MICHIGAN DEFENSE
QUARTERLY

Volume 30, No. 1 August 2013

IN THIS ISSUE:

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

Publication Schedule:

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

For information on article requirements, please contact MDTC at info@mdtc.org

Editor's Notes

Editor:
D. Lee Khachaturian
dkhachaturian@dickinsonwright.com

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

Associate Editor: Kimberlee A. Hillock
khillock@willinghamcote.com

Associate Editor: Beth A. Wittmann
beth.wittmann@kitch.com

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.

MICHIGAN DEFENSE
QUARTERLY

Vol. 30 No. 1 • August 2013

Cite this publication as 30-1 Mich Defense Quarterly.

Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

President's Corner

By: Raymond W. Morganti, *Siemion Huckabay, P.C.*

The Power of Volunteers

Raymond W. Morganti
President
Siemion Huckabay, P.C.
One Towne Square, Suite 1400
Southfield, MI 48076
(248) 213-2013
RMorganti@Siemion-Huckabay.com

"Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has." —Margaret Mead

It has been my privilege to serve MDTC in various capacities in my 30 years of membership. MDTC has faced many challenges during that time, including the economic downturn, evaluating and adapting to various rounds of proposed and enacted tort reform, adapting to changes in technology, and addressing ethical concerns that arise out of the tripartite relationship between the insurer, the insured, and defense counsel. In each case this organization has met the challenge energetically and with creativity.

As President of MDTC, I look forward to working with my fellow officers and the Board of Directors in guiding this venerable organization during the coming year. The core mission of MDTC remains the same, though the methods of accomplishing those goals have changed over the years. MDTC remains committed to the promotion of excellence in civil litigation and continuing legal education by presenting cutting edge educational conferences and teleconferences, and publishing timely and informative articles in the *Quarterly* and the e-Newsletter. Of course, MDTC conferences, receptions and social events also provide opportunities for members to network with colleagues and make new friends.

The continuing educational activities of MDTC have proven valuable not only to our members, but also members of the judiciary. Moreover, MDTC seeks to promote better understanding and a positive working relationship between the bench and bar through judicial receptions at our conferences, as well as the biennial "Meet the Judges" Reception. These receptions provide an opportunity for members of the judiciary and bar to interact in a friendly and relaxed environment, free of the stresses of the courtroom.

MDTC has also continued to advocate for improvements in our system of jurisprudence by submitting amicus briefs, maintaining dialogues with legislators regarding pending legislation, and submitting position papers regarding proposed legislation in areas of interest to our members.

The officers and Board of Directors of MDTC cannot achieve these goals without the involvement and commitment of MDTC members. Every event and resource provided by MDTC is the result of the work and expertise of dedicated volunteers. MDTC presents numerous opportunities for members to become actively involved in the organization's goals. Our organization has been extremely fortunate to have regional, section and committee chairs and members who have devoted their time, energy and skills to the planning of MDTC events and publications. The *Quarterly* and the e-Newsletter benefit from the willingness of practitioners to share their experience and expertise with others. Moreover, amicus briefs submitted on behalf of MDTC have been well-received by Michigan appellate courts, due entirely to the passion and skill which MDTC members devote to the authorship of these briefs. These activities certainly benefit the organization as a whole, but they also provide participating members with opportunities to meet new people, enhance their skills,

MDTC seeks to promote better understanding and a positive working relationship between the bench and bar through judicial receptions at our conferences, as well as the biennial "Meet the Judges" Reception.

develop their reputation and make a difference by having an impact on major issues affecting civil litigation. They also provide members with the opportunity to motivate others. As others have often observed, enthusiasm is contagious.

I encourage all MDTC members to take part in the committees and activities of MDTC. Throughout its 34 year history, MDTC has been a leader in addressing the challenges which confront our legal system, and every year brings new issues, challenges and opportunities. MDTC continues to evolve, in order to address the changing needs of the civil justice system. We seek your input and participation. By remaining active and involved, you will help our organization to fulfill its role as a dynamic and effective leader in our complicated and challenging litigation environment. There is clearly much work left to be done, and you have an opportunity to make a difference.

I look forward to meeting each of you in the coming year, and working with you to accomplish the mission of MDTC.

The Pursuit of Jurisprudential Significance in the Supreme Court

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

Executive Summary

Although practitioners are typically required to demonstrate jurisprudential significance in order to have their case heard by the Michigan Supreme Court, the meaning of jurisprudential significance has never been formally defined. At a recent appellate bench bar conference, the Supreme Court Justices provided insight into their individual interpretation of the jurisprudential significance concept. It would behoove the appellate practitioner to meet these interpretations if the practitioner does not want his or her client's application for leave to appeal to be denied.

Kimberlee A. Hillock is a shareholder and a co-chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. She is also an associate editor of the Michigan Defense Quarterly. Before joining Willingham & Coté, P.C., Ms. Hillock worked as a research attorney and judicial clerk for the Honorable Donald S. Owens of the Michigan Court of Appeals, and as a judicial clerk for the Honorable Chief Justice Clifford W. Taylor of the Michigan Supreme Court. Since joining Willingham & Coté P.C., Ms. Hillock has been instrumental in achieving favorable appellate results for clients in both the Michigan Court of Appeals and the Michigan Supreme Court. Her most notable successes have included *Spectrum Health Hosp v Farm Bureau Mut Ins Co*, 492 Mich 503; 821 NW2d 117 (2012), and *Admire v Auto-Owners Ins Co*, ___Mich ___; ___ NW2d ___ (2013) (Supreme Court Docket No. 142842). She has more than 10 years' experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild. Ms. Hillock is a veteran of the United States Marine Corps, and she served during Operation Desert Storm. She currently volunteers as a Veteran Mentor on the Ingham County Veteran's Treatment Court. For more questions about this article or appellate practice in general, Ms. Hillock can be reached at khillock@willinghamcote.com, or (517) 324-1080.

