery issues in 2011, a number of decisions from other jurisdictions may have far-reaching implications and Michigan courts will likely look to them for guidance in addressing complex e-discovery issues going forward.[1]

Several new e-discovery trends have emerged in the last year. First, the ever-increasing popularity of websites such as Facebook, Twitter, and LinkedIn, and the potential goldmines of relevant information they contain, have encouraged litigants to attempt to discover and ultimately admit into evidence social media content created by opposing parties and witnesses. Courts are beginning to wrestle with the issues inherent in discovering and admitting this relatively new form of evidence, and court decisions are beginning to frame the contours of social media e-discovery. Second, recent opinions have further addressed when the duty to preserve potentially relevant documents begins. Third, there have been several decisions addressing the issuance of written litigation hold notices, including Judge Scheindlin's decision in *Pension Committee of the University of Montreal Pension Plan v Banc of America Securities, LLC*, as well as a number of decisions disagreeing with Judge Scheindlin's approach. Lastly, there have been important decisions regarding the imposition of sanctions for e-discovery abuses and errors.

Social Media: Discovery, Authentication, and Admissibility

The proliferation of social media has created an important new category of electronically stored information that can be sought in discovery, and litigants are increasingly requesting production from these sources. Social media content raises several important issues in the context of discovery.

One issue is whether a company in litigation may have an obligation to preserve, collect, review, and produce personal social media content created by its employees. If a company has such an obligation, the scope and cost of e-discovery could increase dramatically. While courts have not yet addressed this specific issue, a brief review of e-discovery decisions to date is instructive as to how courts in Michigan and elsewhere may rule.

In the seminal electronic discovery case *Zubulake v UBS Warburg LLC*, the federal district court in New York stated that a party to litigation "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action. . . ."[2] This duty to preserve evidence, including electronically stored information, "extends to those employees likely to have relevant information – the 'key players' in the case."[3]

The ever-increasing popularity of websites such as Facebook, Twitter, and LinkedIn, and the potential goldmines of relevant information they contain, have encouraged litigants to attempt to discover and ultimately admit into evidence social media content created by opposing parties and witnesses.

Thus, if employee-generated social media content is potentially relevant to a dispute, it may be within the scope of the company's preservation obligations.

Nevertheless, in general, only relevant, nonprivileged documents that are within the possession, custody, and control of the responding party must be preserved and produced. Courts have consistently held that materials are within a party's control if the party has a legal right or practical ability to obtain them.[4] While this might appear to limit a party's ability to seek social media content created by an opposing party's employee, in practice this data may often be discoverable. For example, any temporary internet files, cached web pages, logged internet activity, or other data related to an employee's social media use that is contained on a company's storage media is likely discoverable by an opposing party, as the storage media is clearly within the company's possession, custody, and control. Furthermore, "[i]f a company's IT policy states that the business owns everything created, stored, sent or received on company equipment . . . then a court might find that the company arguably owns – and therefore controls – any social media created by an employee at work or on a company computer."[5]

Additionally, some courts have construed the definition of control even more broadly. In *Flagg v City of Detroit*, for example, the court observed that "[a] party responding to a Rule 34 production request cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek information reasonably available to him from his *employees, agents, or others subject to his control*."[6] This language suggests that even where social media content itself may not be within the control of the company, the fact that the *employee* is within the company's control may be a sufficient basis for seeking discovery of that employee's social media. It is possible that in the future a court will rely on cases such as *Flagg* and *Gray* to hold that a company has a duty to preserve and ultimately produce relevant social media content created by an employee.

Even if social media content is discoverable, a related issue is whether a party is able to authenticate it for purposes of admitting it into evidence. This issue was raised in *People v Mills, III*, a Michigan case in which the defendant, convicted of second-degree murder, challenged the trial court's exclusion of photographs from the victim's MySpace page depicting the victim with a variety of weapons.[7] The defendant attempted to introduce the photographs to prove both the victim's character for aggression and to establish the defendant's reasonable apprehension of harm.[8] The Court of Appeals discussed the difficulty inherent in authenticating photographs from a social media website, noting that the defendant "does not know who took the photographs . . . does not know who posted the photographs . . . [and] has no way of knowing if the photos were altered in any way."[9] Additionally, defendant could not demonstrate that the weapons in the photograph were real.[10] Ultimately, the court held that the exclusion of the MySpace photographs was proper.[11]

If employee-generated social media content is potentially relevant to a dispute, it may be within the scope of the company's preservation obligations.

Any temporary internet files, cached web pages, logged internet activity, or other data related to an employee's social media use that is contained on a company's storage media is likely discoverable by an opposing party.

While social media content uncovered in the e-discovery process could prove vital in litigation, attorneys must take the appropriate steps to address the authentication issues raised in *Mills*. In *Griffin v Maryland*, the court observed the relative ease with which a person could create a social media profile and create the false impression that it pertained to someone else.[12] The court discussed several ways in which a party could authenticate social media postings, such as having the creator of the account testify regarding his or her postings, conducting a search of the alleged creator's personal computer for evidence of social media activity, and seeking information about the social media content directly from the website on which it was published.[13] By taking affirmative steps early in litigation to authenticate relevant social media content, attorneys can avoid the frustration of having the "smoking gun" MySpace photograph or Facebook post excluded at trial.

Triggering the Duty to Preserve

Courts have held that the duty to preserve evidence arises "when a party reasonably should know that the evidence may be relevant to anticipated litigation."[14] While this appears to be a relatively straightforward rule, courts continue to wrestle with the concept of precisely when litigation is "reasonably anticipated."

One 2011 case that addressed this issue is *Hynix Semiconductor, Inc v Rambus, Inc*, in which the Court of Appeals for the Federal Circuit reversed the district court's holding that litigation did not become reasonably foreseeable until after Rambus had engaged in two "shred days" during which critical and potentially damaging documents were destroyed.[15] The district court had determined that litigation was not reasonably foreseeable before that point because "the path to litigation was neither clear nor immediate" and there were still "several contingencies [that] had to occur before Rambus would engage in litigation."[16] The court of appeals, however, held that the district court's interpretation of reasonable foreseeability was too narrow, and that it was legal error to require litigation to be immediate and certain in order for it to be reasonably foreseeable.[17] Justifying its conclusion, the court observed that "[i]t would be inequitable to allow a party to destroy documents it expects will be relevant in an expected future litigation, solely because contingencies exist," and where the party expects the contingencies would be resolved.[18] E-discovery law relating to preservation continues to evolve, and the onus is on parties and their counsel to ensure that all potentially relevant documents are preserved at the first sign of potential litigation in order to avoid spoliation sanctions.

Litigation Hold Notices

Related to the topic of the duty to preserve evidence is the issuance of a litigation hold notice, and the potential for sanctions if a litigation hold is not properly implemented. In *Pension Committee of University of Montreal Pension Plan v Banc of America Securities*,[19] Judge Scheindlin, author of the seminal *Zubulake* decision, evaluated the sufficiency of an oral, rather than written, litigation hold notice. The court first discussed a party's behavior in discovery as falling on a continuum from acceptable to unacceptable, with various degrees of culpability for unacceptable conduct: negligence, gross negligence, and willfulness.[20] The court then held that failing to issue a *written* litigation hold notice was *per se* grossly negligent conduct, describing it as a "failure to exercise even that care which a careless person would use."[21] Ultimately, Judge Scheindlin held that the defendants in *Pension Committee* were entitled to an adverse inference instruction based largely on the plaintiffs' failure to issue a litigation hold notice in writing.

In any case involving extensive e-discovery, it is critical for a party and its counsel to document each stage of the process and perhaps the rationale for each decision made. By doing so, a record exists to show the court that the party's e-discovery strategy is defensible. For this reason, it is almost always better to issue a written litigation hold notice than to orally instruct a party to preserve evidence. However, some other courts that have recently addressed the issue of the propriety of an oral litigation hold notice have disagreed with Judge Scheindlin's conclusion that failure to provide a written notice is *per se* grossly negligent. These courts have emphasized the importance of evaluating discovery conduct on a case by case basis.

In *Orbit One Communications, Inc v Numerex Corp*, for example, the court observed that in a case involving a small business, "issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be."[22] The *Orbit One* court went so far as to say that in some cases, a "formal litigation hold may not be necessary at all."[23] Nevertheless, given that recent decisions have come down on both sides of the issue, the best practice in e-discovery is to issue a litigation hold notice in writing to a party and its key document custodians and thus avoid any appearance of impropriety in managing the preservation of potentially relevant documents.

> Even if social media content is discoverable, a related issue is whether a party is able to authenticate it for purposes of admitting it into evidence.

> By taking affirmative steps early in litigation to authenticate relevant social media content, attorneys can avoid the frustration of having the "smoking gun" MySpace photograph or Facebook post excluded at trial.

Sanctions for Discovery Violations

Abuses and mistakes in the e-discovery process can lead to sanctions, including monetary sanctions,[24] adverse inference instructions,[25] and in some cases orders of default or dismissal.[26] The power of Michigan courts to impose sanctions for errors and abuses in the discovery process derives from two sources: the Michigan Court Rules and the court's inherent authority. MCR 2.313 grants courts the power to impose a variety of

sanctions, including dismissal of a party's claim, for failing to provide or permit discovery. Additionally, Michigan case law recognizes "a court's authority to sanction litigant misconduct, even when there is no statute or court rule addressing the particular form of misconduct, based on a court's fundamental interest in protecting its integrity and that of the judicial system."[27] Michigan courts are free to invoke either of these bases in order to sanction a party for a variety of discovery infractions.

While none of the Michigan state or federal court decisions involving e-discovery sanctions in 2011 has been particularly noteworthy, decisions from other jurisdictions reveal that courts are becoming more creative in fashioning remedies for a party's e-discovery shortcomings. In *Green v Blitz*, for example, the court went so far as to re-open a closed case in order to punish the defendant for discovery violations.[28] In addition to monetary sanctions, the court in *Green* ordered the defendant to supply each plaintiff that had filed suit against it in the previous two years with a copy of the sanctions order, and to attach the same order to its first pleading in any future litigation for the next five years.[29]

While the defendant's history of failing to preserve evidence and provide discovery in multiple related cases clearly justified the severe, if unorthodox, sanctions provided for in *Green*, other cases are not so clear-cut, and courts often grapple with the question of what level of culpability is required to impose various sanctions. Many courts use a party's willfulness or bad faith in perpetrating discovery violations as the justification for severe sanctions, such as entry of a default judgment.[30] In Michigan state court, however, the issue is less clear. In *Lagalo v Allied Corp*, the Michigan Court of Appeals held that proof of "intentional fraudulent conduct and intentional destruction of evidence" was necessary to impose an adverse *presumption* sanction, but that no such proof was required to instruct the jury to draw an adverse *inference*.[31] In *Bloemendaal v Town & Country Sports Center, Inc*, however, the court held that plaintiffs' failure to preserve critical data so severely prejudiced the defendant that dismissal of their claims was proper, even in the absence of bad faith and where plaintiffs' conduct was merely negligent. The takeaway is that the facts and circumstances of a case will often determine the severity of the sanction imposed, and Michigan courts may give the prejudice caused by the offending party's abuse or mistake as much weight as that party's culpability. Even in 2011, the question of what conduct merits which sanction remains an unsettled question.

> The court then held that failing to issue a written litigation hold notice was per se grossly negligent conduct, describing it as a "failure to exercise even that care which a careless person would use."

Conclusion

The e-discovery landscape is in a constant state of flux. New court decisions tackling e-discovery issues may soon number in the hundreds each year, and many of these cases involve issues of first impression brought on by recent technological developments. Now more than ever, it is imperative that litigation counsel be well-versed in the nuances of e-discovery. When in doubt, consulting with attorneys who have expertise in the increasingly complex world of e-discovery could be the difference between a favorable result or draconian sanctions.

