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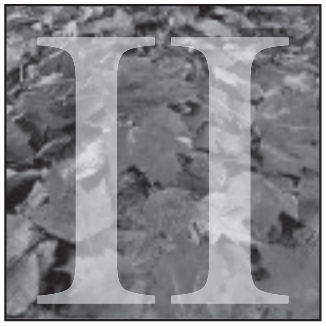

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P.O. Box 66
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www.mdtc.org • info@mdtc.org

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Editor:
Hal O. Carroll
hcarroll@VGpcLAW.com

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

Articles: All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcome articles and opinions on any topic that will be of interest to our members in their practices. Although MDTC is an association of lawyers who primarily practice on the defense side, the *Quarterly* always emphasizes analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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President's Corner

By: Phillip C. Korovesis
Butzel Long

From the President

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

"Since when have we Americans been expected to bow submissively to authority and speak with awe and reverence to those who represent us?"

— William O. Douglas, U. S. Supreme Court Justice

With the campaign season already underway for an election almost a year into the future, and the political turmoil in our nation's capital dragging needlessly on, it seems to me that Justice Douglas' comment has particular relevance these days. Our leaders are elected, not ordained or chosen as the result of divine provenance. Because *we* put them there, *we* should demand more of those leaders.

We need to keep that in mind, just as much as they should keep in mind that they work on our behalf. A lack of civility and blind adherence to party lines or a partisan dogma has proven not only unwieldy, but also unproductive in a time when good representative leadership is desperately needed. Leadership should rise to the occasion and lead not through arrogance or with an air of superiority, but with humility and a sense of purpose that serves at the foremost the interests of the represented. We should demand that accountability and our leaders should deliver.

The same goes for the representative leadership of Michigan Defense Trial Counsel, which I would hope you will agree has been much more responsive to its constituency than have our government leaders. While the leaders of MDTC are indeed elected by the broad populace of the organization, they do not have lucrative pensions or the hopes of lobbying jobs when they depart from their positions. Yet, MDTC representative leaders, who all volunteer their time, have to be and should be responsive to the needs of the organization's members. That is the way it should work. However, in order to do so, and to improve that responsiveness, we need to hear from you, the constituents.

From the executive committee to board members and from regional chairs to section chairs, call us with your ideas, concerns or complaints. Let us know how we can be of service to you, those we represent. Let us know what you think it is we are doing right or that we need to do better, and give us ideas on items that you think would be helpful to the organization and its members. Tell us about a program you would like to see on an area of the law that touches upon your practice and might affect the practices of other members. Bring to our attention pending or proposed legislation that might have an impact upon practitioners who are MDTC members. We are all ears.

Those of us in MDTC's leadership are here for various reasons. Some simply enjoy serving the profession. Others look to broaden their connections and network with lawyers that share similar concerns or practices. Yet others serve to give back to an organization that has provided them some benefit. Whatever the reason, one thing is constant among each and every one of the representative leaders of this organization I have worked with: we listen and we will respond. That response is

Leadership should rise to the occasion and lead not through arrogance or with an air of superiority, but with humility and a sense of purpose that serves at the foremost the interests of the represented. We should demand that accountability and our leaders should deliver.

always timely and, more importantly, well thought out. Whatever the response, you can be sure that on every issue that comes to our attention, the greater overall good of the MDTC and its members will be in mind when the decision is reached by the leaders of this organization.

And while there may be many reasons for that kind of thoughtful, timely and thorough consideration, one that is pertinent now is the reason that comes to my mind in light of Justice Douglas' statement on representative government—we are and act like humble servants, and not like an anointed class of leaders. So, I urge you to get involved, contact your MDTC leaders and let them know what you care about or what concerns you. We'd love to hear from you, so pick up the phone or shoot an email to let us know what you have on your mind. I can guarantee that if you do, you will not be asked to bow submissively or be required to speak to us with awe and reverence. It's just not our style.

"Sole Negligence"– A Tale Of Two Statutes

By: Hal O. Carroll, *Vandeveer Garzia, P.C., hcarroll@VGpcLAW.com*

Executive Summary

This article is adapted from an article that first appeared in the October 2009 issue of the Journal of Insurance and Indemnity Law.

The world of indemnity seems somehow to be destined to confuse courts, and recent research into Tennessee law pointed that out – the same language can have two different meanings in two states, and for each state, the meaning is "obvious." Practitioners in Michigan are all familiar with MCL 691.991, which bars indemnity for one's "sole negligence." Well, Tennessee has the same statute, and Tennessee's statute reads:

> A covenant promise, agreement or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promise against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee, the promisee's agents or employees, or indemnitee, is against public policy and is void and unenforceable.[1]

Since Tennessee's "sole negligence" statute it uses the same words as Michigan's statute, it must have the same meaning, right? Wrong. In Michigan, "sole negligence" means, in effet, "solely negligent," *i.e.,* that the potential indemnitee is the only person who was negligent; the statute bars indemnity if the indemnitee's negligence is the only negligence there is. If anyone else is negligent, then the indemnitee can still be indemnified for its own fault.[2] In Tennessee, "sole negligence" it means, in effect, "own negligence," so that the indemnitee cannot be indemnified for its own negligence, even if it isn't the only person who was negligent. Tennessee says: "Owners in the construction business are no longer able to contract away liability for their own negligence."[3]

That's not the only difference. In Michigan, if the clause is written too broadly and attempts to require indemnity for the indemnitee's own fault, the court trims it to fit the statute and allow as much indemnity as the statute would allow.[4] The mechanism the court used to do this is a fiction, saying that the indemnitor "in effect, made two promises in the indemnity clause: to indemnify for Clark's sole negligence and to indemnify if the injury was caused 'in part' by Clark's negligence."[5] The court ruled that "[o]nly the first promise is made illegal by the construction statute . . .. It does no violence to either the contracting party's [sic: parties'] intent or the statute to sever this independent, unenforceable promise from the rest of the indemnity clause on the facts of this case."

The opinion earns points for creativity, but not for analysis. Whatever might be said for modifying a clause to fit a statute as a matter of policy, it pretty much makes a hash of the words "void and unenforceable."

Hal Carroll is a cofounder and the first chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan, which was founded in 2007. He specializes in insurance coverage and indemnity cases and in civil appeals. His email address is hcarroll@VGpcLAW.com.

Since Tennessee's "sole negligence" statute it uses the same words as Michigan's statute, it must have the same meaning, right? Wrong.

In Tennessee, the court takes "void and unenforceable at its word, and invalidates the entire clause, so that the indemnitee who overreaches gets nothing.

> "Pursuant to Tenn. Code Ann. § 62-6-123, the indemnity provision . . . is void in its entirety as contrary to public policy."[6]

One measure of the strictness of Tennessee's approach is that every reported case where the statute has been applied has voided the clause.

This is a stark difference in interpretation, and those who think simple words ("sole negligence") always have a clear meaning should think again.

What makes this both interesting and cautionary from the perspective of one who drafts contracts, is that neither court had any problem interpreting the statute. Neither court wrestled with any perceived ambiguity, pondering two possible interpretations, and then explaining why its interpretation was the better one. The meaning of "sole negligence" was obvious in Michigan and it was obvious in Tennessee. Michigan and Tennessee agree that the statutory language obviously has only one meaning, but that obvious meaning is different in each state.

To some extent, the difference can be expressed as a matter of judicial public policy. Michigan takes a consciously neutral view of indemnity for one's own fault, whereas Tennessee sees it as suspect. Tennessee adheres to the majority view that a contract that purports to grant indemnity for the indemnitee's own fault must expressly say so.

> [A] contract of indemnity cannot be construed under the law of Tennessee to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms or unless no other meaning can be ascribed to it. Also . . . general, broad and seemingly all inclusive language in an indemnity agreement is not sufficient under the law of Tennessee to impose liability for indemnitee's own negligence.[7]

Michigan's philosophy is different in that indemnity for an at-fault indemnitee is provided, "[a]though not 'expressly stated in the agreement," if "in light of the surrounding circumstances," the court is "persuaded" that this is what "the parties intended."[8] Not exactly a textualist view, but still the current law.

But philosophy aside, there is a lesson here about careful use of words. Neither the Michigan courts nor the Tennessee courts had any problem reading the statute. Each gave the term "sole negligence" a drastically different meaning without any anguish over the phrase. To each court the meaning was obvious.

Is there a "true" meaning? Can we say one state is correct and the other not? There are two parts to look at. One is the phrase "the sole negligence of the promisee." The other is the phrase "against public policy and is void and unenforceable."

The second phrase is the easier one to critique. Tennessee wins. A court is entitled to take a neutral stance about public policy and contracts out of fastidious concern for freedom of contract, as Michigan's Supreme Court has done, but when public policy is declared by the legislature, judicial deference kicks in and the legislature's public policy must be enforced. If the legislature says a clause is "void and unenforceable," the court should defer to the legislature's judgment, not perform a deft little bit of bifurcation so as to invent a new clause

A court is entitled to take a neutral stance about public policy and contracts out of fastidious concern for freedom of contract, as Michigan's Supreme Court has done, but when public policy is declared by the legislature, judicial deference kicks in and the legislature's public policy must be enforced.

that never actually existed, asking for two types of indemnity, one of which is permitted and one which is not.[9] Words may be malleable and occasionally opaque, but when a court invents the words itself and then interprets them it is overstepping its bounds. A clause that offends the statute should be void, not trimmed to fit. Trimming the clause is explicitly inconsistent with the legislative declaration.

The first phrase is the tougher one, and the more interesting from a drafting perspective. If we read "sole negligence" against the common law background that applies in most states other than Michigan, that is, the requirement that an agreement to indemnify someone for his or her own fault must expressly say so, then the better reading of the statute is again Tennessee's. To put it another way, under a contextualist – as opposed to a textualist – view, Tennessee's interpretation is better on this part as well.

What if we ignore context, as Michigan's Supreme Court has done in recent years as a matter of judicial policy? This is tougher. If the phrase were "the negligence of the promisee," without the word "sole," then Tennessee's interpretation would clearly be the only one.

So what does the word "sole" add, or detract, from the meaning? The answer you would get from someone who drafts

contracts is: "Never mind; just tell me what you want to accomplish and I'll give you the words that do it." If we want Tennessee's result, we will write "from the promisee's own negligence or the negligence of the promisee's agents or employees." If we want Michigan's result, we'll write: "from the negligence of the promisee, the promisee's agents or employees, if no other person was negligent."

On balance, in this writer's opinion, and as a matter of textual analysis rather than public policy, Tennessee's construction seems the most natural and the less strained. The lesson for anyone who drafts a contract is to be much more careful about the words you choose. What some people tends to dismiss as "mere semantics" can cost a client dearly. Semantics is the study of the meaning of words, and it is never "mere."

Endnotes

1. Tenn. Code Ann § 62-6-123.
2. *Burdo v Ford Motor Co,* 588 F Supp 1319 (ED Mich 1984); *Trim v Clark Equipment Co,* 87 Mich App 270; 274 NW2d 33 (1978).
3. *Posey v Union Carbide v USF&G,* 507 FSupp 39, 41 (MD Tenn, 1980).
4. *Ford v Clark Equipment Co,* 87 Mich App 270; 274 NW2d 33 (1978).
5. 87 Mich App at 276.
6. *Armoneit v Elliott Crane Service, Inc,* 65 SW3d 623, 631-632 (Ct App Tenn 2001), appeal denied.
7. *Elliott Crane Service, Inc v H G Hill Stores, Inc,* 840 SW2d 376, 380 (Ct App Tenn, 1992)
8. *Vanden Bosch v Consumers Power Co,* 394 Mich 428; 230 NW2d 271 (1975)
9. *Ford v Clark Equipment Co,* 87 Mich App at 276.

IN MEMORIAM

William L. Kritselis passed away on December 2, 2011 at Sparrow Hospital in Lansing. He was admitted to practice in 1962, and began his career as an Assistant Prosecuting Attorney in Ingham County and became chief of the criminal division. He entered private practice in 1965 and focused his practice on representing injured plaintiffs.

He was named "outstanding Attorney of the Year by the Ingham County Bar Association, and was honored by MDTC with its "Respected Advocate Award" in 2006. He was listed in Best Lawyers in America for over 20 years and for several years was voted by his peers as a Super Lawyer.

He is survived by his wife of 48 years, Elaine, and his son, Nicholas Kritselis.

Stupid Mistakes That Lawyers Make With Technology

By Sharon D. Nelson, Esq. and John W. Simek

Wow. This could be an epic novel. No worries, we will restrain ourselves. Here are the things we see most often in our clients' law offices that make us crazy.

1. There is no screen saver password and the computer is left on at night for remote access. This is fine if you'd like to invite the janitorial staff to load your network with pornography or otherwise browse your files.

2. They never turn their machine off. Computers, you have noticed, are imperfect. Processes don't terminate the way they should, applications get tangled, and your own tendency to have 15 programs running at once tends to create collisions. As John puts it, "lots of stuff hangs around impeding the performance of your machine." The fix is easy – either turn the machine off every night – or if you need it for remote access, turn it off when you go to lunch. Once a day is the rule. No exceptions.

3. Passwords need to be twelve characters long – there is no exception to this anymore either. Anyone with any IT sophistication can crack your eight character password, no matter what it is, in less than two hours. With twelve characters, it takes 17 years. Most bad guys can't wait that long. Make it easy on yourself and create a passphrase: GoingonanAlaskancruisein2011! is perfect –and easy to remember.

4. Passwords are meant to be remembered but we are obviously pathetic when it comes to remembering. We find passwords on monitors, under keyboards, and in the top right hand drawer of the desk. That's our field research. We would guess that the bad guys can figure those places out too.

5. Being penny wise and pound foolish is common – the installation of illegal software in law offices is horrifying. The Business Software Alliance is not amused by illegal software – and at $150,000 per copyright violation, you are unlikely to be amused if discovered. By the way, most of the BSA's tips come from employees. Do all of your employees adore you?

6. Back-up media goes bad. Inevitably. No matter what kind of back-up you use (and shame on you if you're not backing up), you must – absolutely must – do test restores of the data to ensure that all is well. That is true even if you are using an online back-up provider. We once saw a major online backup provider lose five years of law firm data – they had never done a test restore.

The authors are the President and Vice President of Sensei Enterprises, Inc., a computer forensics, legal technology and information security firm based in Fairfax, VA. 703-359-0700 (phone) 703-359-8434 (fax) sensei@senseient.com (e-mail), http://www.senseient.com

7. Autocomplete is your enemy. This is the Outlook function that helpfully suggests an e-mail address when you begin to type. In the last week, we have received three e-mails meant for other people. John turns his off. Sharon likes autocomplete, but she has a firm rule. When the e-mail is finished, her hands come off the keyboard until she has verified that the addresses on the e-mail are what she intended. Without this rule, she acknowledges she too would be among the hordes of lawyers who have, at the very least, embarrassed themselves. One lawyer meant to send a very important e-mail to co-counsel and ended up sending it to a *New York Times* reporter instead. Take your hands off the keyboard.
8. There is no PIN on your smartphone. Remember that rule about keeping client data confidential? How lazy can you get? If you don't have a PIN on your smartphone, run, do not walk, and get one installed. We once found a SAIC phone lost at an airport. No PIN. The owner was lucky that we were honest folks and turned it over to security.

Funny how easy it was to come up with these eight. Maybe we'll do a Part II. ☺

Common Questions And Answers About Mediation

By: Peter L. Dunlap, *Peter L. Dunlap, P.C.*

Author's Note

This article has its genesis in a panel discussion during MDTC's winter meeting in Novi on November 4, 2011. Panel members, all distinguished and experienced mediators, were the Honorable Peter D. Houk, former Chief Judge of the Ingham County Circuit Court, the Honorable Richard C. Kaufman, former Chief Judge of the Wayne County Circuit Court, Robert F. Riley, founder and managing partner of Riley & Hurley, P.C. and Wayne J. Miller, founder and managing partner of Miller & Tischler P.C. This writer moderated the discussion. While this article is solely the work of the author, the content borrows liberally from answers by the panel members, who may or may not endorse what is written here. The article follows the same question and answer format used at the November 4 meeting.

Pete Dunlap has extensive experience in litigation since 1968 with Fraser Trebilcock Davis and Dunlap. His practice is now focused solely on mediation and arbitration. He can be reached at (51) 321-6198 or at pdunlap65@gmail.com.

What can be done by lawyers to make facilitation a more positive experience?

First and foremost is preparation by the lawyer.