For those who regularly practice in the appellate arena, it comes as no surprise to hear that there are subtle differences between appeals to the Michigan Court of Appeals and those to the Michigan Supreme Court. Perhaps the most significant difference is the fact that an appeal in the Court of Appeals is by right, while an appeal to the Michigan Supreme Court is granted only at the Supreme Court's discretion. The former is an error correction court; the latter is not merely that. The Supreme Court receives approximately 2,000 applications for leave to appeal each year.[1] This year, the Court heard oral argument (either on leave granted or on mini oral argument on the application) in approximately 60 cases, or 3 percent of the applications filed.[2] Thus, it behooves the appellate practitioner to pay particularly close attention to jurisprudential significance when identifying the grounds for appeal in the application.[3]

Several grounds for appeal listed in the court rules are situation specific and, thus, not applicable to most appeals. For instance, subsection 1 pertains to the validity of a legislative act, subsection 2 applies only when a state entity of some sort is involved as a party, and subsection 6 pertains only to appeals from the Attorney Discipline Board.

Because it is more widely applicable, one of the most often cited grounds is subsection 3: "the issue involves legal principles of major significance to the state's jurisprudence."[4] It is not enough to simply state that the client's appeal involves jurisprudentially significant issues; the court rule mandates that jurisprudential significance must be shown.[5] As Chief Justice Robert P. Young, Jr., recently warned, "Failure to advocate for a case's jurisprudential significance is almost always fatal."[6]

Although 171 Michigan appellate court orders or opinions have referred to various issues as being jurisprudentially significant (often by dissenting justices who advocated for granting leave),[7] the legal definition of jurisprudential significance has remained somewhat curiously elusive. It is not well-defined in Michigan case law. It is not defined in Black's.[8] It is not defined in Webster's.[9] And it is not defined in the court rules themselves. This lack of definition has sometimes left appellate attorneys grasping for the means to entice the Michigan Supreme Court to hear their clients' appeal. Luckily, light was recently shed on this issue at the 2013 Michigan Appellate Bench Bar Conference held April 24 through April 26, 2013. The event was well attended by the judiciary as well as appellate counsel. All seven Justices of the Supreme Court graciously attended and, in one session, provided valuable insight as to their definitions of jurisprudential significance.

Chief Justice Young defined the Supreme Court's role as being the manager of the "fabric of the law." He explained that applications most likely to be selected were ones that pointed out areas where the "pattern of the legal fabric has become disordered,

chaotic, or frayed."[10] An example of disorder is when there are divergent and contradictory strands of case law leading to inconsistent results.[11] In his opinion, "[s]uccessful advocates identify such inconsistencies and provide guidance on how to resolve them."[12]

The cases in which he has commented on jurisprudential significance indeed support his judicial philosophy. For instance, he urged granting leave to appeal regarding a published Court of Appeals opinion involving an issue of first impression pertaining to statutory interpretation.[13] He also urged granting leave to appeal to determine the extent of a township's constitutional and statutory authority.[14] Both of these cases had the potential of affecting a wide area of Michigan law, and it was important to prevent the pattern of the legal fabric from becoming disordered. In contrast but consistent with his judicial philosophy, he concurred in the denial of leave in one case because even though the Court of Appeals might have been in error, the Legislature's recent amendment of the statute in question limited the jurisprudential significance of the case.[15] Again, because the damage to the pattern of the legal fabric was already minimized, there was no reason to grant leave to appeal to fix it.

Justice Cavanagh defined a jurisprudentially significant case as one that needs a definite pronouncement as to the meaning of the law. Although he was not more forthcoming at the session about his definition of jurisprudential significance, he had recently found jurisprudentially significant those cases involving issues of first impression,[16] issues where previously persuasive authority from another jurisdiction has since been rejected by that jurisdiction,[17] and issues with constitutional implications.[18]

Justice Stephen J. Markman stated that there are three main factors to consider when determining whether an issue has jurisprudential significance. First, where there is significant confusion among the courts with regard to the issue (this factor appears similar to Chief Justice Young's example of inconsistent case law). Second, where there would be impact from the issue over the next few years (if the issue will have little impact, then it is not jurisprudentially significant). Third, where there is disparity between the written law (statutes, regulations, court rules, constitution) and case law interpreting the written law (if the interpretive case law is inconsistent with the plain language of the written law, correction of the case law involves an issue of jurisprudential significance). In addition to cases with constitutional implications[19] and statutory interpretation issues,[20] Justice Markman has found jurisprudential significance in cases that involve questions of federal jurisdiction and that could potentially affect an entire economic sector of the state.[21]

The Supreme Court receives approximately 2,000 applications for leave to appeal each year. This year, the Court heard oral argument (either on leave granted or on mini oral argument on the application) in approximately 60 cases, or 3 percent of the applications filed.

The remaining four Justices have been on the Supreme Court bench for less than one term, so less can be gleaned from their opinions in case law. Their statements at the conference were thus particularly enlightening.

