MICHIGAN DEFENSE
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IN THIS ISSUE:

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MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

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MDTC

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Articles: All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcomes articles and opinions on any topic that will be of interest to MDTC 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 Lee Khachaturian or Jenny Zavadil.

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From the President

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The Road Ahead (with apologies to both Bill Gates and Steve Johnston)

One of my favorite President's Corner Columns was written by Steve Johnston more than 2 years ago where he posed and analyzed the straightforward question of whether you would recommend law school to a recent college graduate. While this question was posed rhetorically, once tapped for the Executive Committee, I always intended to revisit the issue and offer a follow up column. Before addressing this question, however, as the year 2012 comes to a close, this President's Column takes a look back at the past year for Michigan Defense Trial Counsel before looking ahead to the future of the role MDTC can play in shaping the future of the law, particularly the legal environment that young lawyers and law students can expect to encounter.

2012 was a tremendously rewarding year for MDTC, filled with many accomplishments we should be proud of. First, as readers are aware, the dread and doom many of us felt regarding the dangerous tort reform proposals that were introduced in May failed to become law. Only two of the five Medical Malpractice bills of the "Patients First Reform Package" were ultimately passed by the Legislature and the two new laws were largely procedural reforms that MDTC favored. The measures that we felt were unwarranted Trojan Horses that would drastically cut the already drastically cut number of medical malpractice filings in this State were never presented to the governor for his signature. Amid a pouring of outcry from lawyers of all stripes and the general public, the two most extreme bills did not even get voted out of committee, an omen that most of us hope foretells their future viability.

Organizational Cash Flow Is On the Uptick

MDTC also experienced welcome reversals of two negative trends that had been haunting virtually all professional associations: shrinking balance sheets and membership ranks. Too often in recent years, the MDTC Board of Directors and Officers had no choice but to draw on the organization's reserves account to meet operational needs. This was very disturbing momentum, but I am extremely happy to report that this trend has not just slowed but, in fact, reversed course to the point where we have now agreed to replenish the organization's reserves account by "paying back" half of the profit earned during fiscal year 2012.

Past Presidents Lori Ittner and Phil Korovesis placed an emphasis on increasing revenue by reaching out to vendors to sponsor our events to boost revenues, and streamlining expenses, including transitioning this publication from paper to pdf, a step that we are now seeing other law journals taking, as well. The increased revenue and reduced costs have put MDTC in a position to replenish our reserves following two years of positive cash flow.

We owe a great deal of gratitude to our previous leaders who had the foresight to create a "rainy day fund" for the organization when the financial strength of the group was at its zenith. We owe it to the future leaders of MDTC to provide a reserves account for them to use, if necessary, down the road. To this end, at our most recent board meeting, we resolved to evaluate our finances on a quarterly basis and have announced an institutional goal to deposit any profits back into the MDTC reserves account.

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So Is Membership

While in this economy simply breaking even by retaining existing members is a notable accomplishment, MDTC actually increased membership this past year. Even looking past the gratis membership boost by our offering a one year free membership to Michigan-based DRI members who are not members of MDTC, throughout the year we added 33 brand new members and also chipped away at non-renewals resulting in a net gain.

Membership Chair Rik Joppich and co-chair Barbara Buchanan have put in a tremendous amount of work to boost membership, reintroducing a telephone drive to reach out to non-renewals before each board meeting. As the statistics show, these efforts have been successful and we commend Rik and Barbara for their successes.

Where We, and the Legal Community as a Whole, Are Falling Short

Adding young lawyers to our organization is one area where, in all honesty, we are not succeeding. Our membership ranks of lawyers with less than five years of experience is stagnant, bucking the overall membership trend of growth. We currently have 29 such members (barely 4% of total membership), despite a long-standing institutional goal of increasing the participation of new lawyers. As an organization, we have attempted to cater to the younger generation by offering law student memberships and reduced dues for recent bar exam passers, by offering educational programs and social events geared to younger lawyers, and by adapting to technological changes to stay current, reflected by the ongoing redesign of our website and expansion into new forms of social media.

Some have suggested that the modern burdens faced by recent law graduates is the root cause and that the additional obligations that come with joining a professional bar association hinder our efforts to motivate new lawyers to join MDTC. Whether or not this causal attribution is accurate, the burdens facing new layers are monumental by any measure and this theory cannot be ignored.

Frankly, the employment statistics for the graduation class of 2011 are an outrage, if not an outright shame. According to The Association for Legal Career Professionals, a mere 65.4% of 2011 law school graduates are putting their legal degrees to use, brutally expensive degrees they spent three years and hundreds of hours of grueling study to obtain.[1] The American Bar Association puts this number even lower at an alarming 55%.[2] Despite making all of the right choices, working hard and pursuing a career that the law schools assured them would pay off, obtaining a legal job after graduating from law school is barely more than a 50/50 proposition.

The rest are either unemployed or not actually working as lawyers, doing things like waiting tables to keep up with their bills, hardly possible now that the average law graduate carries student loan debt over $100,000.[3] These numbers ought to terrify anyone contemplating attending law school.

In 2009, there were twice as many people who passed the bar as there were job openings for lawyers, further support for the ABA's finding of a 55% job placement rate.[4] 2009 was supposed to be the bottom of the dragging legal economy as the country's recession officially came to an end, but the 2011 job placement statistics are the worst ever measured by the NALP, despite the economic rebound of the country as a whole.[5] Not surprisingly, given the ultra-competitive market for legal jobs, starting salaries are dropping, down another 17% over the past year.[6]

With these facts in mind, what is the answer to the question posed by Past President Steve Johnston:

> If a recent college graduate asked you if they should go to law school, how would you answer that question? What would you tell them about their prospects of finding a job, let alone paying off the debts incurred during the course of their undergraduate and law school education?[7]

Personally, I love being a lawyer and could not feel more rewarded professionally. I would not change a thing about my career, let alone second guess my decision to become a lawyer in the first place. But I am not sure how I would answer this question for the anonymous college graduate, knowing that it might cost her $100,000 to have barely an even chance at actually landing a job she would have worked extremely hard to qualify for.

As more and more news outlets report on these troubling statistics, fewer and fewer students are deciding to pursue legal careers. The most recent LSAT administered this past October saw a drop of another 16.4 % from the year before, reaching the lowest number of test takers since 1999.[8] Applications for law schools are down almost 25% from 2012 and, this next fall, law schools are projected to have barely more than half

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the number of law students as they had less than in 2004, a monumental down slide in less than 10 years.[9]

The causes of the decline are unclear, but are likely a reflection of two things. Conventional wisdom had been that, in previous economic downturns, the number of lawschool applicants rose, as students who expected difficulty finding a job could tread water and make themselves more marketable by studying for an advanced degree.[10] The trend held true in 2008 and 2009, when the number of LSATs taken jumped by about 6% and 13%, respectively. Now that the recession is over, perhaps fewer are seeking the temporary holding pattern of pursuing a graduate degree.

More significant, in my opinion, has been the avalanche of bad publicity law schools are receiving for promoting lucrative job prospects for its graduates despite overwhelming evidence to the contrary. Non-trade publications, such as the New York Times and Wall Street Journal, have extensively covered the legal market and are reporting for the benefit of the general public what many of us in the profession have known for a long time now: that the job market for lawyers is lousy.[11] The Association for Legal Career Professionals called the current legal job market "brutal," hardly hyperbole given the objective facts.[12]

The methodology used by some schools to artificially inflate job placement statistics would not survive a *Daubert* challenge and these abuses are finally being called to task.[13] While the fraud lawsuits challenging these employment statistics have largely been duds in the court room,[14] they have certainly caused a wave of negative attention to the post-graduate job prospects for lawyers, and I believe we are seeing the aftershocks with fewer and fewer students seeking to pursue the profession we (at least most of us) love. To their credit, law schools do appear to be recognizing the necessity of scaling back class sizes in addition to the organic drop-off caused by the substantial decrease in applicants.[15]

But this needed scaling back of the number of new lawyers churned out every year is of little help to those who have already decided to take the plunge. What can we do to help them?

Most important, in my opinion, is our continued fight to preserve the integrity of the civil justice system against attacks to weaken it. The MDTC sprung to action to offer our insights in opposition to legislative attempts that ignored the fallibility of human nature by seeking to immunize professionals when they make mistakes. Going forward, the MDTC leadership will of course continue to welcome needed law reforms but will also call out destructive proposals that would undermine the civil justice system or unnecessary reforms taking aim at unidentifiable problems that do not exist.

We must also continue to reach out to young lawyers, hoping to convince them of the benefits of membership. To that end, we are redesigning the website which will enhance the existing job bank to hopefully connect more law graduates with member firms and we are also seeking to improve the job prospects of law students by our recent creation of a job bank just for them.

Instead of using their struggles as an excuse to look past our shortcomings in attracting new lawyers to our group, however, I believe we should see this as an opportunity to promote the MDTC as a premiere source for networking and professional development. Our membership and leadership ranks (including yours truly) are filled with attorneys who landed a new client, a new job or enhanced standing within an existing firm from the enhanced exposure of participation with MDTC. We need to do more to promote these successes.

My sincere hope is that we continue to work to make answering Past President's Johnston question in the affirmative with more confidence.

Endnotes

1. The full text of this report from the NALP can be found at: http://www.nalp.org/2011selectedfindingsrelease.
2. The ABA Report can be found at: http://www.abajournal.com/news/article/only_55_percent_of_2011_law_grads_had_fulltime_long-term_legal_jobs_analys/.
3. http://blogs.wsj.com/law/2012/03/23/lawstudentshowmuchdebtdoyouwant/.
4. http://economix.blogs.nytimes.com/2011/06/27/thelawyersurplusstatebystate/.
5. http://www.nalp.org/2011selectedfindingsrelease.
6. http://economix.blogs.nytimes.com/2012/07/16/thetopplingoftoptierlawyerjobs/.
7. See *Michigan Defense Quarterly*, Volume 26, No. 4, April 2010.
8. http://economix.blogs.nytimes.com/2012/11/21/lawschooladmissiontestingplunges/?ref=lawschools&gwh=194346D72B52DA3FA07428FDD63715C0.
9. http://www.abajournal.com/news/article/fiscal_calamity_ahead_for_some_law_schools_applicants_for_2013_drop_22/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.
10. See *October LSATs Plunge*, Wall Street Journal Law Blog, http://blogs.wsj.com/law/2012/11/23/octoberlsatsplunge/?mod=WSJ_article_outbrain&obref=obinsite.
11. In addition to the Wall Street Journal Law Blog, the New York Times has addressed the issue in editorials: http://www.nytimes.com/2012/07/15/opinion/Sunday/anexistentialcrisisforlawschools.html. Popular blogs such as "Above the Law" are also drawing attention to the issue.

Most important, in my opinion, is our continued fight to preserve the integrity of the civil justice system against attacks to weaken it.

12. http://www.nalp.org/2011selectedfindingsrelease.
13. A lengthy New York Times article examining the bleak job prospects for recent law graduates lambasted the job statistic reporting protocol, noting that many law schools offered their unemployed alumni temporary jobs that would make them technically employed at the magical nine month post-graduation cut off period. See http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all ("A number of law schools hire their own graduates, some in hourly temp jobs that, as it turns out, coincide with the magical date. Last year, for instance, Georgetown Law sent an email to alums who were 'still seeking employment.' It announced three newly created jobs in admissions, paying $20 an hour. The jobs just happened to start on Feb. 1 and lasted six weeks.").
14. The dismissal of one of the more high profile cases, *Gomez-Jiminez v New York Law School*, 2012 NY Slip Op 08819, was recently affirmed by the appellate court. At best, the appellate court charitably described the school's marketing materials as "unquestionably incomplete," but refused to go as far as holding that they were false or misleading. The Opinion can be read here: http://www.nycourts.gov/reporter/3dseries/2012/2012_08819.htm.
15. http://online.wsj.com/article/SB10001424052702303444204577458411514818378.html.

The Affordable Care Act is Here to Stay:
What Does This Mean to Employers?

By: Olivia N. Keuten, *Keller Thoma, P.C.*

Executive Summary

The goal of the Affordable Care Act ("ACA") is to increase the number of Americans covered by health insurance and decrease the cost of health care. The constitutionality of two provisions of the ACA—the "individual mandate" and the "Medicaid expansion" provisions—was recently considered by the United States Supreme Court. The Court held that Congress constitutionally had the power to enact the individual mandate provision under its taxing authority. It concluded that the Medicaid expansion provision was unconstitutionally coercive to the extent that it authorized withdrawal of all federal Medicaid funding from states that declined to participate in the expansion of Medicaid benefits to all who earned less than 133 percent of the federal poverty level. The Court did not alter other effective dates of various ACA provisions, and employers would do well to familiarize themselves with these requirements because noncompliance can lead to penalties.

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"What the court did not do in its last session, I will do on the first day if elected [P]resident of the United States, and that's to repeal Obamacare."[1] This was the reaction of Republican presidential nominee, Mitt Romney, after learning of the United States Supreme Court's ruling upholding the Affordable Care Act ("ACA").[2] The opportunity to repeal "Obamacare," however, was shot down with President Obama's re-election to a second term on November 6, 2012. President Obama's re-election confirms that the ACA is here to stay, and both supporters and opponents expect implementation to go forward unobstructed.[3]

The Basics of the Affordable Care Act

The ACA was signed into law on March 23, 2010. It reorganizes, amends, and adds provisions to part A of Title XXVII of the Public Health Service Act ("PHSA") regarding group health plans and health insurers in the group and individual markets. The ACA "aims to increase the number of Americans covered by health insurance and decrease the cost of health care."[4] The initial mandates of the ACA required employers and insurers to amend group health plans and modify operations to protect patients, and to reduce or eliminate certain expenses. Various provisions of the ACA have different effective dates. The first provisions became effective for plan years beginning on or after September 23, 2010. Other provisions will continue to go into effect through January 2018. Two of the ACA's provisions – the individual mandate and the Medicaid expansion – were recently reviewed by the United States Supreme Court.[5] Employers and individuals alike need to be aware of the ramifications of the Supreme Court decision as well as their obligations under the ACA as new provisions go into effect.

The ACA's Individual Mandate Provisions

The individual mandate (the "minimum essential coverage" provision of the ACA) requires all non-exempt individuals to maintain a minimum level of health insurance coverage beginning in January 2014, or to face a fine or tax if the obligation is not met.[6] Those who are exempt from the individual mandate include illegal immigrants, religious objectors, and incarcerated individuals.[7] One can satisfy the requirements of the individual mandate by obtaining federally recognized health insurance coverage through one of the following: employer-sponsored insurance, an individual insurance plan such as the newly created health insurance exchanges, a grandfathered health plan, Medicare, or Medicaid.[8]

Individuals who do not fulfill the obligations of the individual mandate will be subject to a financial penalty known as the "shared responsibility payment."[9]

Penalties are currently set as follows: in 2014, the greater of $95 or 1 percent of income; in 2015, the greater of $325 or 2 percent of income; in 2016, the greater of $695 or 2.5 percent of income, up to a maximum amount equal to the national average premium for bronze-level health plans in the exchanges for the respective year.[10]

Just as certain individuals are exempt from the individual mandate, there are exceptions to the shared responsibility payment for the following: members of Native American tribes, persons who receive financial hardship waivers, those with incomes below the tax filing threshold or who lacked insurance for less than three months during a year, and persons whose annual insurance premiums would exceed 8 percent of their household adjusted gross income.