- Prepare the client for the give and take of mediation and that they may not pay (or receive) the dollar amount or other relief they expect.
- Analyze and discuss with the client the best alternative to a negotiated settlement (BATNA) and be prepared to change it if necessary.
- Advise the client of the mediator's role and that the mediator is not there to negotiate for any party but to manage the settlement process as a neutral.
- Have the right party present who can freely negotiate a settlement without making numerous phone calls.
- Have the right exhibits available such as all medical records, especially involving recent medical care.
- Know who the lienholder is and how to contact them if you are representing the Plaintiff.
- Scheduling: Give the mediator a realistic date and time for the mediation and make every effort to keep it. The mediator and staff will appreciate making ONE schedule rather than repeated adjournments, especially when there are multiple parties.

When is mediation most effective?

NOT after case evaluation where a dollar figure has been set which causes the client to become fixated on that number with no flexibility. Usually, the best time for mediation is after discovery, or at least after key depositions and exchange of documents has taken place. If the court has imposed a deadline and the attorneys feel mediation will fail if scheduled accordingly, ask the judge for a new deadline by stipulated order. Most judges will accommodate that request since they want the case settled as well. If ordered to early facilitation, a practice followed by some federal courts, make every effort to disclose key documents. As Professor Irving Younger is claimed to have said, "Discovery is a rush to disclose".

What mediation style do mediators find most effective?

No surprises here! All panelists advised against an antagonistic "scorched earth" approach in favor of professionalism, both toward the attorneys and particularly the opposing client. Advise your client that nothing good will happen by either of you attacking the other side's credibility, honesty or motivations. Explaining your position in a calm and professional manner helps the process succeed. Combative behavior does not. If your client's mood is such that you feel a confrontation is inevitable, advise the mediator in advance to please keep the parties physically separated.

What should a mediation brief contain?

- Develop the key facts, case history and legal precedent in the most abbreviated form possible.
- Attach highlighted deposition pages which help your case rather than the complete transcript.
- Remember that the opposing client may also read your brief so avoid personal attacks and outrageous arguments.
- The brief is a great way to *persuade* the other side so use it well. Meet opposing arguments, legal or factual, with rational explanations.
- Admit the obvious. Don't argue positions, such as liability, that are not sustainable.

Opening Statements by Lawyers and parties. Do they work?

Make sure you know in advance what the mediator expects. If you don't feel opening statements would be productive, make this known in advance. If you do make an opening statement, prepare for it as you would for a jury (only shorter?). Again, this is an opportunity to *persuade* the other side. If an apology is warranted, and is genuine, make it – or better yet, have your client do it if they are capable of doing so.

> Usually, the best time for mediation is after discovery, or at least after key depositions and exchange of documents has taken place.

How does the mediator handle the "bottom dollar" demand/ offer or "final" position?

First, if the offer isn't "final", don't use the term. "Final" should be a position of last resort and it should be genuine or your long term credibility will suffer. Think long and hard about ever using the term "final" since last minute changes in position will cease when the other side hears the term. A simple "yes" or "no" to your opponents offer/demand is sufficient to send the message and doesn't eliminate the prospect of a change in position that your client can accept.

Can I be candid with the mediator?

Absolutely, but clarify that the mediator's practice is to keep matters confidential. Don't try to "spin" the mediator. This will only serve to delay settlement and will not help your relationship with the mediator if your statements later prove to be false or less than 100% truthful.

Summary

Mediation settles approximately 65 to 70% of all civil cases. It is a tool for you to use that will save costly trial expenses and provide finality to your client's problems. Use it wisely.

Digital Forensics: Current Practice And Application In The Private Sector

By: Randall L. Weston and Charles W. Rettstadt, *Research North, Inc.*

Executive Summary

Staying current with changes in digital technology has become a daunting task for the computer and mobile phone forensic examiner. Given the increasing number and variety of devices and their associated uses, it is even more of a challenge for investigators working with counsel to ensure that evidence is gathered legally. This article describes current examination and evidence handling protocols and cites specific applications to the civil arena.

Randall L. Weston has over 20 years of experience in law enforcement as a Lieutenant with the Department of Public Safety, Petoskey, Michigan. Randy is responsible for supervising and conducting criminal investigations, specializing in those involving the Internet, computers and cell phones. He is a Certified Digital Evidence Technician and is recognized in Michigan courts as qualified in computer-related evidence gathering and computer forensic investigations. Randy investigates civil matters as an employee of Research North, Inc. with permission from his Department. His email address is weston@researchnorth.com

Charles W. Rettstadt is a former Naval Criminal Investigator and for 10 years worked as a Special Agent for the Michigan Attorney General, Organized Crime Division investigating white collar crime. More recently, he has been President of Research North, Inc., a well-respected Midwestern private detective agency serving the insurance industry and the business community. Charlie has an MA in Police and Public Administration, is a Certified Fraud Examiner and has been qualified as an expert in fraud schemes and financial transactions. His email address is rettstadt@researchnorth.com.

Challenges to the Examiner and the Professional Investigator

It's hard to imagine what a day would be like without personal computers or the Internet! According to the United States Census Bureau (2011), in 1984 only 8.2% of American households had personal computers. Most recent data (2009) found that 68.7% now have Internet access while multiple computers and home wireless networks are commonplace.

Computer and mobile phone technology has become integral to our everyday lives; connectivity is an imperative not an alternative, and access is available to the poorest Americans, as well as the rich. Daily activities include: voice, texting, e-mail, practical Internet applications such as electronic bill paying/banking, online games and gaming activities, casual and formal communicating via social media sites and all types of formal and casual research. There are also a myriad of phone applications that involve the use of search engines to check the stock market, news and weather and to research products and services. Application of this technology has accelerated so rapidly with the advent of the cell phone that the PC and the laptop are rapidly losing popularity and being replaced by smaller, more portable and powerful devices.

Apple has set several one day sales records on the recently introduced iPhone 4 with daily sales exceeding 223,000 units per day. Add in 9,250,000 iPads sold, and sales jump to 325,000 iOS (mobile operating system) devices per day.[1] Samsung and Research in Motion (Blackberry) have also introduced new tablet computers while strong sales continue for all of the Smartphones.

Total mobile phone sales to end users in 2010 totaled 1.6 billion units, an increase of 31.8 percent from the year 2009. It is now estimated that 90 percent of Americans own some type of mobile phone.[2] The popularity of tablet devices has contributed to a significant decline in sales of traditional netbooks, laptops and desktop PCs. A tablet or a Smartphone is certainly more personal since both work-related and personal content can be stored in these hand-held devices. They are capable of accessing high-speed Internet via cellular service, and Wi-Fi hot spots are commonplace. They can be used virtually anywhere.

Best Practices for the Examiner

With the rapid change in technology and the limited training available on new devices, it is important for an examiner to remain current in his/her knowledge of acceptable research tools and methodology. Tools need to be tested and validated prior to each use and established best practices for computer forensic examination must be followed.[3]

The popularity of tablet devices has contributed to a significant decline in sales of traditional netbooks, laptops and desktop PCs.

To extract information from any device, an examiner must first determine what information is potentially available on the subject make and model. Smartphones are particularly challenging since not so long ago all cell phones had only a rudimentary call history, phone book, and a messaging system containing both voice and text messages. Today's devices are much more complex, some with operating systems similar to that of a laptop.

The most common question asked of examiners is "What potentially probative information can be forensically extracted from a device?" The answer is, "Some or all of the following depending on the manufacturer, make, and model":

- Installed applications
- Phone book/contacts
- Recently dialed numbers
- Call logs
- Text messages
- SMS messages
- MMS messages (Media Messages)
- Memos
- Browsing history
- E-mails
- Audio and video recordings
- Pictures
- Appointment calendar entries
- GPS data (locations the phone has been)
- GPS location of photos taken
- Hot list
- Pin data
- SIM card data
- Data stored on internal and removable memory
- Service provider
- IMSI
- Spyware artifacts

Other hidden data

Collecting and protecting data is accomplished by an examiner utilizing a tiered approach. Multiple tools and methods are employed to examine and extract all available data from an enormous variety of mobile and stationary devices. As a result, the consensus is that, "More forensically sound levels should be exhausted before attempting a lower level of analysis."[4] This is accomplished utilizing forensic procedures in the following order:

- Forensic cellular/handheld device software
- Consumer (open source and/or manufacturer's) backup software
- Menu navigation, photographic/video documentation and transcription of information viewed
- Transfer via e-mail or messaging of data to a downloadable device

After evidence extraction is completed, final steps include preservation and reporting of methodology and findings. Whether for criminal or civil proceedings, the report should contain all relevant case information and detail the procedures followed during the forensic examination process.

If a device must remain on, it should be isolated from all network access by using a Farday Bag or a similar piece of hardware that provides radio frequency shielding.

Documentation should include:

- Copy or description of legal authority
- Chain of custody
- Detailed description of the evidence (may include photos)
- Photographs or documentation of any visible damage
- Information regarding the packaging and condition of the evidence upon receipt by the examiner

Best Practices for the Professional Investigator

Before presenting any device to a forensic examiner, the following should be considered to preserve evidence in its original state:

1. Is the device currently powered on or off? If it is on, is it connected to a network and available to receive data? There are applications that provide remote access to phones such as Apple's "MobileMe", which allow a subscriber to remotely wipe the contents of a phone. Other applications enable a device to be tracked by GPS in the event it is lost or stolen. Finally, if left on, the contents of a phone can also be impacted by incoming data. For instance, most cell phone manufacturers utilize the "first in-last out" principle for data. This means any incoming data will replace or delete existing data such as text messages, phone call logs, etc.

To avoid unwanted or unintended corruption or manipulation of data, a device should be turned off. If the device is a cell phone, this will preserve the integrity of the data and location of the last cell tower accessed.[5] If a device must remain on, it should be isolated from all network access by using a Farday Bag or a similar piece of hardware that provides radio frequency shielding. It should also be connected to a charger and the examiner notified for immediate forensic examination.

2. Some data may be lost when a phone is powered off, and powering off without knowledge of the device's password can add a complication. Accessing password protected devices can be very labor intensive, and special software or the pin code from the manufacturer may be required.

Civil Applications

Traditional abuses of digital devices have included criminal and civil infractions related to adult and child pornography, Internet and electronic mail misuse, fraud, forgery and counterfeiting, marital infidelity (chat logs, Internet history, e-mail, and text messages), identity theft and sexual harassment to name a few. In the past, law breakers communicated their illegal acts verbally and in writing. Today, these acts are routinely communicated digitally.

Recent, more novel abuses of digital devices have presented huge challenges to the business community. For instance, the authors recently received a complaint from a manufacturing company's human resource director that a female employee had been receiving sexually explicit messages on her cell phone, and the sending number was blocked. An investigation identified a male employee as the potential sender. As part of the investigation and under the guise of an upgrade, the employer exchanged that employee's assigned company-owned phone. A forensic examination provided the proof that the suspected male employee had sent the offending messages. As a result, the manufacturing company was able to prevent a potentially costly sexual harassment lawsuit.

Business information technology departments are tasked with monitoring the use and abuse of company systems. In another case investigated by the authors, a large health care institution's IT manager requested assistance with a suspected Health Insurance Portability and Accountability Act (HIPAA) violation. The IT department had discovered that patient information including social security, insurance and diagnostic data had been sent to an employee's personal e-mail account. Investigators also sought to determine if the protected information was used or transmitted from the employee's company-assigned computer. A forensic examination of that company-owned laptop determined that the protected information was intact and that none of the patient's confidential information had been compromised. This investigation developed the proofs necessary for the health care institution to remain in compliance with the HIPAA Security Rule.[6]

Conclusion

Rapid changes in the diversity and complexity of digital devices present increasing challenges to prosecutors, attorneys, forensic examiners, police and professional investigators. Everyone involved in the process must remain current on examination practices and protocols as well as legally acceptable methods of obtaining and preserving of evidence.

There are no short cuts! Best practice demands that examiners, police and investigators should vigilantly avoid intrusive behavior where there is a reasonable expectation of privacy, should remain current on legal precedent and should maintain a close working relationship with prosecutor or counsel throughout the investigation.

Endnotes

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Young Lawyers Section

VI. Trial Tips, Techniques & Strategies Part 1: Basic Training

By Scott S. Holmes, *Foley & Mansfield, P.L.L.P.*

Executive Summary

This article is the sixth 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 fourth article focused on dispositive motions while the fifth article outlined trial preparation. This two-part article will provide tips, techniques, and strategies for trial advocacy.

Scott Holmes is an associate in Foley & Mansfield, LLP. His email address is sholmes@foleymansfield.com

The author wishes to recognize and thank Professor J. Alexander Tanford of the Indiana University School of Law – Bloomington and the Honorable Thomas L. Ludington of the United States District Court for the Eastern District of Michigan for their extensive knowledge, experience, and commitment to his development as a young attorney.

Part one of this article covers a broad range of the basics of trial advocacy. There are countless resources which examine the many details and possibilities involved in trial practice. You are encouraged to seek out these resources as you become more experienced and comfortable with the basics of trial advocacy. Look for Part Two of this article in the next issue of the *Michigan Defense Quarterly* where each stage of the trial will be covered in detail from opening statements through closing arguments!

Creating a Theme

Before stepping into the courtroom, you must develop a theme for your case that represents your client's position. Most trial attorneys will agree that having a trial "theme" is essential to capturing a jury's attention and delivering your theory of the case. A good theme can be applied throughout the trial and will link all the stages together. That is why creating a theme is an important part of pre-trial preparation. A theme is an opportunity to be creative with your presentation and it must be short, relatable, and memorable.

Short: One sentence can often be too long. A few words are usually sufficient and most effective.

Relatable: It must create a link in each juror's mind between your case theory and arguments.

Memorable: Your theme must be catchy enough to stick in each juror's mind throughout the trial and deliberations.

Take, for example, a breach of contract case between a business developer and a construction contractor. You represent the business developer and your case theory is that the contractor continually failed to meet construction deadlines, resulting in damages to your client. A good theme for your case could be described to the jury as follows, "this is a case about *broken promises*." The "promises" are the construction deadlines outlined in the construction contract and specifically agreed to by the contractor.

Another example: consider a negligence lawsuit by an automobile driver who you contend pulled out in front of your client's truck, which was hauling products for delivery. An example of a theme for this case would start with, "Ladies and gentlemen of the jury, do you remember the first thing your parents told you before crossing the street as a child? They told you to 'look both ways before you cross.' Well, the case you will hear today is about what happens when you don't follow that important advice. This case is about *failing to look both ways before you cross*."

Creating a good theme should be one of the first things you do when preparing for trial because it will need to be woven into your opening statement, direct and cross examinations, and closing argument. At the very least, it will help you tie these stages of the trial into one uniform presentation.

Learning to Ride – Part One: Entering an Exhibit

One procedure that many young attorneys stumble over is how to properly enter a piece of evidence. It really is a simple process and is as unforgettable as riding a bike – once you have practiced it enough, you will never have to think about it again.

Let's assume we need to enter a letter that the witness wrote to one of the parties. Naturally, your examination of the witness (regardless of whether it is on direct or cross) will at some point lead him to mention that he wrote a letter. At this time, your witness and everyone else in the courtroom is expecting to see that letter. Here is the procedure:

Step 1. Walk over to opposing counsel and show her the document.

She will give it a brief look over and either object to it or give some indication that she does not oppose its use (a nod, an "Okay," or nothing at all). Make sure it does not have any writing, notes, or other markings (including highlighting) that were not on the original.

Step 2. Ask the judge, "May I approach the witness?"

The judge will allow it and you should now take the document over to the witness. *Note*: Many attorneys will have their exhibits marked prior to use (in fact, some courts require it). If your document has not been previously marked, just take it over to the court reporter prior to giving it to the witness and ask for it to be marked. *Note*: Asking for permission to approach the witness usually is necessary only once per witness. Once permission is granted, most judges do not expect you to ask for it again with the same witness.

Step 3. As you are walking toward the witness, say the following, "I am now showing you what has been marked for identification purposes as Defense Exhibit 1."

Note: The distinction that the document is marked "for identification purposes" is a formality based on procedure. The document is obviously not an exhibit simply because it has been marked. As a result, it is important to note for the record that its designation as "Defense Exhibit 1" is simply for identification purposes, not because it represents an actual exhibit admitted into evidence. This is important for situations where a document is ultimately not admitted into evidence for one reason or another. When reading a transcript of the trial, it would be confusing to see "Defense Exhibit 1" twice, where it refers to two different pieces of evidence (one entered and one not entered).

> Before stepping into the courtroom, you must develop a theme for your case that represents your client's position. Most trial attorneys will agree that having a trial "theme" is essential to capturing a jury's attention and delivering your theory of the case.

Step 4. Hand the document to the witness and ask, "Do you recognize this document?"

When he or she answers "Yes," ask "What is it?"