Justice Mary Beth Kelly did not appear to be in disagreement with the other Justices. Consistent with the philosophy of all the Justices, Justice Kelly finds jurisprudential significance in constitutional issues.[22] She would simply expand the variety or types of cases considered jurisprudentially significant beyond insurance and governmental immunity issues. For instance, she recently urged granting leave to appeal in a case involving statutory interpretation, the separation of government from politics and the need to maintain government neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from subsidizing partisan political activities.[23]

Justice Brian K. Zahra agreed with the factors stated by Justice Markman. In addition, he opined that the applicant needed to explain any other reason for the Supreme Court to grant leave to appeal. As an example, he explained that the Supreme Court may be less likely to grant leave on an unpublished Court of Appeals decision than it would on a published and precedentially binding decision. An especially compelling application would involve a "first-out" published opinion. It would be more imperative to have a correct decision in this situation because it would be the first of its kind and would not only follow but set the precedent for the entire state. Justice Zahra has found jurisprudential significance in issues pertaining to mootness, stare decisis, and the scope of judicial power and jurisdiction.[24]

Justice Bridget Mary McCormack likewise agreed that a case was jurisprudentially significant if it could be demonstrated that something needed to be done to clarify confusion in the law. She further pointed out that the Supreme Court was not a court of error correction — a position that has been previously espoused by Chief Justice Young.[25]

Because Justice David F. Viviano had been on the Supreme Court bench for less than two months, he stated that his views pertaining to jurisprudential significance were still evolving. The appellate bar will certainly look forward to his views on this essential issue in the years to come.

The prevailing theme that can be pulled from the panel discussion of jurisprudential significance and the cases in which various justices have found jurisprudential significance is that if the appellate practitioner wants the Michigan Supreme Court to grant leave to appeal, the practitioner needs to look beyond the facts of his or her client's case. At this level, it is no longer about one's client. It is now about the fabric or pattern of the law as a whole. What are the effects on Michigan jurisprudence in its entirety if the Court of Appeals' opinion is allowed to remain good law? And vice versa, what are the effects on Michigan jurisprudence if the Supreme Court grants the relief requested? Is there already confusion in the law that requires clarification? Is this an issue of first impression? If the application for leave to appeal focuses solely on winning a single case, the application will most likely end up part of the 97 percent of applications that do not proceed to oral argument.

Endnotes

1. Michigan Supreme Court Annual Report 2012. http://courts.mi.gov/Administration/SCAO/Resources/Documents/Publications/Statistics/2012/2012MSCAnnualReport.pdf .
2. http://courts.mi.gov/courts/michigansupreme-court/clerks/oral-arguments/2012-2013/pages/default.aspx. It should be noted that merely because oral argument is not granted does not mean that leave is denied in the remaining 97 percent of cases. Some cases are remanded to the Court of Appeals to hear as on leave granted, and some cases are peremptorily reversed. This author does not, however, have the statistics with regard to these dispositions.
3. MCR 7.302(B).
4. MCR 7.302(B)(3).
5. MCR 7.302(B).
6. Chief Justice Robert P. Young, Jr., *Effective Supreme Court Advocacy: Advice from the Chief Justice, Institute of Continuing Legal Education*.
7. https://www.lexis.com, "jurisprudent! significan!"
8. *Black's Law Dictionary* (6th ed).
9. *Random House Webster's College Dictionary.*
10. Young, Jr., *Effective Supreme Court Advocacy: Advice from the Chief Justice, Institute of Continuing Legal Education*, p 1-6.
11. Id. at 1-7.
12. Id.
13. *Thorn v Mercy Mem Hosp*, 483 Mich 1122; 767 NW2d 431 (2009).
14. *Hess v Cannon Twp*, 474 Mich 923; 706 NW2d 8 (2005).
15. *Carrier Creek Drainage Dist v Land One, LLC*, 477 Mich 954; 723 NW2d 907 (2006).
16. *People v Houthoofd*, 487 Mich 568, 607; 790 NW2d 315 (2010).
17. *People v Taylor*, 482 Mich 368, 383; 759 NW2d 361 (2008).
18. *People v Watkins*, 482 Mich 1114; 758 NW2d 267 (2008).
19. *People v Ricks*, 485 Mich 925; 773 NW2d 662 (2009).
20. *Lee v Detroit Med Center*, 487 Mich 859; 784 NW2d 823 (2010).
21. *Sierra Club Mackinack Chapter v Dep't of Environmental Quality*, 483 Mich 1120; 767 NW2d 434 (2009).
22. *People v Sasak* (In re Sasak), 490 Mich 854; 800 NW2d 598 (2011).
23. *Michigan Ed Ass'n v Secretary of State*, 489 Mich 194; 801 NW2d 35 (2011).
24. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884; 796 NW2d 240 (2011).
25. *People v. McKinney*, 468 Mich 928, 930; 663 NW2d 469 (2003).

MDTC Schedule of Events 2013

2013

September 13	Golf Outing – Mystic Creek
September 18–20	SBM Awards Banquet and Annual Meeting: Respected Advocate Award Presentation – Lansing
September 26	Board Meeting – Okemos
October 16–20	DRI Annual Meeting – Chicago, IL
November 7	Board Meeting – Sheraton Detroit/Novi
November 7	Past Presidents Dinner – Sheraton Detroit/Novi
November 8	Winter Meeting – Sheraton Detroit/Novi

2014

January 24	Future Planning Meeting – Grand Rapids
January 25	Board Meeting – Grand Rapids
March 27	Board Meeting – Okemos
May 8 & 9	DRI Central Regional Meeting – Ohio
May 14 & 16	Annual Meeting – The Atheneum Hotel, Greektown
October 2	Meet the Judges – Hotel Baronette, Novi
November 6	Past Presidents Dinner - Marriott, Troy
November 7	Winter Meeting – Marriott, Troy

"Reasonable Certainty" Remains Uncertain[1]

By: Neil Steinkamp, CVA, CCIFP, CCA, nsteinkamp@srr.com, and Regina Alter, Esq., *Butzel Long*, alter@butzel.com

Executive Summary

Although the concept of reasonable certainty in the computation of damages has remained universally undefined, there are several tools available to assist practitioners and damages experts in establishing this necessary factor for admissibility. First, there is the federal rule itself, Rule 702, which lists several standards. Next, there are numerous judicial pronouncements with regard to the standards in Rule 702. Finally, Judge Posner recently expounded on these standards and provided three tests that should be met before damages evidence can be considered reasonably certain for the purpose of admission.