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The ACA's Medicaid Expansion Provisions

In addition to the individual mandate, the ACA expands eligibility for Medicaid benefits. Prior to enactment of the ACA, the Medicaid program only required states to provide health care services to pregnant women, children, needy families, the blind, the elderly, and the disabled.[11] Beginning in January 2014, the ACA's Medicaid provisions require all participating states to provide services to individuals under age 65 with household incomes at or below 133 percent of the federal poverty level ($14,856 a year for an individual and $30,657 a year for a family of four in 2012).[12] Participation is not mandatory, but the ACA encourages states to participate by providing matching federal funds.[13] However, if a state chooses not to comply with the ACA's new coverage requirements, it is at risk of losing *all* of its federal Medicaid funds.[14]

The United States Supreme Court's Decision Upholding Most of the ACA

On the same day that President Obama signed the ACA into law, Florida filed a lawsuit challenging the constitutionality of the individual mandate and the Medicaid expansion. Eventually, 25 other states, including Michigan, joined Florida in its lawsuit.[15] Numerous other lawsuits were subsequently filed around the country challenging the constitutionality of the ACA. The first case to be decided on the merits was *Thomas More Law Center v Obama*, a case pending before Judge George C. Steeh of the United States District Court for the Eastern District of Michigan.[16] Like most cases regarding the ACA, the plaintiffs in *Thomas More Law Center* alleged that Congress exceeded its authority under the Commerce Clause by enacting the individual mandate. Judge Steeh found the individual mandate to be constitutional, and the case was appealed to the United States Court of Appeals for the Sixth Circuit. On June 29, 2011, the Sixth Circuit became the first federal appeals court to opine that the individual mandate is constitutional.[17]

Petitions for Writ of Certiorari to the United States Supreme Court were filed in six cases, including *Thomas More Law Center*. On November 14, 2011, the Supreme Court granted certiorari to decide the constitutionality of the ACA from three Eleventh Circuit cases, consolidated and known as *National Federation of Independent Business v Sebelius*.[18]

The individual mandate (the "minimum essential coverage" provision of the ACA) requires all non-exempt individuals to maintain a minimum level of health insurance coverage beginning in January 2014, or to face a fine or tax if the obligation is not met.

The Supreme Court Finds the Individual Mandate is a Constitutional Exercise of Congress's Power

The Supreme Court upheld the individual mandate of the ACA by a narrow 5-4 ruling. Writing the majority opinion, Chief Justice Roberts, joined by Justices Breyer, Kagan, Ginsburg and Sotomayor, held that the individual mandate is a constitutional exercise of Congress's power to levy taxes,[19] even though a different majority consisting of Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito held that it is impermissible under the Constitution's Commerce Clause.[20] According to Chief Justice Roberts,

> The federal government does not have the power to order people to buy health insurance. . . . The federal government does have the power to impose a tax on those without health insurance. * * * [I]t is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.[21]

The majority relied on three factors to support the constitutionality of the

individual mandate as a tax: "First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. . . . Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation – except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution."[22]

The Supreme Court Finds the Medicaid Expansion is Unconstitutionally Coercive of States

The majority held that the ACA's Medicaid expansion provision is unconstitutionally coercive of states, characterizing the financial "inducement" for states to participate "much more than 'relatively mild encouragement' – it is a gun to the head."[23] The Court reasoned that, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. . . . In addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid."[24] The Court found that the threatened loss of over 10 percent of a state's overall budget "is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[25] Further, "[w]hat Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding."[26]

To remedy the Medicaid expansion's constitutional violation, the Court circumscribed the Health and Human Services Secretary's enforcement authority. The language of section 1396c of the Medicaid Act allows the Secretary to withhold all or part of a non-compliant state's federal Medicaid matching funds.[27] The Court decided that restraining the Secretary from withholding a state's existing Medicaid funding for failure to comply with the Medicaid expansion "fully remedies the constitutional violation."[28]

How Does the Supreme Court Decision and Subsequent Presidential Election Affect Employers' Requirements Under the Affordable Care Act?

The Supreme Court's decision confirmed that the individual mandate is constitutional. The mandate goes into effect on January 1, 2014. How does this ruling impact employers, if at all? Because the Supreme Court's decision did not alter any of the ACA's implementation deadlines or requirements for employers, employers must continue to comply with the implementation deadlines. For the upcoming 2012/2013 plan years and open enrollment, employers have the following obligations:

1. Employers must raise their Health Flexible Spending Accounts (HFSA) limitation to $2,500 for salary reduction/employee contributions beginning January 1, 2013. This amount will be indexed. In addition to plan amendments and summary of material modifications, employers should update their enrollment materials to reflect this change for the upcoming enrollment period.

2. The contraceptive mandate is effective for plan years beginning on or after August 1, 2012. Among other things, the contraceptive mandate requires employers' group health plans to provide coverage for contraceptives without cost sharing. Currently, there is a one-year temporary-enforcement safe harbor, but this will expire on August 1, 2013.[29]

3. PHSA Section 2715 requires employers and insurers to create a summary of benefits and coverage ("SBC") for participants and potential participants. The goal is for participants and enrollees to have the means to compare benefits that an employer offers. Each benefit program must have a separate SBC. For guidance through a variety of forms, including sample documents, templates, and frequently asked questions, see the Department of Labor website.

4. PHSA Section 2715 also requires employers to disclose and distribute, upon request, a uniform glossary of coverage and benefit terms. The employers' SBC(s) must state how the uniform glossary may be obtained online, or must provide contact information to receive a paper copy.

5. The ACA requires employers to provide employees with informational reporting on an IRS Form W-2 beginning with calendar year 2012. The W-2 must reflect the aggregate cost of applicable employer-sponsored coverage, i.e., the amount of coverage reported for group health plan coverage that is excludable from the employee's gross income.

6. Employers must use IRS Form 8928 for self-reporting of penalties and interest for noncompliance with the ACA. The overall limitation for unintentional failures due to reasonable cause and not willful neglect shall not exceed the lessor of $500,000 or 10 percent of the aggregate amount paid or incurred by the employer during the preceding taxable year for group health plans.

7. Employers may not deduct costs for retiree drug claims that were reimbursed under the Medicare Part D retiree drug subsidy.

Employers must be reminded that their obligations under the ACA will

continue for years to come. Knowledge of the ACA's requirements is critical, and employers should take the time to understand the ins and outs of the ACA because non-compliance puts employers at risk for penalties and fines.

Endnotes

1. "Emotions High After Supreme Court Upholds Health Care Law," by Bill Mears and Tom Cohen, www.cnn.com, June 28, 2012.
2. Public Law 111-148, the Patient Protection and Affordable Care Act, and Public Law 111-152, the Health Care and Education Affordability Reconciliation Act, are collectively referred to as the Affordable Care Act.
3. "Obama Win Ensures ACA's Future, But Implementation Challenges Loom," Bloomberg BNA, Health Law Resource Center, November 8, 2012.
4. *Nat'l Federation of Independent Businesses v Sebelius*, 132 S Ct 2566, 2580 (2012).
5. The Supreme Court also agreed to consider two additional issues related to the individual mandate: (1) if the Court found the individual mandate to be unconstitutional, it would also decide whether the mandate was severable; and (2) the Court considered whether the issue was ripe considering that taxpayers have not begun to incur the penalties for failure to comply with the mandate.
6. 26 USC § 5000A.
7. 6 USC § 5000A(d).
8. 26 USC § 5000A(f).
9. 26 USC § 5000A(b)(1).
10. 26 USC § 5000A(c); 42 USC § 18022.
11. 42 USC § 1396a(a)(10).
12. Social Security Act § 1902(a)(10)(A)(i)(VIII), codified at 42 USC § 1396a(a)(10)(A)(i)(VIII).
13. 42 USC § 1396d(y)(1).
14. 42 USC § 1396c.
15. The following states joined Florida in the lawsuit: Alabama, Alaska, Arizona, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.
16. 720 F Supp 2d 882 (ED Mich, 2010).
17. *Thomas More Law Center v Obama,* 651 F 3d 529 (CA 6, 2011), *petition for cert. filed,* 70 USLW 3065 (U.S., July 26, 2011) (No. 11-117).
18. 132 S Ct 2566 (2012).
19. *Id.* at 2600 (*Roberts, CJ*); *id.* at 2609 (*Ginsburg, J, concurring*).
20. *Id.* at 2591(*Roberts, CJ*); *id.* at 2648 (*Scalia, J. dissenting*).
21. *Id.* at 2601, 2608.
22. *Id.* at 2596.
23. *Id.* at 2604 (*Roberts, CJ*). See also, *id.* at 2666 (*Scalia, J*).
24. *Id.* at 2604 (*Roberts, CJ*); *id.* at 2663, 2664 (*Scalia, J*).
25. *Id.* at 2566 (*Roberts, CJ*). See also, *id.* at 2666 (*Scalia, J*).
26. *Id.* at 2607. See also, *id.* at 2666 (*Scalia, J*).
27. 42 USC 1396c.
28. 132 S Ct 2566, 2607 (*Roberts, CJ*); *id.* at 2630 (*Ginsburg, J*).
29. Several lawsuits have been initiated regarding the contraceptive mandate, none of which were decided at the time of this publication.

MDTC Welcomes 26 New Members

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MDTC Schedule of Events 2013

2013

January 25	Future Planning Meeting – The Atheneum, Greektown, Detroit
January 26	Board Meeting – The Atheneum, Greektown, Detroit
March 14	Board Meeting – Okemos
June 20–23	MDTC Annual Meeting – Crystal Mountain, Thompsonville, MI
Sept 18–20	SBM Awards Banquet and Annual Meeting Respected Advocate Award Presentation
October 16–20	DRI Annual Meeting – Chicago

The Necessity of the Attorney Judgment Rule in the Legal Profession

By: Mark Gilchrist and Michael D. Wiese, *Smith Haughey Rice & Roegge PC*

Executive Summary

The attorney judgment rule is necessary because of the adversarial and continuously shifting nature of the legal profession, the unpredictability of other actors, and the need to avoid situations in which attorneys curtail zealous representation to avoid potential legal malpractice suits. The rule does not preclude malpractice suits against attorneys who fail to perform with a reasonable level of skill and care. It simply provides a slightly lower level of potential liability, which permits attorneys to advocate to the best of their abilities on behalf of their clients.

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The legal profession is unique in its ability to police its own practitioners, a luxury typically not afforded to professionals in fields unrelated to the practice of law. One such example is the attorney judgment rule. Detractors argue the rule appears to be attorneys implementing a self-serving doctrine to exempt themselves from the legal maladies that they so readily impose on other professionals accused of malpractice. Upon further investigation, however, such a rule is an absolute necessity to the viability of the legal profession as determined by a common sense analysis of the nature of our adversarial legal system. A similar rule is not as equally vital for other professionals. The attorney judgment rule enables attorneys to more effectively advocate on behalf of their clients, including other professionals who find themselves the subject of litigation regarding their own professional judgment.

The Rule

The seminal Michigan case establishing the attorney judgment rule is *Simko v Blake*. Simko was sentenced to a mandatory life sentence after police found him with firearms and nearly a kilogram of a substance containing cocaine.[1] The Michigan Court of Appeals reversed his conviction, but only after Simko had served two years in prison.[2] Simko filed suit against his attorney, Blake, alleging that he failed to produce adequate witnesses and information at trial. The Michigan Supreme Court affirmed the decision of the court of appeals, holding that Blake had adequately fulfilled his professional duty in representing Simko.

The *Simko* Court found that attorneys are only "obligated to use reasonable skill, care, discretion and judgment in representing a client."[3] Such an obligation does not make an attorney an insurer or guarantor of the "most favorable outcome possible," nor require an attorney to "exercise extraordinary diligence, or act beyond the knowledge, skill and ability ordinarily possessed by members of the legal profession."[4] Moreover, "*where an attorney acts in good faith and in honest belief that his acts or omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment*."[5]

The Rationale

While practitioners of many professions expose themselves to liability in the pursuit of their work, a specific judgmental component to establish a breach of the standard of practice is a necessity for attorneys. The rationale is three-fold: first, the legal profession is adversarial by nature. An attorney's attempts to reach a goal are typically undermined and countered by opposing counsel given the adversarial nature of our profession. Not so with other professions.

Second, the legal profession includes a number of imperfect human actors that play a critical role in an attorney's ability to perform for a client, strongly impacting the attorney's capacity to reach a desirable outcome while operating within his or her own professional judgment. Such actors include an attorney's own client, who ultimately controls the goal of the litigation, as well as "the occasional aberrant ruling of a fallible judge or an intransigent jury,"[6] the decisions of whom an attorney can never accurately and assuredly predict without doubt.

Third, if the attorney judgment rule were not enforced, the legal system would suffer considerably. Primarily, flood gates would open for clients who, upon learning of an undesired result, could immediately sue their attorneys based on their unhappiness with the outcome. If attorneys were forced to practice in an arena in which, despite their good faith efforts, an adverse ruling could cause them to become the subject of litigation from their current clients, they would be more likely to serve their own interests before the interests of their clients. The viability of the legal profession and an attorney's ability to properly represent clients depends largely on the capacity of attorneys to operate as advocates under an umbrella of slightly increased protection, primarily in the form of the attorney judgment rule.

The Adversarial System

The adversarial nature of the legal profession lends itself to the necessity of the rule. Attorneys, more than any other professionals, are confronted by a constant antagonist, typically in the form of opposing counsel, during the fulfillment of their duties and obligations to their clients. Attorneys must approach their goals on two fronts: they must confront the legal issue plaguing their client, and they must also be on constant alert for offensive and defensive maneuvers by opposing counsel that alter their strategy or course of action. When practitioners of other professions engage in their work—such as a doctor performing a complex surgery or an engineer designing an efficient roadway—they are not forced to contend with a second, adversarial opponent beyond the main problem at hand.

Other professionals face a problem, use their own professional judgment to determine a solution, and execute that decision. While there is no doubt that such professionals face complex, multilayered problems, they are able to execute them without another member of their profession stepping in to challenge, scrutinize, and halt the major steps in determining and executing a plan of action. No physician looks over a surgeon's shoulder, questioning and challenging every decision made during the operation. An attorney obtaining a goal for a client, because of the adversarial nature of the legal system, can expect to be challenged at every step along the way. This creates an infinite number of variables that can affect the course of litigation; they emerge constantly and often without adequate predictability. As a result of the constant opposition presented by opposing counsel, the given course of a legal task is often unpredictable. Therefore, for an attorney to effectively adapt his or her solution to a legal problem as it changes, the attorney judgment rule must be available.

Other Human Actors

The role of non-attorney participants in the legal field, including lay people, enhances the necessity of the attorney judgment rule. Throughout the many phases of a legal action, non-attorneys are involved in one way or another. The first non-attorney involved is the client. The Michigan Rules of Professional Conduct indicate that an attorney "shall seek the lawful *objectives of a client* through reasonably available means."[7] This means that "the client has ultimate authority to determine the purposes to be served by legal representation," giving the client the "right to consult with the lawyer about the means to be used in pursuing those objectives."[8] Although the attorney still retains some control, the client's involvement lends to the possibility that certain tactics will be insisted upon that may conflict with the attorney's professional judgment.

In addition to clients, an attorney is at the mercy of judges and juries. While judges are well versed in law and provide a fair determination of issues, their rulings are never entirely predictable. Therefore, an attorney could use his or her professional judgment to construct an argument that appeared a winning argument to the best of the attorney's knowledge, yet still not convince a judge. As was mentioned by the *Simko* Court, judges can be "fallible."