The witness will respond with something to the effect of "This is the letter I wrote to Mr. Jones." It would probably be best to also ask what the date of the letter is or, if there is no date, to ask the witness to identify generally when he sent it. *Note*: At this point, most judges and opposing counsel would accept that proper foundation has been laid as to this potential piece of evidence. However, it may also be necessary to ask the witness how he knows this is his letter (he wrote it and it has his signature). *Note*: Remember that this document is not an admitted exhibit yet. Do not allow the witness to read or discuss any of the *substance* of the document. It is improper and objectionable. This step is merely to *identify* the document.

Step 5. Now that you have laid the foundation for the document, ask the judge, "Your Honor, the Defense moves to have this document admitted as Defense Exhibit 1."

The judge will ask opposing counsel if there are any objections and, barring any, will state that the document has been admitted into evidence.

Step 6. Proceed with examination.

At this point, you are free to discuss the substance of the exhibit and proceed as you usually would with questioning. *Note*: Once the witness has an understanding of the exhibit and you no longer need him or her to refer to it, it is best to take it from the witness so that he or she is not distracted or left to hold it throughout the remainder of the examination. Remember to place the exhibit in the proper area once you are done using it.

Learning to Ride – Part Two: Impeaching a Witness

Another common courtroom procedure that young attorneys have difficulty with

is the proper method for impeachment on cross-examination. For those who did not take a trial advocacy class in law school, "impeachment" or "impeaching the witness" is the method for discrediting a witness' testimony based on prior inconsistent statements. It is one of the most important – and satisfying – parts of trial practice.

Let's assume you are questioning a witness who denies receiving a phone call from your client. The fact that he received this phone call is important to your case and he indeed admitted to this fact during his deposition six months ago. Because this is an important fact, you no doubt have prepared a copy of his deposition transcript in advance with the page and line marked where he admitted to receiving the call. The following is the impeachment procedure starting from the moment the witness denies receiving the call:

Step 1. Repeat the question a second time to force the witness to commit to his inconsistent statement.

For example, "So, you are denying that you received a call from Mr. Jones on May 5th, 2005?" *Note*: If he now backs off his denial, then take a moment to criticize his credibility based on his back-to-back contradictory statements. Do not belabor the point, just make the witness uncomfortable enough to think twice about offering inconsistent statements in the future. It is usually enough to say something to the effect of, "Well, you've now responded both 'Yes' and 'No' to the same question. Which is the truthful answer?"

Step 2. Establish with the witness that he testified previously at a deposition.

Ask the witness the following questions:

a. "Do you remember sitting for a deposition back in August?"

b. "Do you remember being asked all sorts of questions by both myself and your attorney?"

c. "Do you remember being placed under oath and agreeing to tell the truth?"

d. "Did you, in fact, tell the truth that day?"

Step 3. Find the transcript with his admission and tell opposing counsel what page and line number you will be referring to.

One of the most satisfying and powerful parts of the impeachment process is letting the jury watch the witness quietly read his or her deposition testimony and then embarrassingly state the opposite of his or her original courtroom testimony. The jury is not told his deposition response, but they do not need to be told.

The moment you mention the witness' deposition, opposing counsel will know you are going to impeach the witness. *Note*: Although you may end up giving the witness a copy of the transcript that you are using for impeachment, there is no need to follow the formalities of entering an exhibit. The use of a transcript during impeachment is not meant to result in the entering of the transcript as an exhibit.

Step 4. Establish the prior inconsistent statement.

There is minor disagreement over which is the best way to accomplish this.

Method A: Some attorneys at this point read the question and subsequent response from the transcript to the witness (e.g. "I asked you, 'Did you receive Mr. Jones' call?' and you responded 'Yes.'") After doing this, they ask if the witness remembers giving that response and follow it by pointing out the inconsistency between the deposition response and courtroom response ("You've now responded both 'Yes' and 'No' …). The witness is finally asked to identify which response is the truthful one (almost universally followed by a sarcastic, "Are you sure?").

Method B: Other attorneys, including this author, prefer to read only the deposition question and not the response. Instead, after reading the question, the witness is handed a copy of the transcript and asked to read the relevant lines and/or pages to himself. Once the witness is done, the attorney asks, "Now, having read your previous, sworn deposition testimony, I'll ask you again: Did you receive a call from Mr. Jones on May 5th, 2005?" One of the most satisfying and powerful parts of the impeachment process is letting the jury watch the witness quietly read his or her deposition testimony and then embarrassingly state the opposite of his or her original courtroom testimony. The jury is not told his deposition response, but they do not need to be told. The witness's reaction to it is more indicative of the response than hearing the words would ever be.

Regardless of which method you prefer, a proper impeachment is a powerful and impressive experience for everyone in the courtroom, especially the jury. *Note*: There is always the possibility that the witness will stick with his or her courtroom testimony in direct contradiction of his deposition testimony. In this situation, you should emphasize the inconsistent testimony by pointing out the witness's failure to tell the truth. Do not spend too much time on it, just make sure it is a moment the jurors will not forget, and remember to mention it in your closing. Obviously, for *Method B* followers, you should make sure the deposition question and answer is read for the jury before proceeding.

The Basics

Housekeeping. If you are unfamiliar with the judge presiding over your case, ask him or her some basic "housekeeping" questions prior to trial. The questions may include whether the judge allows attorneys to roam freely around the courtroom during their presentations, where to place exhibits that have been admitted into evidence, how much time is allotted for opening statements and closing arguments, etc.

Do not read from a script. Whether it is your opening, closing, direct or cross-examinations, you should know the information you want to say. A rough outline is ok, but there is nothing less persuasive than an attorney who simply reads to the jury. When you truly know and understand what it is you want and need to say, you will be amazed at how easy it is to improve it and make changes "on the fly." This ability is critical since trial cannot be scripted. You will frequently find that what you planned to say no longer applies because certain evidence was not admitted or other uncertainties became realities. Aside from this, some of your best material will come from your mind the moment before you say it, not from a script you wrote weeks, days, or even hours ahead of time.

Distractions. A simple rule is do not hold a pen, notebook, or other item when talking to the jury. It is a distraction that keeps jurors from focusing on what you are saying.

Pacing. When speaking to the jury, it is common for attorneys to either stand in one place or pace uncontrollably. Both are a distraction to the jury and are difficult habits to break. Trial advocacy experts will tell you to practice what is called "purposeful" walking, which means to time your movements with important and transitional points within what you are saying. For example, during your opening, move from one side of the jury box to the other while introducing your witnesses, but stop when you discuss what they will be testifying about. Practicing your opening or closing is crucial to eliminating any pacing problems since most people are unaware they have a problem until someone else points it out to them. Try putting a few X's on the floor with tape to mark stopping points for you to use. If you are not on one of the X's, do not stop walking and time your traveling between them to coincide with what you are saying.

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Lecterns. Many people will tell you that using a lectern is fine if that is what you are comfortable with. However, others will tell you that standing behind a lectern creates a psychological "barrier" between you and the jury and that if you are comfortable with your case you will naturally avoid using it, which is something the jury will recognize. Also, if you can present to the jury without being "tied" to a lectern, you should do it. It will always be more stimulating to listen to someone who moves around rather than someone who speaks from behind a lectern. That said, you should practice what is most comfortable for you, since any effort to project false confidence will likely be transparent to the jury.

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Use common language. As everyone knows, being an attorney changes the way we speak. "After" becomes "subsequently," "agree" becomes "stipulate," and, in Michigan, "summary judgment" becomes "summary disposition." Do not assume jurors know that a handwritten sheet of paper can be referred to as a "document." Studies show that most jurors you will encounter have a high school education at best. But even highly educated people can be lost when bombarded with the amount of information typically thrown at them during a trial. For these reasons, it is best to use common, conversational language as much as possible.

Note: remember to "translate" this sort of language when your witness uses it. Expert witnesses in particular will use language that many people simply do not know. There is obviously a benefit to having your expert *sound* like an expert, but balance this against the fundamental requirement that the jury must actually *understand* what the expert is saying to be capable of evaluating it. Decide what language is essential and what language the expert should make more common. For the language that is essential, it is important for you, as the attorney, to help translate it to the jury once it is spoken by your expert. It is usually enough to say, "And, Dr. Taylor, when you say 'deoxyribonucleic acid,' you're simply saying 'DNA,' right?"

Avoid pronoun confusion. Although common language is important for a clear presentation, other conversational habits must be avoided at all costs. One habit to avoid is the tendency of people to litter their statements with pronouns. There's no quicker way to confuse a jury than to use "he," "she," "him," her," or "they" multiple times in one sentence. Make sure to refer to people by name,

title, or some other unique identifier as much as possible to avoid conclusion. This advice also comes as a responsibility when you are conducting direct examination if you notice your witness is using too many pronouns. Simply interrupt the testimony to establish who "they" are or "he" is.

Sidebars. Sidebars are used frequently in court to discuss all sorts of topics outside of the jury's hearing, including admissibility of evidence, timing considerations, objections, concerns, or most anything the attorneys or the judge do not want heard in open court. Sidebar conversations with the judge and opposing counsel can easily be the most "colorful" of all discussions you will hear in court. Do not be afraid to ask for a sidebar. Nearly all judges will gladly invite you up to the bench upon request. Also, most sidebars clear up confusion, speed up the pace of trial, or simply make the process run more smoothly – all three of which are welcomed by judges universally. So, do not feel uncomfortable to ask for a sidebar. On this note, always participate in a sidebar if the judge or opposing counsel requests one. Even when you know the topic does not require your input, it is your right and responsibility to hear what is said.

Pay attention to the effect of sustained objections on all stages of the trial. Most trial preparation assumes many future outcomes during the trial, like the admission of a particular piece of evidence. It is important to recognize when these assumptions turn out to be wrong. The arguments you make in your closing are the most subject to change when a crucial piece of evidence is denied admission. Pay attention to these factors and change your strategy and presentation accordingly.

Two basic rules for objections: Know *how* to use them and know when *not* to use them. During the course of trial, there will be many instances that are worthy of objecting to, but choose your battles. Objections to matters of form, such as leading, foundation, or compound questions should be used wisely. Use them in situations where the information sought is critical or you wish to "break up" the flow of your opponent's presentation. However, be aware that at some point the jury may become annoyed at your constant interruptions or, even worse, believe you are trying to keep them from hearing important information. Remember, just because you *could* doesn't mean that you *should*.

Never read content from documents that have not been admitted into evidence. When a document is not yet admitted into evidence, it is improper, objectionable, and possibly grounds for a mistrial if you read or allow the content of the potential evidence to be presented to the jury. This is especially important when you hand such a document to your witness and ask him to identify it.

Carefully word your foundational questions and pay close attention to his answers. Maintain this vigilance when your opponent is doing the questioning.

Do not argue on cross. Anyone who has performed a cross-examination will tell you that arguing with a witness is a futile effort to attain an unnecessary result. You will never convince an adversarial witness to agree with you. If you try, you will frustrate and embarrass yourself in front of the jury. The beauty of a well-prepared and executed cross is that you should never need to argue. Your questions should all be designed to elicit a "Yes" or "No" answer. If the witness refuses to give the answer you know is the truthful one, either impeach him or prove him wrong with evidence.

Be ready to control witnesses. On direct, control starts with your preparation of your witness before trial. Practice questioning your witness and pointing out when an answer is non-responsive or a narrative. Agree on the visual signs you will give when you want your witness to stop talking (raising a hand is the most natural). When in trial, a simple, polite, but firm "let me stop you there" or "we'll get to that in a moment" is usually enough to regain control of a witness who is giving you more than you asked for. Although sometimes more difficult, the same technique can be used during cross-examination. You must be tough when trying to control an adversarial witness. Do not be afraid to raise your voice and make a stern request that the witness answer your questions with a "Yes" or "No." Only if the witness continually ignores your instructions should you request an admonishment from the judge.

Maintain control of the presentation and use of your exhibits. Avoid distributing packets of pictures, multiple documents, or other materials to the jury at a time when you want them to focus on the witness who is making use of the exhibit. Studies have shown that people will browse and read over an entire document despite the fact that the witness is only testifying about a portion of it. Also, if opposing counsel made use of a chart, diagram, or other visual aid prior to your questioning or opening/closing, make sure that she takes it down or that you turn it away from the jury so they are not distracted.

Law clerks are your friends. Finally, when you are too uncomfortable or uncertain to ask the judge a question, find the judge's law clerk. The clerk will know the answer to almost any question you could ask and are an excellent resource when working with judges.

Remember to check back in the next issue of the *Michigan Defense Quarterly* for Part Two of this article, where we will discuss tips, techniques, and strategies in detail for each stage of trial from opening statements through closing arguments!

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At right is a list of the sections, with the names of their chairpersons. All MDTC members are invited to join one or more sections. If you are interested in joining a section, just contact the section chair.

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Common uses for the **discussion lists** *include:*

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Appellate Practice ***appellate@mdtc.org***	Beth A. Wittman bethwittman@kitch.com Matthew T. Nelson mnelson@wnj.com
Labor and Employment ***labor@mdtc.org***	Barbara E. Buchanan beb@kellerthoma.com
Professional Liability & Health Care ***profliab@mdtc.org***	Terence P. Durkin terence.durkin@kitch.com
Young Lawyers ***younglaw@mdtc.org***	David L. Campbell david.campbell@bowmanandbrooke.com Robert Paul Vance pvance@ccglawyers.com
Insurance Law ***insurance@mdtc.org***	Hal O. Carroll hcarroll@VGpcLAW.com
Municipal and Government Liability ***munigov@mdtc.org***	Kari Boylan kboylan@co.wayne.mi.us
Law Practice Management ***pracmgt@mdtc.org***	Thaddeus E. Morgan tmorgan@fraserlawfirm.com
Trial Practice ***trialprac@mdtc.org***	David Ottenwess dottenwess@ottenwesslaw.com
General Liability ***genliab@mdtc.org***	David Couch dcouch@garanlucow.com
Commercial Litigation ***comlit@mdtc.org***	Edward Perdue eperdue@dickinson-wright.com

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

MDTC Legislative Report

Many important changes have been made in Lansing in 2011. Whether you think well of them or not will depend upon your political point of view. With the essential assistance of comfortable Republican majorities in both houses of the Legislature, Governor Snyder has enjoyed unprecedented success in achieving the accomplishment of his legislative agenda, and yet recent polling has shown a dramatic erosion of his popularity. This has not come as a great surprise to many observers who predicted the causes early on. The treatments that Mr. Snyder has prescribed to cure Michigan's ailing economy have been very painful for many Michigan residents, and thus, Democrats and many Independents have felt that he has gone too far. But Mr. Snyder does not march in lock-step with the conservative fringes of the Republican Party either, and this has prompted the Tea Party and other conservative Republicans to publicly declare their disappointment that he is not a true conservative. Mr. Snyder has tried to do what is needed while taking a somewhat more balanced approach to governing – as he said he would do all along – but this has left him open to attack on two fronts.

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

As I write this report on December 9, 2011, a cold wind has put an end to the boisterous demonstrations on the lawn of the Capitol, and the Occupy Lansing encampment in the park down the street has now been abandoned for the winter. But the rancorous debates have continued in the House and Senate chambers as the Legislature enters the final days of this year's session, and the Occupiers have pledged to return with their tents in the spring. The holidays will provide a needed respite, but it seems that the spirit of the season has been dampened somewhat by the "us versus them" animosity that has become so pervasive in Lansing and Washington. Regrettably, the notion of compromise seems to have become a foreign concept to most of our elected representatives, and this has led to a paralyzing gridlock in our nation's capital. As 2011 draws to a close, the 99 percent remain dissatisfied, and the rest don't seem to care. Can this be the beginning of the fabled "winter of our discontent"? Let us hope not; I'm looking forward to spring already.

New Public Acts

As of this writing, there are 249 Public Acts of 2011. They include, most notably:

2011 PA 238 – House Bill 4500 (Kowall – R), which will amend the **Administrative Procedures Act** MCL 24.253, to require each executive agency to include, in its Annual Regulatory Plan, an identification and evaluation of rules that the agency plans to review in the coming year. In completing this analysis, priority will be given to rules that directly affect the greatest number of businesses, groups and individuals, and the analysis of each rule must discuss, among other things, the continuing need for the rule and problems or complaints associated with its enforcement.