Neil Steinkamp, CVA, CCIFP, CCA is a Managing Director in the Dispute Advisory & Forensic Services Group at Stout Risius Ross (SRR). He has extensive experience providing a broad range of business and financial advice to trial lawyers and in-house counsel. Mr. Steinkamp's experience has covered many industries and matter types resulting in a comprehensive understanding of the application of damages concepts and other economic analyses. Mr. Steinkamp can be reached at +1.646.807.4229 or nsteinkamp@srr.com.

Regina Alter, Esq. is a Shareholder in the New York office of Butzel Long, P.C. She concentrates her practice on wide-ranging complex commercial litigation and dispute resolution matters in areas including financial services, employment, intellectual property, real estate, securities, and bankruptcy. Ms. Alter can be reached at +1.212.905.1501 or alter@butzel.com.

Introduction

Many legal and financial practitioners are facing increasing challenges on whether alleged damages have been proven with reasonable certainty. This article explores the theoretical and practical considerations of reasonable certainty.[2]

Achieving reasonable certainty as to the calculation of damages is a critical goal in any matter for which damages are to be proven. If a party cannot demonstrate that the damages calculations are reasonably certain, the court is obligated to exclude the testimony. Without this testimony, even successful proof on liability may lead to an award of no damages. Courts have stated it this way:

> In order that it may be a recoverable element of damages, the loss of profits must be the natural and proximate, or direct, result of the breach complained of and they must also be capable of ascertainment with reasonable, or sufficient, certainty . . . absolute certainty is not called for or required.[3]

Professional literature, court opinions, rules of evidence, and other bodies of knowledge and works of law often use the phrase "reasonable certainty" when discussing damages. However, the threshold for reasonable certainty remains undefined.

It is important to note that this article does not provide a specific checklist, mathematical formula, or mechanical manner of deducing whether damages opined by the expert is reasonably certain. No specific mechanism exists that can be applied to all matters. Indeed, "most courts agree that reasonable certainty as to damages is a flexible, inexact concept."[4] Rather, this piece provides a discussion of the factors, elements, and/or characteristics of expert opinions that can generally be considered for any matter to determine the extent to which damages opined on by an expert rise to the level of reasonable certainty.

The article is segmented into several sections. The first section briefly reviews the Federal Rules of Evidence on the admissibility of expert testimony. Then certain sources from professional literature are considered for discussion and commentary on achieving reasonably certain expert opinions as to the calculation of damages. Finally, the recent opinion of one notable judge, Judge Richard Posner, in the case of *Apple v Motorola*[5] is reviewed. In this opinion, Judge Posner provides his guidance and interpretation on the efforts experts should take to achieve a reasonably certain opinion as to damages, at least as it applies in that case.

Taken together, these sections are intended to provide guidance to lawyers and experts toward achieving a reasonably certain result.

The Federal Rules of Evidence

Federal Rule of Evidence (Rule 702) provides guiding principles meant to hold expert testimony to account. Rule 702 has four components:

> The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue
>
> The testimony is based on sufficient facts or data
>
> The testimony is the product of reliable principles and methods
>
> The expert has reliably applied the principles and methods to the facts of the case[6]

These four criteria provide the general framework for damages experts to consider in developing their opinion. However, whether an expert's opinion actually meets the threshold of reasonable certainty in any particular court or for any particular matter involves a more significant assessment of the efforts undertaken by the expert to determine damages.

Attempts to Define "Reasonably Certain"

In many cases, courts and learned commentators have provided a definition or interpretation of what reasonably certain means in the context of damages calculations. The following is a collection of some of those interpretations (emphasis added in each):

- "Does the court think that, given all of the circumstances, this plaintiff has presented **sufficient evidence to make it fair** to award it the damages in question."[7]
- "Damages for future lost profits must 'be capable of measurement based upon known reliable factors **without undue speculation.**'"[8]
- "While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is **speculative and conjectural**."[9]

Rather, this piece provides a discussion of the factors, elements, and/or characteristics of expert opinions that can generally be considered for any matter to determine the extent to which damages opined on by an expert rise to the level of reasonable certainty.

- "The plaintiff has the burden to present evidence with a tendency to show the probable amount of damages to allow the trier of fact to make 'the most **intelligible and accurate estimate** which the nature of the case will permit.'"[10]
- The amount of alleged loss "could not be speculative, possible or imaginary, 'but must be reasonably certain.'"[11]
- Lost profits damages should not be "too dependent upon numerous and changing contingencies to constitute **a definite and trustworthy measure of damages**."[12]
- Lost profits damages should not be based on "too many undetermined variables" and "competent proof" addressing these variables could have removed the "lost profit claim from the **realm of impermissible speculation**.'"[13]
- "[D]amages need not be proved with mathematical certainty, but only with reasonable certainty, and evidence of damages may consist of probabilities and inferences . . . . Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an **intelligent estimate without conjecture.**"[14]
- "[A]nticipated profits may be recovered when '"they are reasonably certain by proof of actual facts, with present data for a **rational estimate** of their amount."'"[15]

As noted, attempts to define reasonably certain have considered phrases such as "rational estimate"; "impermissible speculation"; "intelligent estimate"; "imaginary"; and "intelligible and accurate estimate." These phrases demonstrate courts' attempts to better convey expectations and to frame their evaluation of the damages testimony.