Much less predictable than a judge is a jury of lay people, who by and large lack an educational foundation in law or public policy. A meticulously crafted and brilliantly executed legal argument may affect the jury less than, say, the sorrowful testimony of a harmed party to litigation. Such groups of people can be wholly unpredictable, yet often have the power to cause an attorney's work product, crafted with sound professional judgment, to be unsuccessful in reaching the intended goal. Suppose, for example, a surgeon determines that, based on his or her knowledge, skill, training, and most sound professional judgment, a specific surgical remedy was the best means to produce a healthy result in a patient. Yet despite a clear demonstration that this surgery had been successful in the past with similar cases and was the most appropriate course of action, a group of lay people with no medical training whatsoever had the ability to veto the surgeon's expert advice. Should the surgeon in that case be held responsible for not convincing them of the best course of action? No, and neither should an attorney who executes a legal issue based on professional judgment and a reasonable degree of skill and care, but loses nonetheless.

The Profession

Finally, one must examine the potential climate of the legal profession if there were no attorney judgment rule. Without the attorney judgment rule, attorneys would be more likely to become the subject of litigation when their clients learn of an unfavorable or undesired result. With a vastly increased potential for professional liability, more of an attorney's time would be consumed by defending himself or herself in legal malpractice cases, with less time focused on advocating on behalf of clients. Moreover, the execution of an attorney's best professional judgment would change. How could an attorney effectively advocate if he or she was aware that certain tactics should be avoided to circumvent malpractice liability? Instead of pursuing what may be best for the client, the attorney would likely adhere to a more conservative strategy to protect him or herself. With attorneys becoming more open to legal malpractice suits, they would have less room to effectively advocate on behalf of their clients.

While the attorney judgment rule does allow attorneys a bit more flexibility to operate under their own professional judgment than other professions may enjoy, this does not completely relieve attorneys from liability. Attorneys are still bound to a "reasonable degree of skill and care in all of their professional undertakings."[9] Attorneys continue to owe a duty to their clients to effectively and diligently pursue their clients' legal claims. If their work is not done with a reasonable level of skill and care, attorneys can be sued for legal malpractice, and rightfully so. The benefit of incurring slightly less liability than other professions is a trade-off for attorneys who, as previously mentioned, must operate in an adversarial arena in attempting to achieve client goals.

The attorney judgment rule should remain intact and exclusive to attorneys in order to ensure the viability of the legal profession and the continued effective representation of all parties to legal actions. The adversarial nature of the legal profession, consisting of opposing counsel who constantly attempt to stop, undermine, or reverse any affirmative action taken by an attorney, increases the variability of a legal action. Greater variability means that attorneys must use their professional judgment to constantly adjust tactics and goals throughout the course of representation. These constant push-backs and continuously changing tactics open attorneys to increased questioning of their professional judgment, requiring increased protection for attorneys making such decisions. Moreover, the insertion of other often unpredictable actors in the course of a legal action, the decisions of whom may be impossible to accurately predict, creates an environment of uncertainty for which attorneys should not be held wholly responsible. Finally, if the attorney judgment rule was not in place, attorneys would more likely pursue legal work in accordance with their own interests in order to avoid liability, rather than do what may be best for their client. The attorney judgment rule should not extend to professionals who similarly face challenges to their judgment; the multiple obstacles that must be overcome by attorneys commands an alternative standard to be professionally judged.

Endnotes

1. *Simko v Blake*, 448 Mich 648, 651; 532 NW2d 842 (1995).
2. *Id.* at 651-652.
3 *Id.* at 656.
4. *Id.*
5. *Id.* at 658.
6. *Id.* at 657.
7. MRPC 1.2(a), Scope of Representation (emphasis added).
8. Comment to MRPC 1.2.
9. *Simko* at 658.

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 Lee Khachaturian (dkhachaturian@dickinsonwright.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

Massaron Ross, Ballentine Contribute to Appellate Compendium: A comprehensive book about appellate law recently published by the American Bar Association (ABA) features one chapter co-authored by Plunkett Cooney attorneys Mary Massaron Ross and Hilary Ballentine. Sponsored by the ABA's Council of Appellate Lawyers, the book, titled: "*Appellate Practice Compendium,*" informs general practitioners about appellate practice rules and procedures in all 50 states, Washington, D.C., all federal circuit courts and the U.S. Military Appellate Court. Massaron Ross and Ballentine co-authored the seventh chapter titled "Sixth Circuit."

Unpublished but Binding?
Federal Courts Give Near-Binding Effect to Even Unpublished Michigan Court of Appeals Decisions

By: Matthew T. Nelson and Elinor R. Jordan, *Warner Norcross & Judd LLP*

Executive Summary

Case law from the Sixth Circuit Court of Appeals has developed such that the Sixth Circuit now gives near-equal weight to unpublished decisions of the Michigan Court of Appeals as it does to published decisions, where there is no controlling Michigan Supreme Court precedent. Practitioners should familiarize themselves with all court of appeals' decisions on the issues of law relevant to their action, even unpublished authority, to make a well-reasoned decision about the best forum in which to bring their action and how to most effectively argue their case.

More than 92% of the Michigan Court of Appeals' decisions are unpublished.[1] The Michigan Court Rules provide that "[a]n unpublished decision is not precedentially binding under the rule of stare decisis."[2] The Michigan Court of Appeals frequently reiterates that "unpublished decisions of this Court are not binding precedent, [but] they may, however, be considered instructive or persuasive."[3] Some judges on that court have expressed their view that unpublished decisions are nothing more than "private letters" from the court to the parties resolving the parties' particular dispute. But, are unpublished decisions really only "instructive" or "persuasive"?

Even setting aside the frequent reliance on unpublished decisions by the Michigan trial courts, the answer is effectively "no" in the federal courts. The federal courts in Michigan are required to consider equally both published and unpublished decisions of the Michigan Court of Appeals when applying Michigan law. And, the standard applied by federal courts – that the courts cannot disregard Michigan Court of Appeals' decisions absent persuasive data suggesting that the Michigan Supreme Court would reach a contrary result – makes unpublished decisions all but binding in federal court.

The *Erie* Guess

As every lawyer remembers from the first year of law school, in *Erie Railroad v Tompkins*, the United States Supreme Court held that a federal court sitting in diversity must apply state substantive law.[4] Likewise, state substantive law provides the rule of decision for federal courts exercising supplemental jurisdiction over state claims.[5] Where the highest state court has yet to speak on a particular issue, federal courts engage in a predictive analysis to determine how that court would rule.[6] To apply state substantive law under circumstances where the state's highest court has not decided an issue, a federal court must make "'the best prediction, even in the absence of direct state precedent, of what the [state's highest court] would do if it were confronted with [the] question.'"[7]

To make an "*Erie* guess," the federal court must ascertain the state law from "all relevant data," including state appellate court decisions, supreme court *dicta*, restatements of law, and the majority rule among other states.[8] Where a state intermediate appellate court has resolved an issue that the state's high court has not addressed, federal courts "will normally treat [those] decisions . . . as authoritative absent a strong showing that the state's highest court would decide the issue differently."[9] Throughout the process of making an *Erie* guess, the federal courts are guided by the twin goals of federalism embodied in *Erie*: discouragement of forum shopping and avoidance of inequitable administration of the laws.[10]

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Sixth Circuit Deference to Unpublished State-Court Opinions

Over time, the Sixth Circuit has increasingly deferred to unpublished state intermediate appellate court decisions when making its *Erie* guess.[11] The court has stated that it "may not disregard the decisions of a state appellate court . . . irrespective of whether a state appellate decision is published or unpublished."[12] The practice of deferring to unreported state court decisions at the federal level is anomalous because these decisions are no more than persuasive authority in the state courts within the Circuit.[13]

The Sixth Circuit has expressly relied on unpublished state appellate court decisions since 1983. In *Mathis v Eli Lilly & Co*,[14] the court found unpublished authority to be persuasive evidence of what the Tennessee Supreme Court would do when considering an analogous case.[15] The *Mathis* court dealt with the validity of a state law creating a statute of limitations for personal injury claims involving a synthetic hormone designed to prevent miscarriages.[16] The plaintiff, whose mother had taken the drug, sought to toll the statute of limitations up to the time she discovered her injuries – rather than the time the drug was purchased by her mother, as the relevant statute provided. The court referred to an unreported state appellate court decision that enforced the statute of limitations, stating that the unreported case provided "persuasive authority as to what the highest court of Tennessee would decide if the issue had been presented to it."[17]

Three years later, in *Kochins v Linden-Alimak, Inc.*,[18] the Sixth Circuit, citing *Mathis*, found the same unreported case persuasive, and based its decision on that unpublished case.[19] In these cases, the Sixth Circuit began a practice of relying on unpublished state intermediate appellate court decisions, but without discussion or analysis of the merits of doing so.

In 1989, the Sixth Circuit extended its reliance on unpublished cases in *Puckett v Tennessee Eastman Co*,[20] reasoning that "[w]here a state's highest court has not spoken on a precise issue, a federal court may not disregard a decision of the state appellate court on point, unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. This rule applies regardless of whether the appellate court decision is published or unpublished."[21] The court cited *Kochins* as authority for this proposition, but *Kochins* does not address giving equal weight to unpublished decisions.

> To apply state substantive law under circumstances where the state's highest court has not decided an issue, a federal court must make "'the best prediction, even in the absence of direct state precedent, of what the [state's highest court] would do if it were confronted with [the] question.'"

Based on this reasoning, the court held in *Puckett* that the plaintiff's administrative filings did not toll the statute of limitations on plaintiff's sexual harassment suit based on an unpublished state intermediary appellate court opinion to that effect.[22] The court followed the unpublished state court decision in lieu of an earlier federal district court decision that held than an administrative filing did toll the statute of limitations.[23] Thus, the court in *Puckett* correctly deferred to a state court's interpretation of state law, but in doing so adopted a sweeping rule that the state court's own decision regarding whether to publish its decision (and thus give the decision effect) does not matter when federal courts apply state law.

In 2000, the Sixth Circuit doubled down on its earlier decisions generally requiring reliance on unpublished state appellate court decisions in *Talley v State Farm Fire & Casualty Co.*[24] There, the court reiterated that state appellate court decisions are entitled to deference, "irrespective of whether a state appellate decision is published or unpublished."[25] In *Talley*, the court relied on two unpublished decisions to determine that the Tennessee Supreme Court would require an insurer to show it was prejudiced by an insured's refusal to submit to a sworn examination before dismissing the insured's case based on a cooperation clause.[26] Again, the court did so without any discussion of why federal courts should give unpublished state intermediate appellate court decisions the same level of deference as decisions that those courts chose to publish.

Federal courts in the Sixth Circuit now regularly cite *Talley*'s language requiring federal courts to consider both unpublished and published decisions of the state courts of appeals when making an *Erie* guess.[27] Based upon the unreasoned reiteration of this doctrine, federal courts rely heavily on unpublished decisions of the Michigan Court of Appeals when resolving issues of Michigan law.[28] The result is that unpublished decisions from the Michigan Court of Appeals receive much more weight in the federal courts than from later panels of the Michigan Court of Appeals or state trial courts.

Practical Implications of the Near Precedential Nature of Unpublished Michigan Court of Appeals Decisions in Federal Courts

Practitioners and the judiciary alike should be aware of the anomalous deference given to unpublished Michigan Court of Appeals' opinions by the Sixth Circuit. The fallout from federal courts' deference to unpublished opinions is

three-fold. *First*, federal courts should be aware that reliance on unpublished decisions creates the very opportunity for forum shopping that the *Erie* court intended to discourage. The decision not to publish a decision represents the judgment of the Michigan Court of Appeals that its decision is not to be relied upon as an authoritative, binding statement of the state's law. In contrast, published decisions are. Further, because the Michigan Supreme Court is much more likely to review published decisions of the court of appeals, they are much better predictors of the likely resolution of an issue of Michigan law than an unpublished decision.[29]

Second, the Michigan Court of Appeals should take note that the federal courts give the same deference to an unpublished decision, which the court may intend to be nothing more than a "letter" to the parties, as the court's published decisions. The broader and more generalized statements of the law that are sometimes found in unpublished decisions may be given effect by federal courts in a manner never intended by the court of appeals.

Third, knowledge of increased federal court deference should inform advocates' decisions about where to file a case, whether to remove a case initially filed in state court, and how to argue a case in either system. Advocates in federal court must be aware that just because a case is unpublished does not mean that it is harmless. Because of federalism, unpublished cases are likely to be given greater weight in federal court. It is not enough in federal court to explain away a contrary case by saying "but it is unpublished."

Well-informed advocates should go forum shopping. That is, where an unpublished state appellate court opinion suggests a favorable result, the advocate should seek to either file in federal court or remove the case. By contrast, if an unpublished case is unfavorable, the advocate should take steps to file in state court or keep the case there. Particularly where a recent unpublished Michigan Court of Appeals decision is legally on-point or has highly analogous facts, an advocate should take note and position his or her case accordingly.

The take-home point? Forewarned is forearmed. In federal court, unpublished opinions from the Michigan Court of Appeals could be given near-binding authority – even if they would be brushed aside by a state trial court.

Endnotes

1. A search of Westlaw shows that the Michigan Court of Appeals issued 12,830 opinions from January 1, 2007 through December 31, 2011. There were 938 published opinions and 11,892 unpublished decisions. A breakdown by year follows:

Year	Reported	Unreported	Total	% Unpublished
2011	170	2,190	2,360	92.8%
2010	190	2,284	2,474	92.3%
2009	196	2,424	2,620	92.5%
2008	185	2,417	2,602	92.9%
2007	197	2,577	2,774	92.9%

2. MCR 7.215(C)(1).
3. E.g., *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n3; 783 NW2d 133 (2010).
4. See *Erie RR Co v Tompkins*, 304 US 64 (1938); *see also infra* Part I.
5. See, e.g., *Collins v US Playing Card Co*, 466 F Supp 2d 954, 972 (SD Ohio, 2006), citing 28 USC § 1652; *Erie*, 304 US at 64.
6. *Managed Health Care Assocs, Inc v Kethan*, 209 F3d 923, 927 (CA 6, 2000); see also Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses & the Eighth Circuit*, 36 Wm Mitchell L Rev 1626 (2010).
7. *Managed Health Care Assocs*, 209 F3d at 927, quoting *Welsh v United States*, 844 F2d 1239, 1245 (CA 6, 1988).
8. *Garden City Osteopathic Hosp v HBE Corp*, 55 F3d 1126, 1130 (CA 6, 1995); see also Schaffer & Herr, *supra*, note 2.
9. See *Garrett v Akron-Cleveland Auto Rental, Inc*, 921 F2d 659, 662 (CA 6, 1990) (internal quotation omitted).
10. See *Gasperini v Ctr for Humanities*, 518 US 415, 428 (1996); *Hanna v Plumer*, 380 US 460, 468 (1965).
11. See *Royal Indem Co v Clingan*, 364 F2d 154, 158 (CA 6, 1966); see also *Talley v State Farm Fire & Cas Co*, 223 F3d 323, 328 (CA 6, 2000).
12. E.g., *Talley*, 223 F3d at 328.
13. See Ken R Civ P 76.28(4)(c) (stating that unpublished opinions "shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue"); MCR 7.215(C)(1); Tenn S Ct Rule 4(G)(1) (unpublished cases are only persuasive authority unless designated "Not for Citation"); but see Ohio S Ct Rep Op R 3.4 (allowing all authority to be cited and relied upon in the courts' discretion).
14. 719 F2d 134, 144 (CA 6, 1983).
15. *Id.* at 144.
16. *Id.*
17. *Id.*
18. 799 F.2d 1128, 1140 (CA 6, 1986).
19. The unreported case used in *Mathis* and *Kochins* was *Petty v Vulcan Iron Works, Inc*, Prod Liab Rep (CCH) ¶ 9282 (Tenn App 1982).
20. 889 F2d 1481 1485 (CA 6, 1989).
21. *Id.*
22. *Id.* at 1488.
23. *Id.* at 1486.
24. 223 F3d at 323.
25. *Id.* at 328.
26. *Id.*
27. E.g., *Ziegler v IBP HOG Mkt, Inc*, 249 F3d 509, 517 (CA 6, 2001) (relying on two unpublished decisions and one published decision to decide how the Ohio Supreme Court would come down on the statute of limitations for an age discrimination case).
28. See, e.g., *Bergin Fin, Inc v First Am Title Co*, 397 F App'x 119, 124 (CA 6, 2010) (relying on an unpublished Michigan Court of Appeals decision with analogous facts); see also *FL Aerospace v Aetna Cas & Sur Co*, 897 F2d 214 (CA 6, 1990) (supporting decision with an unpublished Michigan Court of Appeals case); but see *Tooling Mfg & Tech Ass'n v Hartford Fire Ins Co*, 693 F3d 665 (CA 6, 2012) (recognizing the circuit's prior instruction regarding deference to unpublished state appellate court decisions but deciding it was convinced the Michigan Supreme Court would not follow a particular unpublished Michigan Court of Appeals decision).
29. Of the 73 cases argued before the Michigan Supreme Court in the 2011 Term, 32 arose from published decisions of the Michigan Court of Appeals. To date, in the 2012 Term, 13 of 20 cases arose from published decisions of the Michigan Court of Appeals. Thus, even though published decisions represent less than 8% of all decisions by the court of appeals, they have recently represented approximately half of the cases that the Michigan Supreme Court has resolved after oral argument.