Governor Snyder has a companion Bill, House Bill 4326 (Farrington – R), that would have prohibited the promulgation of administrative rules more stringent than applicable federal rules unless specifically authorized by statute. This veto – the first of Mr. Snyder's gubernatorial career – has provided a lesson for the legislators of his party. Mr. Snyder, who does not favor simplistic solutions to complex problems, had made it known that he did not approve of this legislation, and hinted that he would probably veto it if it landed on his desk. The Legislature, undeterred by that warning, sent it to him anyway. The legislative leadership now understands, if there was any doubt before, that Mr. Snyder is not a rubber stamp. 2011 PA 241 – House Bill 4163 (Potvin – R), will **require school districts to establish policies to prohibit and prevent bullying.** This legislation, which should probably have been a no-brainer, was a long time coming, and its passage has provided some other useful lessons for our legislators. The first lesson, for all of them, is that compromise is still possible, and can produce a favorable result for the people of Michigan. The second, primarily for the benefit of the Republicans, is that the minority party can have its way if adherence to an unreasonable position produces a public relations fiasco. Many readers will recall that the Democrats had wanted to focus attention upon bullying based upon specific characteristics such as race, gender or sexual orientation. The Senate Republicans were staunchly opposed to this, and passed a separate Bill – Senate

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Bill 137 (Jones – R) which included a specific exemption for conduct based upon moral or religious beliefs. This exemption, quickly dubbed a "license to bully," gained national attention of the most unfavorable kind, which led to the prompt passage of HB 4163a version which sensibly excluded the preferred language of both parties.

2011 PA 162 – Senate Bill 77 (Schuitmaker – R),which will amend the Revised Judicature Act to clarify that actions against state licensed architects, professional engineers and licensed professional surveyors arising from professional services rendered are considered actions for malpractice, subject to the two-year limitation for malpractice actions under MCL 600.5805(6) and the periods of repose provided under MCL 600.5839.

2011 PA 168 – Senate Bill 160 (Meekhof – R),providing new **criminal penalties for performance of partial-birth abortions.**

2011 PA Nos. 201 – 208 – Senate Bills 43, 249, 250, 251 and 252, and House Bills 4462, 4478 and 4492), providing new criminal penalties for mortgage fraud.

2011 PA 281 – Senate Bill 281 (Hune – R),which has created a new Bowling Center Act, providing immunity for bowling establishments from civil liability for slip and fall accidents caused by wearing bowling shoes outside if the establishment has posted a statutorily-prescribed notice that wearing bowling shoes outside may subject the wearer to the danger of a fall caused by snow, moisture or other materials picked up outside. This new act, which was evidently prompted by a rash of slip and fall injuries suffered after smoking outside, will take effect on January 1, 2012.

The Dreaded Recall

Time will tell, of course, but it is possible that some other valuable lessons may have been learned from the successful recall of Republican Representative Paul Scott. As I mentioned in my last report, the animosity of this year's proceedings prompted efforts to recall Governor Snyder and numerous legislators from both sides of the aisle. Recall campaigns have been rewarded with failure in recent years – no legislator had been successfully recalled since 1983, when two Democratic Senators were recalled for voting for a tax increase – but the fear of being the first in a long while has always been present in the minds of most legislators. Representative Scott was the only legislator to face the judgment of the voters in the last election, but the judgment was unfavorable, and thus, there is now a new Chair of the House Education Committee.

The campaign to remove Representative Scott was orchestrated and heavily financed by the Michigan Education Association, and the success of that campaign was a stunning defeat for Governor Snyder and the Republican majority. Although the significance of the MEA's victory has been downplayed, it has served as a reminder that there is real danger in passing controversial legislation without input or support from the minority party. The effect that this will have, if any, remains to be seen, but I note with interest that I have not heard any more talk about the "right to teach" legislation since the election.

Another lesson which does appear to have been learned from this year's recall frenzy is that the time, money and attention devoted to these campaigns and the defenses raised against them could have been put to much better use. The effort to recall Governor Snyder has fallen short, and it does not appear that additional efforts will be made to recall any more legislators at this time. To prevent further abuse of the recall authority, the newly-introduced Senate Joint Resolution S (Meekhof – R) proposes an amendment of Const 1963, art 2, § 8, to limit the permissible grounds for recall of elected officials. If approved by the voters, the amended provision would limit recalls to cases involving conviction of a felony or a misdemeanor involving breach of the public trust, misappropriation of public resources, or other official misconduct.

What's Next?

Our Legislature has been busy since its return from the Thanksgiving break. The initiatives which may be completed before the end of the year or taken up early next year include:

No-Fault Insurance Reform – House Bill 4936 (Lund – R). This Bill 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 $500,000, but an insured could also choose a policy providing coverage levels of $1,000,000 or $5,000,000 for all reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation. HB 4936 would also establish caps for PIP benefits paid for attendant care or nursing services provided in an injured person's home. On October 13, 2011, after a series of well-attended public hearings, the House

The legislative leadership now understands, if there was any doubt before, that Mr. Snyder is not a rubber stamp.

Insurance Committee reported a Bill Substitute (H-2), which now awaits further consideration by the full House on the Second Reading Calendar.

Unemployment Compensation Reform – Senate Bill 806 (Brandenburg – R)**.** This Bill proposes amendments to the Michigan Employment Security Act, which would effect a variety of mostly employer-friendly changes. A Bill Substitute (S-1) was passed by the Senate on December 1, 2011, over vigorously expressed opposition of the minority party, and now awaits consideration by the House Committee on Commerce.

Worker's Compensation Reform – House Bill 5002 (Jacobsen – R)**.** This Bill, which would limit eligibility for Worker's Compensation benefits and implement a variety of additional reforms, was passed by the Senate on December 7, 2011, and returned to the House for consideration of the Senate amendments.

Domestic Partner Benefits – House Bill 4770 (Agema – R)**.** Enrolled for presentation to the Governor on December 8, 2011, this Bill would prohibit public employers from providing medical benefits or other fringe benefits to domestic partners of employees other than lawfully married spouses. There appears to be some question as to whether this prohibition will apply to employees of the autonomous State Universities. Governor Snyder has hinted that he may exercise another veto if he finds that it does.

Elimination of Trial Court Judgeships – House Bills 5071, 5073 – 5075, 5093 – 5094, 5101-5105 and 5107. These Bills, which propose **the elimination of 44 trial court judgeships** by attrition in accordance with the recommendations of Chief Justice Young, were reported by the House Judiciary Committee on December 8, 2011, and now await consideration by the full House on the Second Reading Calendar.

Redistricting of the Court of Appeals – House Bill 5160 (Lund – R). This Bill would amend the Revised Judicature Act to redefine the election districts for the Court of Appeals, but does not reduce the number of judgeships, as requested by the Chief Justice and Governor Snyder. The Bill was passed by the House on December 1, 2011, and now awaits consideration by the Senate Committee on Redistricting.

Where Do You Stand?

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.

MDTC Welcomes These New Members

Bennet J. Bush, *Garan Lucow Miller, PC*, Grand Blanc, bbush@garanlucow.com

Laura Baucus, *Dykema Gossett PLLC,* Bloomfield Hills, lbaucus@dykema.com

Stephen R. Crislip, *Jackson Kelly PLLC,* Charleston, West Virginia, scrislip@jacksonkelly.com

Johanna Novak, *Foster Swift Collins & Smith,* Marquette, jnovak@fosterswift.com

Brett Schlender, Straub, Seaman & Allen, PC, St. Joseph, bschlender@lawssa.com

Paul Tower, Garan Lucow Miller, PC, Lansing, ptower@garanlucow.com

Natalie Priest Yaw, *Dickinson Wright PLLC,* Detroit, nyaw@dickinsonwright.com

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

No-Fault Supreme Court Bolo
(Be On The Lookout) Report

Kimberelee Hillock is a co-chairperson of Willingham & Coté P.C.'s Appellate Practice Group. Ms. Hillock has more than eight years' experience in appellate matters. She is a member of the Appellate Section of the State Bar of Michigan, the Michigan Defense Trial Counsel, and the Ingham County Bar Association. In addition to the state courts of Michigan, Ms. Hillock is admitted to practice in the United States District Courts for the Eastern and Western Districts of Michigan and the United States Sixth Circuit.

Executive Summary

No-fault law continues to be one of the most active areas of the practice. The Supreme Court has granted leave to appeal in cases involving several important issues. Decisions in these calendar cases are expected before July 31, 2012.

- Whether the provision that tolls the statute of limitations in cases of minority or insanity applies to the one-year-back rule of the no-fault act.
- Whether the chain of permissive use doctrine applies in the context of no-fault.
- Whether the family joyriding doctrine applies to no-fault claims.
- Whether an insurer may reform a policy based on a misrepresentation that is "easily ascertainable" when the claimant is an injured third party.
- Whether an insurer must pay for handicap-accessible vans as transportation.
- Bystander recovery: Is psychological injury sustained by a mother who witnesses her son, in the motorcycle ahead, killed in an accident recoverable under the no-fault act?

The Supreme Court has either granted leave or ordered oral argument on several cases that have the potential of significantly affecting no-fault law. For almost all calendar cases in which leave has been granted, a Supreme Court opinion or order will be issued by July 31st, the end of the court's calendar year.[1] Therefore, no-fault practitioners should be on the lookout for these decisions sometime between now and July 31, 2012.

These are the issues before the court.

The One-Year-Back Rule vis á vis Minority and Insanity Tolling

In *Joseph v ACIA,*[2] the Supreme Court granted ACIA's bypass application for leave to appeal and directed the parties to address "whether the minority/insanity provision of the Revised Judicature Act, MCL 600.5851(1), applies to toll the 'one-year back rule' in MCL 500.3145(1)" and whether *U of M Regents v Titan Ins Co,*[3] was correctly decided. To provide a little background, on the last day of the 2009-2010 term, the then-liberal-dominated Supreme Court issued *U of M Regents,* which overruled its previous holdings in *Liptow v State Farm Mut Ins Co,*[4] and *Cameron v Auto Club Ins Ass'n,*[5]

In overruling *Cameron,* the court found that the minority/insanity tolling provision in MCL 600.5851(1) must be read in conjunction with MCL 500.3145(1). The court concluded that the minority/insanity tolling provision, which permits minors and incompetents to bring suit within one year after their disability is removed, would merely grant a hollow right if the formerly minor/incompetent plaintiff could not recover damages. It concluded that "the 'action' and 'claim' preserved by MCL 600.5851(1) include the right to collect damages."[6]

The Court then applied this same logic to overrule *Liptow.* It noted that MCL 600.5821(4) preserves actions brought by state entities, and that the right to bring these actions was more than a "right to file papers in court."[7] It held that "the provisions of MCL 600.5821(4) preserving a right to bring an action also preserve the plaintiff's right to recover damages incurred more than one year before suit is filed."[8]

After this hotly contested 4-3 decision was issued, there was a flurry of amended pleadings filed by the plaintiff's bar in cases involving minority and incapacitated plaintiffs seeking "back-pay" attendant care benefits back to the dates of the respective motor vehicle accidents. One insurer suddenly found itself facing a multi-million dollar attendant care "back pay" claim even though it had faithfully paid attendant care benefits according to the parties' agreement since 1995.

In *Joseph*, the case accepted by the Supreme Court, the plaintiff sought to recover first-party no-fault benefits for 33 years of family-provided "case management" services. ACIA, which had already paid more than $4 million in personal protection insurance (PIP) benefits, sought to limit recovery to expenses incurred the year before suit was filed by moving for partial summary disposition based on the one-year-back provision in MCL 500.3145(1). The trial court denied the motion.

ACIA, recognizing that the Court of Appeals would be bound by *U of M Regents,* filed a bypass application for

After this hotly contested 4-3 decision was issued, there was a flurry of amended pleadings filed by the plaintiff's bar in cases involving minority and incapacitated plaintiffs seeking "back-pay" attendant care benefits back to the dates of the respective motor vehicle accidents.

leave to appeal to the Supreme Court. It argued, consistently with the dissenting opinion in *U of M Regents* and the majority opinion in *Cameron* that the minority/insanity tolling provision of MCL 500.5851(1) pertains only to when a lawsuit can be brought and does not pertain to what damages may be recovered. On the other hand, the one-year-back provision of MCL 500.3145(1) limits recoverable damages to those incurred one year before filing suit. Because the statutes pertain to different subjects, ACIA argued that the Supreme Court erred in *U of M Regents* when it concluded that the minority/insanity tolling provision applied to the one-year-back provision. On May 20, 2011, the Supreme Court granted leave to appeal, and oral arguments were held December 6, 2011.

The Chain of Permissive Use Doctrine and the Family Joyriding Exception

With few exceptions under Michigan's no-fault insurance system, insurers are required to pay unlimited medical personal protection insurance (PIP) benefits without regard to fault. One of the exceptions explicitly enacted by the Legislature prohibits a person from recovering benefits if: "[t]he person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle."[9] Nevertheless, two judicially created doctrines have all but rendered the exception a nullity.

Chain of Permissive Use Doctrine:

The first doctrine, the chain of permissive use doctrine, actually originated in the context of the owner's liability statute[10] but has since been extended to first-party PIP benefits. In *Cowan v Strecker,*[11] the owner of a vehicle loaned the vehicle to an acquaintance with specific instructions that she not let anyone else drive the vehicle. The acquaintance allowed her son to drive. While the son was driving, he became involved in an accident, which injured the plaintiff. The Supreme Court held that once consent is given, it essentially cannot be limited or revoked.[12]

A parallel line of subsequent cases takes a more limited approach, holding that the common-law or statutory presumption of consent under the owner's liability statute may be rebutted by clear and convincing evidence that the end user knows he or she is forbidden from using the vehicle.[13]

Nevertheless, the Court of Appeals in *Bronson Methodist Hosp v Forshee,*[14] imported the *Cowan* holding without the subsequent limiting line of authority to the first-party no-fault context to conclude that an unbroken chain of permissive use existed notwithstanding the vehicle owner's specific restriction that the end user was not to use the vehicle. This is now under review in the context of the § 3113(a) disqualification.

Family Joyriding Doctrine

The family joyriding doctrine was created by a plurality opinion of the Supreme Court in *Priesman v Meridian Mut Ins Co,*[15] Based on sympathetic facts – a joyriding 14 year old child who lived with his mother and thus was otherwise entitled to coverage under MCL 500.3114(1) – the Court surmised that legislators were parents and grandparents who may have had experience with children who joyride, and concluded that the Legislature did not intend to exclude such joyriders from no-fault coverage.

Thus, with no support from the statutory language itself, the lead opinion created a joyriding exception to the MCL 500.3113(a) exclusion of coverage for underage drivers who reside in the parent's household and who are otherwise covered under the parent's insurance pursuant to MCL 500.3114(1). Following *Priesman,* the only Supreme Court case on the subject, the Court of Appeals has extended the family joyriding exception to include adult family members who do not reside with the insured.[16]

In *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Michigan, et al,*[17] the owner of the vehicle gave his son's girlfriend permission to drive his vehicle but explicitly forbade the girlfriend from letting the son drive because the son did not have a driver's license. The son, who was present and heard his father forbid him from using the vehicle, nonetheless convinced the girlfriend to give him the keys after they had both been drinking. The son then crashed the vehicle and sustained injuries.

Because the son did not have his own insurance, the medical provider brought suit against the father's insurer arguing that the son was a permissive user by virtue of an unbroken chain of consent pursuant to *Cowan, supra*, and *Bronson Methodist Hosp, supra*; and that even if the son took the vehicle unlawfully, he was not excluded from coverage pursuant to the family joyriding exception pursuant to *Butterworth Hosp v Farm Bureau,*[18] and *Roberts v Titan Ins Co (On Reconsideration).*[19] Despite the fact that

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the son testified that he knew he was forbidden from driving the vehicle, both the trial court and the Court of Appeals held that the insurer owed benefits to the medical provider because of the chain of consent doctrine under *Cowan.*

The insurer applied for leave to appeal to the Supreme Court, arguing that an immediate family member who knows that he or she has been forbidden to drive a vehicle cannot be a permissive user of the vehicle eligible for PIP benefits under MCL 500.3113(a) because (a) there can be no chain of consent when the end driver knows he or she is forbidden from driving; and (b) a joyriding exception to MCL 500.3113(a) is not supported by the plain language of the statute or any binding authority from the Supreme Court.

On September 21, 2011, the Supreme Court granted leave to appeal and directed the parties to address "whether an immediate family member who knows that he or she has been forbidden to drive a vehicle may nevertheless be a permissive user of the vehicle eligible for personal protection insurance ("PIP") benefits under MCL 500.3113(a) when, contrary to the owner's prohibition, an intermediate permissive user grants the PIP claimant permission to operate the accident vehicle."