Endnotes

1. *See, e.g., Brenner v Marathon Oil Co*, 222 Mich App 128, 133; 565 NW2d 1 (1997) ("[I]n the absence of available Michigan precedents, we turn to federal cases construing the similar federal rule for guidance."); *White v Taylor Distrib Co*, 275 Mich App 615, 628 n7; 739 NW2d 132 (2007) (Michigan courts "do[] not lightly adopt a position at odds with the federal rules, after which our rules are patterned").
2. 220 FRD 212, 217 (SDNY 2003) (quoting *Turner v Hudson Transit Lines, Inc*, 142 FRD 68, 72 (SDNY 1991)); *accord Holt v Northwestern Mut Life Ins Co*, No 1:04-CV-280, 2005 WL 3262420, at *4 (WD Mich Nov 30, 2005); *see also* MCR 2.302(B)(1).
3. *Id.* at 218.
4. *Flagg v City of Detroit*, 252 FRD 346, 353 (ED Mich 2008); *Goodman v Praxair Servs, Inc*, 632 F Supp 2d 494, 515 (D Md 2009).
5. Peter S. Kozinets & Aaron J. Lockwood, *Discovery in the Age of Facebook*, Arizona Attorney, July/August 2011, at 47, *available at* http://www.azattorneymag-digital.com/azattorneymag/20110708/#pg45 (last visited September 1, 2011).
6. 252 FRD at 353 (quoting *Gray v Faulkner*, 148 FRD 220, 223 (ND Ind 1992)) (emphasis added).
7. No 293378, 2011 WL 1086559, at *12 (Mich App Mar 24, 2011).
8. *Id.* at 13.
9. *Id.*
10. *Id.*
11. *Id.*
12. 419 Md 343, 358 (2011).
13. *Id.* at 427-28.
14. *Silvestri v General Motors Corp*, 271 F3d 583, 591 (4th Cir 2001) (citing *Kronish v United States*, 150 F3d 112, 126 (2d Cir 1998)).
15. 645 F3d 1336, 1346 (Fed Cir 2011).
16. *Id.* at 1345 (internal quotations and citations omitted).
17. *Id.* at 1346.
18. *Id.*
19. 685 F Supp 2d 456 (SDNY 2010).
20. *Id.* at 464.
21. *Id.*
22. 271 FRD 429, 441 (SDNY 2010).
23. *Id. See also, Centrifugal Force, Inc v Softnet Commc'n, Inc*, ___ F Supp 2d ___, 2011 WL 1792047, at *4 (SDNY 2011) ("There has been no showing that this oral [litigation hold] instruction was incomplete or was inferior to a written instruction for the purpose of informing . . . employees regarding the requirement that evidence be preserved.").
24. *Nartron Corp v General Motors Corp*, No 245942, 2005 WL 26991 (Mich App Jan 6, 2005).
25. *Lagalo v Allied Corp*, 233 Mich App 514; 592 NW2d 786 (1999).
26. *Nartron v General Motors Corp*, No 232085, 2003 WL 1985261 (Mich App Apr 29, 2003).
27. *Brenner v Kolk*, 226 Mich App 149; 573 NW2d 65 (1997).
28. No 2:07-CV-372 (TJW), 2011 WL806011, at *1 (ED Tex Mar 1, 2011).
29. *Id.*
30. *See, e.g., Grange Mut Cas Co v Mack*, 270 Fed Appx 372 (6th Cir 2008).
31. 233 Mich App 514, 520-21; 592 NW2d 786 (1999).

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Every section has a ***discussion list*** *so that the members can discuss issues that they have in common. See the email address below each section's name to contact all the members in that area of practice. The discussion list can help facilitate discussion among section members and has the potential to become a great resource for you in your practice.*

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Young Lawyers Section

V. Motions In Limine And Preparing For Trial

By: Scott S. Holmes, *Foley & Mansfield, P.L.L.P.*
Chairperson of the Young Lawyers Section

This article is the fifth installment in our series providing an introduction to the basics of litigation from a defense perspective. In the first article, we discussed pleading and responding to a cause of action. In the second article, we offered tips and tricks for raising cross claims, third party claims, and pursuing indemnity. In the third article, we addressed seeking discovery and responding to discovery related issues. The last article focused on dispositive motions. This article will outline the basic information you need to know to prepare for trial.

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I once heard that all trial lawyers dream of being actors. It makes sense when you consider the true talent it takes to present a persuasive case in a courtroom. However, given that less than 5% of cases are tried today, if we really do dream of the stage and screen, nearly all of us fall into that category of "starving" actors and actresses. The simple reality is, very few cases end up in trial.

This leads to a "catch 22" where a young attorney needs experience to become talented at trial, but when that rare opportunity comes along at a law firm, it is much too precious and critical to trust any significant courtroom responsibility to an inexperienced associate. This is why the young associate's best opportunity for showing his or her promise for trial success is to prove he or she understands and is competent in preparing the case for trial. Whether you are preparing as the lead attorney at trial, the second or third chair, or the lowly associate (confined to your office) who will be on call for research and reference throughout the trial, this article will examine the essential steps necessary to prepare a case for trial.

The File

If you are beginning preparation for trial, you undoubtedly know your case inside and out from the months and sometimes years it takes to end up at trial…or do you? Now is the time to review the entire file for the facts and evidence you may have forgotten. Evaluate the importance of the contents of the file and create one concentrated trial folder that excludes all the unnecessary documents and materials. This will save you time and frustration as you are surrounded by only the documents you need for trial.

Witnesses

Examine your witness list and that of your opponent (now is also the time to decide if there are any additional witnesses who you believe may end up on the stand). Then, prepare a folder which contains only the documents you will discuss with each witness or introduce into evidence through them.

Outline your rough order of when you will call each witness and begin preparing your examinations. Re-read deposition transcripts and reports and make clear, memorable notations of key information. Creating a master evidence list is extremely helpful in keeping track of each piece of evidence and what information within it is important.

Pay careful attention to any conceivable objection that may be raised in your examinations. There is no excuse for poorly worded questions that do not comply

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with the rules of evidence or being unprepared for foreseeable objections. There are only two times to address potential objections and evidentiary issues: 1) in your office, or 2) in the courtroom. Take the time now to consider potential objections and craft your questions and evidentiary arguments accordingly. It will not guarantee a ruling in your favor, but it will guarantee that your best argument is considered and, if necessary, preserved for appeal.

Preparing Witnesses

"Prepping" your witness is obviously an essential component of success at trial. However, it is also an important part of the attorney-client relationship. Prepping keeps your witness informed and puts him or her at ease before their testimony at trial. Let your witness know exactly what to do and expect by telling her all the seemingly "minor" details such as what to wear, what the courtroom will look like, how many people will be there, how much time it should take, and the likely demeanor or personalities of opposing counsel and the judge. When you are dealing with a witness, particularly one who has never participated in a trial before, no detail is too insignificant to discuss. Proper preparation puts your witness at ease, which will likely lead to successful trial testimony (and an extremely grateful witness!).

Motions in Limine

If trial is the main event, consider your motions in limine as the undercard. The rulings made on motions in limine can set the tone for the big fight and can be just as important. A motion in limine is a motion made prior to trial ("in limine" is Latin for "on the threshold") which determines the scope of the trial based on the admissibility of evidence. These motions are filed to prevent certain inadmissible evidence from even being mentioned in trial. The purpose for this type of motion is because this evidence is so highly prejudicial or inflammatory that no limiting instruction from the court can effectively remedy the jury's exposure to the evidence.

When preparing for trial, pay attention to whether the court sets a deadline for motions in limine. In reviewing the file, consider whether there is any information detrimental to your case that might be appropriate for filing a motion in limine. Even if you decide not to file or you lose the motion, you will be much better prepared for addressing it at trial.

Jury Selection

Choosing a jury begins before the morning of trial. All courts maintain jury questionnaires for the pool that your jury will be chosen from. These questionnaires are available for review prior to trial, sometimes weeks in advance, other times only on the day of trial. Make sure you obtain the jury questionnaires as early as possible so that you can begin to evaluate each person as a potential juror and develop bases for challenges for cause.

There is no excuse for poorly worded questions that do not comply with the rules of evidence or being unprepared for foreseeable objections.

In reviewing the file, consider whether there is any information detrimental to your case that might be appropriate for filing a motion in limine.

If time permits, the jury questionnaires should be used to create a brief profile of each potential juror. Based on the profiles, a list of favored and disfavored persons can be created to aid the trial attorney in selecting the jurors most beneficial to the client's position. Make sure to craft voir dire questions appropriately so that your case theory is recognizable based on your questions.

Consider a breach of contract case based on an oral agreement. Many attorneys become so focused on questioning potential jurors about the breach that they fail to consider jurors' pre-conceived notions of what a contract even is. Start with the basics by asking questions such as, "is there anyone here who believes that you cannot enforce a contract or agreement if it has not been written on a piece of paper?" The responses you hear may surprise you. In doing this, you are beginning to lay the foundation for your client's case minutes, hours, days, or sometimes even longer in advance of your opening statement.

Exhibits

One of the easiest and most beneficial methods of exhibit management in preparation for trial is to address the admissibility of important and controversial exhibits prior to trial in the form of a motion in limine. Aside from saving the trouble and distraction of dealing with the admissibility of an exhibit at trial, this method ensures that there will be no surprises at trial which may severely

One of the easiest and most beneficial methods of exhibit management in preparation for trial is to address the admissibility of important and controversial exhibits prior to trial in the form of a motion in limine.

impact the likelihood of success. If a key exhibit is ruled inadmissible prior to trial, your settlement or trial strategy may change dramatically. It is far better to deal with this at a time when you are still in a position to negotiate settlement.

A smooth flow is essential to an understandable, effective, and persuasive presentation. The simplest way (at least in theory) to maintain a flowing presentation in your case in chief is to utilize your exhibits properly. As mentioned earlier, the admissibility of many important and contested exhibits can and should be addressed prior to trial in a motion in limine. However, once at trial, your preparation and organization of each and every exhibit is crucial.

Copies: Make enough copies of each exhibit for the court, opposing counsel, the witness, and the jury.

Organize: Whether it is electronic or on paper, maintain a master list which includes the exhibit number, description, and the witness it will be admitted through – and keep it handy during trial. When creating this list, it is also a good time to evaluate and note any potential objections to the admissibility of each exhibit.

Substance: Verify that there are no marks on the exhibit that are not a part of its original form. In the preparation for trial, it is easy to end up with exhibits which have been highlighted or written on. Showing the witness or jury these marked documents is obviously improper and should be objected to. Finally, pay attention to two sided copies and make sure these exhibits are properly prepared.

Jury Instructions ("The Missing Link")

One of the most important and overlooked parts of trial preparation is the use of the Michigan Standard Civil Jury Instructions. Regardless of how knowledgeable or experienced you are with a particular cause of action, the jury instructions are what link the law to the jury. Knowing these instructions is your key to eliciting the information you need from each witness. Also, when preparing your closing argument, point out the few instructions that are the most important to winning your case. Read them to the jury and explain how the evidence presented during trial leaves the jury with only one reasonable verdict (your's naturally!). An attorney's application of the facts and evidence to each instruction is what the jury will remember in the jury room.

Bingham Farms attorney Howard Wallach emphasizes also giving careful consideration to *non-standard* instructions which are supported by case law. Wallach explains, "this helps frame questions, remind you of the burden of proof and elements of various claims, as well as focus on the documentary evidence you may have in your file to help prove a particular point."

Regardless of how knowledgeable or experienced you are with a particular cause of action, the jury instructions are what link the law to the jury. Knowing these instructions is your key to eliciting the information you need from each witness.

The Michigan Standard Civil Jury Instructions can be found online at http://courts.mi.gov/mcji/MCJI.htm. These instructions also frequently include case law or comments interpreting the instruction. However, remember to check for any revisions or updates to these instructions as this website may not always contain the newest changes.

The most important part of preparing for trial is to be organized. The advice offered in this article begins with a strong foundation of understanding the information available for your case and being able to effectively make use of it. So, grab your files and get to work!

Stay tuned for our next installment in this series where we will offer tips and strategies for trial advocacy.

The author would like to acknowledge and thank Howard Wallach for his advice, experience, and extensive assistance in the creation of this article.