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Premises Liability Update in the Wake of *Hoffner v Lanctoe*

By: Joseph E. Kozely, Jr. and Mark J. Colon, *Foster Swift Collins & Smith PC*

Executive Summary

Since the Michigan Supreme Court issued its opinion in Hoffner v Lanctoe*, 492 Mich 450; 821 NW2d 88 (2012), refining the definition of what makes an open and obvious danger "effectively unavoidable," the Michigan Court of Appeals has issued a string of opinions since* Hoffner. *This article discusses five of those opinions.*

A possessor of land in Michigan owes no duty to warn or protect a business invitee regarding known dangers on land that are "open and obvious" unless there are special circumstances, one of which is that the danger is "effectively unavoidable." *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).

In Hoffner v Lanctoe, 492 Mich 450; 821 NW2d 88 (2012),[1] the Michigan Supreme Court refined the understanding of what makes an open and obvious danger "effectively unavoidable." Ice that blocks the only entrance to a commercial building is not "effectively unavoidable" even though the plaintiff has a contractual right to enter the building. The court stated:

> Plaintiff observed the ice at the entrance to the fitness center, which she desired to enter. . . . Plaintiff was not forced to confront the risk, as even she admits; she was not "trapped" in the building or compelled by extenuating circumstances with no choice but to traverse a previously unknown risk. In other words, *the danger was not unavoidable, or even effectively so."*
>
> 492 Mich at 473.

Ice Outside an Exit is Less Avoidable than Ice in Front of an Entrance

Less than two weeks after *Hoffner*, the Michigan Court of Appeals utilized the same analysis to hold in the unpublished case of *Sabatos v Cherrywood Lodge, Inc.,* 2012 WL 3238845 (August 9, 2012), that ice outside the ***exit*** in the parking lot was effectively unavoidable.

The plaintiff was an employee who stayed after her shift to eat and socialize. When leaving, she slipped and fell on ice in the parking lot. The trial court granted the defendant's motion for summary disposition on the grounds that danger posed by the icy parking lot was open and obvious and that it had no special aspects. The court of appeals reversed, holding that the icy parking lot was effectively unavoidable. The court stated:

> Here, the undisputed evidence showed that, no matter which way she travelled, she had to encounter the icy parking lot. . . . Thus, like the facts in *Robertson [v Blue Water Oil Co., 268 Mich App 588; 708 NW2d 749 (2005)], there was no ice-free path from the Lodge's business to Sabatos' truck. As such, the hazard was effectively unavoidable. Id. at 593; accord Hoffner v. Lanctoe, 290 Mich.App 449; 802 NW2d 648 (2010).*
>
> Slip Opinion at p. 2.

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Inadequate Lighting Effectively Avoids Need to Discuss Effective Avoidability

In *Dougherty v Somerset Management, LLC*, 2012 WL 3854788 (September 4, 2012), the Michigan Court of Appeals held that allegedly inadequate lighting raised a question of fact whether the danger presented by an icy sidewalk was open and obvious, thus effectively avoiding any need to discuss *Hoffner*.

Dougherty lived in an apartment on property owned by Somerset. The plaintiff testified at his deposition that when he left his apartment in the mid-afternoon in February 2008, the sidewalk to his car was clear. When he returned at approximately 7 p.m., he followed the same route to return to his apartment, but at some point along that sidewalk, he slipped and fell on a patch of ice. Dougherty sued Somerset, alleging that he fell on black ice, which "could not be detected upon casual observation and inspection" because the area of the sidewalk in question was "inadequately lit."

Dougherty's suit sounded in four separate theories: ordinary negligence, breach of the contractual duty imposed under MCL 554.139(1)(a), breach of implied or quasi contract, and nuisance. While the court of appeals discussed all four of Dougherty's theories, the issue of the allegedly inadequate lighting received the most attention. The court of appeals held as follows:

- Whether the lighting was inadequate presented a question of fact.
- If the lighting was inadequate, then even if Somerset might not have been on notice that ice had formed, it was on notice that tenants might be unable to see the ice.
- Whether Dougherty could have noticed the dangerous condition of the icy and inadequately lit sidewalk presented a question of fact.

Since Somerset failed to establish that there were no genuine issues as to any material facts, the trial court's grant of summary disposition had to be reversed.

Indicia of a Potentially Hazardous Condition Renders "Black Ice" Open and Obvious

In *Spears v Providence Hospital and Medical Centers, Inc*, 2012 WL 4840535 (October 11, 2012), the plaintiff was exiting defendant's facility at 12:30 p.m. after her doctor's appointment when she slipped and fell on ice near the entrance to the facility. On that date, there was no snow fall, trace amounts of drizzle and freezing drizzle throughout the day, and the maximum temperature was 30 degrees, which was the warmest day in at least six days.

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The defendant moved in the trial court for summary disposition on the basis that the condition was open and obvious and that the weather conditions should have put the plaintiff on notice of the icy conditions. The trial court denied the motion, finding that there was an issue of material fact in dispute.

The Michigan Court of Appeals reversed, with a quote from *Hoffner,* that the determination whether a danger is open and obvious depends on "whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." The court of appeals also quoted the statement (which seems destined for an off-quoted future) that, "Michigan, being above the 42nd parallel of north latitude, is prone to winter. And with winter comes snow and ice accumulations on sidewalks, parking lots, roads and other outdoor surfaces."

In deciding *Spears*, the court of appeals also relied on *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 201 (2010), for the authority that "black ice" is "open and obvious when there are 'indicia of a potentially hazardous condition,' including the 'specific weather conditions present at the time of the plaintiff's fall.'" The *Spears* court stated that the mere allegation of black ice was insufficient to defeat the open and obvious doctrine when there were other indicia that ice may be present. Ultimately, the *Spears* court found that the actual weather conditions for January 6, 2012, provided sufficient indicia of winter weather to alert an average user of ordinary intelligence to the open and obvious danger of black ice.

Past Performance is Not Indicative of Future Results

This expression from the world of investing aptly describes the rationale of the majority opinion of *Hazelton v C F Fick and Sons, Inc*, 2012 WL 5290316 (October 25, 2012). In *Hazelton*, the plaintiff slipped and fell on black ice under a wooden awning near the entrance to a convenience store. The plaintiff alleged that the black ice formed in front of the store because of melted snow dripping from the roof above the patch of ice. She further alleged that the defendant had notice, or should have known, that the ice formed because water previously dripped from

In affirming the trial court, the court of appeals found that the plaintiff had not produced any evidence suggesting that the ice had existed for a length of time or that the defendant should have noticed the ice due to its character or the circumstances of its formation.

the roof and caused ice to build up near the location of the accident. The trial court granted defendant's motion for summary disposition, finding that defendant did not have actual or constructive knowledge of the dangerous condition.

In affirming the trial court, the court of appeals found that the plaintiff had not produced any evidence suggesting that the ice had existed for a length of time or that the defendant should have noticed the ice due to its character or the circumstances of its formation. The weather was consistent for several days, and on the day of the accident, the skies were clear and sunny. The temperature was below freezing and it had not recently snowed or rained.

The court of appeals noted that "the fact that defendant's employees admitted that they were aware that water sometimes dripped from the roof of the store does not demonstrate that defendant had notice that a dangerous condition was present on the property on the day that Plaintiff was injured." The plaintiff failed to produce any evidence that snow melt was dripping from the roof on the date of her injury. "Thus, the fact that water dripped from the awning onto the pavement on other occasions does not establish that on this particular day defendant failed to exercise reasonable care." "[I]t is clear that the formation of the black ice cannot be traced to the overhead awning because the record evidence establishes no connection to it except on the basis of pure speculation."

The dissenting opinion asserted that, viewing all reasonable inferences in favor of the plaintiff, a genuine issue of material fact existed regarding whether the defendant should have known about the black ice on the ground under the awning. Essentially, what the majority opinion viewed as "speculation" (i.e., the ice formed because of water dripping from the awning), the dissenting opinion viewed as "reasonable inference," based on the defendant's employees' testimony of ongoing issues with ice forming in front of the store due to water dripping from the awning.

The court did not reach the question of effective avoidability and never mentioned *Hoffner*.

Snow-Covered Parking Lot Still Open and Obvious and Not Unavoidable

In *Garces v La Providencia, LLC*, 2012 WL 5856603 (November 6, 2012), the plaintiff slipped and fell on snow-covered ice in the parking lot while walking toward the defendant's grocery store. The trial court granted the defendant's motion for summary disposition on the basis that the danger was open and obvious and did not have any special aspects.

In affirming the trial court, the court of appeals pointed out that, absent special circumstances, Michigan courts have generally held that the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises owner to warn of or remove the hazard. "[A] snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."

The plaintiff tried to argue that, even if the conditions were open and obvious, the conditions were unavoidable because the entire parking lot was covered in snow, and plaintiff had to cross the parking lot to enter the store. The *Garces* court rejected this argument because the plaintiff failed to allege, and had no evidence to support, that it was necessary to cross the patch of ice to enter the store. Continuing, the *Garces* court quoted *Hoffner*: "Accordingly, the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so."

The *Garces* court determined that because the plaintiff could have avoided the icy parking lot by choosing to go to a different store or shopping another day, the plaintiff was not compelled to confront a dangerous hazard, and thus the hazard was not unavoidable.

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Endnotes

1. For more on Hoffner, see the discussion by Joshua Richardson in the Michigan Defense Quarterly, Vol 29, No. 2 (October 2012), p. 48.

Young Lawyers Section

VIII. Brief Writing in the Court of Appeals

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

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

Timothy A. Diemer was recently selected as a biographee in Best Lawyers of America, an honor bestowed upon him at the age of 32 making him one of the youngest Appellate Lawyers in America to be so recognized. In 2011, Crain's Detroit Business honored him as one of Detroit's 40 Under 40 and Michigan Lawyers Weekly honored him as an Up & Coming Lawyer for 2012. Mr. Diemer has also been recognized as a Top Lawyer by dBusiness Magazine and as a Michigan SuperLawyer for his work with the appellate team at Jacobs and Diemer. Mr. Diemer received his Juris Doctor from Boston College Law School and his Bachelor of Arts from James Madison College at Michigan State University. Business litigation and Insurance Coverage matters round out his practice.

Introduction

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

Initiating the Appeal

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

Know Your Audience

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

This multi-level of review also means that misstatements of the record will be caught – so will misstatements of precedent. With what can sometimes amount to an audience of eight, as well as an opponent who will point out misrepresentations, it is nearly impossible to sneak a record or case law misrepresentation past your readers. The prehearing attorney handling your appeal will scrub the transcripts to create her own fact statement virtually ensuring that record misrepresentations will be corrected. Not all appeals go through the Prehearing Division, however. Complicated matters often avoid the Prehearing Division altogether, either going directly to the judges or

sometimes to another, more experienced pool of research attorneys.

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

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

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

The Statement of Facts

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

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

Providing an accurate statement of facts is probably the single most important component of an effective brief – it goes first and the facts shape the contours of the legal discussion.

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

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

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

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

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

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

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

Although it is a statement of the ***facts*** of the case, an effective brief uses the statement of facts to frame the legal issues addressed later in the argument section. The fact statement should not only contain the underlying facts, but also the procedural history of the case, which can be used effectively to introduce the legal issues central to the appeal.

While it is never a good idea to unfairly disparage the trial judge or your opponents, it is effective to use their misstatements of the law or questionable legal positions asserted in the trial court to cast doubt upon their legal position on appeal. For example, if arguing for a reversal, use bizarre quotations from hearing transcripts or trial court briefs to cast doubt on your opponents or the trial judge. To use the "open and obvious" issue used above as an example, suppose the trial judge ruled that a sheet of ice in a store's parking lot was not open and obvious because the plaintiff testified he could not see it when he walked past it. This reasoning conflicts with the objective standard our case law mandates for the open and obvious doctrine, and obviously, this misstatement of the law should be prominent in the procedural history of the case.

While it is never a good idea to unfairly disparage the trial judge or your opponents, it is effective to use their misstatements of the law or questionable legal positions asserted in the trial court to cast doubt upon their legal position on appeal.

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

The Argument Section

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

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

A couple of other requirements: every brief must have a Statement of the Standard of Review and an Issue Preservation Statement. Don't view these

two requirements as mere technicalities. An unfavorable standard of review can be the death knell of a compelling legal argument. To prevail on appeal under the abuse of discretion standard, for example, requires a showing that there was only one "reasonable and principled outcome," and not two or more from which a judge could reasonably choose.[5] This is obviously a high hurdle and if you are representing an appellant, you want to get out from under this burdensome standard of review if at all possible. Evidentiary issues are reviewed under the abuse of discretion standard, but if the evidence admitted is inadmissible as a matter of law (under a *de novo* standard), an abuse of discretion is shown.[6]

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

As for the heart of the argument section, it is somewhat difficult to offer guidance. There is no "blueprint" for effectively arguing your point; argument style and structure will vary according to the issues involved and *a priori* whether you are the appellant or appellee. An appellant's brief, naturally, will be more emphatic, screeching and argumentative while the appellee will try to paint the lower court result as reasonable, fair and legally accurate. Furthermore, the tenor of your brief should also correspond to the issue being addressed. There's no need to scream and rave about the trial judge's denial of $250.00 in taxable costs – this will compromise the effectiveness of those arguments where screaming and raving are called for.

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

As for styles generally, in a very Oprah-esque sense, be yourself. Writing styles vary greatly and a good result can be obtained with an explanatory style of appellate brief writing or with a bellowing diatribe about the injustice of the result below. Lastly, the sheer bulk of brief reading performed by the judges who will decide your case begs for some level of creativity or effort to make the brief an interesting read.

Conclusion

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

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

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

Endnotes

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

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MDTC Legislative Report

As I finish this report on December 5th, the dust from the General Election dust-up has settled, and although there were a few surprises, we now know that the balance of political power in Lansing will be the same for the next two years. The Governor and state Senators were safe this year, but will be up for election or re-election in 2014, along with all of the state Representatives. The Republicans have retained control of the House with a 59-51 majority, but their edge has been eroded somewhat by their loss of five seats, and it has been noted that the total number of votes preserving their majority status was far less than most have realized. The conservative majority on the state supreme court also remains unchanged for now.