In *Progressive Marathon Ins Co v DeYoung,*[20] the owner of the vehicle was insured through Progressive; her husband was specifically listed as an excluded driver on the policy. Her husband, while intoxicated, took the vehicle without her permission, was involved in an accident, and was injured. The insurer filed suit seeking a declaratory judgment that the husband was precluded by MCL 500.3113(a) from receiving PIP benefits. The husband's medical providers intervened. The trial court held that the husband was not entitled to PIP benefits under MCL 500.3113(a). The Court of Appeals reversed on the basis of the family joyriding exception. In doing so, it noted that (a) the family joyriding exception had no basis under MCL 500.3113(a), (b) it would not apply a family joyriding exception were it not bound by prior Court of Appeals precedent, and (c) "whether this exception should have any continuing validity in our jurisprudence is squarely a matter left to our Supreme Court."

The insurer applied for leave to appeal to the Supreme Court. On September 21, 2011, the Supreme Court granted leave and directed the parties to address: "(1) whether an immediate family member who knows that he or she has been forbidden to drive a vehicle, and has been named in the no-fault insurance policy applicable to the vehicle as an excluded driver, but who nevertheless operates the vehicle and sustains personal injury in an accident while doing so, comes within the so-called 'family joyriding exception' to MCL 500.3113(a); and (2) if so, whether the 'family joyriding exception' should be limited or overruled."

Whether an Insurer May Reform a Policy Based on a Misrepresentation that is "Easily Ascertainable" and the Claimant is an Injured Third Party.

In *Titan Ins Co v Hyten,*[21] the insured misrepresented in her application for insurance that she possessed a valid driver's license. About one month after she applied for insurance, her driver's license, which had previously been suspended, was restored. Five months after her license was restored, the insured was involved in a motor vehicle accident in which others were injured. Titan filed suit to reform the insurance policy to provide only the statutory minimum residual liability coverage on the basis of the insured's misrepresentation. The trial court concluded that Titan did not have a right to reduce coverage to the statutory minimums because the court was not convinced that the insured knowingly committed fraud, and the existence of a driver's license was easily verifiable. The Court of Appeals affirmed stating, "Because Titan could have easily ascertained [the insured's] misrepresentation and because the coverage implicated benefits innocent third parties, Titan may not reform [the insured's] policy to reduce the residual coverage to the statutory minimum limits." On September 21, 2011, the Supreme Court granted leave and directed the parties to brief

> whether an insurance carrier may reform an insurance policy on the ground of misrepresentation in the application for insurance where the misrepresentation is "easily ascertainable" and the claimant is an injured third party.

Must an Insurer Pay for Handicap-Accessible Vans as Transportation?

Nowhere in the no-fault act does it say an insurer must provide a means of transportation as part of an insured's PIP benefits. Rather, under MCL 500.3107(1)(a), PIP benefits are payable for "[a]llowable expenses consisting of

The Court renounced compensation for quotidian, or daily expenses: "[I]n seeking reimbursement for food and other such quotidian expenses, plaintiff is essentially seeking a wage-loss benefit. Reimbursement for the value of lost wages, however, is specifically addressed elsewhere in the no-fault act."

all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's *care, recovery, or rehabilitation*." In *Griffith v State Farm Mut Auto Ins Co,*[22] the Supreme Court analyzed the import of the terms "care," "recovery," and "rehabilitation" in the context of the plaintiff's claim that her husband's food expenses were compensable no-fault benefits. The court distinguished between the type of ordinary food that was being provided to the plaintiff's husband and a type of special or select diet that might be necessary for an injured person's recovery.[23] It then concluded that because the food in the case before it was not necessary for the injured person's care, recovery, or rehabilitation, it was not an allowable expense under MCL 500.3107(1)(a).

Importantly, the *Griffith* court did not interpret a statute that merely defined "food" benefits; rather, it interpreted MCL 500.3105(1) and MCL 500.3107(1)(a), which define *all* compensable no-fault products, services, or accommodations. In fact, the Court renounced compensation for quotidian, or daily expenses: "[I]n seeking reimbursement for food and other such quotidian expenses, plaintiff is essentially seeking a wage-loss benefit. Reimbursement for the value of lost wages, however, is specifically addressed elsewhere in the no-fault act."[24] Thus, *Griffith* governs an insurer's responsibility to pay for any of these items, including transportation.

However, before *Griffith*, the Court of Appeals had extended an insurer's "statutory" obligations to cover these very quotidian expenses.[25] Subsequent to *Griffith,* quotidian expenses have still been allowed.[26]

At least one prominent member of the plaintiff's bar has taken the stance in an article that allowable expenses under MCL 500.3107(1) include the full cost of any product or service for which a portion is owed under no-fault; this stance is called "anti-incrementalism."[27] The article provides the following as examples of so-called incrementalism that is decried:

> [I]f the injured person would have required residential accommodations prior to an injury, then under incrementalism, a no-fault insurer would be responsible to only pay for the incremental increase in the cost of residential accommodations related solely to the nature of the person's injury – for example, the cost of wheelchair ramps, widened doorways, or special bathroom equipment. Similarly, if the injured person would have required motor-vehicle transportation prior to the injury but now needs a handicap-accessible van, incrementalism would allow a no-fault insurer to pay only the incremental increase in the cost of the motor-vehicle transportation specifically necessitated by the nature of the person's injury – for example, the cost of a wheelchair lift and special hand controls but not the cost of the van itself.

Against this backdrop arises *Admire v Auto-Owners Ins Co,*[28] In light of the Supreme Court's decision in *Griffith,* the insurer in *Admire* agreed to pay for handicap modifications to a van purchased by the plaintiff but declined to pay for the base purchase price of the van itself. Both the trial court and the Court of Appeals held that the insurer was required to pay for the purchase price of the van itself. The insurer applied for leave to appeal to the Supreme Court on the basis of *Griffith,* and *Weakland v Toledo Engineering Co,*[29] a worker's compensation case in which the Supreme Court held that the base purchase price of a van is not compensable. On September 23, 2011, the Supreme Court directed the court clerk to schedule oral argument on whether to grant leave to appeal or take other action, and directed the parties to address "whether, or to what extent, the defendant is obligated to pay the plaintiff personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq.*, for handicap-accessible transportation."

Is Psychological Injury Sustained While Not an Occupant of the Motor Vehicle Involved in the Accident Compensable under the No-Fault Act?

In *Boertmann v Cincinnati Ins Co,*[30] the plaintiff, who was driving behind her son, saw her son become involved in a fatal motor vehicle accident. She submitted a claim for psychological benefits for post-traumatic stress disorder to her insurer and, when the insurer denied the claim, brought suit against the insurer. Both the trial court and the Court of Appeals held that plaintiff's psychological injuries arose out of the use of a motor vehicle as a motor vehicle. On October 19, 2011, the Supreme Court granted the insurer's application for leave to appeal, and directed the parties to address whether a no-fault insured who

With no support from the statutory language itself, the lead opinion created a joyriding exception to the MCL 500.3113(a) exclusion of coverage for underage drivers who reside in the parent's household and who are otherwise covered under the parent's insurance pursuant to MCL 500.3114(1).

sustains psychological injury producing physical symptoms as a result of witnessing the fatal injury of a family member in an automobile accident while not an occupant of the vehicle involved is entitled under MCL 500.3105(1) to recover benefits for the accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

Endnotes

1. MCR 7.312, Michigan Supreme Court Processing of Cases and Administrative Matters, H.7.
2. Supreme Court Docket No. 142615.
3. 487 Mich 289; 791 NW2d 897 (2010).
4. 272 Mich App 544; 726 NW2d 442 (2006).
5. 476 Mich 55; 718 NW2d 784 (2006).
6. *U of M Regents, supra* at 299.
7. *U of M Regents, supra* at 300.
8. *U of M Regents, supra* at 302.
9. MCL 500.3113(a).
10. MCL 257.401(1).
11. 394 Mich 110; 229 NW2d 302 (1975).
12. *Id.* at 115.
13. *Fout v Dietz,* 401 Mich 403, 405, 408; 258 NW2d 53 (1977); *accord, Bieszck v Avis Rent-A-Car Sys, Inc,* 459 Mich 9; 583 NW2d 691 (1998).
14. 198 Mich App 617; 499 NW2d 423 (1993).
15. 441 Mich 60; 490 NW2d 314 (1992).
16. See *Butterworth Hosp v Farm Bureau Ins Co,* 225 Mich App 244, 248-249; 570 NW2d 304 (1997).
17. unpublished opinion of the Court of Appeals, issued February 24, 2011 (Docket No. 296976).
18. 225 Mich App 244; 570 NW2d 304 (1997).
19. 282 Mich App 339; 764 NW2d 304 (2009).
20. unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 296502).
21. unpublished opinion per curiam of the Court of Appeals, issued February 1, 2011 (Docket No. 291899).
22. 472 Mich 521; 697 NW2d 895 (2004).
23. *Id.* at 537.
24. *Id.* at 540.
25. See *Sharp v Preferred Risk Mut Ins Co,* 142 Mich App 499; 370 NW2d 619 (1985), no app (housing); *Davis v Citizens Ins Co of America,* 195 Mich App 323; 489 NW2d 214 (1992), no app (transportation); *Griffith v State Farm Mut Automobile Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued August 16, 2002 (Docket No. 232517), rev'd 472 Mich 521; 697 NW2d 895 (2004) (food).
26. See *Hoover v Michigan Mut Ins Co,* 281 Mich App 617; 761 NW2d 801 (2008), app dismissed by stipulation of parties ("property taxes, standard utility bills, homeowner's insurance, home maintenance costs, telephone bills, dumpster expenses, elevator inspection costs, home security system expenses, cleaning stipends . . . and snow removal"); *In re Carroll,* ___ Mich App ___; ___ NW2d ___ (2011), Court of Appeals Docket No. 292649, lv pending (financial management); *In re Geror,* 286 Mich App 132; 779 NW2d 316 (2009), no app (guardian ad litem fees in child custody dispute).
27. Sinas, *Deciphering Two Related Concepts: No-Fault PIP Causation Law and the Decision in Griffith v State Farm,* 27 TM Cooley L Rev 105 (2010).
28. Supreme Court Docket No. 142842.
29. 467 Mich 344; 656 NW2d 175, amended 468 Mich 1216 (2003).
30. unpublished opinion per curiam of the Court of Appeals, issued March 8, 2011 (Docket No. 293835).

By: Geoffrey M. Brown
Collins, Einhorn, Farrell & Ulanoff

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.

Malpractice Versus Ordinary Negligence

***Johnson v William Beaumont Hospital:* Unpublished opinion per curiam opinion, Court of Appeals, October 20, 2011 (No. 299215).**

The facts: Plaintiff underwent surgery to remove her left parotid gland (a salivary gland located near the ear). The defendant surgeon wore a headlight on her head during the operation. About an hour into the procedure, she noticed that the plaintiff's left earlobe was "extremely warm," and that the skin was blistering and peeling off. The doctor's operative note stated that the headlight had been extremely warm and caused a slight burn on the skin. The plaintiff sued the surgeon and the hospital alleging ordinary negligence. The plaintiff alleged that the hospital had a duty to properly maintain the headlight and keep it in safe working order, to inspect and test it, and to supervise its staff to ensure that only safe equipment was used during surgery, and that the hospital failed to do these things. The plaintiff also alleged that the surgeon had a duty to inspect and test the equipment, and that the surgeon negligently allowed the headlight to touch or come too close to plaintiff's earlobe. The plaintiff also claimed that neither the headlight nor her left earlobe was involved in the procedure, and that no medical judgment was necessary to prevent her injuries.

The hospital and the surgeon moved for summary disposition arguing that the complaint actually sounded in malpractice, and not ordinary negligence. As a result, the defendants argued, the complaint should be dismissed because there was no notice of intent served as required by MCL 600.2912b or an affidavit of merit as required by MCL 600.2912d. The defendants argued that the alleged negligence occurred in the course of a professional relationship and that it involved medical judgment outside the common knowledge and experience of a lay jury. The trial court agreed and dismissed the complaint.

The ruling: The Court of Appeals affirmed. Citing *Lee v Detroit Med Ctr*, 285 Mich App 51, 61; 775 NW2d 326 (2009), the court explained that the question of whether a case sounds in malpractice instead of ordinary negligence turns on whether (1) the claim pertains to something that happened in the court of a professional relationship; and (2) the claim raises questions of medical judgment beyond the realm of common knowledge and experience. Since it was undisputed that the alleged injury occurred in the course of a professional relationship, the court considered whether the claim "raise[d] questions of medical judgment beyond the realm of common knowledge and experience. Because the headlight is a piece of surgical equipment, the court concluded that it was necessary to know how often a hospital is required to inspect and test it, something that falls outside the realm of common knowledge. Accordingly, the claim against the hospital was held to sound in medical malpractice. Likewise, the court concluded that medical expert testimony would be required to explain the surgery to a jury, and why and how the headlight is appropriately used. As such, the claim against the surgeon also sounded in malpractice.

Practice tip: When defending a health-care provider or facility against a claim of ordinary negligence, consider whether your client has an argument that the claim is actually one for malpractice. Since malpractice claims must be filed consistent with the procedural requirements that don't apply to ordinary-negligence claims, such as those set forth in MCL 600.2912b and 600.2912d (among others), successfully arguing that a claim is one for malpractice instead of negligence should result in dismissal. Depending on when the plaintiff filed the complaint, it might also give rise to a statute-of-limitations defense.

Proximate Cause

***Mauch v Hurley Medical Center* Unpublished opinion Court of Appeals, October 11, 2011 (No. 299938).**

The facts: Plaintiff, the guardian of defendants' patient, sued the defendants for medical-malpractice after the patient was struck by a car. That accident occurred approximately 57 hours after her discharge from the defendant hospital's psychiatric unit. Plaintiff's theory was that discharging the patient somehow caused her to be struck by the car. The trial court granted summary disposition, ruling that the plaintiff could not raise a question of fact on the cause-in-fact prong of the proximate causation

The complaint, however, was not filed until after the expiration of the savings period. It was undisputed, then, that the complaint was not timely filed. The plaintiff, however, argued that the dismissal should be without prejudice, and the trial court agreed.

element. This was despite the fact that all of the experts agreed that the accident wouldn't have happened if the patient had still been hospitalized.

The ruling: The Court of Appeals affirmed. The court held that the plaintiff's experts' opinions that perhaps the accident wouldn't have happened if the patient had been better stabilized were simply speculative. In reaching this conclusion, the court noted that there were "simply too many unknowns," such as her state of mind, what she had had to eat or drink, and whether she was taking her medication. The court also relied on *Teal v Prasad*, 283 Mich App 384; 772 NW2d 57 (2009), in which the plaintiff argued that the plaintiff's decedent had been negligently discharged from a psychiatric unit, allegedly causing the decedent to commit suicide. The panel noted that the court had agreed in *Teal* that the decedent would not have committed suicide had the defendants locked the decedent away for the rest of his life, that was not enough to overcome the speculative nature of the claim that the discharge caused the suicide. Similarly, in *Mauch*, the discharge itself was held to be too attenuated to permit a jury to conclude there was a causal connection without resorting to speculation.

Practice tip: A defendant can move for motion for summary disposition on causation grounds even where the experts agree, technically, that the alleged injury wouldn't have happened but for the alleged act of negligence, if the connection between the alleged negligence (such as discharge from a hospital) is too attenuated from the injury (getting hit by a car or committing suicide).

Statute of Limitations

***In re Cepeda:* Unpublished opinion, Court of Appeals, October 18, 2011 (No. 299855).**

The facts: Plaintiff, the personal representative of her husband's estate, sued for medical malpractice. Plaintiff served a notice of intent after the expiration of the two-year limitations period, but within two years of her appointment as personal representative, meaning it was served within the two-year savings provision of MCL 600.5852. The complaint, however, was not filed until after the expiration of the savings period. It was undisputed, then, that the complaint was not timely filed. The plaintiff, however, argued that the dismissal should be without prejudice, and the trial court agreed. The trial court did not cite a legal basis for doing so, but the plaintiff cited *Eggleston v Bio-Med Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), and argued that a successor personal representative could timely file the complaint so long as it was done within two years of the successor personal representative's appointment (and within three years of the expiration of the statute of limitations).

The without-prejudice notation on the order was necessary to avoid the holding of *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007), which held that an order dismissing a personal representative's complaint as untimely served as a *res judicata* bar on the successor personal representative's complaint because the order did not state it was without prejudice and thus was presumed to be entered with prejudice. The defendants, on the other hand, argued that dismissals based on the expiration of the statute of limitations are dismissals on the merits and must be entered with prejudice under *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 284, 285; 731 NW2d 29 (2007), and that simply labeling an order as being "without prejudice" couldn't avoid that fact.