By: Geoffrey M. Brown
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Medical Malpractice Report

Geoffrey M. Brown is an associate in the appellate department at Collins, Einhorn, Farrell & Ulanoff, PC, in Southfield. His focus is primarily on the appellate defense of medical-malpractice claims, and he has substantial experience in defending appeals in legal-malpractice and other professional-liability claims. His email address is Geoffrey.Brown@ceflawyers.com.

Affidavits Of Merit And Statute Of Limitations

Ligons V Crittenton Hosp, **490 Mich 61; ___ Nw2d ___ (2011).**

The Facts: The plaintiff brought a medical-malpractice action against a hospital, an emergency physician, and his professional corporation arising out of the death of his decedent. The plaintiff claimed that the death resulted from the physician's alleged failure to admit the decedent to the hospital or obtain appropriate consults. The decedent died January 29, 2002. The plaintiff was appointed personal representative on February 22, 2005—more than a year after the two-year statute of limitations expired. The plaintiff served a notice of intent (NOI) on June 8, 2005, and a supplemental NOI on October 21, 2005.

The plaintiff filed a complaint with two affidavits of merit on April 7, 2006, more than four years after the statute of limitations expired, but within two years of his appointment as personal representative. The defendants moved for summary disposition, asserting that the NOIs and affidavits of merit were defective. The trial court denied the motion, and the Court of Appeals initially denied leave to appeal before being ordered by the Supreme Court to consider the appeal as on leave granted. The Court of Appeals affirmed the trial court with respect to the NOIs, holding that they satisfied MCL 600.2912b, but reversed with respect to the affidavits.

The Court of Appeals majority held that the affidavits were deficient, and that under *Kirkaldy v Rim*, 478 Mich 581 (2007), dismissal was required. And since the complaint had been filed after the statute of limitations expired, dismissal with prejudice was required, even though the complaint had been filed within the two-year wrongful-death savings period provided under MCL 600.5852. The panel concluded that tolling only applied to complaints and affidavits filed within the statute of limitations, and not to those filed after the limitations period expired but within the saving period.

The ruling: In a decision authored by Justice Zahra and signed by Chief Justice Young and Justices Markman and Mary Beth Kelly, the Supreme Court affirmed the Court of Appeals. The Supreme Court ruled that the affidavits of merit were defective because they conclusorily stated that the standard of care was breached and that the alleged breach caused the decedent's death without explaining how, precisely, that was so. The Supreme Court also rejected the plaintiff's argument that retroactive amendment of the affidavits was permitted under MCR 2.118, MCL 600.2301, and *Bush v Shabahang*, 484 Mich 156 (2009). MCR 2.118 didn't apply, the Court explained, because and affidavit of merit isn't a "pleading" that can be amended under MCR 2.118 as it existed at the time the case was ending in the trial court. The Court also held that MCL 600.2301 and *Bush* don't apply because an affidavit of merit is an attachment to a complaint, and such an attachment is neither a "process" or a "proceeding" under MCL 600.2301. The Court also rejected the argument that because the statute of limitations expired long before plaintiff filed his complaint, there was no tolling available under MCL 600.5856(a) because that only applies to the statute of limitations, and not to the wrongful-death savings provision.

Justice Cavanagh filed a dissent, joined by Justice Marilyn Kelly, in which he opined that the plaintiff should have been permitted to amend his affidavit of merit under MCL 600.2301. Justice Hathaway dissented and opined that the affidavits in question were not defective, and that MCL 600.2301 should have permitted the plaintiff to correct any defects that did exist.

Practical impact: *Ligons* makes clear that a dismissal under *Kirkaldy* for a defective affidavit of merit **can** be with prejudice in cases where a plaintiff files his or her complaint after the statute of limitations expires but within MCL 600.5852's wrongful-death savings period. This is because the filing of an affidavit of merit and a complaint does not toll the savings period. Anecdotal evidence is that *Kirkaldy* all but ended defense challenges to the content of affidavits of merit. It is unclear whether such challenges would be fruitful given that MCR 2.112 and MCR 2.118 were amended to permit amendments to affidavits of merit and to require challenges to affidavits within 63 days of service. The Supreme Court explicitly did not consider the applicability of these amendments ("The substance of the amendments is not at issue here."), but instead simply refused the plaintiff's invitation to apply them retrospectively.

The Supreme Court also rejected the plaintiff's argument that retroactive amendment of the affidavits was permitted.

MCL 600.2912B NOTICE PERIOD AND STATUTE OF LIMITATIONS

Driver v Naini, 490 Mich 239; ___ NW2d ___ (2011).

The Facts: Plaintiff timely sued defendants Dr. Naini and his medical practice for malpractice arising out of the alleged failure to refer plaintiff for a colonoscopy or other action despite plaintiff's age, family history of colon cancer, and an abnormal result on a cancer-screening blood test. The plaintiff later learned he had Stage IV metastatic colon cancer. The defendants served the plaintiff with a notice of nonparty fault naming Dr. Naini's former medical practice, Cardiovascular Clinical Associates, P.C. (CCA) in January 2007. On February 1, 2007, the plaintiff sent an NOI to CCA and filed a motion to amend the complaint to add CCA as a defendant as permitted under the nonparty-fault statute, MCL 600.2957(2). The trial court granted the motion to amend, and the plaintiff filed the amended complaint on March 22, 2007, 49 days after sending the NOI. CCA moved for summary disposition, arguing that the statute of limitations had expired, and that the plaintiff hadn't waited the 91-day NOI notice period required under MCL 600.2912b(3) when adding new defendants to existing medical-malpractice lawsuits. The trial court denied the motion. The Court of Appeals granted leave to appeal and reversed the trial court, holding that CCA was entitled to summary disposition. The panel concluded that under *Burton v Reed City Hosp Corp*, 471 Mich 745 (2005), the premature filing of the complaint before the conclusion of the 91-day NOI waiting period meant that plaintiff had failed to commence an action against CCA that tolled the statute of limitations.

The Ruling: In a 4-3 decision, the Supreme Court affirmed the judgment of the Court of Appeals but employed different reasoning. The Court concluded that the Court of Appeals had used the wrong date of accrual for determining whether the statute of limitations had run. The Court explained that the date of accrual was in 2003 when Dr. Naini didn't screen the plaintiff for cancer after plaintiff's abnormal blood-test result. Since the plaintiff didn't discover this claim until his cancer diagnosis more than two years later in November 2005, the six-month discovery rule from MCL 600.5838a(2) applied instead, meaning that the plaintiff had until May 2006 to commence his claim against all of the defendants, including CCA. Since the plaintiff sent Dr. Naini and his practice an NOI in April 2006 and waited the appropriate notice period before suing them, the complaint against Dr. Naini and his practice was timely filed. But since that NOI didn't name CCA, the limitations period was not tolled as to CCA, and expired in May 2006. The Court rejected plaintiff's argument that *Bush* and MCL 600.2301 permitted him to amend his NOI to add CCA and have such an amendment relate back to when he originally sent it to Dr. Naini and his practice.

Citing *Burton*, the Court stressed that a plaintiff could not activate Notice of Intent tolling without complying with the notice-period provision of MCL 600.2912b, and the plaintiff had not sent CCA a timely NOI or complied with the NOI period as to CCA. Explaining that "[n]othing in *Bush* altered our holding in *Burton*," the Court concluded that permitting a plaintiff to amend his NOI and have it relate back (thus meaning that the original complaint would toll the statute of limitations) would "allow a claimant in a medical malpractice action to preserve claims against an infinite number of potential nonparty defendants by simply submitting an NOI to a single defendant."

The Court also rejected the argument that MCL 600.2957(2) preserved plaintiff's claim against CCA because it permits amending a complaint to add a party named in a notice of nonparty fault within 91 days of the nonparty-fault notice. The Court explained that the statute also provides that amendment is only permitted if the statute of limitations against the nonparty to be added hadn't expired when the original complaint was filed. Because the original complaint against Dr. Naini and his practice was filed in October 2006, and because the statute of limitations expired in May 2006, MCL 600.2957(2) didn't save plaintiff's claim against CCA.

Practical impact: Significantly, *Driver* confirms that the rule in *Burton* remains in full force despite the Court's decision in *Bush* ("Nothing in *Bush* altered our holding in *Burton*."). In reaching this conclusion, the majority stressed that "the *Bush* Court repeatedly emphasized that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b" which meant that "this aspect of *Bush* aligned with *Burton*'s holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations. This means that defense motions for summary disposition under *Burton* should no longer be susceptible to an argument that *Bush* excuses the premature filing. See, e.g., *Zwiers v Growney*, 286 Mich App 38 (2009) (holding that *Bush* excused a premature filing that would have otherwise been subject to dismissal with prejudice under *Burton*).

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MDTC Legislative Report

Vacation's Over

After a very busy June, the rest of the summer has been relatively quiet in Lansing. But now, two days after the Labor Day holiday, our Senate and House of Representatives are back in session, their members rejuvenated by a nice vacation, and the partisan bickering will soon resume at full volume. For today, the peace and quiet has been shattered by a large, colorful and boisterous gathering of the medical marijuana crowd on the lawn of the Capitol, across the street. Later this afternoon, we'll be treated to a visit from the Koran-burning Pastor. The quiet times in Lansing are finished for now, it seems.

In my last report at the beginning of June, I predicted that several important issues would be addressed before the fourth of July, and much of what was being discussed then is the law today.

Teacher Tenure. Over the strongly-voiced objections of the teachers' unions, the Legislature has enacted reforms of the teacher tenure system. 2011 PA Nos. 100-103.

Legislative Redistricting. Over the vigorous objections of the Democratic minority, the legislative redistricting for the coming decade has been finalized. 2011 PA Nos. 128-129.

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Compulsory Arbitration. The "Act 312" compulsory arbitration process for police and firefighters has been reformed by the provisions of 2011 PA 116.

Welfare reforms, establishing a new 48-month lifetime limit on welfare benefits, have been enacted. 2011 PA Nos. 131-132.

Employee Health Benefits. And as I write this, legislation limiting the amounts that public employers may contribute for employee health benefits – Enrolled Senate Bill 7 (Jansen - R) – is being sent to Governor Snyder for his anticipated approval.

As I've mentioned before, most of what has been accomplished to date in this new session has been done with little or no support from the minority party. This has generated a great deal of frustration and anger which has been manifested in the form of numerous recall petitions. A petition drive to recall Governor Snyder is underway (highly visible at today's medical marijuana rally), and efforts seeking to recall 43 legislators – 29 Republicans and 14 Democrats – have been initiated. Few of these efforts have met with any success, and at present, there is only one legislator – Representative Paul Scott **(R - Grand Blanc) –** who may be facing the prospect of a recall in November.

2011 Public Acts

Other new Public Acts of 2011 which may be of interest to civil litigators include:

Immunity for Pro Bono Dentists. 2011 PA 55 – HB 4389 (Stamas - R) This act has amended the Public Health Code, MCL 333.16185, to extend, to dentists, the immunity from liability currently provided under that section to physicians providing uncompensated medical care to medically indigent persons under a special volunteer license.

Releases for Non-Profits and Volunteers. 2011 PA 61 – HB 4231 (Walsh - R). This act, a response to the Supreme Court's decision in *Woodman v Khera, LLC*, 486 Mich 228 (2010), has amended the Estates and Protected Individuals Code to add a new section MCL 700.5109, allowing parents or guardians of minors to release sponsors and organizers of recreational activities sponsored by nongovernmental, nonprofit organizations, and employees or volunteers coaching or assisting such activities, from liability for injuries resulting from inherent risks of such activities.

Auto Insurers Reporting Requirement – Medicaid Recovery. 2011 PA Nos. 91 and 92 – SB 441 and 442 (Caswell - R) These acts have amended the Insurance Code and Vehicle Code to require automobile insurers to report policy information to the Secretary of State, who will then be required to forward the information to the Department of Community Health to facilitate the State's recovery of Medicaid benefits in actions against third-party tortfeasors.