In an article for the Business Litigation Section of the Dallas Bar Association in 2011, Hon. Martin "Marty" Lowy noted that "[w]hatever methods are used, the final calculation, as well as all of its elements, should be reasonable. Put another way, the expert, like the jurors, **should not leave common sense behind**."[16]

Regarding the courts' varied assessments of "reasonably certain," in 1929, Professor Charles T. McCormick succinctly noted:

> [A]n examination of a large number of the cases, in which claims for lost profits are asserted, leaves one with a feeling that the vagueness and generality of the principles which are used as standards of judgment in this field are by no means to be regretted. It results in a flexibility in the working

As noted, attempts to define reasonably certain have considered phrases such as "rational estimate"; "impermissible speculation"; "intelligent estimate"; "imaginary"; and "intelligible and accurate estimate."

> of the judicial process in these cases – a free play in the joints of the machine – which enables the judges to give due effect to certain "imponderables" not reducible to exact rule.[17]

Indeed these quotes from various courts demonstrate the "free play in the joints" described by McCormick. This supports the concept of a "best efforts" doctrine when evaluating the threshold of reasonably certain. However, a comparison of the following three opinions demonstrates the wide latitude courts have used when evaluating whether "best efforts" necessarily results in a reasonably certain result.

- "If the best evidence of damage of which the situation admits is furnished, this is sufficient."[18]
- "Though plaintiff's proof was 'not without fault,' it was sufficient because it was the best reasonably obtainable under the circumstances."[19]
- "The quantity of proof is massive and, unquestionably represents business and industry's most advanced and sophisticated method of predicting the probable results of contemplated projects. Indeed, it is difficult to conclude what additional relevant proof could have been submitted by [the plaintiff] in support of its attempt to establish, with reasonable certainty, loss of prospective profits. Nevertheless, [the claimant's] proof is insufficient to meet the required standard."[20]

A review of the case referred to in the latter quote is instructive. In that matter, the court's concerns appear to rest with the foundation for the analysis of the expert. That is, while the expert may have utilized "business and industry's most advanced and sophisticated method" in the calculation, if the foundation of such analysis is speculative or unreliable, the result may be speculative or unreliable, as well.

The court in that case appears to emphasize the importance of the "foundation" of the expert analysis in its determination of whether the result is a reasonably certain measure of the damages in that case.[21] The importance of a "stable foundation" was also noted in *Contemporary Mission, Inc v Famous Music Corp*,[22] where the court indicated "the plaintiff must show 'a stable foundation for a reasonable estimate' of damages."[23]

In November 2010, Robert Lloyd of the University of Tennessee, Knoxville, published *The Reasonable Certainty Requirement in Lost Profits Litigation: What it Really Means.*[24] This research paper provides a comprehensive review of court opinions that considered the reasonable certainty of lost profits damages. In this research paper, Lloyd concludes that there are six factors courts consider "to determine whether a party has proven lost profits with reasonable certainty."[25] These stated factors are:[26]

1. The court's confidence that the estimate is accurate
2. Whether the court is certain that the injured party has suffered at least some damage
3. The degree of blameworthiness or moral fault on the part of the defendant
4. The extent to which the plaintiff has produced the best available evidence of lost profits
5. The amount at stake
6. Whether there is an alternative method of compensating the injured party

Several factors listed by Lloyd are seemingly beyond the calculations that are typically prepared by an expert, but may be relevant for counsel's consideration. Lloyd notes that "[i]n most cases, courts deciding whether lost profits have been proven with reasonable certainty consider all or almost all of these factors" but also indicates that "[t]he vast majority of opinions focus on only one or two factors."[27]

This discussion illustrates the challenges that experts face: If the courts provide varied guidance on what is or is not reasonably certain, how is an expert to know whether his or her work is reasonably certain? A common theme in the materials and opinions described is that the expert must develop a foundation for his or her work that is based on reasonable facts and build on that foundation with the expert's best effort using the documents and information reasonably available to them. An expert must then consider what is his or her "best effort."

This term, much like reasonable certainty, does not have a standard, clearly

> In *Apple v Motorola,* Judge Posner took a stern approach in affirming that "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible."

> The first test of the adequacy of proposed expert testimony for Posner is "whether the expert has ***sufficiently*** explained how he derived his opinion from the evidence that he considered. Any step that renders the analysis unreliable renders the testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

articulated definition. However, Judge Posner in *Apple v Motorola*, provided some valuable insight into this concept. The opinion of Judge Posner provides another, recent, review of one judge's assessment of both "reasonable certainty" and "best effort" as it pertains to damages. The opinion of Judge Posner is not likely shared by all damages practitioners, or all judges, but it does provide a thorough discussion of issues pertinent to this article.

Apple v Motorola

In *Apple v Motorola*, Judge Posner took a stern approach in affirming that "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible." Posner proposed three "tests of adequacy" that the court should consider when exercising its duty as gatekeeper. Of particular interest are the reasons the Apple and Motorola experts failed to meet the threshold of reasonable certainty.

Judge Posner specified three tests to assess the merits of expert testimony:

1. "[w]hether the expert has sufficiently explained ***how he derived*** his opinion from the evidence that he considered"[28]
2. whether the expert "[e]mploys in the courtroom the same level of ***intellectual rigor*** that characterizes the practice of an ***expert in the relevant field***"[29]
3. "[e]ven where expert testimony is admissible it may be too weak to get the case past summary judgment"[30]

By using these tests, Posner evaluated whether the expert exercised best efforts to develop a

- Sound opinion based on
- An accepted method applied to
- Relevant data
- Judged against the intellectual rigor of an industry expert.