The ruling: The Court of Appeals agreed with the defendants, and reversed the trial court, remanding for entry of an order granting summary disposition with prejudice. In so holding, the court emphasized that *Eggleston* was distinguishable because in that case, while the first personal representative didn't file a timely complaint, he also **never filed one at all**. There was, therefore, no summary-disposition order to provide a *res judicata* bar on the successor personal representative's complaint. Because the order was a dismissal based on the expiration of the statute of limitations, it was a dismissal on the merits, and it should have been granted with prejudice.

Practice tip: While notices of intent toll the running of the statute of limitations, they do not toll the wrongful-death savings period that permits a personal representative to file a complaint after the statute of limitations expires. If you obtain a statute-of-limitations-based dismissal of a complaint filed after the expiration of both the statute of limitations and the savings period, take care to ensure that you object to any attempt to designate the order as "without prejudice." Also, if the estate gets a new successor personal representative appointed, and files a new complaint, be sure to move for summary disposition on *res judicata* grounds.

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).*

Super Lawyers and Rising Stars
These members of MDTC have been named to Thomson Reuters' list of "**SuperLawyers 2011":**

- **Robert S. Bick**, a partner at *Williams, Williams, Rattner & Plunkett, P.C.* Robert's practice focuses on corporate law, mergers & acquisitions law, corporate governance and business planning.
- **Hal O. Carroll** of *Vandeveer Garzia, P. C.,* whose practice includes insurance coverage and indemnity disputes as well as civil appeals. Hal was also elected to the council of the Insurance and Indemnity Law Section of the State Bar of Michigan and continues to serve as editor of the *Journal of Insurance and Indemnity Law*.
- **John J. Lynch,** a partner at *Vandeveer Garzia, P.C.* John's practice focuses on ADR, mediation and arbitration, governmental entities, and public transit.
- **Thomas M. Peters,** a partner at *Vandeveer Garzia, P.C.* Tom's practice focuses on complex litigation, ADR, serious injury defense litigation and commercial litigation.
- **Richard D. Rattner,** a partner at *Williams, Williams, Rattner & Plunkett, P.C.* Richard's practice focuses on real estate, land use, zoning and corporate law.
- **Daniel P. Steele,** a partner at *Vandeveer Garzia, P.C.* Dan's practice focuses on general litigation, with an emphasis on first and third party auto and insurance coverage.
- **David B. Timmis,** a partner at *Vandeveer Garzia, P.C.* David's practice focuses on business litigation.

Lawyers Weekly "Up and Coming"
Hilary A. Ballentine was recently named an "Up & Coming Lawyer" by Michigan Lawyers Weekly. Hilary specializes in appellate practice at *Plunkett Cooney,* and is a co-chair of MDTC's Amicus Committee.

Chestnut Crop Report

In addition to practicing appellate and insurance coverage law, Hal Carroll maintains a small planting of 12 Chinese Chestnut trees, 14 Pecan trees, 4 walnut trees, 4 apple trees, and 1 pear tree. He reports that this year the chestnut trees brought in a crop of over a bushel. Above is a photograph of him with his new truck in front of one of the chestnut trees.

By: Phillip J. DeRosier and Trent B. Collier, *Dickinson Wright*
pderosier@dickinsonwright.com; twhite@dickinsonwright.com

Appellate Practice Report

Raising New Issues In A Reply Brief

A recent decision from the Court of Appeals serves as a reminder of a well-established, but sometimes overlooked, rule against raising new issues or making new arguments in a reply brief. In this regard, MCR 7.212(G) provides that "[r]eply briefs must be confined to rebuttal of the arguments in the appellee's or cross-appellee's brief."

The Court of Appeals recently applied this rule in *C A Kime, Inc v Van Buren Twp*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2011.[1] *C A Kime* involved an appeal from the dismissal of a taxpayer's request to "correct the taxable value of certain parcels it owned." In its principal brief, the plaintiff made several arguments in response to the Michigan Tax Tribunal's decision that it lacked jurisdiction over the plaintiff's petition. Then, in its reply brief, the plaintiff raised various constitutional issues. However, the Court of Appeals declined to address them, citing MCR 7.212(G):

> In its reply brief plaintiff argues that the result of the Tribunal's holding, and defendants' argument in support of that holding, deprived it of several constitutional rights. However, we do not entertain new arguments raised for the first time in a reply brief. Plaintiff had ample opportunity to raise these constitutional issues in its principal brief of appeal.

As support for its refusal to consider the plaintiff's constitutional arguments, the Court of Appeals cited its prior published decision in *Curry v Meijer, Inc*,[2] where the Court similarly declined to address arguments made for the first time in a reply brief. See also *Blazer Foods, Inc v Restaurant Properties, Inc.*[3]

Oral Argument Tips

"How Do I Get Ready?" - Preparing for Oral Argument

- Re-read the entire record of your case.
- Re-read and be familiar with all of the authorities relied on in your brief, as well as in your opponent's brief. Be prepared to discuss each case, especially the central ones.
- Update the authorities cited in your brief and your opponent's brief. Most of the time, briefs will have been filed several months to a year before oral argument is held. It is crucial to update your authorities and make sure they are still good law, as well as to see if the authorities your opponent has cited have been overruled or undermined in any way. You may even find recent cases that place further emphasis on the points you make in your brief.
- Consider researching your panel – you might learn something about their proclivities.

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He serves as Secretary for the State Bar of Michigan's Appellate Practice Section Council, and is the chair of the Appellate Practice Section of the Detroit Metropolitan Bar Association. He can be reached at pderosier@dickinsonwright.com or 313-223-3866.

Trent B. Collier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the areas of commercial litigation, bankruptcy law, and appellate ADVOCACY. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. His email address is tcollier@dickinsonwright.com.

While the Court of Appeals allows potential cross-appellants to wait until an application for leave has actually been granted before filing a claim of cross-appeal, cross-appellants in the Michigan Supreme Court must file an application for leave within 28 days after the appellant's application is filed.

- **Think about questions the Court may ask, especially as they relate to weaknesses in your case.**
- Consider how the Court should craft an opinion or order.
- Consider rehearsing your argument before your colleagues.
- If possible, consider observing your panel in action.

"What Should I Say?" - Appearing Before the Court

- Oral argument is considered to be an opportunity for you to have a dialogue with the Court.
- **Try to develop a consistent theme. Consider telling the Court up front what you intend to address.**
- Don't read from your brief or from a prepared text. Instead, present an overview of your case (e.g., "get to the point") and be prepared to answer questions.
- The primary purpose of oral argument is to answer any questions the judges might have based on the parties' briefs and to clear up any points that they may find confusing.
- Don't reiterate facts. You can assume that the Court has read the parties' briefs and is familiar with the facts.
- **Be sure to listen carefully to questions and answer them directly. Don't dodge or evade a question by attempting to change the subject – answer the question and return to your theme. At the same time, try to recognize when a judge is "on your side" – sometimes judges will ask questions to help you out.**
- Be prepared to concede any weaknesses in your position, but then explain why those weaknesses are not dispositive of the appeal.
- If you're the appellee, listen to the questions directed to the other attorney and his or her answers. You may want to begin your argument by addressing a question raised during your opponent's argument.
- As appellant, consider addressing your opponent's likely arguments before they do in order to mitigate the effectiveness of those arguments.
- **Be prepared to articulate exactly what relief you are seeking** (e.g., " The lower court's decision granting summary disposition to Defendant should be reversed for the following reasons . . . ."). **In addition, consider discussing the positive or negative practical and policy implications of the relief you are seeking or that your opponent is seeking.**
- Pay close attention to time limits, because they generally are strictly enforced. And make sure to reserve time for rebuttal.
- **Don't feel obligated to use all of your time. If you have made the points you feel are necessary, sit down. The Court will thank you for it.**
- **Recognize when you're ahead – if the Court sends vibes suggesting that it does not need to hear any more from you, sit down, let the Court ask the opposing party questions, and use your remaining time to respond to your opponent's answers.**

Cross-Appeals

The specific rationale for asserting a cross-appeal varies from case to case. A common example is when a client obtains a judgment on some of its claims following a trial, but there are other claims that were summarily dismissed prior to trial.

Whatever the reason for filing a cross-appeal, the process for asserting and arguing a cross-appeal in the Michigan Court of Appeals and the Michigan Supreme Court varies, and it is important for Michigan appellate counsel to appreciate these differences. Although this article is not an exhaustive overview of cross-appeal procedures, it highlights a few salient differences between the handling of cross-appeals in the Michigan Court of Appeals and the Michigan Supreme Court.

Cross-appeals in the Court of Appeals

In order to assert a cross-appeal in the Court of Appeals, a party may wait until the opposing party has either filed a claim of appeal or obtained an order granting leave to appeal. If an opposing party has an appeal of right, a claim of cross-appeal must be filed within 21 days after the claim of appeal is filed or served.[4] If the opposing party must seek leave to appeal, a claim of cross-appeal must be filed within 21 days after certifi-

In other words, an appellee may not wait to see if the Court is interested in granting leave on the issues raised by the appellant before putting pen to paper on its own application.

cation of an order granting leave to appeal.[5]

The Michigan Court Rules suggest that a cross-appellant must file a separate brief on cross-appeal at the same time the appellant files its brief on appeal.[6] But the court of appeals' internal operating procedures provide for an alternative and potentially simpler procedure. According to Court of Appeals IOP 7.212(e), an appellee/cross-appellant may file a joint brief on appeal/brief on cross-appeal. Notably, this brief may be filed as late as the due date for the appellee's brief in response to the appellant's brief: "a combined appellee/cross-appellant brief filed by the date appellee's brief is due will be docketed as timely filed."[7]

The only "catch," to the extent it can be considered one, is that the joint appellee/cross-appellant brief must be no more than fifty pages—the page limit for a single appellee brief or a single cross-appellant brief. As such, a joint appellee/cross-appellant brief requires the filing party to sacrifice the ability to file two briefs in exchange for extra time in responding to the appellant.

A joint appellee/cross-appellant brief in the Court of Appeals must be clearly labeled as such. The IOPs themselves recommend using the standard cover page available on the Court of Appeals' website.

Cross-appeals in the Michigan Supreme Court

In the Michigan Supreme Court, as in the Michigan Court of Appeals, a party may wait to see if an opposing party files an application for leave to appeal before filing an application for a cross-appeal.[8] But while the Court of Appeals allows potential cross-appellants to wait until an application for leave has actually been *granted* before filing a claim of cross-appeal, cross-appellants in the Michigan Supreme Court must file an application for leave within 28 days after the appellant's *application* is filed.[9]

In other words, an appellee may not wait to see if the Court is interested in granting leave on the issues raised by the appellant before putting pen to paper on its own application. Instead, an appellee must assert independent grounds for the Michigan Supreme Court to grant leave and must do so before the Court has made a decision with respect to the appellant's application. A party may also decide to make its application for a cross-appeal "conditional," such as in a case where the party is overall satisfied with the Court of Appeals' decision, but wants to preserve the ability to challenge certain aspects of it in the event that the Supreme Court grants the opposing party's application for leave to appeal. In such a case, the party might consider informing the Court that it only has interest in pursuing the cross-appeal if the Court grants the original application.

Unlike the Court of Appeals, the Michigan Supreme Court does not allow for combined appellee/cross-appellant briefs. Consequently, a cross-appellant, like an appellant, must file a brief on appeal within 56 days after leave to appeal is granted.[10]

A possible rationale for different cross-appeal procedures?

At first blush, it may seem odd that the Court of Appeals and Supreme Court should employ such different procedures for briefing cross-appeals. But this difference may be grounded in the very distinct roles that these courts play in Michigan's judiciary. Parties have a right to appeal final judgments before the Court of Appeals, and the court serves the critical function of correcting errors committed below. If the Court of Appeals is to examine whether errors were committed in a particular case, it makes sense that all potential errors should be examined. The Supreme Court, on the other hand, limits its review to issues of jurisprudential significance.[11] Even if an appeal raises issues warranting review by the state's highest court, it does not follow that those asserted on cross-appeal merit similar treatment.

Regardless of the rationale for these different procedures, it is important for counsel to carefully examine the rules governing cross-appeals and to evaluate in each case whether there are grounds—prudential or otherwise—for asserting a cross-appeal.

Endnotes

1. 2011 Mich App LEXIS 438 (Docket No. 295323); *C A Kime*, 2011 Mich App LEXIS 438, *13 n 8
2. 286 Mich App 586, 596 n 5; 780 NW2d 603 (2005).
3. 259 Mich App 241, 252; 673 NW2d 805 (2003).
4. MCR 7.207(B).
5. *Id.*
6. MCR 7.212(E).
7. Court of Appeals IOP 7.212(E)
8. MCR 7.302(D)(2).
9. *Id.*
10. MCR 7.309(B)(1)(a).
11. *See, e.g.,* MCR 7.302(B).

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

Legal Malpractice Update

NO COVERAGE UNDER LEGAL MALPRACTICE INSURANCE POLICY

***Leeds v Insurer Defendant*, 2011 WL 2971228 (S.D. Fla., July 20, 2011) (Unpublished)**

The Facts: The Leeds law firm provided representation to its client over a period of time including August of 2007. On August 23, 2007, the client expressed her dissatisfaction with the representation. The client did not demand monetary relief from the law firm. However, the former client did engage counsel to represent it.

The law firm entered into a malpractice insurance policy with the insurer on January 26, 2008. In order for coverage to apply, the alleged malpractice had to occur on or after the retroactive date of February 1, 2006. Moreover, the policy had a provision requirement that the claim be reported to the carrier within 10 days. The policy also stated that "[n]o insured shall, except at their own expense...agree to any settlement claim...without the [carrier's] written consent."

The former client retained counsel on March 12, 2008. The law firm retained counsel who attempted to negotiate with the former client's attorney. A settlement offer was made, rejected, and the possibility of mediation was discussed. Ultimately, the law firm's attorney was provided with a draft complaint on November 17, 2008, which sought damages in excess of $27 million dollars.

The law firm did not notify the carrier of the impending action until December 2, 2008. At that time, the law firm informed the carrier that mediation had been scheduled, and also mentioned the amount asserted in the complaint. The law firm did not inform the carrier of prior settlement attempts and discussion. Ultimately, the carrier did authorize the law firm to enter into mediation, but never authorized the law firm to enter into a settlement.

Ultimately, the law firm settled the claim for $287,000. When the carrier was informed of the outcome of the mediation, it advised the law firm that the settlement was not authorized, and would not be covered by the policy. The law firm then filed suit against the carrier, demanding payment under the policy.

The insurer filed a Motion for Summary Disposition premised upon three theories:

1. That the claim arose prior to the retroactive date of the policy;
2. The insured breached the 10-day notice requirement under the policy;
3. The insured settled the claim without the insurer's express written consent.

The Ruling: The United States District Court for the Southern District of Florida granted the insurer's motion for summary judgment. The policy required that the insured give "written notice of a claim *or circumstances which could give rise to a claim*" within ten days. (Emphasis added). The court held that under the language of the insurance policy, Leeds was clearly on notice as to the basis for his client's claims, regardless of the lack of a monetary demand. The court said that even if Leeds did not have knowledge of the claim itself, he certainly had knowledge of the circumstances giving rise to a claim.

Leeds argued that even if his notice was untimely, the insurer was not prejudiced and should therefore be required to cover the claim. The court held that the insurer

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

The Court of Appeals reversed. The court stated that "it is well established that '[r]etention of an alternate attorney effectively terminates the attorney-client relationship.'"

was prejudiced by Leed's late notice. The delay prevented the insurer from investigating the claim, from participating in the meaningful defense of Leeds, and from participating in settlement. The court said that the notice provision in the policy would be meaningless if it did not find that the insurer was prejudiced.

The court also held that the insurer's motion for summary judgment was appropriate because Leeds failed to obtain consent for the settlement. Instructive to the court was that the insurer did not provide a settlement ceiling and was not aware of prior settlement discussions. Therefore, the court stated that the insurer could not have been adequately informed so as to permit Leeds to settle a $27 million claim.

Practice Tips: Be sure to give timely notice of both actual **and** potential malpractice claims to your insurer. Failing to do so may leave you without the coverage for which you've paid.

Approval by an insurer to enter into mediation of a claim should not necessarily be construed as *carte blanche* to enter into a settlement. If the policy requires written authorization of a settlement, approval by the insurer to take steps leading up to settlement should not be construed as approval of the settlement itself.

ACCRUAL OF LEGAL MALPRACTICE CLAIMS

***Easton v Lawyer Defendant*, 2011 WL 3299921 (August 2, 2011 (Unpublished)**

The Facts: Plaintiff was in a motorcycle accident in 2004. He hired Lawyer Defendant to represent him in an action to recover no-fault benefits. Lawyer Defendant negotiated a settlement with the insurance company in February 2006. Under the agreement, Plaintiff received payment in exchange for his release of his right to work loss benefits from September 20, 2004 through March 1, 2006. The agreement specifically allowed Plaintiff to obtain work loss benefits from March 1, 2006 through September 20, 2007.