Pro Bono Health Referral Agencies. 2011 PA 94 – HB 4350 (Haines - R) This act has amended the Public Health Code, MCL 333.16277, to extend the existing immunity from liability for injuries arising from uncompensated nonemergency health care to nonprofit entities, other than health facilities, that are organized and operated for the sole purpose of coordinating and providing referrals for uncompensated nonemergency health care to uninsured and underinsured

Efforts seeking to recall 43 legislators – 29 Republicans and 14 Democrats – have been initiated. Few of these efforts have met with any success,

individuals. These entities will not be liable for damages arising from such uncompensated nonemergency health care, even if the injury has resulted from gross negligence or willful, wanton or intentional misconduct on the part of the licensee or registrant providing the care. The act also amends this section's definition of "compensation" to ensure that health care providers who provide compensated care in other facilities are not denied the benefit of the immunity conferred under § 16277 for provision of uncompensated care.

Court of Appeals Motion Fees. 2011 PA 130 – HB 4731 (Cotter - R) This act has amended the Revised Judicature Act, MCL 600.321, to eliminate the provisions which would have reduced the Court of Appeals motion fees on October 1, 2012. Thus, the current fees of $200 for motions for immediate consideration and motions to expedite, and $100 for all other motions, are here to stay.

New Initiatives

As of this writing, the legislative agendas for the Fall have not been finalized. It is generally expected, however, that the Legislature will keep very busy with a broad variety of issues for the remainder of the year. Although a great deal has been done this year already, there are still a few issues which must be addressed to finalize the FY 2011-2012 Budget, and Governor Snyder has made it clear that he is not finished with his plans for rein-

Discussions about the proposal to build a new international bridge at Detroit will surely continue, and there is great interest in reforming or repealing the Personal Property Tax.

vention of Michigan's economy. Discussions about the proposal to build a new international bridge at Detroit will surely continue, and there is great interest in reforming or repealing the Personal Property Tax.

Other issues which may well be addressed include:

1) Additional education reforms;

2) Making Michigan a "right to work" state;

3) A legislative fix for the medical marijuana mess;

4) Reform of the no-fault automobile insurance laws;

5) Implementation of the Chief Justice's recommendations for elimination of Court of Appeals and trial court judgeships;

6) Additional welfare reforms; and

7) Prohibition of partial-birth abortions.

Eliminating Judgeships. As I mentioned in my last report, the Supreme Court has proposed the elimination of several trial court judgeships, and a reduction of the Court of Appeals from 28 judges to 24, by attrition. SB 319 (Jones - R), proposing implementation of those changes, still awaits consideration by the Senate Judiciary Committee. SB 416 (Caswell - R), which proposes the elimination of three vacant judgeships – one in the Wayne County Circuit Court, and one each in the 26th and 85th District Courts – was passed by the Senate on June 30, 2011, and now awaits consideration by the House Judiciary Committee.

No-Fault Reform. There are a number of pending Bills which could be used as a vehicle for no-fault insurance reform. Two of those Bills – SB 293 and SB 294 (Hune – R) – have generated some significant interest in recent days. SB 293 would provide for caps on Personal Protection Insurance (PIP) medical coverage for a named insured and his or her spouse and relatives domiciled in the same household, and allow consumers to choose from a variety of differing levels of that coverage with corresponding differences in premium costs. The minimum level of coverage for PIP medical benefits would be $50,000, but an insured could still choose a policy providing coverage for all reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. PIP medical coverage for persons other than the named insured and his or her spouse and relatives domiciled in the same household would be limited to $50,000. SB 294 would amend MCL 500.3107 to establish caps for PIP benefits paid for attendant care or nursing services provided in an injured person's home.

What Do You Think?

Don't take my word for any of this. As I've mentioned before, all of the Legislature's Bills, Journals and analyses are available for viewing and downloading on the Legislature's very excellent website – www.legislature.mi.gov. 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 Report

Proximate Causation

Michigan Supreme Court to Determine Whether (1) Probability of Injury Is a Valid Consideration In Assessing Proximate Causation and (2) Whether a Trial Court May Grant Summary Disposition on Proximate Causation Before Determining Whether the Defendant Was Negligent.

Jones v Detroit Medical Center, Docket No. 288710, 288 Mich App 466; 794 NW2d 55 (2010), lv gtd ___ Mich ___ (Docket No. 141624, February 4, 2011)

The Michigan Supreme Court is poised to provide clarity in an area of tort law that has vexed attorneys and law students alike since *Palsgraf v Long Island Railroad Co.*[1] The Court granted leave in *Jones v Detroit Medical Center* to consider, among other issues, "[w]hether the probability of injury is a proper consideration in determining 'proximate causation'" and "[w]hether partial summary disposition may be granted to the plaintiff with regard to proximate causation where the negligence of the defendant has not been established." Its resolution of these issues could provide guidance as to what role issues of probability should play in tort cases, the difference between duty and proximate causation analyses, and whether it is appropriate to narrow the issues for trial by resolving proximate causation as a matter of law in a plaintiff's favor.

In *Jones,* the plaintiffs' decedent, Jamar Jones, was injured in a car accident and taken to Detroit Medical Center/Sinai-Grace Hospital for treatment of his injuries. During his treatment for lacerations and related injuries, his treating physician, Defendant Danny F. Watson, M.D., became concerned that Mr. Jones had been suffering from a partial complex seizure disorder—a condition Dr. Watson diagnosed based on Mr. Jones' inability to remember the accident and recent occasions on which Mr. Jones had been found "staring blankly" and "was not easily aroused from these spells." Accordingly, Dr. Watson prescribed Tegretol, which is known in its generic form as carbamazepine.

After a couple of weeks on carbamazepine, Dr. Watson examined Mr. Jones again and decided to continue carbamazepine. Shortly after this second examination, however, Mr. Jones' health took a dramatic turn. After experiencing a sore throat and bloodshot eyes, he soon developed a blistery rash on his torso and face. Upon admission to the hospital, he was transferred to the burn unit. There, it was determined that his condition—known as "Stevens Johnson syndrome"—was an allergic reaction to carbamazepine. In the Court of Appeals' words, "Stevens-Johnson syndrome is a life-threatening dermatological condition in which the top layer of skin dies and is shed." It is, according to all of the parties in *Jones*, an exceedingly rare condition. Mr. Jones died approximately one week after his admission to the hospital.

Representatives of his estate brought a medical malpractice action against Dr. Watson (and others allegedly liable under *respondent superior*) alleging, according to the Court of Appeals, that Dr. Watson had been negligent in two ways: (1) by diagnosing a seizure disorder and, thus, prescribing carbamazepine; and (2) by failing to warn Mr.

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Because there was no dispute below that some patients develop Stevens-Johnson syndrome as a reaction to carbamazepine… there was no question, in the majority's view, that Mr. Jones' injuries were foreseeable.

Jones of the potential risk of Stevens-Johnson syndrome, if he took carbamazepine. The trial court held that, although there was a question of fact as to whether the defendants breached the standard of care, the plaintiffs were entitled to summary disposition on the issues of both cause-in-fact and proximate causation. Thus, the trial court held that there was no question that Dr. Watson's decision to prescribe carbamazepine and failure to warn about Stevens-Johnson syndrome actually caused Mr. Jones' death *and* that these factors were the proximate cause of his death as a matter of law.

The Court of Appeals (Shapiro, J. and Beckering, J.) affirmed in a published opinion, with Judge Hoekstra dissenting. The majority's analysis began with the supposition that proximate causation is predominately a question of foreseeability. Because there was no dispute below that some patients develop Stevens-Johnson syndrome as a reaction to carbamazepine—and, indeed, "the drug warnings specifically mention Stevens-Johnson syndrome"—there was no question, in the majority's view, that Mr. Jones' injuries were foreseeable. Although doctors could not determine in advance whether a specific patient was likely to develop Stevens-Johnson syndrome, "this is true for all first-time allergic reactions and for many other rare reactions." The panel analogized this situation to injuries that result from speeding while driving an automobile. It is impossible to determine in advance which specific driver will cause an automobile accident because of excessive speeds but it is foreseeable that excessive speeds may cause accidents. In the same way, although Dr. Watson could not determine whether Mr. Jones in particular was at risk of developing Stevens-Johnson syndrome, he could determine that Stevens-Johnson syndrome might develop from an allergic reaction to carbamazepine.

The majority also held that probability—the likelihood of an individual patient developing Stevens-Johnson syndrome—could be considered only in the context of assessing standard of care. The fact that Stevens-Johnson syndrome is, by all accounts, an extremely rare reaction to carbamazepine should not factor into the analysis of proximate causation.

Notably, the court also held that the proximate causation analysis could "collapse" into causation-in-fact. With respect to the plaintiffs' theory that Mr. Jones should have been advised about the warning signs of Stevens-Johnson syndrome, the court reasoned, "[T]he link between the alleged violation of the standard of care and the injury is direct, and we do not believe a reasonable juror could conclude otherwise. Indeed, one could fairly say that under this theory the issues of cause in fact and proximate cause collapse and are essentially indistinguishable." The court found less of a direct link between the alleged negligent diagnosis and Mr. Jones' death but held that the number of "intermediate steps" was small enough that there was no question of fact as to proximate causation: "The diagnosis was not merely an event in a chain of events that led to the prescription; it was the final and apparently sole reason the medication was prescribed." Thus, the court held that it could "not see how a reasonable juror could conclude that an allegedly negligent diagnosis that was the sole cause for prescribing the injury-causing mediation was not a proximate cause of the injury."

In dissent, Judge Hoekstra advocated a more expansive view of proximate causation, one that considers not only the relationship between the act and the injury but also "whether it is socially and economically desirable to hold the wrongdoer liable." Indeed, Judge Hoekstra contended that the majority's focus on foreseeability was contrary to the rule set forth in cases like *McMillan v Vilet,*[2] which eschewed a strict focus on foreseeability in favor of an assessment of whether the injury was a natural or direct consequence of the defendant's negligence. Judge Hoekstra therefore reasoned that there was a genuine issue of fact as to both theories of negligence pled by the plaintiffs and that the jury should be given the opportunity to determine whether Mr. Jones' death was the natural and probable result of Dr. Watson's alleged negligence and whether it is "socially and economically desirable" to hold the defendants liable.

Neither the majority nor the dissent expressly addressed the second question raised by the Michigan Supreme Court's February 2011 order: whether the trial court could grant summary disposition as to proximate causation without first determining that the defendant was actually negligent. But the majority's analysis certainly presumed that it was permissible to do so. In contrast, by holding that proximate causation calls for the jury to assess the desirability of imposing liability on a *negligent* defendant, Judge Hoekstra's analysis suggests that negligence should be determined before proximate causation can be analyzed.

As evidenced between the Court of Appeals opinions, there seems to be significant disagreement on the bench as to

As evidenced between the Court of Appeals opinions, there seems to be significant disagreement on the bench as to how proximate causation should be approached.

how proximate causation should be approached. In one view, demonstrated by the Court of Appeals majority, proximate causation is primarily an issue of foreseeability and, when the causal chain between act and injury is direct enough, it can be "collapsed" into cause in fact. According to another view, proximate causation calls for a much more expansive analysis, one that considers not only whether a plaintiff's injuries are the direct and natural consequence of the defendant's actions but also whether it makes sense, from a policy standpoint, to impose tort liability on the defendant. Proximate causation, according to this latter view, is more than connecting the dots between negligence and injury: it is the jury's opportunity to enforce community standards and shape future conduct through its assessment of the costs and benefits of imposing tort liability.

It remains to be seen which approach the Michigan Supreme Court will adopt.

Recovering And Collecting Costs On Appeal

Under MCR 7.219, the "prevailing party" in an appeal[3] is entitled to recover costs unless the Court of Appeals otherwise directs.[4] Although the process for recovering and collecting costs on appeal is relatively straightforward, there are a few things to keep mind.