The second test above states that an expert should "employ in the courtroom the same level of ***intellectual rigor*** that characterizes the practice of an ***expert in the field.***"

Test 1:

The first test of the adequacy of proposed expert testimony for Posner is "whether the expert has ***sufficiently*** explained how he derived his opinion from the evidence that he considered. Any step that renders the analysis unreliable renders the testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

Federal Rule of Evidence 702(d) states that testimony may be admitted if the "expert has reliably applied the principles and methods to the facts of the case."[31] Thus, Posner takes Rule 702(d) one step further. For Posner, a "best effort" at "reasonable certainty" to "reliably apply" principles to the facts of the case no longer appears sufficient.[32]

Sound opinion: The court looks to several key variables to assess whether testimony has achieved reasonable certainty. These variables include sound data, acceptable methodology, and logical opinion. Posner offers an example during his discussion of Expert M's (expert for Motorola) patent valuation. In this instance, Expert M assigned the patent in question 2% of the total portfolio value despite the fact that the actual patent represented only 1% of the total number of patents in that portfolio. Ultimately, Posner concludes that Expert M's testimony would be excluded, because Expert M's declaration does not answer that essential question: How to pick the right non-linear royalty.[33]

Posner's criticism indicates his distaste with the unsubstantiated number. It may well be that the patent portfolio consisted of patents of various values (i.e., 100 patents do not necessarily retain 1% each of the total value). Indeed, Expert M may well have had a good, qualitative reason to attach a premium to the patent in question. Nevertheless, Expert M's inability to attach this premium to some quantifiable variable rendered it a "gap" in his analysis. Once again, Posner takes a hard line approach in affirming that, "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible." This indicates Posner's consideration of a judicial duty to exclude testimony where it falls short of this first test.

Indeed, this appears consistent with the case of *ATA Airlines v Federal Express Corporation* wherein Posner stated that, "the evaluation of [expert testimony] may not be easy; the 'principles and methods' used by expert witnesses will often be difficult for a judge to understand. But difficult is not impossible. The judge can require the lawyer who wants to offer the expert's testimony to explain to the judge in plain English what the basis and logic of the testimony are . . . . If a party's own lawyer cannot understand the testimony . . . the testimony ***should*** be withheld from the jury."[34] He even proposes that, in particularly complex or technical situations, the court should hire an aid to help the judge gauge the validity of testimony.[35]

Test 2:

The second test above states that an expert should "employ in the courtroom the same level of ***intellectual rigor*** that characterizes the practice of an ***expert in the field***." "Sufficiency" and "Reliability," for Posner, seem to be evaluated as a "best effort" analysis defined as the ***rigor*** that could be expected of an industry expert. This standard is a high one, and particularly relevant to the (a) quality of

data, (b) the expert's chosen methodology, and (c) the general standards of analysis (for example, did the expert consider alternatives?).

Quality of data and methodology: Judge Posner in *Apple v Motorola* largely melded these two areas by virtue of the fact that he did not believe that the method for obtaining data was sound. Twice Posner finds Expert A (expert witness for Apple) falls short of "best efforts" when compared against the standard of ***intellectual rigor*** of the ***industry expert***.

Posner appears to further Rule 702 by qualifying the word "reliable" and supplanting the metric "intellectual rigor of the expert in the field." The following example serves as an illustration: Posner states, "I am merely asserting that the survey that Motorola did conduct, which did not look for aversion to partial obstruction and so far as I can tell had nothing to do with its pricing, but rather with helping the company to determine which programs and features are particularly important to users, is not the kind of survey that Expert A — ***assuming him to be a responsible adviser on marketing or consumer behavior*** — would have conducted."[36]

The inference, therefore, is that sound financial analysis alone may not be sufficient for admissibility of the financial expert's testimony. Indeed, his burden may be greater; a "best effort" at achieving the "reasonably certain" threshold appears to be judged by Posner against the benchmark of the "intellectual rigor of an industry expert."

Second, Posner dismissed Expert A on the grounds that his due diligence was not to the standard of the industry expert. "Suppose Expert A had been hired by Motorola to advise on how Motorola might obtain the functionality of the '263 [patent] at lowest cost without infringing on that patent. Obviously, he would not have gone to the patentee for that information! For it would be in the patentee's interest to suggest a method of inventing around that was extremely costly – because the costlier the invent-around, the higher the ceiling on reasonable royalty."[37]

Posner's disagreement on the method used to aggregate data for the purposes of the expert's analysis demonstrated to him that the expert fell short of Posner's interpretation of "best efforts" and consequently the threshold of "reasonable certainty." Specifically, he takes issue with the concept that the hypothetical "expert in the industry" would not have followed this procedure of market research.

General standards of analysis: On the third point, it appears that a failure to consider alternatives would fall short, at least for Posner, of the "vigorous" standard expected of an industry professional. "This is one fatal defect in Expert A's proposed testimony (referencing the survey criticized), but there is another, and that is a ***failure to consider alternatives*** to a 35mm royalty that would enable Motorola to provide the superior gestural control enabled by the relevant claim in the Apple patent.