Plaintiff retained attorney another attorney after Lawyer Defendant took no action to obtain Plaintiff's work loss benefits for the period preserved in the settlement. The new attorney sent Lawyer Defendant a letter on December 17, 2007, advising him that she had been retained by Plaintiff in connection with the no-fault action. Defendant did not respond to the new attorney's letter, nor to two subsequent phone calls. On December 24, 2007, the new attorney sent a follow-up letter seeking Plaintiff's file.

Without communicating with the new attorney, Lawyer Defendant filed a new complaint for Plaintiff's no-fault benefits on January 3, 2008. One month after receiving the insurance company's answer, Lawyer Defendant forwarded the complaint and a "substitution of counsel" form to the new attorney. Lawyer Defendant advised the new attorney that Plaintiff's file was ready for her to pick up, and that his only outstanding cost was for the complaint filing fee. The new attorney filed the substitution of counsel with the court on February 27, 2008 and subsequently negotiated a settlement for Plaintiff. Lawyer Defendant asserted a lien against the settlement amount for his filing costs.

Plaintiff filed a legal malpractice action against Lawyer Defendant on December 21, 2009. Lawyer Defendant filed a motion for summary disposition, contending that the attorney-client relationship terminated on December 17, 2007 when Plaintiff retained the new attorney. Therefore, Lawyer Defendant contended that the complaint was filed four days after the expiration of the two-year statute of limitations and the trial court agreed.

The Ruling: The Court of Appeals reversed. The court stated that "it is well established that '[r]etention of an alternate attorney effectively terminates the attorney-client relationship.'" However, the court determined that the attorney-client relationship is not severed when a client hires **additional**, rather than **substitute**, counsel. The new attorney's letters to Lawyer Defendant in December 2007 made no reference to firing Lawyer Defendant, nor did the letters convey any dissatisfaction with Lawyer Defendant's representation. Further, the letters did not state that Plaintiff intended to substitute the new attorney as the attorney of record. As a result, the court determined that the attorney-client relationship was not formally severed by Plaintiff.

Additionally, the court held that Lawyer Defendant continued to represent Plaintiff by filing the new complaint. He expressly acknowledged that he continued to represent Plaintiff by inquiring whether the new attorney intended to substitute as counsel. Moreover, the court's conclusion was supported by the fact that Lawyer Defendant continued to bill Plaintiff for costs associated with legal services.

Practical Implications: A client's mere retention of *additional* counsel is not sufficient to sever a preexisting attorney-client relationship. And, if you continue to provide legal services to a client after a perceived termination date, those additional services may serve to toll the accrual of the claim.

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

Supreme Court Update

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

Court Upholds Tax Plan That Reduces or Eliminates Tax Exemptions for Pension Income

On November 18, 2011, at the request of Governor Snyder, the Michigan Supreme Court issued an advisory opinion that upholds the portions of 2011 PA 38 that reduce or eliminate tax exemptions for public and private pension income. *In re Request for Advisory Opinion*, __ Mich __; __ NW2d __ (2011).

Facts: On May 25, 2011, Governor Snyder signed Enrolled House Bill 4361, which became 2011 PA 38. The essence of 2011 PA 38 is to amend MCL 206.30, which relates to taxable income in Michigan. The amendments to MCL 206.30, which become effective January 1, 2012, are designed to reduce or eliminate tax exemptions for public and private pension income, and to reduce or eliminate tax exemptions and deductions based on an individual's age and income. Prior to 2011 PA 38, "public-pension benefits were completely deductible, private-pension benefits were deductible up to $42,240 for a single return and $84,480 for a joint return (subject to annual inflation adjustments), and all taxpayers were entitled to a personal exemption of $2,500 (subject to annual inflation adjustments)."

Recognizing the public attention this legislation had received, Governor Snyder requested, pursuant to Const 1963, art 3, § 8, that the Michigan Supreme Court provide an advisory opinion as to the constitutionality of 2011 PA 38. The Supreme Court listed the constitutional questions before it as follows:

(1) whether reducing or eliminating the statutory exemption for public-pension incomes as described in MCL 206.30, as amended, impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24;

(2) whether reducing or eliminating the statutory tax exemption for pension incomes, as described in MCL 206.30, as amended, impairs a contract obligation in violation of Const 1963, art 1, § 10 or U.S. Const, art I, § 10(1);

(3) whether determining eligibility for income-tax exemptions on the basis of total household resources, or age and total household resources, as described in MCL 206.30(7) and (9), as amended, creates a graduated income tax in violation of Const 1963, art 9, § 7; and

(4) whether determining eligibility for income-tax exemptions on the basis of date of birth, as described in MCL 206.30(9), as amended, violates equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution.

Holding: Upon receiving briefs and arguments from the Attorney General's office, requesting amicus briefs from other interested parties, and hearing oral arguments, the Michigan Supreme Court upheld provisions of 2011 PA 38 relating to the taxation of public and private pension income and upheld the portions limiting tax exemptions and deductions based on age.

The court, however, struck down as unconstitutional the portions of MCL 206.30(7) and (9), as amended, that would have reduced or eliminated tax exemptions and deductions based on total household resources.

With respect to the provisions of the 2011 PA 38 that are designed to reduce or eliminate tax exemptions for public pension income, the court held that those provisions do not violate the constitution because, although Const 1963, art 9, § 24 precludes the diminishment or impairment of "accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions," a tax exemption does not constitute an accrued financial benefit of a pension plan. The court further held that reducing or eliminating the statutory tax exemption for public pension income does not impair a contractual obligation in violation Const 1963, art 1, § 10 or U.S. Const, art I, § 10(1), because neither constitution provides a contractual right to pensioners that their pension income will, "in perpetuity," remain tax-free. According to the court, although accrued public pensions are protected contractual obligations, the contractual obligation relates to the pension income, not the taxability of that income.

The court also rejected the notion that reducing or eliminating tax exemp-

The Michigan Supreme Court upheld provisions of 2011 PA 38 relating to the taxation of public and private pension income and upheld the portions limiting tax exemptions and deductions based on age.

tions based on date of birth violated equal protections of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution. The Supreme Court held that "there is no constitutional right to a tax-free pension." The court also held that there is a rational basis for "grounding a taxpayer's eligibility for the pension exemption upon date of birth," because older individuals are more likely to be retired or nearing retirement and will be less likely to garner future income necessary to offset the loss of the exemption.

As to reducing or eliminating tax exemptions and deductions based on total household resources, the court held that 2011 PA 38 was unconstitutional, since it effectively created a graduated income tax; a system prohibited by Const 1963, art 9, § 7, which provides that "[n]o income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions." Although the provisions do not create a graduated income tax based on "rate," the court held that the provisions created a graduated income tax based on "base" because they premised a phase-out of tax exemptions and deductions based on the individual's income.

Finally, the court held that the unconstitutional provisions of 2011 PA 38 could be reasonably severed from the remainder of the act. The court explained that MCL 8.5 provides that where a provision of an act is deemed invalid, it will not affect the remaining portions of the act. The court also explained that, in the circumstances presented, "the remainder of the act can be given effect without the invalid portions" because "[w]hen the unconstitutional language is severed, what remains is complete in and of itself, logical in its formulation and organization, and clearly in furtherance of the Legislature's stated goal of addressing deficiencies in state funds."

Significance: This highly anticipated decision has the potential to impact hundreds of thousands of workers and retirees across the state, particularly those who are or will soon be relying on public pensions. For many years prior to 2011 PA 38, many public pensioners understood that their pension income was off-limits and would remain tax-free throughout retirement. Given the significant publicity surrounding this decision, the court was careful to emphasize that it was not deciding whether 2011 PA 38 "represents wise or unwise, prudent or imprudent public policy, only whether 2011 PA 38 is consistent with the constitutions of the United States and Michigan."

Court Holds That MERS Mortgage Foreclosures by Advertisement Are Valid

On November 16, 2011, in lieu of granting leave to appeal, the Michigan Supreme Court reversed the Court of Appeals decision because it "erroneously construed MCL 600.3204(1)(d)" as precluding the Mortgage Electronic Registration System ("MERS") from exercising its right to foreclose by advertisement. *Residential Funding Co, LLC v Sauman*, ___ Mich __; __ NW2d __ (2011).

Facts: In these consolidated cases, each defendant purchased property with financing through a lending institution. Each defendant signed a loan document (i.e., "note") and a mortgage. The mortgages designated MERS as the mortgagee and provided that the mortgagee has rights of foreclosure in the event of default on the loan. The defendants eventually defaulted on their loans, prompting MERS to institute non-judicial foreclosures by advertisement pursuant to MCL 600.3201, *et seq.*, purchase the respective properties at sheriff's sales, and quit-claim the properties to the plaintiff lenders who held the notes on the respective properties.

When the plaintiffs began eviction proceedings, the defendants challenged the foreclosures are invalid, arguing that MERS could not have properly foreclosed on the mortgages because, under MCL 600.3204(1)(d), it was not "the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." The district courts disagreed and held that MERS had authority to foreclose by statute. On appeal, the circuit courts affirmed.

The Court of Appeals reversed and determined that the "sole question presented is whether MERS is an entity that qualifies under MCL 600.3204(1)(d) to foreclose by advertisement on the subject properties, or if it must instead seek to foreclose by judicial process." The Court of Appeals held that the plaintiffs' "suggestion that an "interest in the mortgage' is sufficient under MCL 600.3204(d)(1) is without merit," because "[t]he only interest MERS possessed was in the properties through the mortgages …. [and] [g]iven that the notes and mortgages are separate documents, evidencing separate obligations and interests, MERS' interest in the mortgage did not give it an interest in the debt." According to the Court of Appeals, MCL 600.3204(1)(d) requires

The court, however, struck down as unconstitutional the portions of MCL 206.30(7) and (9), as amended, that would have reduced or eliminated tax exemptions and deductions based on total household resources.

the foreclosing party to own an interest in the debt. Because MERS owned no such interest, it could not maintain non-judicial foreclosures under the statute.

Holding: In lieu of granting MERS' application for leave to appeal, the Michigan Supreme Court reversed the Court of Appeals decision. The Supreme Court held that MERS, as record holder of the mortgage, was an owner of legal title to a security lien on the properties, which was sufficient to allow forecloses by advertisement under MCL 600.3204(1)(d). The court clarified that MERS' ownership "interest in the indebtedness does not equate to an ownership interest in the note." Nonetheless, the court held that the Court of Appeals decision was inconsistent with established legal principles, which demonstrate that a mortgagee has a right to foreclose on a mortgage regardless of who holds the note. Because MERS, as the designated mortgagee, held an interest in the indebtedness "whose existence is wholly contingent on the satisfaction of the indebtedness," the Legislature, by way of MCL 600.3204(1)(d), authorized MERS to foreclose by advertisement.

Significance: Foreclosures by advertisement have become a hot topic in recent years. These non-judicial foreclosures allow mortgagees to foreclose on mortgages without first seeking judicial approval. The court's decision validates not only the thousands of foreclosures by advertisement carried out by MERS in Michigan, but also MERS' general business model. Under this model, MERS acts as the designated mortgagee without holding the note and simply transfers title of the properties to the holder of the note upon foreclosure.

While the court's ruling closes one chapter of MERS' litigation in Michigan, yet another chapter may be opening. Through recent filings, several counties within Michigan now seek significant unpaid transfer taxes based on MERS' post-foreclosure transfers of title to lenders holding notes on the foreclosed properties.

Court Rejects State Representative's Attempt to Enjoin Recall Election

On October 26, 2011, the Michigan Supreme Court granted motions for immediate consideration and a motion to intervene and denied a motion for reconsideration of its October 20, 2011, order on issues relating to the recall election of State Representative, Paul Scott. *Scott v Director of Elections*, __ Mich __; 804 NW2d 551 (2011).

Facts: This case arose from State Representative Paul H. Scott's efforts to enjoin a recall election instituted by recall organizers in Genesee County. In August 2011, recall organizers submitted a recall petition to the Secretary of State containing over 12,000 signatures by registered voters in District 51 of the Michigan House of Representatives.

Scott filed suit against the Michigan Director of Elections and Genesee County Direct of Elections to enjoin the recall efforts. Specifically, Scott sought a preliminary injunction to prevent the recall from being placed on the November 8, 2011 ballot. Scott argued that injunctive relief was necessary because the recall petition failed to satisfy the clarity requirements of MCL 168.952(7), which requires that a recall petition clearly state each reason for the recall. Scott also argued that signatures on the recall petition are invalid to the extent they were gathered before the circuit court's decision on the clarity of the petition. On September 16, 2011, the circuit court denied Scott's request for injunctive relief, holding that Scott had failed to meet his burden of demonstrating a likelihood of success on the merits of his claim. Scott sought leave to appeal to the Court of Appeals.

In an order on October 6, 2011, the Court of Appeals granted Scott's application for leave to appeal and reversed the trial court's denial of injunctive relief. The Court of Appeals held that the trial court "erred in determining that it was unlikely that plaintiff would prevail on the merits." The Court of Appeals also held that Scott raised "an issue of first impression concerning the proper interpretation of MCL 168.952(7) and the interplay between MCL 168.952(7) and 168.961(2)(d)."

Upon remand, the circuit court issued an injunction, preventing the recall from being placed on the November 8, 2011 ballot.

Holding: On October 20, 2011, in an order in lieu of granting leave to appeal, the Supreme Court reversed the Court of Appeals decision and reinstated the circuit court's order denying Scott's motion for preliminary injunction. The Supreme Court held that the circuit court did not err in denying the motion for preliminary injunction because "[i]t is not clear that plaintiff is likely to prevail on the merits." The court noted that the Court of Appeals decision created confusion as to how the parties were to proceed. The court encouraged parties in future election disputes to avail them-

The Supreme Court held that MERS, as record holder of the mortgage, was an owner of legal title to a security lien on the properties, which was sufficient to allow forecloses by advertisement

selves of MCR 7.302(C)(1)(b), which authorizes parties to file applications for leave to appeal directly in the Michigan Supreme Court prior to a decision by the Court of Appeals.

Six days following its October 20, 2011 order, the Michigan Supreme Court denied motions for reconsideration of that order. The court clarified that its October 20, 2011 order reversed the Court of Appeals because Scott failed to demonstrate that he was likely to prevail on the merits. The court then explained that "[t]he ultimate question here is whether signatures gathered on a recall petition are invalid if collected before the circuit court appeal of a ruling on the clarity of the petition is decided." Because MCL 168.952(7) lacks explicit language on this issue, the court held that Scott's construction of the statute is "at the very least debatable." Accordingly, the trial court did not err in concluding that Scott failed to meet his burden of establishing the elements necessary for a preliminary injunction to issue.

The court also held that, despite his claim that he was not seeking to "prevent" the election, but merely seeking to "adjourn" the election to the next scheduled election in February, Scott presented "no authority for the proposition that [the] Court is authorized to 'adjourn' an election."

Significance: The court's decision reinforces the extraordinary nature of preliminary injunctive relief and demonstrates that, even under unusually severe time constraints in cases involving issues of first impression, a plaintiff's likelihood of obtaining preliminary injunctive relief is anything but certain.

Court Remands for Reconsideration Based on the Court of Appeals' Misunderstanding of Parties' Arguments

On September 23, 2011, in lieu of granting leave to appeal, the Michigan Supreme Court vacated the judgment of the Court of Appeals and remanded the case for reconsideration based on the Court of Appeals' misunderstanding of the parties' arguments. *Marsack v Estate of Gabriel*, __ Mich __; 803 NW2d 318 (2011).

Facts: In this third-party no-fault action, the plaintiff passenger filed suit against the driver for injuries the plaintiff suffered in a single-vehicle accident. After filing the lawsuit, but before serving the driver, the plaintiff learned that the driver died from causes unrelated to the accident. The plaintiff spent several months attempting to have an estate opened for the driver, so that a proper defendant could be named in the lawsuit. By the time a personal representative of the estate was appointed, the three year statute of limitations for the plaintiff's negligence action had run.

The personal representative of the estate filed a motion for summary disposition arguing, among other things, that the statute of limitations barred the plaintiff's claim. In response, the plaintiff argued that the limitations period was tolled by MCL 600.5852 during the time the estate was without a personal representative. The personal representative filed a reply brief, arguing that MCL 600.5852, as amended, applied only to actions where a personal representative filed suit on behalf of a deceased plaintiff.