In order to recover costs, the prevailing party must file, within 28 days "after the dispositive order, opinion, or order denying reconsideration is mailed," a "certified or verified bill of costs" with the court clerk.[5] The bill of costs must specify each item claimed.[6]

Typical costs on appeal that may be recovered include: (1) costs for the "original" briefs and exhibits or appendices ($1 per page for briefs and $.10 per page for exhibits and appendices);[7] (2) costs associated with obtaining an appeal bond;[8] (3) costs for procuring transcripts or other documents "required for the record on appeal";[9] (4) fees paid either to the Court of Appeals or the trial court "incident to the appeal" (including the initial entry fee and any motion fees);[10] and (5) taxable costs allowed under MCL 600.2441 (most commonly consisting of $50 for "calendar causes" and $20 for each motion filed).[11]

Once the bill of costs has been verified by the court clerk and any objections resolved,[12] allowable costs are taxed "by the issuance of a letter indicating the amount taxed."[13] Upon motion by the objecting party filed within "7 days from the date of the taxation," the Court of Appeals will review the clerk's taxation of costs.[14] Such a motion "may not raise or present new matters."[15] Instead, the clerk's action will be reviewed by the panel that issued the opinion or order "on the basis of the affidavits in support of the costs and the objections against the costs that were previously filed with the clerk's office."

In most cases, the losing party will pay the costs taxed without further action being required. If not, the prevailing party must seek enforcement of the order taxing costs in the trial court. As explained in the Court's Internal Operating Procedures, "[e]ach party is responsible for collecting the taxable costs assessed against another party. If the party owing costs has not paid within a reasonable period of time, the letter taxing costs may be presented to the trial court for judgment and execution under MCR 7.215(F)(1)(b)."[16]

Issues Raised For The First Time In An Amicus Brief

When significant issues are pending either in the Michigan Supreme Court or Court of Appeals, it is common for interested parties to submit amicus briefs in order to offer their own unique perspective. But what if the amicus raises a new issue? Is that appropriate? Does it matter if one of the parties seeks to adopt the issue? A recent decision from the Michigan Court of Appeals suggests that a cautious approach is warranted.

In *Ile v Foremost Ins Co*,[17] Foremost Insurance Company appealed the trial court's finding that the underinsured motorist (UIM) coverage provided in the motorcycle insurance policy it issued to the decedent was illusory because it was equal to the minimum liability coverage ($20,000/$40,000) permitted under the No-Fault Act.[18] In its briefing, Foremost challenged the trial court's decision on two primary grounds. First, Foremost argued that the coverage was not illusory because the insured was "assured of receiving the benefits for which he paid."[19] Second, the UIM coverage was bundled with uninsured motorist (UM) coverage and thus "did not include a separate premium for UIM coverage."[20]

In affirming the trial court's decision, the Court of Appeals rejected both of Foremost's arguments and agreed with the trial court's determination that the policy was illusory. According to the Court, because "Michigan mandates a minimum coverage for bodily injury equal to the amount of [the] decedent's policy of $20,000/$40,000, there exists

Once the bill of costs has been verified by the court clerk and any objections resolved, allowable costs are taxed "by the issuance of a letter indicating the amount taxed."

no possibility for [the] decedent to collect underinsured motorist benefits at the selected level of coverage."[21] Citing decisions from other jurisdictions addressing the issue, the Court reasoned that "'[a] policy with UIM coverage "under which no benefits will ever be paid" is illusory,' because 'a policy is illusory if it will never be triggered in practice.'"[22] As to the appropriate remedy, the Court upheld the trial court's award "of an unspecified amount to a maximum of $20,000 of underinsurance for damages incurred exceeding the $20,000 already received from another insurer."[23]

The Court then turned to an issue that was apparently raised for the first time in an amicus brief filed by the Insurance Institute of Michigan ("IIM"). The IIM argued, in part, that the trial court's ruling "comprise[d] a reformation of the contract infringing on the authority of the Insurance Commissioner," who had approved the policy, and that the insurance contract had to be enforced as written.[24] Foremost did not raise the issue in its own brief on appeal, but sought in its reply brief to "agree . . . and incorporate[]" the IIM's argument "by reference." Although it ended up remanding the matter to the trial court "for an opportunity to evaluate the position asserted by the IIM,"[26] the Court of Appeals disapproved of the manner in which it was raised. The Court noted that MCR 7.215(H)(2) limits an amicus

The Court noted that MCR 7.215(H)(2) limits an amicus brief "to the issues raised by the parties," and found that it was inappropriate for Foremost to seek "to incorporate the content of the amicus brief."

brief "to the issues raised by the parties," and found that it was inappropriate for Foremost to seek "to incorporate the content of the amicus brief."[27]

So what should Foremost have done? The answer to that question is not as apparent. Of course, Foremost could have raised the issue itself, as the Court of Appeals observed.[28] The Court also suggested that it might have been acceptable for Foremost to have at least "procur[ed] permission to . . . respond to the IIM brief," which the plaintiff apparently did.[29] In any event, the lesson of *Ile* is clear: parties should proceed with caution when working with an amicus in order to ensure that issues are not belatedly raised, and should not rely solely on an amicus brief to present potentially dispositive arguments.

Endnotes

1. 248 NY 339; 162 NE 99 (NY 1928).
2. 22 Mich 570; 374 NW2d 679 (1985).
3. The precise standard for determining the "prevailing party" on appeal is unfortunately unclear. While numerous Court of Appeals panels have stated that a party must prevail "in full" in order to be entitled to costs, see, e.g., *Michigan Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 437; 592 NW2d 760 (1999) ("Because in this appeal neither party has prevailed in full, neither party may tax costs pursuant to MCR 7.219"), what it means to prevail "in full" is not immediately apparent. Moreover, in his appellate treatise, *Civil Appeals* (West 2003 supp), Justice Markman posits that an appellant is the "prevailing party" so long as the "appealed judgment or order is reversed 'in whole or in part' or modified." *Id*. at ¶ 12:73, citing *Head v Phillips Camper Sales Rental, Inc*, 234 Mich App 94, 115; 593 NW2d 595 (1999), and *Hutchings v Geistert*, 311 Mich 24, 30; 18 NW2d 263 (1945).
4. See IOP 7.219(A).
5. MCR 7.219(B).
6. *Id*. See also IOP 7.219(B) ("If the bill of costs lacks sufficiently specific information to allow the clerk to tax costs, the clerk will request additional information to verify the costs.").
7. MCR 7.219(F)(1); IOP 7.219(F)-1. The Court's Internal Operating Procedures further provide that "[t]he prevailing party may only tax costs for the appellant's brief, the appellee's brief, a reply brief, and/or a supplemental brief. Neither a brief in support of an application nor a brief in support of a motion is taxable." IOP 7.219(F)-1.
8. MCR 7.219(F)(2).
9. MCR 7.219(F)(3) and (4). See also IOP 7.219(F)-1 ("[T]he prevailing party is only allowed the standard amount to be paid for preparation of the transcript.").
10. MCR 7.219(F)(5); IOP 7.219(G)-1.
11. MCR 7.219(F)(6).
12. The opposing party must file any objections within 7 days after being served with the verified bill of costs. MCR 7.219(C).
13. IOP 7.219(D).
14. MCR 7.219(E).
15. IOP 7.219(E).
16. MCR 7.215(F)(1)(b) provides:[E]xecution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210[I] or by the Supreme Court clerk under MCR 7.311[B]) with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for the return of the record had it been transmitted.
17. ___ Mich App ___; ___ NW2d ___ (Docket No. 295685, issued July 14, 2011).
18. Slip op at 1.
19. *Id*. at 4.
20. *Id*.
21. *Id*. at 5.
22. Id. at 6.
23. *Id*. at 10.
24. *Id*. at 13.
25. *Id*.
26. The remand took place after oral argument and before the Court issued its opinion. On remand, the trial court rejected the IIM's argument, and the Court of Appeals affirmed. *Id*. at 14-16.
27. *Id*. at 13.
28. *Id*.
29. *Id*.

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Legal Malpractice Update

STATUTE OF LIMITATIONS ISSUES

Horne v Lawyer Defendant, 2011 WL 2644202 (June 21, 2011) (Unpublished)

The Facts: Plaintiffs retained the Lawyer Defendant to pursue a medical malpractice lawsuit for professional negligence that occurred on January 24, 2002. On January 16, 2004, the Lawyer Defendant served the medical malpractice defendant with a notice of intent to sue, tolling the limitations period in that suit just eight days before it expired. On May 4, 2004, the Lawyer Defendant sent plaintiffs a letter stating that he had been unsuccessful in obtaining a favorable opinion from a qualified expert. Plaintiffs called the Lawyer Defendant and told him that they no longer wanted to pursue the medical malpractice case. On June 9, 2004, the Lawyer Defendant sent plaintiffs a letter memorializing the telephone call and informing the plaintiffs they needed to file their lawsuit by June 25, 2004, if they changed their minds. The limitations period on the medical malpractice lawsuit actually expired on July 24, 2004.

Plaintiffs continued to pursue the medical malpractice lawsuit and found out from another attorney in February 2008 that the Lawyer Defendant incorrectly calculated the limitations period, and that he might have committed malpractice. Plaintiffs filed a legal malpractice lawsuit against the Lawyer Defendant on July 28, 2008. The trial court held that plaintiffs' action was not saved by the six-month discovery rule because plaintiffs should have known they had a potential malpractice claim against the Lawyer Defendant as early as June 9, 2004, when they received the lawyer's letter, but failed to file the legal malpractice lawsuit until July 29, 2008.

The Ruling: The Court of Appeals affirmed the trial court's dismissal of the plaintiffs' claim. Specifically, the court reasoned that plaintiffs did not provide evidence – or even an argument – that it is "unreasonable to state that they 'should have' discovered their claim earlier." The Lawyer Defendant did not conceal from plaintiffs when the limitation period would expire. Plaintiffs knew the Lawyer Defendant stopped pursuing their case. Also, the court reasoned that "[n]othing prevented plaintiffs from talking about the case with other attorneys during the two-year period that followed [the Lawyer Defendant's] last day of service" and plaintiffs continued to pursue the medical malpractice case. The court reasoned that "[t]his establishes that they were aware of their injury and its possible cause."

Practical Implications: The six-month discovery rule will not save a plaintiff's legal malpractice claim if that plaintiff knew or *should have known* that he had a possible claim more than six-months before the filing of the complaint.

Little v Lawyer Defendant, 2011 WL 2271310 (June 9, 2011) (Unpublished)

The Facts: The Lawyer Defendant discontinued serving plaintiff as his attorney on May 22, 2007. Plaintiff was an incarcerated prisoner, and he alleged that his complaint was "filed" when he submitted his motion to waive fees under MCL

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The Court of Appeals affirmed the trial court's dismissal of the plaintiffs' claim. Specifically, the court reasoned that plaintiffs did not provide evidence – or even an argument – that it is "unreasonable to state that they 'should have' discovered their claim earlier."

600.2963(1). However, due to a procedural defect, the trial court rejected plaintiff's complaint. Plaintiff resubmitted his complaint and motion to waive fees on April 24, 2009. On May 19, 2009, the trial court ordered that plaintiff pay part of his filing fee within 21 days of the order. Plaintiff claimed he complied with the order and paid the filing fee and resubmitted his complaint on May 22, 2009. However, the time-stamped copy of plaintiff's complaint showed that the complaint was filed on May 26, 2009.

The Ruling: The Court of Appeals affirmed summary disposition for the Lawyer Defendant based on the expiration of the two-year statute of limitations. The court reasoned that MCL 600.2963(1) does not allow the complaint to be filed before the filing fee or partial fee is paid. Thus, a civil action is suspended until the court receives the filing fee or partial filing fee. The court reasoned that plaintiff's claim was not filed until the court filed plaintiff's complaint with the partial filing fee on May 26, 2009, after the two-year statute of limitations expired. Therefore, the court reasoned that "mere tendering of the complaint to the clerk of the court without the appropriate fees does not constitute a completed 'filing.'"

Practical Implications: You've got to pay to play.

Schultz v Lawyer Defendant, 2011 WL 2732157 (July 14, 2011) (Unpublished)

The Facts: Plaintiffs filed their complaint on November 29, 2009 against the Lawyer Defendant, in a third-party beneficiary capacity, for legal malpractice when the Lawyer Defendant drafted trusts and amendments for plaintiffs' parents. Specifically, plaintiffs alleged that the Lawyer Defendant failed to properly draft the estate planning documents to meet their parents' intent and breached the standard of care owed to plaintiffs as trust beneficiaries. The Lawyer Defendant last performed legal services for plaintiffs' father on April 8, 2005. However, the Lawyer Defendant performed legal services for the successor trustee of the trusts in her capacity as a trustee. The trial court held that the statute of limitations barred the plaintiffs' legal malpractice claim.