In reference to this situation, Posner once again compares Expert A to the hypothetical industry by creating a hypothetical skit in the text of his judgment. Posner asks his reader to "imagine a conversation between Expert A and Motorola, which I'll pretend hired Expert A to advise on how at lowest cost to duplicate the patent's functionality without infringement:"

- Motorola: "What will it cost us to invent around, for that will place a ceiling on the royalty we'll pay Apple."
- Expert A: "Brace yourself: $35 [million] greenbacks."
- Motorola: "That sounds high; where did you get that figure?"
- Expert A: "I asked the engineer who worked for Apple."
- Motorola: "Dummkopf! You're fired!"[38]

The inference, therefore, is that sound financial analysis alone may not be sufficient for admissibility of the financial expert's testimony.

This dialog serves to illustrate several key points: 1) Posner once again compared Expert A's performance against that of the hypothetical industry expert — in this case, a consultant; 2) A failure to consider alternatives will undermine expert testimony admissibility. Indeed, in Posner's later consideration of a separate Motorola expert, Expert M-2, Posner reinforced this position by excluding her testimony because "Expert M-2 failed to consider the range of plausible alternatives."

Posner seemed to advocate preclusion of expert testimony that falls short of the above thresholds "where an [expert] failed to do so – then his proposed testimony should be barred." Note the definitive nature of his language; he states that testimony "should" be barred, not that it "may" be barred.

Test 3:

Posner's third test—"[e]ven where expert testimony is admissible it may be too weak to get the case past summary judgment"—is less revealing. Simply put, it appears to reaffirm the wide judicial discretion enjoyed by the court in its role as "gatekeeper." Here, Posner cited the case of *Hirsh v CSX Transportation Inc*,[39] wherein the court distinguished between the admissibility of evidence and its sufficiency. As circumstances would have it, the court permitted summary judgment despite the fact that opposition expert testimony was admissible under *Daubert*.[40] In other words, despite a valid

expert opinion, the merits of the case may be that the testimony's validity does not compel the court to entertain a trial.

Conclusion

A "reasonably certain" threshold for expert testimony is a function of "best efforts" having regard for the merits of the case. The courts enjoy wide judicial discretion in determining whether the expert's testimony qualifies as a "best" effort. It appears that the courts will look toward several potential variables including, but not limited to: (a) soundness of opinion based upon (b) an acceptable methodology underpinned by (c) relevant data, all of which is to be judged against, at least according to Posner, (d) the intellectual rigor that could be expected of an industry expert. Finally, where expert testimony falls short of the standard, Judge Posner believes that the trial judge "should" throw out the testimony in question. The word "should" may serve as fertile ground upon which the seeds of a new "duty to exclude" testimony may grow.

Endnotes

1. The authors would like to thank Stephen McMullin for his research and assistance with developing the content for this article.
2. Of course, with a topic of this breadth and significance, this piece is not meant to serve as a comprehensive analysis of all relevant aspects of reasonable certainty. This article is intended for general information purposes only and is not intended to provide, and should not be used in lieu of, professional advice. The publisher assumes no liability for readers' use of the information herein and readers are encouraged to seek professional assistance with regard to specific matters. Any conclusions or opinions are based on the individual facts and circumstances of a particular matter and therefore may not apply in other matters. All opinions expressed in these articles are those of the authors and do not necessarily reflect the views of Stout Risius Ross, Inc. or Stout Risius Ross Advisors, LLC.
3. *Morris Concrete, Inc v Warrick*, 868 So 2d 429 (Ala App, 2003).
4. Milikowsky, *A Not Intractable Problem: Reasonable Certainty, Tractebel, and the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market*, Columbia Law Review, Vol. 108, Page 467.
5. *Apple, Inc v Motorola, Inc*, unpublished opinion and order of the United States District Court of the Northern District of Illinois, issued May 22, 2012 (Docket No. 11-cv-08540).
6. Federal Rules of Evidence (as amended Apr. 26, 2011, eff. Dec. 1, 2011).
7. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 6.
8. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 7 (citing Bykowsky v Eskanazi, 2010 NY App Div LEXIS 3317 (Apr 27, 2010)).
9. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 26 (citing Katskee v Nev Bob's Golf of Neb, Inc, 472 NW2d 372, 379 (Neb, 1991)).
10. Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 643 (citing *Duane Jones Co v Burke*, 306 NY 172, 192; 117 NE2d 237, 247–48 (1954) (quoting SUTHERLAND ON DAMAGES § 70 (4th ed. 1916)).
11. Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing *Kenford*, 67 NY2d at 259–60; 493 NE2d at 234; 502 NYS2d at 131).
12. Banks, L*ost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing *Witherbee*, 155 NY at 453; 50 NE at 60).
13. Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?,* Albany Law Review, Vol. 74.2, 2010/2011, Page 644 (citing 155 NY at 405; 624 NE2d at 1012; 604 NYS2d at 917).
14. *Delahanty v First Penn BK, NA*, 318 Pa Super 90; 464 A2d 1243 (1983).
15. *Independent Business Forms, Inc v A-m Graphics, Inc*, 127 F3d 698 (CA 8, 1997).
16. Hon. Martin "Marty" Lowy, *Proving and Defending Lost Profits Damages*, Dallas Bar Association, Business Litigation Section, June 2011, Page 11 (emphasis added).
17. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 36 (citing Charles T. McCormick, T*he Recovery of Damages for Loss of Expected Profits*, 7 NC L Rev 235, 248 (1929)).
18. Lloyd, T*he Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 37 (citing Charles T. McCormick, Handbook on the Law of Damages §27, at 101 (1935)).
19. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 37 (citing *Koehring Co v Hyde Const Co*, 178 So 2d 838, 853 (Miss, 1965)).
20. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010, Page 40 (citing 493 NE2d at 236).
21. Banks, *Lost Profits for Breach of Contract: Would the Court of Appeals Apply the Second Circuits Analysis?*, Albany Law Review, Vol. 74.2, 2010/2011, Page 645 (citing *Kenford*, 67 NY2d at 262; 493 NE2d at 336; 502 NYS2d at 133).
22. 557 F 2d 918, 926 (CA 2, 1976).
23. *Wathne Imports, Ltd v PRL USA, Inc* (63 AD3d 476; 881 NYS2d 402 (2009)) (citing *Contemporary Mission, Inc v Famous Music Corp*, 557 F2d 918, 926 (CA 2, 1976).
24. Lloyd, *The Reasonable Certainty Requirement in Lost Profits Litigation: What It Really Means*, November 2010.
25. *Id*. at 6.
26. *Id*.
27. *Id*.
28. *Apple, Inc v Motorola, Inc*, unpublished opinion and order of the United States District Court of the Northern District of Illinois, issued May 22, 2012 (Docket No. 11-cv-08540).
29. *Id*. at 3.
30. *Id*. at 4.
31. Federal Rules of Evidence (as amended Apr. 26, 2011, eff. Dec. 1, 2011).
32. *Apple, Inc v Motorola, Inc*, unpublished opinion and order of the United States District Court of the Northern District of Illinois, issued May 22, 2012 (Docket No. 11-cv-08540). Notably, this particular requirement was first suggested in the case of *ATA Airlines, Inc v Federal Express Corporation*, No 11-1382, 11-1492 (SD Ind, December 2011). Here, Judge Posner indicated that the burden for "sufficient explanation" is to be shouldered by the expert, counsel, and judge. He stated, "it is the [Judge's] responsibility, as painful as it may be, to screen expert testimony, however technical; we have suggested aids to the discharge of that responsibility." Posner continued, "[i]f a party's lawyer cannot understand the testimony of the party's own expert, the testimony should be withheld from the jury. Evidence unintelligible to the trier or triers of fact has no place in a trial."
33. *Apple, Inc v Motorola, Inc*, unpublished opinion and order of the United States District Court of the Northern District of Illinois, issued May 22, 2012 (Docket No. 11-cv-08540).
34. *ATA Airlines, Inc v Federal Express Corp*, Nos 11-1382,11-1492, (SD Ind, December 27, 2011).
35. *Id*. at 27.
36. *Apple, Inc v Motorola, Inc*, unpublished opinion and order of the United States District Court of the Northern District of Illinois, issued May 22, 2012 (Docket No. 11-cv-08540).
37. *Id*. at 16,17.
38. *Id*. at 17.
39. *Hirsch v CSX Transp, Inc*, 656 F3d 359, 362 (CA 6, 2011).
40. *CSX Transp, Inc v United Transp Union*, 879 F2d 990, 1004-1005 (CA 2, 1989).