But with the essential balance of power unchanged, there is still some uncertainty as to where we will go from here. The Legislature is now into the second week of the lame duck session, with another week and a half remaining, but the agenda for the remainder of the session has not yet been finalized. My predictions about the lame duck session must therefore be based upon speculation and rumors, and will, as usual, be proven sound or inaccurate by future events before they are published. So with that large caveat disclosed, I'll go out on a limb and predict that the medical malpractice tort reform legislation will be passed in some form before the end of the session, that the proposed elimination of the personal property tax will probably be addressed in some manner, and that the legislation proposing conversion of Blue Cross and Blue Shield of Michigan to a non-profit mutual insurance company may also be finalized. It should be noted, in this regard, that it is not strictly necessary for the Legislature to complete its work on any of these initiatives before the end of the year. Any pending bills of the 96th Legislature that are not enacted by the end of the year may be reintroduced in the next session, and with the balance of power unchanged, the Republican leadership can continue where they left off in the new session if the necessary votes can be lined up. Thus, my predictions for the lame duck session may serve as accurate predictions of what may be accomplished next year.

The uncertainty in Lansing this week has resulted, primarily, from the continuing discussions about whether right-to-work legislation will be taken up in the lame duck session. Angered by the union effort to secure passage of Proposal 2 and emboldened by its rejection at the polls, many Republicans are calling, loudly and persistently, for the prompt passage of a right-to-work bill. The Democrats and union officials are doing their best to persuade the Governor and Republican legislative leaders that it would be unwise for them to yield to this pressure. The high-level discussions continue in a ***very*** tense atmosphere amid speculation that the Republicans may seize the opportunity to push a right-to-work bill through before the end of the year, despite the potential threat of adverse political consequences. At this time, it is impossible to predict how this very delicate issue will be resolved. All than can be said with certainty is that this divisive discussion has diverted the Legislature's attention from a number of other important issues.

2012 Public Acts

As of this writing, there are 346 Public Acts of 2012. The new Public Acts of interest since my last report include:

2012 PA 304 – House Bill 5592 (Lane – D) has amended the Revised Judicature Act, MCL 600.4012, to provide that **a writ of garnishment of wages, salary, commissions, or other earnings will now remain in effect for a period of 182 days** instead of the 91-day period provided under MCR 3.101.

2012 PA 333 – House Bill 5128 (Walsh – R) has amended the Revised Judicature Act to require the **creation of a new "Business Court" – a special circuit court docket for specialized handing of commercial and business disputes – in every judicial circuit having three or more circuit judges**. The new provisions defining the jurisdiction and functions of the Business Court have replaced the former provisions of RJA Chapter 80, pertaining to the never-established "Cyber Court" created by 2001 PA 262. This Act will take effect, creating the new Business Court, on January 1, 2013. The supreme court has been invited to adopt new rules of practice and procedure to govern its operation.

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SB 1118 would also amend MCL 600.6013, pertaining to calculation of judgment interest, to eliminate prejudgment interest on costs and attorney fees in medical malpractice cases.

2012 PA 336 – House Bill 4928 (Cotter – R) has amended 1915 PA 123 to add a new section MCL 565.451d, which will **allow the recording of affidavits to correct scrivener's errors or omissions**, and errors or omissions relating to the proper place of recording, in previously-recorded documents.

2012 PA 338 – House Bill 5124 (Cotter – R) will amend the Revised Judicature Act to **revise its procedures for adoption and approval of plans for concurrent jurisdiction of unified trial courts**. This amendatory act, effective on January 1, 2013, will also eliminate existing language reserving exclusive jurisdiction over trust and estate matters to the probate court, and exclusive jurisdiction over small claims and civil infraction actions to the district court, in jurisdictions where concurrent jurisdiction plans have been adopted.

Medical Malpractice Tort Reform Update

As I've mentioned in my prior reports, several public hearings on the new medical malpractice tort reform package were held before the Senate Insurance Committee in May, June and July, and the Committee heard many hours of testimony from interested persons, most of which was presented in opposition. As the hearings progressed, it became apparent that the necessary votes were not there, and thus, the bills were not reported for consideration by the full Senate before the November election. An additional hearing was held on November 27, 2012, and the Committee reported three of the five Bills – Senate Bill 1115 (Kahn – R), Senate Bill 1117 (Moolenar – R) and Senate Bill 1118 (Hune – R) – without amendment. These bills were then promptly passed by the full Senate with a few amendments and referred to the House Judiciary Committee on November 30, 2012. The most controversial of the five Bills – Senate Bill 1110 (Kahn – R) and Senate Bill 1116 (Meekhof – R) were not reported.

Senate Bill 1115 would amend several sections of the Revised Judicature Act and add a new section MCL 600.6306a. As introduced, the bill would have amended MCL 600.1483, establishing the existing caps on noneconomic damages, by expanding that section's present definition of "noneconomic loss" to also include "loss of household or other services, loss of society and companionship, whether claimed under section 2922 or otherwise" and "loss of consortium." Before passage by the Senate on November 29th, the bill was amended to strike the new language which would have added "loss of household or other services" to that definition. The language of § 1483 was also amended on the Senate floor to substantially narrow the potential scope of the existing cap on noneconomic damages. At present, the cap applies to "the total amount of noneconomic loss recoverable by all plaintiffs, resulting from the ***negligence*** of all defendants" in "***an action*** for damages alleging malpractice." Amendments adopted on November 29th would limit application of the cap to "the total amount of noneconomic loss recoverable by all plaintiffs, resulting from the ***medical malpractice*** of all defendants" in "***a claim*** for damages alleging malpractice." Thus, the cap could no longer be applied to noneconomic damages attributable to ordinary negligence claims joined in an action seeking damages for medical malpractice.

The new MCL 600.6306a proposed by Senate Bill 1115 would **prescribe a new order of judgment for medical malpractice cases**. In the bill as introduced, this new section and corresponding amendments of § 6306 would have added new requirements: 1) that a reduction of noneconomic damages necessitated by application of the statutory caps on such damages in medical malpractice cases be apportioned proportionally between past and future noneconomic damages; 2) that future medical and other health care costs be reduced by collateral source payments "determined to be collectible under section 6303"; 3) that the reduction of future damages to "gross present cash value" (in all cases) be calculated at a rate of 5% per year ***compounded annually*** (legislatively overruling case law providing that this value is calculated without compounding, and thus, increasing the amount of the reduction); and 4) that the total judgment amount in a medical malpractice case be reduced by the amount of all settlements paid by all joint tortfeasors, including all joint tortfeasors who were not parties to the action and/or not described in § 5838a(1). The reduction for settlements paid by joint tortfeasors would be allocated proportionally between past and future damages, and would be applied before calculation of judgment interest.

Amendments adopted by the Senate on November 29th eliminated the proposed requirement that future medical and other health care costs be reduced by collateral source payments, making the new § 6306a consistent with the existing § 6306 in this regard, and limited the proposed offset for settlements with other tortfeasors to cases where the liability is determined to be joint and several.

Senate Bill 903 (Schuitmaker – R) proposes the adoption of a new "uniform arbitration act" based upon the model act of the same name proposed by the Uniform Law Commission.

As introduced and subsequently passed by the Senate, Senate Bill 1117 would amend MCL 600.2912 to add a new subsection (2), clarifying, consistent with the existing language of MCL 600.5838a, that **an action for medical malpractice may be maintained against any person who is, or holds himself or herself out to be, an employee or agent of a licensed health facility or agency, and who is engaged in or otherwise assisting in medical care and treatment**. At present, this section is limited to persons who profess or hold themselves out to be a member of a state licensed profession, and thus, it does not apply to persons who are not, and do not claim to be, a member of a state licensed health profession. SB 1117 would also amend MCL 600.2169, prescribing the qualifications for expert witnesses in medical malpractice cases, to **establish qualifications for experts testifying for or against a party who is not a licensed health professional**. An amendment adopted by the Senate on November 29th specifies that, as used in the new subsection 2912(2), "licensed health facility or agency" does not include a health maintenance organization, as defined in § 3501 of the Insurance Code.

As introduced and subsequently passed by the Senate, Senate Bill 1118 would amend the tolling provisions of MCL 600.5852. At present, subsection 5852(1) provides that when a person dies before the statute of limitations has run, or within 30 days thereafter, an action that survives by law may be commenced by the personal representative of the deceased within 2 years after issuance of the letters of authority, provided that the action is filed within 3 years after the period of limitations has run. SB 1118 would provide that, **in actions alleging medical malpractice, the 2-year tolling period would run from the date that letters of authority are issued to the first personal representative, and would not be enlarged by the issuance of subsequent letters of authority, except as otherwise provided** in the new subsection 5852(3). That provision would allow the filing of an action alleging medical malpractice within 1 year after the appointment of a successor personal representative in cases where the original personal representative dies or is declared legally incompetent within 2 years after his or her appointment, provided that the action is filed within 3 years after the period of limitations has run.

SB 1118 would also amend MCL 600.6013, pertaining to calculation of judgment interest, to **eliminate prejudgment interest on costs and attorney fees in medical malpractice cases**. In its present form, the statute provides that all of the judgment interest calculated under the "sliding scale" of subsection (8) "is calculated on the entire amount of the money judgment, including attorney fees and other costs." The bill would amend subsection (8) to provide that, in medical malpractice cases, interest on costs or attorney fees would not be calculated for any period prior to entry of the judgment.

Each of these bills was also amended, prior to passage by the Senate on November 29th, to prohibit retroactive application of any of the changes effected by the amendatory legislation.

Other Initiatives of Interest

Senate Bill 903 (Schuitmaker – R) proposes the adoption of **a new "uniform arbitration act"** based upon the model act of the same name proposed by the Uniform Law Commission. This bill was passed by the Senate in May, and a Bill Substitute (H-1) was passed by the House on November 29, 2012. As of this writing, the House amendments await consideration by the Senate on the Order of Messages from the House.

Senate Bill 402 (Schuitmaker – R) would amend the Public Health Code to add a new section MCL 333.5139. The new section would **allow physicians and optometrists to voluntarily make a report to the Secretary of State, or to warn third parties, of physical or mental conditions adversely affecting a patient's ability to safely operate a motor vehicle, and provide immunity from civil or criminal liability** arising from the making of such reports to physicians and optometrists who make a report of such conditions in good faith, with due care. This bill was passed by the Senate in June and passed without amendment by the House on November 29, 2012. As of this writing, it awaits enrollment printing and presentation to the Governor.

What Do You Think?

The MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

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Appellate Practice Report

Appealing the Denial of Summary Disposition or Summary Judgment Following an Adverse Jury Verdict

The most common avenue for challenging an adverse jury verdict on appeal is to argue that the trial court should have granted judgment notwithstanding the verdict. But can a party also appeal an earlier denial of summary disposition (or summary judgment in the case of a federal court action)? The answer depends on whether the case is in state or federal court.

In Michigan, there is ample authority that a denial of summary disposition can be appealed even after a case has been submitted to a jury and a judgment entered. For example, in *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619 (2010), Allstate Insurance Company denied coverage for damage to Mary McGrath's unoccupied home in Gaylord when some frozen pipes burst. Although McGrath's family apparently used the home for vacations, and she returned there periodically, she had been living full-time in an apartment in Farmington Hills. After McGrath died some time later, the personal representative of her estate filed a lawsuit challenging Allstate's denial of coverage.

Allstate filed two motions for summary disposition under MCR 2.116(C)(10) arguing that McGrath failed to notify Allstate of the home's unoccupied status as required under the policy. The trial court denied the motions, finding that there was a genuine issue of material fact because there was evidence that although McGrath was not residing in the home at the time the pipe burst, she intended to return. A jury found in favor of the plaintiff, and a $100,000 judgment was entered against Allstate. On appeal, Allstate argued that the trial court should have granted its motions for summary disposition because under the ordinary meaning of the term "reside," McGrath was required to be living in the home at the time the pipes burst. The Michigan Court of Appeals agreed and vacated the judgment on the jury verdict. See also *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 271; 480 NW2d 330 (1991) ("[B]ecause plaintiff's complaint alleges a violation of the inherently dangerous activity doctrine, and thus active negligence, the trial court erred in allowing the issues of common-law and implied contractual indemnity to go to the jury. Commercial's motion for summary disposition pursuant to MCR 2.116(C)(10) should have been granted. The jury verdict finding Hawthorne entitled to common-law and implied contractual indemnity from Commercial is vacated.").

In federal court, however, the ability to appeal the denial of summary judgment after a jury verdict is much more limited. In *Ortiz v Jordan*, 131 S Ct 884; 178 L Ed 2d 703 (2011), the Supreme Court, resolving a conflict among the circuits, held that a party generally cannot appeal an order denying a motion for summary judgment after a full trial on the merits. The *Ortiz* Court explained that such an order "retains its interlocutory character as simply a step along the route to a final judgment," and that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Id*. at 889. See also *Adams v Auto Rail Logistics, Inc*, No. 11-1357, 2012 US App LEXIS 23189, *8 (CA 6, Nov 8, 2012) ("[T]he district court denied summary judgment to Adams because of the existence of 'multiple genuine issues of material fact.' Consequently, this court does not have jurisdiction to review the district court's denial of Adams's motion for summary judgment."); *Doherty v City of Maryville*, 431 Fed Appx 381, 384 (CA 6, 2011) (concluding that, ordinarily, "a party may not appeal an order denying summary judgment after a full trial on the merits").

The only exception to this general rule appears to be in situations where the request for summary judgment was based solely on an issue of law that does not require resolution of any disputed facts. For example, in *Nolfi v Ohio Kentucky Oil Corp*, 675 F3d 538 (CA 6, 2012), the jury rendered a verdict against the defendants for fraud in connection with the issuance of securities related to

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As these various authorities illustrate, although the Michigan Court of Appeals will consider an appeal of a denial of summary disposition after a jury trial, such review in the Sixth Circuit is limited to cases in which the summary judgment denial involves a "pure question of law."

oil and gas interests. Although the Sixth Circuit recognized the general rule precluding summary judgment appeals after a jury trial, it agreed to consider whether the defendants should have been granted summary judgment based on a purely legal issue concerning whether the "plaintiffs' loss causation theory [was] actionable under § 10(b) [of the Securities Exchange Act of 1934, 15 USC 78j(b)]." *Id*. at 645. In reaching the issue, the *Nolfi* court found that the Supreme Court left open the possibility that cases "involv[ing] . . . [only] disputes about the substance and clarity of pre-existing law" may still be considered. *Id*. See also *FDIC v Amtrust Fin Corp (In re Amtrust Fin Corp)*, 684 F3d 741, 750 (CA 6, 2012) ("*Ortiz* is not applicable here . . . . Despite summarizing its ruling in unfortunately broad language, the opinion in *Ortiz* was actually limited to cases where summary judgment is denied because of factual disputes.").

As these various authorities illustrate, although the Michigan Court of Appeals will consider an appeal of a denial of summary disposition after a jury trial, such review in the Sixth Circuit is limited to cases in which the summary judgment denial involves a "pure question of law."

When is a Judgment or Order Considered "Final" for the Purpose of Appeal?

While there are certain exceptions (a subject that is beyond the scope of this article), most appeals as of right, whether in state or federal court, are limited to "final" judgments or orders. Although determining whether a judgment or order is "final" is not always easy, there are some general rules that make the process easier.