The Ruling: The Court of Appeals affirmed that plaintiffs untimely filed their legal malpractice claim. Specifically, under *Ohio Farmers Ins Co v Shamie (On Remand)*, 243 Mich App 232, 241 (2000), where the plaintiffs' malpractice claim is based on a third-party beneficiary theory, liability accrues at the same time that "the promisee/client's claim would have accrued." Also, the court reasoned, under *Bullis v Downes*, 240 Mich App 462 (2000), that malpractice actions can arise from promises between an attorney and the decedent. Thus, the plaintiffs' claim would accrue when the defendant discontinued serving the plaintiffs' father in a professional capacity "with regard to the matters out of which the malpractice claim arose." The Lawyer Defendant's representation of the successor trustee after plaintiffs' father's death had no effect on the accrual of their legal malpractice claim.

Practical Implications: A plaintiff who asserts a legal malpractice claim as a third-party beneficiary against a lawyer who prepared estate-planning documents stands in the shoes of the decedent. Plaintiff is subject to the same limitations period as if the decedent were still alive.

Michigan Defense Quarterly Publication Schedule

Publication Date	Copy Deadline
January	December 1
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Supreme Court Update

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Supreme Court Overrules *Champion* And Holds That Employers Cannot Be Held Strictly Liabile For Their Employees' Acts Of Quid Pro Quo Sexual Harassment

On July 29, 2011, the Michigan Supreme Court overruled *Champion v Nation Wide Security, Inc*, and held that employers are not strictly liable for acts of quid pro quo sexual harassment committed by their employees. *Hamed v Wayne County*, 490 Mich 1; ___ NW2d ___ (2011).

Facts: The plaintiff, Tara Hamed, was arrested for unpaid child support in Livingston County. The plaintiff was later transferred to the Wayne County jail based on outstanding warrants for probation violations. When the plaintiff arrived at the Wayne County jail, only a male officer was on duty in the inmate registry area. Once alone with the plaintiff, the male officer, Reginald Johnson, began making sexually-charged remarks and advances toward the plaintiff. Johnson offered the plaintiff better treatment in exchange for sexual favors. The plaintiff rejected Johnson's advances. Johnson then transferred the plaintiff to a remote area of the jail and sexually assaulted her. The plaintiff reported the incident after her release.

The plaintiff then filed suit against Johnson, Wayne County, the Wayne County Sheriff's Department and others, alleging claims of quid pro quo and hostile environment sexual harassment. The defendants move for summary disposition. The trial court granted the defendants' motion and ruled that the plaintiff's hostile-environment claim failed because the defendant had no prior notice of Johnson's sexual predatory propensities and that the plaintiff's quid pro quo claim failed because the defendants could not be held vicariously liable for the criminal acts of their employees.

The plaintiff appealed only the trial court's ruling as to the quid pro quo claim. The Court of Appeals reversed the trial court's decision and relied on the holding in *Champion v Nation Wide Security, Inc*, to find that the defendants "are vicariously liable for acts of quid pro quo sexual harassment committed by their employees when those employees use their supervisory authority to perpetrate the harassment." Because the plaintiff had established a claim of quid pro quo sexual harassment based on Johnson's use of his authority to exploit the plaintiff's vulnerabilities, the Court of Appeals held that the defendants could be held vicariously liable.

Holding: The Michigan Supreme Court reversed the Court of Appeals decision, holding that the decision was flawed to the extent it relied on *Champion*. According to the court, *Champion* was wrongly decided and improperly imposed strict liability against employers for the unforeseeable criminal acts of their employees. In overruling *Champion*, the Supreme Court held that it has "consistently held that an employer's liability for the criminal acts of its employees is limited to those acts it can reasonably foresee or reasonably should have foreseen." This rule is established both through traditional principles of respondeat superior and the language of the CRA. The court explained that employers should not be required to "assume that their employees will disobey the law."

Applying the "foreseeability analysis," the court determined that the defendants could not be held liable for Johnson's acts of quid pro quo sexual harassment because, even when viewed in the light most favorable to the plaintiff, the facts established that Johnson's conduct was not foreseeable. Although Johnson had a history of engaging in misconduct, including violence and rule violations, his prior misconduct did not put the defendants on notice of his propensity to engage in sexual assault. Consequently, the defendants could not be held vicariously liable for Johnson's acts of quid pro quo sexual harassment under traditional principles of respondeat superior.

Significance: By overruling *Champion*, the court uprooted 15 years of Michigan precedent imposing strict liability on employers for their supervisory employees' acts of quid pro quo sexual harassment regardless of the foreseeability of the employee's conduct. The decision abrogates the so-called "aided by agency" exception and reinstates conventional notions of respondeat superior in quid pro quo sexual harassment cases.

By overruling Champion, the court uprooted 15 years of Michigan precedent imposing strict liability on employers for their supervisory employees' acts of quid pro quo sexual harassment regardless of the foreseeability of the employee's conduct.

Experimental Treatments Are Covered Under The No-Fault Insurance Act To The Extent Insureds Can Meet High Burden Of Establishing That The Treatments Are "Efficacious"

In its July 29, 2011, opinion in *Krohn v Home-Owners Ins, Co*, 490 Mich 145; ___ NW2d ___ (2011), the Michigan Supreme Court held that no-fault insurers have an obligation to reimburse their insureds for experimental medical treatments only to the extent insureds can establish, through objective and verifiable medical evidence, that the treatments are "efficacious."

Facts: The plaintiff, Kevin Krohn, was severely injured in a 2001 motorcycle accident, which left him paraplegic. Despite physical therapy, the plaintiff remained without function or movement below the mid-chest area. The plaintiff later learned of an experimental treatment being performed in Portugal that involves transplanting stem cell tissue from behind the patient's sinuses to the site of the injury. The treatment is not approved by the Food and Drug Administration ("FDA") and, therefore, cannot be performed in the United States. The plaintiff sought coverage for the procedure from his no-fault insurance carrier, Home-Owners Insurance Company. Home-Owners offered to pay for testing before, and rehabilitation after, the procedure, but denied coverage for the procedure itself. Home-Owner's denial of coverage was premised largely on the experimental nature of the procedure.

The plaintiff went forward with the procedure in Portugal and, thereafter, began a rigorous physical therapy program. The plaintiff then filed suit against Home-Owners, seeking reimbursement for expenses related to the procedure. The plaintiff testified at trial that, since undergoing the procedure, he has gained some voluntary movement and control of his lower body functions. A Portuguese doctor involved in the treatment testified that the procedure could possibly provide the plaintiff with some function below the injury site. A medical expert testified, however, that it was impossible to conclude whether the increased function was a result of the procedure or the plaintiff's subsequent physical therapy. The expert also testified that the procedure was not necessary to the plaintiff's the treatment or care.

At the close of the plaintiff's proofs, Home-Owners moved for a directed verdict, arguing that an experimental procedure cannot be deemed "reasonably necessary" for purposes of requiring reimbursement under the no-fault act. The trial court denied Home-Owners' motion, and the jury returned a verdict in the plaintiff's favor. Home-Owners' appealed.

The Court of Appeals reversed and held that Home-Owners' motion for directed verdict should have been granted because the plaintiff failed to prove that the procedure had gained general acceptance in the medical community.

Holding; The Michigan Supreme Court affirmed the Court of Appeals decision, but held that the Court of Appeals applied the wrong standard in reaching the right result. Specifically, the court held that "an insured is not required to prove that an experimental surgical procedure gained general acceptance in the medical community." Rather, for an experimental procedure to be a compensable expense under the no-fault act, an insured "must present objective and verifiable medical evidence that [the] medical treatment is efficacious in [the insured's] care, recovery, or rehabilitation." At a minimum, this requires medical evidence indicating that the treatment "presents a reasonable chance" that it will be efficacious.

The Supreme Court determined that the plaintiff failed to present evidence of "an objectively verifiable chance that [the experimental procedure] would be efficacious in his care, recovery, or rehabilitation." The court explained that, despite the Portuguese doctor's testimony that the procedure could possibly provide the plaintiff with additional function, no objective evidence was presented to support that assertion. The plaintiff, therefore, failed to meet his burden of demonstrating that the procedure was reasonably necessary and Home-Owners was under no obligation to reimburse the plaintiff for expenses related to the procedure.

Significance: The decision clarifies the standard associated with a no-fault insurer's duty to reimburse its insureds for expenses related to experimental treatments. A no-fault insurer may not deny coverage for an experimental treatment simply because the treatment lacks acceptance within the medical community. Rather, the insurer is obligated to reimburse an insured's expenses to the extent the insured is able to meet a high burden of establishing, through objectively verifiable evidence, that the treatment has a reasonable

For an experimental procedure to be a compensable expense under the no-fault act, an insured "must present objective and verifiable medical evidence that [the] medical treatment is efficacious in [the insured's] care, recovery, or rehabilitation.

chance of being efficacious in the insured's care, recovery, or rehabilitation.

On Rehearing, The Supreme Court Vacates Its Prior Decision And Finds That A Public School's Administration Of Payroll Deducation System To Fund A Political Action Committee Violates The Michigan Campaign Finance Act

On June 30, 2011, upon rehearing, the Michigan Supreme Court vacated its December 2010 decision and held that the a public school's administration of a payroll deduction plan that collects and remits political contributions from its employees to the Michigan Education Association's Political Action Committee ("MEA-PAC") violates the Michigan Campaign Finance Act ("MCFA"). *Michigan Ed Ass'n v Secretary of State*, 489 Mich. 194; ___ NW2d ___ (2011).

Facts: The Michigan Education Association ("MEA"), an incorporated labor union, established a political action committee, MEA-PAC, which is funded in part by payroll deductions from MEA members. The MEA requires various public schools to administer payroll deduction systems for the purpose of collecting contributions from the MEA's members and remitting those contributions to the MEA-PAC. The MEA pays all expenses related to the administration of these systems.

Based on the request of a public school district, the MEA petitioned the Secretary of State for a declaratory ruling on the validity of the payroll deduction systems. The Secretary of State ruled that administration of the payroll deductions systems violates the MCFA, MCL 169.257, which prohibits public bodies from making expenditures or making contributions to political action committees. The Secretary of State further ruled that the use of a public school's resources and facilities to administer the payroll system constitutes a contribution or expenditure in violation of the MCFA. Whether the MEA pays the expenses associated with the payroll systems does not "effectively avoid a violation" of the MCFA.

The MEA appealed the Secretary of State's ruling to the circuit court, which held that the ruling was "arbitrary, capricious, and an abuse of discretion." According to the circuit court, if the expenses associated with administering the payroll systems are paid by the MEA, "no transfer of money to the MEAPAC has occurred, and therefore an 'expenditure' has not been made within the meaning of the MCFA."

The Court of Appeals reversed, holding that the costs associated with the public school's administration of the payroll systems constitute an "expenditure" regardless of whether those costs are ultimately paid by the MEA.

The MEA appealed to the Michigan Supreme Court, which initially reversed the Court of Appeals on December 29, 2010. In doing so, the court held that the public school's administration of the payroll deduction system to remit contributions from its employees to a segregated political action committee did not violate the MCFA. The court reasoned that, although public resources and facilities were being used, no "contribution" or "expenditure" was being made because the schools were not conveying anything of monetary value and the school's expenses were being fully reimbursed.

Holding; The Michigan Supreme Court granted a motion for rehearing and vacated its prior decision. The court determined that its previous decision was flawed because it failed to properly follow the language and intent of the law. The Supreme Court relied on Justice Markman's prior dissenting opinion and affirmed the Court of Appeals. The Supreme Court held that the costs associated with a public body's administration of a system that collects and remits contributions to a political action committee constitutes an "expenditure" in violation of the MCFA, whether or not those costs are fully reimbursed. The court explained that MCL 169.257 prohibits public bodies, such as public schools, from using public resources "to make a contribution or expenditure" for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question. Because the purpose of the MEA-PAC is to "facilitate and coordinate the involvement of the MEA in politics by electing candidates favored by the MEA and by furthering the enactment of MEA legislative and executive policy initiatives," a public school's administration of a system that collects contributions for and remits those contributions to the MEA-PAC violates the MCFA.