Because the deceased driver was the defendant, the personal representative argued that the plaintiff's reliance on MCL 5852 was misplaced. The trial court denied the personal representative's motion for summary disposition.

The Court of Appeals affirmed and held that the personal representative "bears the burden of establishing that plaintiff's claim is barred by MCL 600.5852." According to the Court of Appeals, because the personal representative failed to show that MCL 600.5852 was a statute of limitations that applied to bar the plaintiff's claim, the trial court properly denied the personal representative's motion.

Holding: On appeal, the Michigan Supreme Court vacated the judgment of the Court of Appeals, holding that the Court of Appeals based its decision on an apparent misunderstanding of the parties' arguments because the Court of Appeals held that the personal representative of the estate failed to "meet her burden of establishing that MCL 600.5852 applied." The Supreme Court noted that the personal representative, who was the defendant, actually argued that MCL 60.5852 did not apply. Instead, it was the plaintiff who relied on MCL 600.5852 as a means of attempting to toll the applicable three year limitations period. Because the Court of Appeals misconstrued the personal representative's arguments, the Supreme Court remanded the case for reconsideration.

Significance: Courts are not infallible. While perhaps rare, instances arise where a party's position is so incorrectly received or interpreted, that a court's decision is incapable of being upheld.

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.

For the first time in the organization's history, MDTC has filed an amicus brief in support of an application for leave to appeal in the Michigan Court of Appeals. *Anderson v M.G. Trucking, Inc, (*No. 306709) involves the discoverability of social media profiles in a third-party auto negligence claim under Michigan's No-Fault Act. MDTC's amicus brief, authored by **Timothy A. Diemer** of *Jacobs and Diemer, P.C.,* asserts that Michigan should follow the national trend to allow discovery of social media information, which is relevant to the claim at issue.

MDTC has also filed an amicus brief in *Joseph v ACIA* (No. 142615), a merits appeal in the Michigan Supreme Court involving two related issues: (1) whether the minority/insanity tolling provision of MCL 600.585(1) applies to toll the "one-year back rule" in MCL 500.3145(1); and (2) whether *Regents of the Univ of Michigan v Titan Ins Co*, 487 Mich 289 (2010), was correctly decided. MDTC's amicus brief, authored by **Ronald M. Sangster, Jr.** of the *Law Offices of Ronald M. Sangster, PLLC,* urges the Court to overrule *Regents*.

In other matters, the Supreme Court recently held oral arguments in *Jilek v Stockson* (No. 141727), and *LaMeau v City of Royal Oak* (No. 141559-60). Those decisions are currently pending.

In early 2012, MDTC will be filing an amicus brief in *Boertmann v Cincinnati Insurance Company* (No. 142936), a Supreme Court merits appeal involving a no-fault insured with claimed psychological injury producing physical symptoms as a result of witnessing the fatal injury of a family member in an automobile accident. The issue posed in *Boertmann* is whether that insured, who was not an occupant of the vehicle involved in the accident, is entitled to recover benefits under MCL 500.3105(1) for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. **MDTC is currently seeking an author for this brief.** If you are interested in drafting this amicus brief on behalf of MDTC, please contact the amicus committee co-chairs, Hilary Ballentine and James Brenner. [**Editor's Note:** For an additional discussion of this case see the No Fault Report by Kimberlee Hillock in this issue.]

Thanks to all and Happy Holidays!

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.

By: Edward Perdue, DRI State of Michigan Representative
Dickinson Wright PLLC

DRI Report: January 2012

This is my first report in the *Quarterly* as State Representative to the DRI. I look forward to acting on your behalf and you should feel free to contact me if you have any questions about DRI or are looking for ways to get more involved. I will take this opportunity to outline the benefits of DRI membership and the DRI resources and assistance that are available to members of the MDTC.

About DRI

DRI is a business development and networking organization for civil defense attorneys with more than 22,000 like-minded practitioners and industry representatives. DRI members come from diverse backgrounds and practice areas, working in firms of all sizes, as in-house counsel and as claims professionals. For over 50 years, DRI has been the recognized leader in providing the contacts, tools, resources and education needed to be successful in an ever-changing and competitive legal environment.

Benefits of DRI membership are many and evolving. DRI is a community-like organization in which members can grow their practices, engage with others, network with colleagues, make new friends and learn from best-in-class education programs.

Growing Your Practice Is Made Much Easier

DRI invites in-house counsel to all of our educational events, at no cost to them. This puts you in touch with business contacts at events that are focused on your area of law. It also provides you with the opportunity to develop business contacts at events that are focused on your area of law. If you're attending a DRI seminar sponsored by a particular committee, please consider contacting the committee chair or vice chair before attending. They will make sure that you enter a welcoming environment that can help facilitate your opportunities to meet other members and potential business referral sources.

DRI's online membership directory allows you to create a profile, searchable by others. Last year more than 10,000 people visited DRI's online directory of members each month looking for lawyers like you.

DRI Online and the DRI Expert Witness Database are tools that enable you to find the articles you need and the information on witnesses you want, 24/7/365, with just a few clicks of a mouse. This resource is available to members only.

DRI Is a Community for You

Personalize your membership by opting to join any of our 29 substantive law committees. For no additional cost, you are put in touch with others and on a path to leadership. You may join as many committees as you like. From Aerospace Law, Insurance Law, Product Liability and Fidelity and Surety, to Drug and Medical Device, Toxic Torts and Environmental Law, Construction Law, Technology, and many more, there are abundant opportunities for committee participation through which you can learn and thrive.

Ed Perdue is a member of Dickinson Wright PLLC and practices out of its Grand Rapids office. He specializes in complex commercial litigation and assumed the position of DRI representative in October, 2011. He can be reached at 616-336-1038 or at eperdue@dickinsonwright.coms

DRI is a business development and networking organization for civil defense attorneys with more than 22,000 like-minded practitioners and industry representatives.

DRI Connects You in So Many Ways

- DRI Today—www.dritoday.org is a legal portal designed specifically for the defense lawyer and others interested in civil litigation. Providing direct access to the DRI Blog, previously published *For The Defense* articles, and the latest in legal and business news, DRI Today is a one-stop resource with the most current information covering a wide range of topics and issues.
- Social Networking—Twitter, Facebook and LinkedIn communities are all linked with DRI.
- Mobile DRI Apps—Electronic applications (apps) for your smartphone or PDA that put you in touch with fellow members with just a few clicks, along with apps that enhance our seminars through personalized schedules, reminders and more.

Cost

- Defense attorney—$250/year.
- Young lawyer (admitted to the bar five years or less)—$130/year. Young lawyers also receive a certificate to attend one DRI seminar of their choice for free, by itself a value of over $700.
- DRI offers a Free One-Year Membership to MDTC members that have never been a member of DRI (application can be downloaded from the DRI website).
- DRI is not a membership by invitation only organization. Membership is open to those who wish to learn and benefit from the many opportunities we offer.

Additional Benefits

- Discounts on seminar registration
- Discounts on publications
- Opportunities to author articles and legal blogs
- Subscription to *For The Defense*, the nation's only monthly legal magazine focused on civil defense practice
- Discounts on timely webcast registrations
- Sponsorship opportunities available exclusively to members' firms
- Access to corporate and insurance company counsel meetings at seminars
- Opportunities to serve as a media spokesperson for DRI and gain personal and firm exposure
- Speaking opportunities to demonstrate the expertise of you and your firm
- Networking with potential clients and attorneys for business referral

Veterans' Network

DRI is in the process of creating a military veterans' network committee for the purpose of providing a means for veteran members to meet and network, share their service experiences, and participate in veteran related service and charity work. I am a former artillery officer in the Marine Corps and Persian Gulf War veteran and will be personally involved in getting that network off the ground. If you are a veteran or know of other veteran attorneys who might be interested in that network, or a possible similar organization in Michigan, please contact me.

If you have any questions about DRI or the veteran related initiative described above, or want some insight on how to best get involved in a way that fits your practice, please don't hesitate to contact me. eperdue@dickinsonwright.com 616-336-1038. I look forward to serving you as your DRI representative.

Michigan Defense Quarterly Publication Schedule

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

For information on article requirements, please contact:

Hal O. Carroll, Editor
hcarroll@vgpclaw.com

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

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MDTC New Regional Chairs

Paul E. Tower
Lansing

Paul E. Tower is a shareholder and managing attorney of Garan Lucow Miller, P.C. He received his bachelor of arts degree from the University of Michigan-Dearborn in 1989 and his Juris Doctorate from Wayne State University in 1993. His practice areas include no-fault first party and third party litigation, premises liability, municipal liability, construction litigation, and civil rights litigation. He has tried several circuit court jury trials throughout mid-Michigan. He also has two wonderful sons.

Bennet Bush
Flint

After receiving his undergraduate degree from Calvin College in 1990, Bennet Bush graduated Magna Cum Laude from Valparaiso University School of Law in 1994. While at the law school, he clerked for the Honorable Alan Sharp a Federal District Court Judge in the Northern District of Indiana. Mr. Bush has been employed at Garan Lucow Miller P.C. since 2004. His practice areas include Automobile Negligence, Personal Injury Protection benefits, Premises Liability, Municipal Liability, Product Liability, Property Damage and Probate. Prior to coming to Garan Lucow Miller, P.C., Mr. Bush was employed in the Legal Department for the City of Flint. He has lived in Genesee County since 1995. His wife Heather is also a practicing attorney in Genesee County and they have three children.

Johanna Novak
Marquette

Johanna is a member of Foster Swift's Health Care Practice Group and works from the firm's Marquette office. Johanna practices primarily in the areas of health law, health insurance and employee benefits. Specifically, the types of matters Johanna handles for her clients include:

- Health Law
- Health Insurance
- Employee Benefits

Active in both professional and community organizations, she is a member of the American Bar Association, the State Bar of Michigan, the State Bar of Wisconsin, the American Health Lawyers Association, the Marquette County Bar Association, the U.P. Human Resources Association, and the Marquette County Economic Club.

Johanna received her undergraduate degree from Michigan State University, and her juris doctorate from the University of Wisconsin Law School.

Michigan Defense Trial Counsel has established Regional Chairpersons to best serve the membership by providing a local presence around the State.

Regional Chairpersons

The goals of the Regional Chairpersons are to:

1. Attend at least one MDTC board meeting annually.
2. Provide articles for the Michigan Defense Quarterly by calling upon members within each local area.
3. Provide at least three (3) new members per year to MDTC from your area.
4. Make recommendations to the board regarding promotion of MDTC/events within each local area
5. Assist in generating advertising for Michigan Defense Quarterly by providing staff with contacts.
6. Serve on the promotions committee by assisting with increasing attendance at the Winter & Summer Conferences.
7. Attend annual orientation session scheduled during the MDTC Summer Conference.

The Board Liaison for these chairpersons will be the Treasurer of MDTC.

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

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

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Vandeveer Garzia, P.C.
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Troy, MI 48098
(248) 312-2800
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Thomas R. Meagher
Foster, Swift, Collins & Smith, PC
313 S. Washington Square
Lansing MI 48933
(517) 371-8100
tmeagher@fosterswift.com

MDTC LEADER CONTACT INFORMATION

Officers

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

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

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

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

Lori A. Ittner
Immediate Past President
ittnerlaw@charter.net

Board

Hilary A. Ballentine hballentine@plunkettcooney.com 313-983-4419 • 313-983-4350	Plunkett Cooney Buhl Building, 535 Griswold, Suite 2400 Detroit, MI 48226
Lawrence G. Campbell lcampbell@dickinsonwright.com 313-223-3703 • 313-223-3598	Dickinson Wright P.L.L.C. 500 Woodward Ave., Ste 4000 Detroit, MI 48226
Hal O. Carroll HCarroll@VGpcLAW.com 248-312-2800 • 248-267-1242	Vandeveer Garzia, P.C. 1450 W Long Lake Rd, Ste 100 Troy, MI 48098
Jeffrey C. Collison jcc@saginaw-law.com 989-799-3033 • 989-799-2969	Collison & Collison PC 5811 Colony Dr N, PO Box 6010 Saginaw, MI 48608
Linda M. Foster-Wells lmf@kellerthoma.com 313-965-7610 • 313-965-4480	Keller Thoma PC 440 E. Congress St. Fl 5 Detroit, MI 48226
Scott S. Holmes sholmes@foleymansfield.com 248-721-4200 • 248-721-4201	Foley & Mansfield PLLP 130 East Nine Mile Road Ferndale, MI 48220
Catherine D. Jasinski cdj@runningwise.com 231-946-2700 • 231-946-0857	Running Wise & Ford PLC 326 E. State Street Traverse City, MI 49684
Richard J. Joppich richard.joppich@kitch.com 517-381-7196 • 517-381-4427	Kitch Drutchas Wagner Valitutti & Sherbrook 2379 Woodlake Dr., Suite 400 Okemos, MI 48864-6032
Diana Lee Khachaturian dkhachaturian@dickinsonwright.com 313-223-3128 • 313-223-3598	Dickinson Wright PLLC 500 Woodward Ave., Ste 4000 Detroit, MI 48226
Joshua Richardson jrichardson@fosterswift.com 517-371-8303 • 517-371-8200	Foster Swift Collins & Smith PC 313 South Washington Square Lansing, MI 48933
Dean F. Pacific dpacific@wnj.com 616-752-2424 • 616-752-2500	Warner, Norcross & Judd LLP 111 Lyon St NW Ste 900 Grand Rapids, MI 49503
Allison C. Reuter areuter@hopenetwork.org 616-301-8000 • 616-301-8010	General Counsel, Hope Network P.O. Box 890, 755 36th St., SE Grand Rapids, MI 49518-0890

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice:
Matthew T Nelson, Co-Chair
mnelson@wnj.com
616-752-2539 • 616-222-2539
Warner Norcross & Judd LLP
900 Fifth Third Center, 111 Lyon Street NW
Grand Rapids, MI 49503

Beth A. Wittmann, Co-Chair
beth.wittmann@kitch.com
313-965-7405 • 313-965-7403
Kitch Drutchas Wagner Valitutti & Sherbrook, PC
One Woodward Ave, Ste. 2400
Detroit, MI 48226

Commercial Litigation: Richard W. Paul
rpaul@dickinsonwright.com
248-433-7532 • 248-433-7274
Dickinson Wright PLLC
2600 W. Big Beaver Road, Suite 300
Troy, MI 48084

General Liability: Open

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

Labor & Employment:
Barbara Eckert Buchanan
beb@kellerthoma.com
313-965-7610 • 313-965-4480
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

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

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

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

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

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

Robert Paul Vance, Co-Chair
pvance@ccglawyers.com
810-232-3141 • 810-232-1079
Cline, Cline & Griffin, PC
503 S. Saginaw St., Ste. 1000
Flint, MI 48503

Regional Chairs

Flint: Bennet Bush
Garan Lucow Miller PC
8332 Office Park Drive
Grand Blanc, MI 48439
810-695-3700 • 810-695-6488
bbush@garanlucow.com

Grand Rapids: Open

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

Lansing: Paul Tower
Garan Lucow Miller PC
504 S. Creyts Rd., Ste. A
Lansing, MI 48917
517-327-0300
ptower@garanlucow.com

Marquette: Johanna Novak
Foster Swift Collins & Smith, PC
205 S. Front Street, Suite D
Marquette, MI 49855
906-226-5501 • 517-367-7331
jnovak@fosterswift.com

Saginaw / Bay City: David Carbajal
O'Neill Wallace & Doyle PC
300 Saint Andrews Rd Ste 302, PO Box 1966
Saginaw, MI 48605
989-790-0960 • 989-790-6902
dcarbajal@owdpc.com

Southeast Michigan: Nicole DiNardo
Dykema Gossett, PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
248-203-0752 • 248-203-0763
ndinardo@dykema.com

Traverse City / Petoskey: John Patrick Deegan
Plunkett Cooney
303 Howard Street
Petosky, MI 49770
231-348-6435 • 231-347-2949
jdeegan@plunkettcooney.com

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

MDTC Schedule of Events 2012–2013

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
March 15	Board Meeting, Okemos Holiday Inn Express
April 27 & 28	DRI Central Regional Meeting – Greenbrier, West Virginia
May 10	Board Meeting, The Westin Book Cadillac Detroit
May 10–11	Annual Meeting, The Westin Book Cadillac - Detroit
September 14	16th Annual MDTC Open Golf tournament – Mystic Creek
October 4	Meet the Judges – Bi-Annual – Hotel Baronette, Novi
November 1	Annual Past Presidents Dinner – Hotel Baronette, Novi
November 2	Winter Meeting – Hotel Baronette, Novi

2013

June 20–23	Summer Conference – Crystal Mountain

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