In Michigan state court, whether a judgment or order is "final" is governed by the Michigan Court Rules. MCR 7.202(6)(a)(i) provides that in a civil case, a "final judgment" or "final order" is one that "disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order." Other common orders considered to be "final" for the purpose of appeal include postjudgment orders "awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule," and orders denying governmental immunity. See MCR 7.202(6)(a)(iv) and (v). In most cases, however, if an order only disposes of some of the claims, or the claims of some but not all of the parties (including cross-claims and counterclaims), it is not considered final. See *Berg v Binder*, No. 275894, 2008 Mich App LEXIS 1230, *1-2 (Mich App, June 12, 2008) ("[D]efendant could not have properly filed a claim of appeal, because no order resolving Schwartz Plumbing's cross claims had been entered."); *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 709; 742 NW2d 399 (2007) ("Because the trial court's order of July 12, 2006, did not dispose of all the claims and adjudicate the rights and liabilities of all the parties, it was not the final order in this case. Instead, the trial court's order of October 30, 2006, which dismissed the still-pending counterclaims of the defendants, was the final order under MCR 7.202(6)(a)(i).").

It is also important to note that while MCR 2.602(A)(3) requires a final judgment or order to state that it resolves "the last pending claim and closes the case," the presence of such language does not necessarily mean that the judgment or order is in fact final. As explained in the Staff Comment to MCR 2.602(A)(3), the purpose of the subrule is only "to facilitate docket management." Whether or not a judgment or order is, by definition, a "final judgment" or "final order" depends on strict application of MCR 7.202(6)(a)(i). See *Boatman v Motorists Mut Ins Co*, 158 Mich App 431, 437; 404 NW2d 261 (1987) (holding that "[w]hether an order is a final judgment is determined not by its form, but by its effect").

Similar rules apply when it comes to review of judgments and orders in federal court, where 28 USC 1291 vests the circuit courts of appeal with jurisdiction to hear appeals as of right from "final decisions" from the district court. As the Sixth Circuit recently explained in *Armisted v State Farm Mut Auto Ins Co*, 675 F3d 989 (CA 6, 2012), the general rule is that "[a] final decision does not normally occur until there has been a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id*. at 993 (citation and some internal quotation marks omitted). Thus, the presence of an unresolved cross-claim or counterclaim will ordinarily deprive the court of appeals of jurisdiction. See *Thompson v Budd*, No. 97-6013, 1998 US App LEXIS 2114 (CA 6, Feb 11, 1998) ("[T]he plaintiff filed an appeal from the July 30, 1997 order granting summary judgment in favor of The Budd Company ("Budd"). Although the district court docket sheet indicates that plaintiff's claims against the other defendants have also been terminated, there

Unlike Michigan trial courts, a federal district does have the ability to certify as final a judgment or order disposing of fewer than all of the claims or parties under Fed. R. Civ. P. 54(b).

remain pending in the district court cross-claims and a third party claim by Budd. . . . [B]ecause the order does not resolve all of the claims pending in the litigation, the notice of appeal is premature and does not confer jurisdiction in this court.").

Unlike Michigan trial courts, a federal district does have the ability to certify as final a judgment or order disposing of fewer than all of the claims or parties under Fed. R. Civ. P. 54(b). That rule allows a district court, when an action presents more than one claim for relief or when multiple parties are involved, to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."[1] But while Rule 54(b) relaxes the finality requirement for appellate review somewhat, "'it does not tolerate immediate appeal of every action taken by a district court.'" *Polyvision Corp v Smart Technologies, Inc*, No. 04-CV-713, 2007 US Dist LEXIS 66492, *10 (WD Mich, Sept 7, 2007) (citation omitted). Rather, the rule attempts to strike a balance between avoiding piecemeal appeals and making review and appeal available to the parties. *Id*. In applying Rule 54(b), "the district judge acts as a 'dispatcher' who decides whether his or her decision should be released for appellate review." *Id*. (citation omitted).

Determining the finality of a decision in bankruptcy court can be trickier. This is because "'[t]he concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation.'" *In re Millers Cove Energy Co*, 128 F3d 449, 451 (CA 6, 1997) (citation omitted). Thus, "'[a]n order that concludes a particular adversarial matter within the larger case should be deemed final and reviewable in a bankruptcy setting.'" *Olson v Anderson (In re Anderson)*, 377 BR 865, 868 (BAP CA 6, 2007) (citation omitted). Examples of such orders include, but are not limited to, "[a] bankruptcy court's judgment determining dischargeability," *In re Hertzel,* 329 BR 221, 224–225 (BAP CA 6, 2005), as well as orders granting or denying relief from the automatic stay. *In re Sun Valley Foods Co,* 801 F2d 186, 189–190 (CA 6, 1986).

Before filing any appeal as of right, counsel must carefully review the judgment or order at issue to determine whether it is sufficiently "final." Although counsel can typically rely on pronouncements of finality by federal district courts, careful and independent review is especially important when appealing orders from Michigan's state courts.

Conflicts in the Michigan Court of Appeals

The Michigan Court of Appeals generally decides cases through panels consisting of only three of its twenty-six judges.[2] Naturally, there will be differences of opinion among twenty-six jurists. The Michigan Court Rules anticipate not only that differences will arise but also that conflicts will be manifest in the court's opinions. Although the court rules provide detailed guidance about how appellate panels are to deal with conflicting published opinions, they provide no guidance at all about detailed *unpublished* opinions.

Conflicts in published opinions: The court is only required to follow a *published* opinion "issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or a special panel of the Court of Appeals." MCR 7.215(J)(1). Although published opinions issued after November 1990 are binding, subsequent panels are not necessarily required to agree with them. If a panel follows an earlier opinion only because it is required to do so under Michigan Court Rule 7.215(J) and despite the current panel's disagreement with the published opinion, the current panel "must" indicate its disagreement with the opinion at issue and cite Michigan Court Rule 7.215(J)(2) in a published opinion. MCR 7.215(J)(2). By so doing, the panel triggers the conflict resolution process set forth in Rule 7.215.

Generally, within 28 days after the publication of an opinion citing a conflict under MCR 7.215(J)(2), the court of appeals' chief judge must poll the other judges to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of addressing the certain judges' disagreement with binding precedent. *Id.* By requiring judges to ensure that issues are "outcome determinative" before wading into a potential conflict, the Michigan Court Rules ensure that the court of appeals does not address conflicts in *dicta.*

If a special panel is convened, seven judges—excluding those who originally heard the case—are selected by lot. MCR 7.215(J)(4). The conflict panel must "limit its review to resolving the conflict that would have been created but for" the requirement that the court follow published, post-November 1990 opinions. MCR 7.215(J)(5). Litigants

The conflict panel must "limit its review to resolving the conflict that would have been created but for" the requirement that the court follow published, post-November 1990 opinions.

may file supplemental briefs "and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument." *Id.* The resulting decision is, of course, binding on future panels.

These rules provide a straightforward and orderly process for avoiding and addressing conflicts among published opinions. A very different picture arises when one examines the court's treatment of conflicts in its unpublished opinions.

Conflicts in unpublished opinions: When it comes to unpublished opinions, panels are generally left to their own devices, free to follow or reject earlier unpublished opinions as they like. Panels can do so expressly or tacitly, intentionally or accidentally, and therefore may leave appellate counsel with a tangled web of conflicting opinions to unravel.

The Michigan Court of Appeals' treatment of *Harts v Farmers Ins Exchange,* 461 Mich 1; 597 NW2d 47 (1999), provides an example of how these conflicts can arise and persist unchecked. In *Harts,* the Michigan Supreme Court held that a licensed insurance agent has "no duty to advise the insured regarding the adequacy of insurance coverage." *Id.* at 7. Rather, "[s]uch an agent's job is to merely present the product of his principal and take such orders as can be secured from those who want to purchase the coverage offered." *Id.* at 8.

Some cases have recognized a distinction between "captive" and "independent" agents, with the former selling policies on behalf of only one insurer and the latter selling policies on behalf of more than one insurer. The agent in *Harts* was captive but the Michigan Supreme Court did not indicate whether its opinion was limited to captive agents. This omission in *Harts* led to disagreement among judges of the court of appeals, with some panels holding that *Harts* applies to *all* insurance agents, whether captive or independent, and others concluding that the rule stated in *Harts* is limited to captive insurance agents.

In three cases, the Michigan Court of Appeals has held that the *Harts* no-duty-to-advise rule applies to independent insurance agents. *Nokielski v Colton,* unpublished opinion per curiam of the Court of Appeals, issued January 4, 2011 (Docket No. 294143); *General Agency Co v Huron Oil Co,* unpublished opinion per curiam of the Court of Appeals, issued April 27, 2010 (Docket No. 288663); *Home-Owners Ins Co v Wellinger,* unpublished opinion per curiam of the Court of Appeals, issued August 5, 2008 (Docket No. 275472). In two cases, however, the court of appeals has held that *Harts* applies only to captive agents. *Deremo v TWC & Associates, Inc.,* unpublished opinion per curiam, issued August 30, 2012 (Docket No. 305810); *Stover v Secura Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued June 9, 2005 (Docket Nos. 252613, 252625). One of the cases holding that *Harts* was limited to captive agents was issued after the other four cases—yet the panel declined to mention, much less address, the conflict in its colleagues' opinions.

Neither this conflict nor the court's disinclination to address it is unusual. There are many loose ends in Michigan's unpublished jurisprudence and the Michigan Court Rules impose no obligation on the court of appeals to bring order where litigants find chaos. This omission in the court rules at least tacitly endorses the court of appeals' practice of issuing Delphic pronouncements instead of directly confronting conflicts in unpublished opinions. Whether this practice is sound, however, is subject to debate.

The Automatic Stay, Debtor Standing, and Civil Appeals

A bankruptcy petition can affect an appeal in a civil action in a number of ways. This section focuses on just two of the issues that appellate counsel should evaluate: (1) the effect of the automatic stay imposed by 11 USC § 362, and (2) the debtor's standing to pursue an appeal in the wake of its bankruptcy petition.

The automatic stay: Most litigators understand that, when a debtor files a bankruptcy petition, all litigation against the debtor—including appeals—is automatically stayed. Although it is rare for the stay to apply to parties other than the debtor itself, it is important not to underestimate the breadth of the automatic stay. The Bankruptcy Code stays more than just actions against the debtor. 11 USC § 362(a). For example, appellate counsel should be aware that the stay also applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 USC § 362. To be sure, the debtor is usually the subject of the automatic stay. But some cases may require a more careful examination of the text of the Bankruptcy Code and relevant case law—or, better yet, a consultation with experienced bankruptcy counsel.

It is equally important not to *over*estimate the breadth of the automatic stay.

Most litigators understand that, when a debtor files a bankruptcy petition, all litigation against the debtor—including appeals—is automatically stayed. Although it is rare for the stay to apply to parties other than the debtor itself, it is important not to underestimate the breadth of the automatic stay.

The automatic stay generally applies to claims against particular parties or property, not to actions as a whole. If your client is appealing a judgment entered in favor of two parties, only one of which is a debtor in bankruptcy, you may be able to continue your appeal against the non-debtor, even though claims against the debtor are stayed. *In re Delta Air Lines,* 310 F3d 953, 956 (6th Cir. 2002) ("In the absence of unusual circumstances, the automatic stay does not halt proceedings against solvent codefendants."). See also 9B Am Jur 2d Bankruptcy § 1744 ("It is a cardinal principle of bankruptcy law that it does not normally benefit those who have not themselves 'come into' the bankruptcy court with their liabilities and all their assets.").

As for how to notify a court about the potential impact of the automatic stay, it is necessary to consult the court's internal operating procedures. When a case is before the Michigan Court of Appeals, *all* parties have an obligation to assess the potential impact of the automatic stay. See COA IOP 7.216(A)(7)-2. The Michigan Court of Appeals Internal Operating Procedures provide that "*any party* who becomes aware of a proceeding in bankruptcy that *may* cause or impose a stay of proceedings of a case in this Court should immediately file a written notice with the clerk's office." *Id.* (emphasis added). This filing with the clerk's office must "include an explanation why the bankruptcy proceedings impact the pending case." *Id.* Opposing parties may file contrary statements. *Id.* The clerk's office then makes an initial determination and either notifies the parties by letter that it believes the stay does not apply or recommends that the court enter an order staying the appeal. If a party believes that the clerk erred in declining to stay an appeal, it may file a formal motion with the court. A party who believes the court erred in staying an appeal may file a motion for reconsideration. Once the stay is removed or lifted, parties may file a motion to reopen the case. *Id.*

The real party-in-interest: The automatic stay raises the issue of whether a party may continue pursuing an appeal against a debtor/appellee (a claim against property of the estate). When the debtor is the *appellant*, a related question arises: is the debtor/appellant still the real party-in-interest after filing a bankruptcy petition?

To answer this question, one must consult the Bankruptcy Code sections and relevant case law about the scope of the bankruptcy estate. A bankruptcy estate is created when a debtor files a bankruptcy petition. See 11 USC § 541(1)(1). The estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case," *id.,* and therefore includes any claims or causes of action the debtor may hold when the bankruptcy petition is filed. *Cottrell v Schilling (In re Cottrell),* 876 F2d 540 (6th Cir 1989). Whether the debtor has standing to pursue that claim on behalf of the estate (not on its own behalf) often depends on which chapter of the Bankruptcy Code is invoked by the debtor's petition.

When an appellant files a petition under Chapter 7 of the Bankruptcy Code, the Chapter 7 trustee has sole authority to pursue any prepetition claims or causes of action that the debtor possessed. *RDM Holdings, LTD v Cont'l Plastics Co,* 281 Mich App 678, 703; 762 NW2d 529 (2008) ("It is clear that causes of action belonging to the debtor prior to bankruptcy constitute estate property, and that [11 USC § 704(a)(1)] grants the bankruptcy trustee the authority to pursue such causes of action."). Thus, an appellant no longer has standing to pursue an appeal once it files a bankruptcy petition.

The analysis likely differs when a debtor files under other chapters, including Chapters 11 and 13. Although the Sixth Circuit Court of Appeals has not yet addressed the issue, most courts to address the issue have held that Chapter 13 debtors have "concurrent jurisdiction" with Chapter 13 trustees to continue pursuing prepetition causes of action. See *Assasepa v JPMorgan Chase Bank,* 1:11-CV-156, 2012 WL 88162 (SD Ohio, Jan 11, 2012). See also Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts,* 60 U Miami L Rev 1, 9 (2005). Thus, although there is still some debate about the issue, it is likely that the debtor *or* the trustee can pursue an appeal after the appellant files a Chapter 13 petition.

A debtor under Chapter 11 will ordinarily have standing to continue pursuing its appeal. This conclusion follows from the fact that a debtor-in-possession under Chapter 11 has many of the powers ordinarily conferred on trustees, including the authority to pursue causes of action on behalf of the estate. See 11 USC § 1107. This authority terminates if a Chapter 11 trustee is appointed. *Id.* But until that time, a debtor-in-possession likely has standing to continue pursuing an appeal on behalf of its bankruptcy estate.

Violating the automatic stay can expose both an attorney and its client to actual and punitive damages.

Conclusion

These issues are among the first that appellate counsel should consider when an opposing or related party files a bankruptcy petition while an appeal is pending. Violating the automatic stay can expose both an attorney and its client to actual and punitive damages. See 11 USC § 362(k). And failing to identify an appellant/debtor's lack of standing can expose a client to unnecessary costs and expenses. A thorough examination of other obligations—including those necessary to preserve a claim—is also recommended. To that end, it is usually worthwhile to consult experienced bankruptcy counsel about the impact of a new bankruptcy case and the steps necessary to ensure that a client's rights are protected.

Endnotes

1. Under the Michigan Court Rules, a trial court only has discretion to certify as final an order disposing of fewer than all claim or all parties in "receivership and similar actions." MCR 2.604(B).
2. The conflict resolution process contemplated by MCR 7.215(J)(2) requires seven-judge panels. For the Court's current composition, see http://courts.mi.gov/Courts/COA/judges/Pages/Current.aspx (last visited December 2, 2012).