Significance: As was expected by many, the court's prior ruling, made just days before conservative justices regained majority control of the court, did not stand up on rehearing. The court's opinion restates many of the points raised in Justice Markman's prior dissenting opinion and clarifies that the use of a public body's resources and facilities, even if

The Supreme Court held that the costs associated with a public body's administration of a system that collects and remits contributions to a political action committee constitutes an "expenditure" in violation of the MCFA, whether or not those costs are fully reimbursed.

expenses are fully reimbursed, remains an expenditure or contribution in violation of the MCFA. This decision aligns with previous interpretations of the MCFA by the Attorney General and the Department of State.

Recreational Trailway Located Miles From Established Highways Does Not Fall Within The Highway Exception To Governmental Immunity

As a matter of first impression, the Michigan Supreme Court held in *Duffy v Michigan Dep't of Natural Resources*, ___ Mich ___; ___ NW2d ___ (2011), that a recreational trailway located miles from any "bona fide" highway is not a "road" for purposes of the highway exception to governmental immunity under the Governmental Tort Liability Act ("GTLA").

Facts: The plaintiff was severely injured while riding an off-road vehicle over a trailway owned by the State of Michigan and maintained by the Michigan Department of Natural Resources ("DNR"). As the plaintiff was negotiating a left turn, her vehicle encountered several partially-buried boards. The boards caused her vehicle to bounce in the air, throwing her against nearby trees.

The trailway, commonly known as the Little Manistee Trail, is part of a larger system of recreational trailways, which the DNR is statutorily obligated to maintain for off-road vehicles. The portion of the trailway on which the plaintiff was injured is designated as an "OVR trail," meaning any licensed vehicle is allowed on the trailway.

The plaintiff sued both the State of Michigan and the DNR on the basis of the highway exception to governmental immunity, alleging that the defendants breached their duty to maintain the trailway in reasonable repair by not remedying the partially buried boards. The defendants moved for summary disposition and argued that because the trailway is not a "highway," they had no duty to maintain it in reasonable repair under the highway exception to the GTLA. The trial court sided with the plaintiff and denied the motion. The trial court found that the trailway fits within the definition of a "highway" under MCL 691.1401(e), which includes the term "trailways."

The defendants appealed. Although the Court of Appeals agreed with the trial court that the trailway falls within the definition of a "highway," it held that the defendants remained immune from liability because "the limited liability granted to the state in MCL 691.1402(1) applies to all trailways."

Holding; The Michigan Supreme Court affirmed and held that the trailway is not a "highway" as that term is defined under the GTLA. The GTLA creates an obligation of the state to repair and maintain highways. The term "highway" is defined as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." The court held that the trailway is not, itself, a highway or road, and is, therefore, covered under the GTLA only to the extent is constitutes a "trailway … *on the highway*." Because the trailway is miles from any "bona fide" highway, it is not a trailway "on the highway" as necessary to fall

The court held that the trailway is not, itself, a highway or road, and is, therefore, covered under the GTLA only to the extent is constitutes a "trailway … *on the highway*."

within the highway exception to governmental immunity.

In determining that the trailway, which is open to recreational vehicle traffic, is a trailway rather than a road, the court turned to the Michigan Trailways Act, MCL 324.7201(k), which defines "trailway" as a "land corridor that features a broad trail capable of accommodating a variety of public recreation uses." A road, on the other hand, is commonly defined as a "leveled or paved surface, made for traveling by motor vehicle." Thus, the court concluded that the trailway, though leveled and open to recreational vehicles, is not is not a road because it was not "made for traveling by motor vehicle."

Significance: By removing trailways, even those that are open to vehicular traffic, from the otherwise broad definitions of "road" and "highway," the court's decision limits the state's obligation to repair thousands of miles of trailways under the state's control. Under this decision, the state is obligated to maintain in reasonable repair only those trailways running "on," or adjacent to, "bona fide" highways.

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).

Two members of MDTC contributed to the recently published book, *The Road to Independence: 101 Women's Journeys to Starting their Own Law Firms*. **Julie I. Fershtman** and **Patricia M. Nemeth** are among four Michigan lawyers and 101 women nationally who responded to an invitation from the ABA Commission on Women in the Profession. The result is the book, *The Road to Independence: 101 Women's Journeys to Starting their Own Law Firms,* containing 101 letters telling the writers' experiences and offering insights into the obstacles they faced in forming a law firm of their own. Their letters appear chronologically according to the date each started her woman-owned law practice. Fershtman and Nemeth began their practices in the early 1990s.

Arranging the letters chronologically revealed an acceleration in the rate at which women are starting firms. According to the introduction to the book, in the '50's and '60's each just one woman started a practice. In the '70s, seven of the writers started firms while by the 2000's, 57 women lawyers started their own firms. Thirty-seven of the 101 writers founded their firms in the last six years, the years 2005-2010 and one on January 1, 2011. The progression of the chapters also revealed that an increasing proportion of women starting their own firms are, in fact, seasoned women lawyers with significant practice histories.

The letters present "a picture of the legal profession that the reader may recognize on a personal level—a profession that underestimates the power and grit of women lawyers who comprise the essential half of the profession's talent still not at the table in traditional firms."

Nemeth would agree with that assessment, noting that when she and her partner were first practicing, they were called the "chick firm." Now a firm of 13 lawyers, 12 support staff and covering 15,000 square feet of office space on two floors of the Talon Center in downtown Detroit, "I could not tell you without looking at the mast-head how many of our lawyers are women."

By: Hilary A. Ballentine
Plunkett Cooney

MDTC Amicus Activity in the Michigan Supreme Court

An asterisk (*) after the case name denotes a case in which the Michigan Supreme Court expressly invited MDTC to file an amicus curiae brief.

RECENT OPINIONS

Hamed v Wayne County (MSC No. 139505)*

- Issues: (1) whether defendants Wayne County and Wayne County Sheriff's Department may be held liable to the plaintiff for quid pro quo sexual harassment under MCL37.2103(i)
- Author: **Marcelyn Stepanski,** Johnson Rosati LaBarge Aseltyne & Field
- Decision issued July 29, 2011 reversing the Court of Appeals' judgment and reinstating the circuit court's order granting summary disposition to Wayne County

  Hamed Court held that "a provider of a public service may not be held vicariously liable for quid pro quo sexual harassment affecting public services on the basis of unforeseeable criminal acts that its employee committed outside the scope of employment." Accordingly, the Michigan Supreme Court overruled *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996). (Justices Hathaway, Cavanagh, and Marilyn Kelly dissented)

Loweke v Ann Arbor Ceiling and Partition Co (MSC No. 141168)

- Issue: whether a contracting party has a separate and distinct legal duty to an injured third person when the hazard causing the injury is the subject of the contract between the defendant and a third party
- Author: **Anthony F. Caffrey, III,** Cardelli, Lanfear & Buikema, P.C.
- Decision issued June 6, 2011 reversing the judgment of the Court of Appeals and remanding to the trial court

  The *Loweke* Court held that "a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract." (Justice Hathaway concurred in the result only and Justice Zahra did not participate because he was on the Court of Appeals panel in *Loweke*).

Krohn v Home-Owners Insurance Co (MSC No. 140945)*

- Issues: proper interpretation of the phrases "lawfully rendering" in MCL 500.3157, and "reasonably necessary" under MCL 500.3107
- Author: James E. Brenner, Clark Hill
- Decision issued July 29, 2011 affirming the Court of Appeals' judgment

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

- The *Krohn* Court held that what constitutes a "reasonably necessary" product, service, or accommodation for an injured person's care, rehabilitation, or recovery is to be determined by an objective standard. Therefore, to receive reimbursement for experimental medical treatment, an insured "must present objective and verifiable medical evidence establishing that the treatment is efficacious." Absent such a showing, the treatment is not reasonable or necessary under the No-Fault Act. An insured's subjective belief about the treatment will not create a question of fact. Here, the objective and verifiable medical evidence presented at trial did not establish that the plaintiff's experimental surgery was efficacious for care or recovery of his injury, and thus, was not "reasonably necessary." (Justices Hathaway, Cavanagh, and Marily Kelly dissented)

UPCOMING ORAL ARGUMENTS IN CASES MDTC HAS BRIEFED

Avram v McMaster-Carr Supply Co (MCOA No. 296605)

- Issue: asbestos appeal involving trial court's management of asbestos docket and *Daubert* issues
- Author: **Matthew T. Nelson,** Warner, Norcross & Judd
- Stage: pending on appeal in Michigan Court of Appeals
- Status: MDTC amicus brief filed 2/18/11; oral argument TBD

Jilek v Stockson (MSC No. 141727)*

- Issue: medical malpractice appeal involving standard of care issues
- Author: **Beth A. Wittmann,** The Kitch Firm
- Stage: oral argument on application for leave to appeal in MSC
- Status: MDTC amicus Brief filed 4/20/11; oral argument TBD

RECENTLY-FILED MDTC AMICUS BRIEFS

Jones v DMC (MSC No. 141624)*

- Issue: medical malpractice appeal involving legal cause aspect of proximate cause, including whether a rare and unpredictable reaction to a medication is foreseeable
- Author: **Philip DeRosier** and **Toby White,** Dickinson Wright
- Stage: Leave granted 2/4/11
- Status: MDTC amicus brief filed 8/19/11

LaMeau v City of Royal Oak (MSC No 141559-60)*

- Issue: governmental immunity appeal involving whether guy wire and anchor are part of sidewalk thus necessitating a duty by the City to keep it in "reasonable repair"
- Author: Kitch Law Firm
- Stage: oral argument on application for leave to appeal in Michigan Supreme Court
- Status: MDTC amicus brief filed 5/18/11

Atkins v SMART (MSC No. 140401)*

- Issue: whether written notice of a no-fault claim, together with the defendant's knowledge of facts that could give rise to a tort claim by the plaintiff, is sufficient to constitute written notice of the plaintiff's tort claim under MCL 124.419
- Author: **Hal O. Carroll,** Vandeveer Garzia
- Stage: Leave granted 6/22/11
- Status: MDTC amicus brief filed 8/11/11

FORTHCOMING AMICUS BRIEFS

Joseph v ACIA (MSC No. 142615)*

- Issues: (1) whether the minority/insanity tolling provision of MCL 600.5851(1) applies to toll the "one-year back rule" in MCL 500.3145(1); and (2) whether the Court correctly decided *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289 (2010)
- Stage: Leave granted 5/20/11

By: Todd W. Millar, DRI State of Michigan Representative
Smith Haughey Rice & Roegge

DRI Report: October 2011

Join fellow DRI members in Washington, D.C., October 26-30, 2011, for DRI's 16th Annual Meeting. We are delighted to have President Bill Clinton, Founder of the William J. Clinton Foundation and 42nd President of the United States as our keynote speaker on Friday. His presentation *Embracing Our Common Humanity* will be thought provoking and timely. On Thursday, we will have U.S. Supreme Court Justice Antonin Scalia and award winning author Bryan A. Garner presenting *Making Your Case-The Art of Persuading Judges*, during which they will share insight on the principles of persuasion, legal reasoning, brief writing and oral argument. On Friday, John S. Pistole, Administrator of the Transportation Security Administration will speak on *Transportation Security-Its Evolution and Future*. Saturday offers you an interactive three-hour blockbuster featuring preeminent trial advocacy experts Thomas A. Mauet and Dominic J. Gianna.

The DRI Annual Meeting is a good time to remind everyone of the opportunities DRI has to become involved on a national stage. While DRI is one organization, it has 29 different substantive law committees for you to get involved in. You can find out what it has to offer by visit www.DRI.org and clicking on the committees link. The annual meeting usually signals a change in the leadership of the committees and is a great time to let the new leaders know you want to be involved. involvement can be from writing articles for publications or assisting in presenting seminars. The opportunities to get to know people with similar practices and expand you network are boundless in the committee structure.