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Legal Malpractice Update

Client Complaints to the Attorney Grievance Commission Can Provide a Limitations Period Commencement Date in a Malpractice Action as well as a Potential Defense to a "Discovery Rule" Limitations Period

Estate of Parvis Meghnot v Lawyer Defendants, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2012 (Docket No. 306403)

The Facts: The defendant attorneys provided pro bono representation of Parviz Meghnot. The matter the defendant attorneys litigated on behalf of Parviz concluded in November 2004. Parviz subsequently filed a complaint with the Attorney Grievance Commission in August 2007. Parviz and his wife, Lillian Meghnot, filed a lawsuit against defendants in December 2010 alleging malpractice and fraud. During the proceedings in the lower court malpractice action, Parviz passed away and his wife Lillian Meghnot became the personal representative of his estate.

The Ruling: The Michigan Court of Appeals affirmed the trial court's order granting summary disposition to defendants and dismissing the case with prejudice. The court concluded that plaintiffs' claims, pleaded as allegations of malpractice and fraud, were, in substance, only allegations of malpractice. The complaint did not indicate, with particularity, in what way the defendant attorney's alleged silent misrepresentation was intended to mislead plaintiffs. Instead, the court observed that plaintiffs alleged that the attorney defendants merely failed to keep Parviz informed of certain events during the representation, including the dismissal of his case. Because the plaintiffs' allegations sounded of malpractice—not fraud—the two-year malpractice limitations period applied to the plaintiffs' claims.

The statutes of limitations governing legal malpractice lawsuits provide that a plaintiff must file a legal malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later. Neither party identified a specific date on which the defendant attorneys' services were expressly terminated. The matter litigated for Parviz concluded in November 2004 and, even if Parviz neither sanctioned nor knew of the litigation's conclusion, the court found it clear that at the very latest, the defendant attorneys' services were constructively terminated when Parviz filed a complaint with the Attorney Grievance Commission in August 2007.

Moreover, the court opined that the discovery rule did not operate to make the malpractice suit timely because the complaint Parviz filed with the Attorney Grievance Commission consisted of the same facts and allegations that formed the basis of the current malpractice suit. Plaintiffs thus knew of the defendant attorneys' alleged failures and the resulting injury in August 2007, more than six months before filing suit in December 2010. Even assuming that the defendant attorneys fraudulently concealed the malpractice from Parviz, the lawsuit still was not timely under MCL 600.5855, which provides for a two-year limitations period where wrongdoing has been fraudulently concealed.

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.

A client's filing of a complaint with the Attorney Grievance Commission offers the court solid footing in determining the *latest* date that the limitations period would commence.

Practice Note: In cases where there is no clear termination of an attorney-client relationship, the court can rely on constructive termination of the relationship in determining the start of the limitations period for a malpractice claim. A client's filing of a complaint with the Attorney Grievance Commission offers the court solid footing in determining the *latest* date that the limitations period would commence. Such a filing – where it includes the same allegations as the alleged malpractice – also diminishes the possibility of a plaintiff successfully arguing application of the "discovery rule" limitations period.

Plaintiff's Attempt to Avoid Arbitration Provision in Fee Agreement Is Rejected

Vandekerckhove v Lawyer Defendant, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2012 (Docket No. 303130)

The Facts: Plaintiff hired the defendant attorney to act as personal representative of her deceased son's estate and in foreclosing on a mortgage interest her son had granted her in his home. Plaintiff signed a "Fee Arrangement for Legal Services," retaining "the Law Firm" of defendant attorney "in connection with a real estate loan and estate matter." The fee arrangement provided that it was entered into by the law firm, and that legal services would be provided by employees of the law firm. The fee arrangement set forth an arbitration agreement for any controversy, dispute, or claim arising out of or relating to "our fees, charges, performance of legal services, obligations . . . or other aspects of our representation." The fee arrangement also provided that plaintiff acknowledged that, by agreeing to arbitration, she was relinquishing her right to bring an action in court and to a jury trial. The fee arrangement closed "Very truly yours, [defendant attorney]" but did not include an actual signature.

Plaintiff subsequently signed a "Second Fee Arrangement for Legal Services" with the firm indicating that she had requested legal services "in connection with a separate lawsuit to enforce [her] promissory note and mortgage against the Estate." In connection with this arrangement, plaintiff agreed to pay an additional fee to the law firm. The second fee arrangement was also entered into with the law firm and not the defendant attorney as an individual, but the defendant attorney physically signed the new arrangement. This new arrangement included the same arbitration clause as the original.

Plaintiff later became dissatisfied with defendant attorney's representation and filed suit, alleging legal malpractice and fraud claims. The trial court summarily dismissed plaintiff's claims, concluding that any challenge to the validity of the contractual fee arrangement should be determined by the arbitrator because the arbitration clause in the fee arrangement applied to claims against the law firm's attorneys related to the services rendered.

The Ruling: The Michigan Court of Appeals affirmed the trial court's ruling because plaintiff had raised no real claim of fraud in the inducement pertaining specifically to the arbitration clause. The court concluded that the defendant attorney could raise the arbitration clause despite the fact he individually was not a party to the fee arrangements. The fee arrangements specifically provided that the work would be done by the law firm's employees and the arbitration clause broadly applied to any controversy, dispute, or claim arising out of or relating to "***our*** fees, charges, performance of legal services, obligations . . . or other aspects of our representation" (emphasis added). The contract contemplated its application to the law firm's employees and plaintiff's claims clearly related to the fees charged and performance of legal services "reflected in" the fee arrangement.

In coming to this conclusion, the court recognized that a corporation does not provide services; its employees do. The court held that an arbitration agreement covering claims related to the services rendered thus must apply to the employees performing those services because a person who enters into a service contract with a firm contemplates an ongoing relationship in which the firm's promises only can be fulfilled by future, unspecified acts of its employees. The court also noted that plaintiff contemplated that the legal services she retained would be performed by the defendant attorney individually and not by the law firm, and she filed suit against him personally. The defendant attorney was thus both bound by and benefitted from the arbitration agreement in the service contract despite not signing the document in his personal capacity.

Plaintiff also attempted to avoid the arbitration clause on enforceability grounds but was actually challenging her ability to understand the entirety of the fee arrangement, including the amount of fees owed and whether her divergent relationship with her deceased son's estate amounted to a conflict of interest.

Where a service contract between a client and a law firm contemplates its application to the firm's employees, the employee can later raise the provisions contained therein if applicable to a malpractice claim made against him or her individually.

She alleged that she did not understand that the defendant attorney took a lien on the estate's property and could collect additional fees from the estate, not only that she agreed to arbitrate any claims arising from the representation. Because she challenged the validity of the contract as a whole, the court determined that it was proper for the issue to proceed through arbitration in the first instance.

Practice Note: Where a service contract between a client and a law firm contemplates its application to the firm's employees, the employee can later raise the provisions contained therein if applicable to a malpractice claim made against him or her individually. Such terms, including an arbitration clause, could offer a basis for summary dismissal of a plaintiff's claims that are filed with the trial court in the first instance regardless of whether the employee signed the contract individually.

MDTC E-Newsletter Publication Schedule

Publication Date	Copy Deadline
December	November 1
March	February 1
June	May 1
September	August 1

For information on article requirements, please contact:

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Supreme Court

By: Joshua K. Richardson, *Foster, Swift, Collins & Smith, P.C.*
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Supreme Court Update

Ballot Proposal Language Triggers Republication Requirements and Precludes a Proposal's Inclusion on the General Election Ballot

On September 5, 2012, the Michigan Supreme Court held, in deciding whether four ballot proposals to amend the Michigan Constitution could be properly placed on the November 2012 general election ballot, that three of the four petitions for the proposals met republication requirements but the fourth, regarding the construction of eight new casinos in Michigan, did not. *Protect Our Jobs v Bd of State Canvassers*, 492 Mich 763; __ NW2d __ (2012).

Facts: This consolidated appeal involved four separate complaints for mandamus to the Michigan Court of Appeals filed by interest groups relating to four ballot proposals to amend the Michigan Constitution. The four ballot proposals – familiar now with most citizens in the state – included: 1) a proposal to provide for and protect collective bargaining rights; 2) a proposal to require a two-thirds vote of the Legislature or a vote of the people before any tax increase can be approved; 3) a proposal to require a popular vote before any new international bridge can be constructed; and 4) a proposal to allow the construction of eight new casinos and to grant those casinos liquor licenses.

In each case, ballot question committees obtained sufficient valid signatures to have their respective ballot proposal placed on the November 2012 general election ballot. Yet, each ballot proposal was challenged before the Board of State Canvassers.

At issue in each case was whether the petitions for the proposals complied with constitutional and statutory republication requirements, which require the republication of any existing provisions of the Constitution that would be altered or abrogated by the proposals. Article 12, § 2 of the Constitution provides in part that a "proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be republished in full as provided by law." Additionally, MCL 168.482(3) states: "If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted . . . ."

Opponents of the ballot proposals contended that the proposals would alter or abrogate existing provisions of the Constitution and, as a result, the petitions for those proposals were required to republish the existing provisions of the Constitution that would be altered or abrogated. Because the petitions for the ballot proposals contained no such republication, opponents of the ballot proposals argued that the proposals failed to satisfy constitutional and statutory safeguards and could not be placed on the November 2012 general election ballot.

The Board of State Canvassers ultimately refused to certify the proposals for the ballot, causing proponents for each ballot proposal to seek mandamus relief in the court of appeals.

Holding: The Michigan Supreme Court granted applications for leave to appeal and consolidated the appeals for consideration of whether the petitions properly satisfied constitutional and statutory safeguards.

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Yet, it is clear that interest groups seeking the inclusion of proposed amendments on future ballots will be sure to carefully craft petition language so as to avoid even the possibility of running afoul of constitutional and statutory requirements.

The Michigan Supreme Court held that all but one of the proposals – the proposal to allow the construction of eight casinos – should be placed on the November 2012 general election ballot. Applying and reaffirming prior case law, the court held that none of the ballot proposals "alter" an existing provision of the Constitution because none of the proposals "add to, delete from, or change the existing wording of the provision," and only the proposal relating to casinos abrogates an existing constitutional provision by rending the provision "wholly inoperative." The court clarified that a proposed amendment which "create[s] an entirely new section of the Constitution and [leaves] unaffected the wording of other provisions," does not alter or abrogate those provisions and does not invoke the republication requirement.

Because three of the proposals neither altered nor abrogated an existing provision of the Constitution, the petitions for those proposals had no obligation to republish existing provisions of the Constitution and, consequently, were properly submitted. On the other hand, because the casino proposal would abrogate an existing constitutional provision, the petition for that proposal was required to satisfy the republication requirements. Having failed to satisfy those requirements, the proposal could not be placed on the general election ballot and mandamus relief could not be granted.

The court determined that, unlike the other proposals, the proposal regarding the construction of eight casinos would abrogate an existing provision of the Constitution, article 4, § 40, by nullifying a component of that provision that provides for the creation of a liquor control commission to regulate the sale of alcoholic beverages in Michigan. In particular, article 4, § 40 grants to the Liquor Control Commission (LCC) "complete control of the alcoholic beverage traffic within this state, including the retail sale thereof." The court determined that by requiring that each of the eight casinos also be granted a liquor license, the casino proposal would remove from the LCC the exclusive right to decide whether to issue liquor licenses to the newly established casinos. Because the proposal would render wholly inoperative that portion of § 40, the petition for the proposal was required to republish that existing provision. Having failed to comply with this requirement, the petition was improper and the court was compelled to deny mandamus, precluding the proposal from being included on the general election ballot.

In Justice Marilyn Kelly's partial dissent, which Justices Hathaway and Cavanagh joined, she opined that the majority reached the correct result with respect to the three proposals to be included on the general election ballot, but erred by excluding from the ballot the casino proposal. According to Justice Kelly, the petition relating to this proposal had no obligation to satisfy the republication requirements because the proposal "neither alters nor abrogates article 4, § 40 of the state Constitution." Justice Kelly explained that, contrary to the majority's reasoning, the proposal does not abrogate article 4, § 40 of the Constitution because, although the proposal might impose a limitation on the LCC, § 40 does not provide the LCC with complete and unlimited control over the granting of liquor licenses. The language of § 40 indicates that the LCC remains subject to limitations imposed by the Legislature. Justice Kelly reasoned that "[i]f the Legislature may limit the LCC's control, then so may the people of this state," without abrogating the constitutional language that allows for such limitations.

Significance: Most residents of Michigan are now well aware that the debate over the 2012 ballot proposals was highly contentious, with both proponents and opponents of the proposals spending millions of dollars in advertising in an effort to sway voters to their respective positions. While all of the proposed amendments on the ballot were ultimately defeated, this case reveals just how fine the line is between a proposal making the ballot and not.

Given the court's analysis, it stands to reason that had the casino proposal been drafted without the liquor license language, the proposal may have proceeded to the general election ballot. Whether the removal of this language would have significantly altered the purpose of proposal is another question. Yet, it is clear that interest groups seeking the inclusion of proposed amendments on future ballots will be sure to carefully craft petition language so as to avoid even the possibility of running afoul of constitutional and statutory requirements.

Bystanders who Suffer Physiological Injuries from Witnessing a Motor Vehicle Accident may not Recover No-Fault PIP Benefits

This order demonstrates the conservative majority's continuing reluctance to expand the realm of compensable injuries under the no-fault act.

In a November 21, 2012, Order, the Michigan Supreme Court reversed the court of appeals and remanded this no-fault action back to the trial court for entry of summary disposition in favor of the defendant insurance carrier, explaining that the plaintiff's injury – mental distress from witnessing a motor vehicle accident that resulted in her son's death – was too attenuated to be considered an injury that arises from the "use of a motor vehicle as a motor vehicle" under the no-fault act. *Boertmann v Cincinnati Ins Co*, __ Mich __; __ NW2d __ (2012) (Docket No. 142936).

Facts: While driving a motor vehicle insured by the defendant, the plaintiff saw a vehicle make a wide turn and collide with her son, who was operating a motorcycle in front of the plaintiff's vehicle. The plaintiff's son suffered severe physical injuries as a result of the collision and was pronounced dead 30 minutes later. The plaintiff subsequently received treatment from two licensed psychologists, who diagnosed her as suffering from post-traumatic stress disorder and major depressive disorder, among other things. The psychologists concluded that the plaintiff's psychological injuries were directly caused by her witnessing the motor vehicle accident that killed her son. The plaintiff sought first-party no-fault benefits from the defendant, which denied the plaintiff's claim. The plaintiff then sued the defendant for recovery of those benefits, including wage loss, replacement services, and medical expenses.

The defendant filed a motion for summary disposition, arguing that the plaintiff's injuries did not "aris[e] out of the … use of a motor vehicle as a motor vehicle" under MCL 500.3105(1). The trial court granted the defendant's motion, but later vacated its decision on reconsideration and concluded that no case law existed to preclude the recovery of no-fault benefits for injuries suffered as a result of observing a motor vehicle accident. The defendant appealed.

The Michigan Court of Appeals affirmed and held that the trial court "correctly concluded that the undisputed evidence indicated that plaintiff's injuries arose out of the use of a motor vehicle as a motor vehicle." The court of appeals distinguished *Keller v Citizens Ins Co of America*, 199 Mich App 714 (1993), a prior holding that precluded the recovery of no-fault benefits for an insured's psychological injuries that arose after the death of the insured's son in an automobile accident. The *Keller* court concluded that the insured's psychological injuries resulted solely from the death of her son and that the injuries would have occurred regardless of whether a motor vehicle had caused the son's death. In contrast to *Keller*, the court held that the plaintiff's injuries in this case were not caused solely by the death of her son, but instead "were the result of her having witnessed the fatal collision." The court of appeals rejected the defendant's arguments that, to be compensable, the plaintiff's injuries must have resulted from her own use of or physical contact with the vehicle. Instead, the court concluded that a sufficient causal connection existed between the "use of a motor vehicle" and the plaintiff's injuries.

Holding: The Michigan Supreme Court reversed the court of appeals decision, holding that the causal connection between the plaintiff's injuries and the use of the motor vehicle was too attenuated because the plaintiff "was in no way involved in the motor vehicle accident." The court held that, consistent with *Keller*, the plaintiff was simply "a bystander who very unfortunately witnessed an accident that resulted in her son's death." Because the causal connection between the injury and the motor vehicle accident was nothing "more than incidental, fortuitous, or 'but for,'" the injury did not "arise out of the use of a motor vehicle" and was not compensable under MCL 500.3105(1). Accordingly, the court remanded the case to the trial court for entry of summary disposition for the defendant.

Significance: This order demonstrates the conservative majority's continuing reluctance to expand the realm of compensable injuries under the no-fault act. Without creating a bright line rule, the court requires a more tangible connection between the use of a motor vehicle and the plaintiff's claimed injuries for those injuries to be compensable under the no-fault act.

Notice of a Plaintiff's Injury and Application for First-Party No-Fault Benefits is not Adequate Notice of the Plaintiff's Intent to Raise Tort Claims Against a Transportation Authority Under MCL 124.419

In a 4-3 decision on August 20, 2012, the Michigan Supreme Court again strictly construed statutory notice requirements and held that, despite providing timely notice of her injury and notice of her first-party no-fault claim, the plaintiff failed to provide proper notice of her tort claims against the

The court rejected the plaintiff's argument that notice of her injury and notice of her claim for first-party benefits was sufficient notice of her tort claims.

transportation authority within 60 days as required under MCL 124.419. *Atkins v Suburban Mobility Auth for Regional Transportation*, 492 Mich 707; __ NW2d __ (2012).

Facts: The plaintiff sustained injuries while riding on a bus operated by the Suburban Mobility Authority for Regional Transportation (SMART) when the bus collided with another SMART bus. Shortly after the accident, the plaintiff notified SMART's insurer of her injuries and filed an application for first-party no-fault benefits. SMART's insurer began paying the plaintiff benefits and, in doing so, both the insurer and SMART obtained updates as to the plaintiff's injuries.

Seven months after the accident, the plaintiff sent a letter to SMART, notifying it of her intent to seek tort damages against SMART as a result of the accident. Three months later, the plaintiff filed a complaint against SMART, alleging claims of negligence, negligent entrustment, and respondeat superior, and seeking additional first-party no-fault benefits. SMART moved for summary disposition of the tort claims, arguing that the plaintiff had failed to satisfy the notice requirements of MCL 124.419, which require that "written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained."

The trial court granted SMART's motion and held that although the plaintiff provided timely notice of her injury, she failed to provide notice of her tort claims within the 60-day period.

The court of appeals reversed and held that SMART's knowledge of the plaintiff's injury and her first-party no-fault claim constituted sufficient notice under the statute. The court explained that MCL 124.419 calls only for notice of "a" claim and does not require a plaintiff to specify each legal theory she might pursue. The court concluded that because SMART had notice of the plaintiff's injuries and her claim for first-party benefits, it "had notice of the operative facts needed to anticipate plaintiff's tort claim" within the 60-day notice period. As a result, the notice provision of the statute was satisfied and, according to the court, summary disposition was improper.

Holding: The Michigan Supreme Court reversed and remanded the case to the trial court for entry of an order granting summary disposition in favor of SMART.

The majority opinion reiterated that "statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate." MCL 124.419 requires a plaintiff seeking to avoid governmental immunity to provide notice of any "ordinary claims" against a transportation authority within 60 days of the injury. Because the plaintiff waited until seven months after the accident to provide notice of her tort claims, she failed to comply with the notice requirement under MCL 124.419.

In reaching this conclusion, the court rejected the plaintiff's argument that notice of her injury and notice of her claim for first-party benefits was sufficient notice of her tort claims. The court first analyzed the language of MCL 124.419 as requiring notice of all "ordinary claims" involving injury to persons or property to be provided within 60-days. The court explained that, while not defined within the statute, "ordinary claims" can reasonably be "understood to include traditional tort claims." The court also explained that the statute mandates that these claims be paid by the authority itself and that tort claims and first-party no-fault claims are qualitatively different. On this analysis, the court concluded that a claim for no-fault benefits is not an ordinary claim under the statute because it is not a tort claim and is not to be paid by the authority, but rather by the authority's no-fault insurer. Thus, only the plaintiff's tort claims qualified as "ordinary claims" under the statute and she provided no notice of those claims within the 60-day period.

The court secondly determined that the court of appeals erred by "importing concepts of substantial compliance and SMART's institutional knowledge of the accident gleaned from other sources as sufficient to provide the notice required by MCL 124.419." The statute requires the plaintiff to serve written notice of a claim and "[k]nowledge of operative facts is not equivalent to written notice of a claim." The court of appeals' reading of the statute would require transportation authorities to "*anticipate* when a tort claim is likely to be filed," an approach that "entirely subverts the notice process instituted by the Legislature."

In her dissenting opinion, with which Justices Hathaway and Cavanagh concurred, Justice Marilyn Kelly opined that statutory notice provisions, such as that under MCL 124.419, should be enforced "only to the extent that a defendant is prejudiced by a plaintiff's failure to comply." Justice Kelly concluded that because

In her dissenting opinion, with which Justices Hathaway and Cavanagh concurred, Justice Marilyn Kelly opined that statutory notice provisions, such as that under MCL 124.419, should be enforced "only to the extent that a defendant is prejudiced by a plaintiff's failure to comply."

SMART had notice of the underlying accident and the plaintiff's injuries, it was not prejudiced by the plaintiff's technical failure to comply with the notice requirements of MCL 124.419. Consequently, Justice Kelly would affirm the judgment of the court of appeals and remand the case to the trial court for further proceedings.

Significance: The "conservative" Justices comprising the current majority of the court have not been shy about their aversion to allowing policy considerations to cloud the interpretation of otherwise clearly worded statutory notice provisions. Here, the court held true to this approach in again holding that, regardless of the result, statutory notice provisions contain no substantial compliance or prejudice components and must be read and enforced as written.

Michigan Defense Quarterly Publication Schedule

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

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MDTC Amicus Activity in the Michigan Supreme Court

The Michigan Supreme Court has issued a favorable order for the defense bar in *Boertmann v Cincinnati Insurance Co* (SC No. 142936). The *Boertmann* Court invited the MDTC to weigh in on the following issue on leave granted:

> whether a no-fault insured who 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 accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle.

Cincinnati Insurance Company took the appeal to challenge the Michigan Court of Appeals' opinion affirming a grant of summary disposition for the plaintiff. On November 21, 2012, the supreme court issued an order reversing the judgment of the court of appeals and remanding the case to the circuit court for entry of an order granting summary disposition to Cincinnati Insurance Company. In so ruling, the court determined that the casual connection between the plaintiff's claimed post-traumatic stress disorder and the "use of a motor vehicle as a motor vehicle" was not "more than fortuitous, or 'but for.'" In short, the court reasoned, "[a]ny injury suffered by plaintiff was too attenuated to be compensable." Justice Hathaway dissented, opining that the court of appeals reached the correct result and that she would therefore affirm. Justices Cavanagh and Marilyn Kelly joined in her statement.

The MDTC amicus brief in *Boertmann* was authored by **Valerie Henning Mock of Kopka, Pinkus, Dolin & Eads, PLC**.

The MDTC has also accepted the Michigan Supreme Court's invitation to file an amicus brief in *Bailey v Schaff* (SC No. 144055), a case involving the limited duty of merchants and the propriety of extending that duty to landlords and other premises proprietors. The court of appeals determined that "a premises possessor has a duty to take reasonable measures in response to an ongoing situation that is occurring on the premises, which means expediting the involvement of, or reasonably attempting to notify, the police." The MDTC, through **Carson Tucker of Lacey & Jones, LLP**, has filed an amicus brief urging the supreme court to reverse the court of appeals' decision and hold that there is no duty on the part of landlords to protect tenants from the intentional criminal acts of third parties, given the absence of a "special relationship."

The MDTC's ability to weigh in on these important legal issues is made possible through the tireless efforts of our volunteer brief writers. As we move into 2013, please consider whether you would like to be added to our list of available amicus authors.

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.

Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
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Michigan Court Rules (and the RJA) Adopted and Proposed Amendments

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

NOTE: The courts have given their web pages an overhaul, and the pages on proposed and adopted amendments have been significantly improved. (And we are not saying that just because they follow in part the format that we have been using on this page for the last year or so.)

PROPOSED

2012-28 – Business Court

Rule: MCR 7.203
Date: December 5, 2012 Comments to: April 1, 2013

This would prohibit an appeal to the court of appeals, by right or by leave, of an order assigning a case to a Business Court under the new MCL 600.8301, et seq.

ADOPTED

2011-08 – Motion for summary disposition

Date: October 3, 2012 Effective: January 1, 2013
Rule: MCR 2.116(C)

This adds a forum selection agreement as one of the possible grounds for summary disposition under subsection (C)(7).

2011-06 – Entry of default judgment

Date: October 3, 2012 Effective: January 1, 2013
Rule: MCR 2.603

This provides that the entry of default judgment by the clerk of the court may now reflect payments already credited.

2011-25 – Periodic writ of garnishment

Date: October 24, 2012 Effective: Immediately
Rule: MCR 3.101

Acting without notice, the court adopted this amendment to provide that a periodic writ of garnishment will last for 182 days, in order to conform to statutory changes. The court will accept post-adoption comments until February 1, 2013.

2006-47 – Court records and documents

Date: May 24, 2012 and October 31, 2012 (final order)
Effective: January 1, 2013
Rules: Several

This amends several of the court rules, aimed at the common purpose of updating the references to filings to more broadly encompass electronic as well as paper files. The changes to Rule 1.109, entitled "Court Records Defined," and to Rule 8.119, entitled "Court Records and Reports," are the central amendments.

Overall, the word "papers" is replaced by the phrase "documents and other materials." A new Rule 1.109(D) deals with electronic signatures, which may consist of "an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."

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

By: Edward Perdue, *Dickinson Wright PLLC*
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DRI Report

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.com.

I am writing as MDTC's state representative to the Defense Research Institute (DRI), the MDTC's sister national defense counsel organization.

DRI is currently running a free year membership promotion. To the extent you are not already a member of DRI, and if eligible, as a benefit of your MDTC membership you receive a free year's membership to DRI. All you need to do is ask me about it and I can confirm your eligibility and get your application form filled out for you.

As many of us have experienced firsthand, DRI is a great way to begin (or continue) to build your national network and offers a great many opportunities for professional development in specialty committees or affinity groups of your choosing (such as Young Lawyers, Veterans' Network, Commercial Litigation, Construction Law, etc.). There is no easier source of business than to meet and get to know a DRI member from a firm in another state who will refer you when he or his colleagues have a need for Michigan counsel.

DRI also puts on quite a few seminars and annual meetings each year in exciting and fun venues that offer its members an opportunity to meet other practitioners in their field on a face to face basis. My wife and I just returned from a wonderfully organized DRI annual meeting in New Orleans where, among other things, there were presentations by two former US Press Secretaries and a party on the field in the Super Dome.

As always, feel free to contact me if you have any questions about DRI or if I can be of any assistance.

January 17, 2013

Governor Rick Snyder
P.O. Box 30013
Lansing, MI 48909

Lt. Governor Brian Calley
P.O. Box 30013
Lansing, MI 48909

"Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." [*Republican Party of Minn. v. White*, 536 U.S. 765, 793, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002).]

Dear Governor Snyder and Lieutenant Governor Calley,

On behalf of our membership, the Executive Committee of the Michigan Defense Trial Counsel ("MDTC"), over the course of almost a year, has considered and weighed the Report and Recommendations of the bipartisan Michigan Judicial Selection Task Force. To date, we as a committee have not taken concrete action on its conclusions, other than public endorsements of the group's work as a whole and various levels of editorial support published in our *Quarterly*. Justice Diane Hathaway's recent resignation from the Supreme Court, however, and the resulting very public fallout, forces us to re-direct our attention to the Report and compels us to examine, and ultimately recommend, the adoption of a Nominating Commission to support Governor Snyder's selection of a successor justice to fill the current vacancy on our State's "Court of Last Resort."

The Report itself has been widely discussed and analyzed. And, while it is difficult to form a yea or nay consensus on all of the recommendations as a whole (the Task Force, itself, was unable to reach such a consensus), the recommendation of forming a Nominating Commission is one particular provision that has garnered broad, bipartisan support. It is one step that can be taken to boost public confidence and faith in our State's highest court, by making the nominating process more transparent and the selection process less likely to be perceived by the public as a form of political favoritism.

The Governor's power to appoint Justice Hathaway's successor offers an opportunity to adopt the Nominating Commission method outlined in the Task Force's Report, while also leaving intact the Governor's unilateral discretion to fill Supreme Court vacancies under the law. See MCL 168.404. The fact that this appointment replaces a justice who resigned amid a highly publicized scandal provides a unique opportunity to shore up public confidence in the Michigan Supreme Court itself, and our State's justice system as a whole.

We are, of course, not trying to cast suspicion on any candidate the Governor may ultimately pick or has picked to fill previous vacancies, but remain solely focused on the perception of the public, whose faith in the judicial system depends on a belief that the public officials who interpret and apply the law do so only with a loyalty to the Constitution and legislation and not to any political party or public official. This critical state interest can be bolstered with the adoption of the recommendation of a bipartisan Nominating Commission, consisting of members of the bar and general public, to screen potential candidates in a completely transparent manner to create a slate of nominees from which the Governor's Office can pick.

The Governor's Office taking a public stand in favor of the bipartisan recommendation of the Task Force in picking Justice Hathaway's replacement would do much to counter the negative fallout in the wake of Justice Hathaway's resignation, as well as solidify the perception of our State's highest court as a neutral arbitrer of justice.

Sincerely,

Timothy A. Diemer, President
Michigan Defense Trial Counsel

MDTC
TELECONFERENCE AUDIO ARCHIVE

Reminder that all these events are available to you for free.

If you were unable to attend the event simply download an audio recording – see what MDTC has in its archive below.

Not a member of MDTC, but still want to take advantage of participating in timely events as they are scheduled?

Join Here:
http://mdtc.org/content/join-mdtc

Or Email:
info@mdtc.org

December 18, 2012

Employment Law –
Using the Internet for Informal Discovery and How to Use What You Find
Presenters: Terry Miglio & Brian E. Koncius

http://tinyurl.com/mdtcemploymentlaw

October 31, 2012

General Liability – 3rd Party Auto
Presenters: Tom Aycock/Todd Tennis, Legislative Consultant

http://tinyurl.com/mdtcgenliability

October 6, 2011

Professional Liability & Health Care Medicare's Right of Recovery
Presenters: Richard Joppich and Ray Morganti

http://tinyurl.com/mdtcrightrecovery

June 1, 2011

Professional Liability & Health Care Medicare's Right of Reimbursement
Presenters: Richard Joppich & Russell Whittle

http://tinyurl.com/mdtcreimbursement

September 16, 2012

Commercial Litigation – Fraud Prevention
Work Place Embezzlement & Asset Misappropriation
Presenters: Ed Perdue, Robert Wagman, Jeffery Johnson

http://tinyurl.com/mdtcfraudprevention

August 5, 2010

General Liability – McCormick vs Carrier
Presenters: Dan Saylor, Michael McDonald, Barry Conybear

http://tinyurl.com/mdtcgeneralliability

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