This will be my last report in the *Quarterly* as my term as State Representative comes to an end in October at the Annual Meeting. It has been my pleasure and honor to serve the defense bar from the great State of Michigan. Rest assured that you will be in good hands as Edward Perdue from Dickinson Wright will take over as State Representative. I look forward to seeing all of you in the future as I plan to stay active in both MDTC and DRI. Thank you for the last three years.

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

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

Michigan Court Rules Amendments and Proposed Amendments

For additional information on these and other amendments, visit http://michlaw.net/courtrules.html and the Court's official site at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm

ADOPTED

2005-19 - Major jury trial changes

Issued: June 29, 2011
Effective date: September 1, 2011

This series of proposed amendments was reported in the Michigan Defense Quarterly in the fall of 2006. Numerous comments were submitted that year, with the last (but one) submitted in November 2006. Since that time, the proposal has been quiescent. The Court did approve a pilot program in 2007, but this was not widely publicized. (The dissenting opinion by Justice Marilyn Kelly says that the pilot project was adopted in "Administrative Order 2008-2", although no such AO is found on the Supreme Court's web site.)

In March 2010, one organization submitted a further comment, in light of the fact that the pilot program was expected to end in December 2010.

This is a major overhaul of the provisions of several rules. The staff comments include this:

The amendments in this order reflect the Court's approval of many of the jury reform principles tested in the Court's two-year jury reform pilot project that ended in December 2010. Under this order, jury practices for both civil and criminal proceedings are generally incorporated in a new MCR 2.513. The Court will review the efficacy of these amendments in 2014.

Some of the significant new provisions found under MCR 2.513:

(D) Interim commentary - allows the court to have counsel give "interim commentary" during the course of trial. This is a procedure that has been used in certain lengthy jury trials. When many weeks of testimony are involved, the court will allow the attorneys to provide weekly mini-summations, at the end of each week, addressing the testimony given that week. The rule is flexible enough to allow the court to fashion an order appropriate to the case.

(E) Reference notebooks to jurors, containing copies of documents, lists of witnesses, relevant statutes, etc. This may be permitted or required.

(F) Reading summaries rather than actual deposition testimony of witnesses. The summaries will be provided to the jurors before they are read.

(G) Permitting the presentation of expert witnesses sequentially - plaintiff, then defendant, on the same day.

(K) Permitting interim jury discussion of the evidence, with a caution that they are not to decide the issues until the case has been presented.

(M) Allowing the judge to "sum up the evidence", with an instruction that the jury has to determine issues of credibility and weight for itself. "The court shall not

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

The proposal to amend MCR 2.512 would essentially abolish the long-respected rule that the jury is free to talk with anyone, including counsel for the parties, after the case has been concluded.

comment on the credibility of witnesses or state a conclusion on the ultimate issue of fact before the jury."

(N)(3) Copies of instructions to jury now required.

2010-08 – New Caseflow Management Guidelines

Issued: August 17, 2011
Effective: September 1, 2011

The previous caseflow management order is replaced. The most significant items for trial lawyers practicing in the Circuit Courts:

Motions – decisions to be made within 35 days.

Trial or resolution – 75% of cases within one year, 100% within two years

These are characterized as "guidelines" rather than mandatory requirements. The dissents, however, note that some judges have been reported to the Judicial Tenure Commission for failure to comply with earlier versions.

PROPOSED

2010-12 - Jurors

Rule affected: MCR 2.512 and MRE 606
Issued: June 28, 2011
Comments open to:October 1, 2011

Would add the following to MRE 606 as new subparagraph (b):

Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying

and would add the following to MCR 2.512 as new subparagraph (e):

Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing a formal motion therefore with the court and securing the court's permission, interrogate jurors in civil or criminal cases, either in person or in writing, in an attempt to determine the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof. The court itself may conduct such interrogation in lieu of granting permission to the movant.

The MRE proposal may be unnecessary, since this is pretty much what the law is now. The proposal would conform MRE 606 to FRE 606(b), which uses identical wording. It is worthwhile to peruse the lengthy notes to FRE 606(b) for some commentary on the Federal counterpart.

(Notes are found at the Cornell LII site – http://www.law.cornell.edu/rules/fre/ACRule606.htm)

The proposal to amend MCR 2.512 would essentially abolish the long-respected rule that the jury is free to talk with anyone, including counsel for the parties, after the case has been concluded. I see no reason to prohibit this practice, and no reason to prohibit inquiry into "the basis for the verdict". The members of the jury are instructed, before being released, that they are free to talk and free to decline to talk to anyone.

This one appears to be a solution in search of a problem.

2002-24 – Lawyer Advertising and Communications

Rule affected: MRPC 7.3
Issued: July 19, 2011
Comments open to:November 1, 2011

The previous order adopting a rule change was rescinded and a new proposal has been submitted.

The revised proposal would add the following language to a new subrule (c), the subrule as a whole taking the place of the language in (a) on what does and does not constitute solicitation:

If the written solicitation concerns an action, or potential claim, that pertains to the person to whom a communication is directed, or a relative of such person, the communication shall not be transmitted less than 30 days after the injury, death, or accident occurred that has given rise to the action or potential claim.

(3) Every written communication from a lawyer described in subsections (1) and (2) shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any written communication, unless the lawyer has a family or prior professional relationship with the recipient. If a written com-

The MRE proposal may be unnecessary, since this is pretty much what the law is now. The proposal would conform MRE 606 to FRE 606(b), which uses identical wording.

munication is in the form of a self-mailing brochure, pamphlet, or postcard, the words "Advertising Material" shall appear on the address panel of the brochure, pamphlet, or postcard. The requirement to include the words "Advertising Material" shall apply regardless whether the written communication is transmitted by regular United States mail, private carrier, electronically, or in any other manner.

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MDTC Winter Meeting

Friday, November 4, 2011

Hotel Baronette (Novi)

8:00 A.M. – 3:00 P.M.

MDTC

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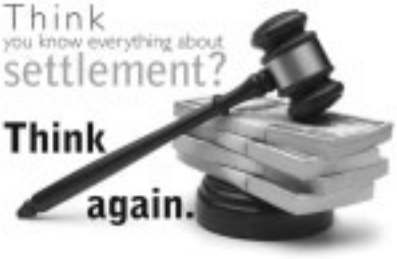

MDTC Winter Meeting
REGISTRATION FORM

Friday, November 4, 2011
Hotel Baronette (Novi)
8:00 A.M. – 3:00 P.M.

Full Name: _____ Preferred First Name: _____

Company or Firm Name: _____

Address: _____

City/State/Zip: _____ Phone Number: _____

Fax: _____ Email Address: _____

Emergency Contact/Phone Number: _____

Special Dietary Requirements: _____

_____

CLE (If licensed in other States) Please indicate what State: _____

REGISTRATION FEES

☐ **MDTC Member** – $210.00 ☐ **Non-Member** – $235.00

☐ Members of the Commercial Litigation Committee of the State Bar Business Law Section – $215.00
(includes membership in MDTC for one year)

☐ Yes, *sign me up for membership in MDTC.* ☐ No, *sorry, not interested in membership at this time.*

☐ Group (up to three Members from your firm) -- $360.00
(each additional person over 3, $65 each
includes individual's one year membership)

☐ Lunch only – $75.00

☐ Handout only – $235.00

☐ New Member Special – $285.00
(Cost of meeting and 1 year of membership)

☐ Check (payable to MDTC) ☐ Credit Card - **ONLY** ___Visa **or** ___Master Card

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Registration fee includes program, lunch, and breaks. If you have any questions, please contact Madelyne Lawry at (517) 627-3745. Payment MUST be received on or before the date of the event. ***Cancellations must be received in writing 72 hours in advance of the event for a refund – less $20.00 administrative fee.***

Please complete this form and return it to:

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FRIDAY, NOVEMBER 4, 2011

8:00 – 8:30 a.m. **Registration**

8:30 a.m. – 8:45 a.m.
Opening Comments

8:45 a.m. – 9:30 a.m.
CASE EVALUATION: MAKE IT COUNT
Transforming Case Evaluation from an Obligation to an Advantage

Larry R. Donaldson, *Plunkett Cooney*

Gary C. Berger, *Berger Miller & Strager PC*
Martin C. Weisman,
Weisman Young & Ruemenapp

9:30 a.m. – 10:15 a.m.
FACILITATION: MAKE IT WORK
Impartially Aiding in Discussions and Negotiations

Peter L. Dunlap, *Peter L. Dunlap PC*

Peter D. Houk,
Fraser Trebilcock Davis & Dunlap PC
Richard C. Kaufman, *Zausmer, Kaufman, August, Caldwell, & Taylor, PC*
Wayne J. Miller, *Miller & Tischler PC*
Robert F. Riley, *Riley & Hurley, PC*

10:15 – 10:45 a.m.
STRUCTURED SETTLEMENTS: MAKE IT MAKE SENSE
Benefiting from the Agreement of Compromise: Are structured settlements really protecting victims from economic loss and hardship?

Rachael Grant, *Ringler Associates*

10:45 a.m. – 11:00 a.m. –
Refreshment Break

11:00 a.m. – 12:00 p.m.
EXCEEDING EXPECTATIONS: MAKE IT EFFECTIVE
The Client's Perspective on Settlement and What We Are (or Aren't) Doing Right

Ridley S. Nimmo, II, *Plunkett Cooney*

Jayson J. Hall, *Oakland University*

Kelly A. Freeman,
Meadowbrook Insurance Group
Louis A. Lessem, *Wayne State University*

12:00 p.m. – 1:30 p.m. – Lunch
With presentations from 2011 Respected Advocate Award Recipients

Thomas J. Evans, *Evans Portenga*
Paul Lazar, *Hanba & Lazar, PC*

MDTC/MAJ Respected Advocate Award:
Every year 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.

1:30 – 2:30 p.m.
A VIEW FROM THE BENCH: MAKE IT CLEAR
Dispositive motions as a settlement tool: the Judge's perspective

Beth A. Wittmann,
Kitch Drutchas Wagner Valitutti & Sherbrook

Hon. Thomas S. Eveland,
Eaton County Circuit Court
Hon. Christopher M. Murray,
Michigan Court of Appeals
Hon. Victoria A. Roberts, *U.S. District Court, Eastern District of Michigan*

2:30 p.m. – 3:00 p.m.
Concluding Remarks

Raffle

3:00 p.m. **Meeting Adjourns**

Hotel Baronette • 27790 Novi Road • Novi, MI 48377 • Toll Free: 800-395-9009

15th Annual MDTC Open Golf Tournament

Friday, September 9, 2011 • Mystic Creek Golf Club

2011 Tournament Winners: *Jim Gross, Mark Hypnar, Keith Sterley, Josh Bauer*

Justice Brian Zahra, Jim Gross, David Tuffley

Kathy Bogas, Pamela Harwood, Judge Christopher Murray

Jim Bodary, Michael Malloy & Bob Krause

MDTC Golf Tournament Sponsors: *Bienenstock Court Reporting & Video, Butzel Long, Collins Einhorn Farrell & Ulanoff PC, Exponent, Foster, Swift, Collins & Smith PC, Fraser Trebilcock, Davis & Dunlap PC, Gross & Nemeth, PLC, Legal Copy Services, Inc., Record Copy Services, Siemion Huckabay, PC*

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

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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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2011

Board Meeting Guests in BOLD

October 26-30	DRI Annual Meeting – Washington DC
November 3	Board Meeting, Hotel, Baronette – **Justice Zahra & Justice Mary Beth Kelly**
November 3	Past Presidents' Dinner, Hotel Baronette
November 4	Winter Meeting, Hotel Baronette

2012

January 13	Excellence in Defense Nomination Deadline
January 13	Young Lawyers Golden Gavel Award Nomination Deadline
January 27	Future Planning Meeting, The Westin Book Cadillac Detroit
January 28	Board Meeting, The Westin Book Cadillac Detroit **– OPEN**
March 15	Board Meeting, Okemos Holiday Inn Express – **COA Judge Krause**
April 27 & 28	DRI Central Regional Meeting – Greenbrier, West Virginia
May 10	Board Meeting, The Westin Book Cadillac Detroit **– OPEN**
May 10-11	Annual Meeting, The Westin Book Cadillac Detroit

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