VENDOR PROFILE

Paul Dank, PCI • President
Sherlock Investigations, Inc.
42815 Garfield Rd, Ste 208 • Clinton Township, MI 48038
888-989-2800 • *pdank@claimspi.com*

1. Where are you originally from? Metro-Detroit.

2. What was your motivation for entering into your profession? To provide truly professional investigations geared to the insurance defense community on a scale not previously achieved in Michigan.

3. What is your educational background? MBA from Wayne State.

4. How long have you been with your current company, and what is the nature of your business? 18 years with Sherlock. Originally I was involved on a part-time basis while still working at KPMG. Over time, the scope of my role increased to the point where I was managing the day-to-day operations, earned an equity position and ultimately lead to my purchase of the agency.

5. What are some of the greatest challenges/rewards in your business? The main challenge we face is differentiating us from the herd of small generalist PIs who purport to be larger and more capable than they really are. They often claim to be similar, but in actuality, they simply broker the work to the cheapest PI they can find. We derive a great deal of pride from our culture of excellence and our continued growth via word-of-mouth recommendations within the insurance and legal communities.

6. Describe some of the most significant accomplishments of your career. Becoming board certified in investigations, deploying a management team comprised of all masters in intelligence analysis degree holders, moving past the 25 investigator headcount milestone.

7. How did you become involved with the MDTC? We have a strong client base within the MDTC membership and acted upon the many recommendations to become more involved in the association.

8. What do you feel the MDTC provides to Michigan lawyers? A community to share and support the insurance industry and a vehicle to help members provide the best legal services within this space.

9. What do you feel the greatest benefit has been to you in becoming involved with the MDTC? As the service providers who supply information and evidence to the insurance defense community, we too strive to learn new and better ways to be of service to the defense bar. The information we learn from the Quarterly alone is amazing and the opportunity to network is the icing on the cake for us.

10. Why would you encourage others to become involved with the MDTC? It has no equal in the state and is an obvious place to go to become better at your craft.

11. What are some of your hobbies and interests outside of work? Hometown sports fan, periodic appearances at local cigar bar, lacrosse Dad, avid reader.

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).*

Member **Hal Carroll** reports that the State Bar has granted permission for the Insurance and Indemnity Law Section to create a searchable directory of its members. The directory will allow attorneys and court personnel, in particular the Business Courts, to identify section members with expertise relating to specific issues and types of cases. For Business Courts in particular, the searchable directory is expected to assist in early resolution of cases.

A trial team led by Foster Swift attorney, **John Inhulsen**, including **Andrew Vredenburg** and **Joshua Richardson**, won a $5.15 million unanimous jury verdict on June 21, 2013, in favor of McCormick International, LLC, a former Ionia County farm equipment dealer. The verdict was against Manitou North America, Inc., a Texas-based distributor of farm equipment manufactured by its parent company, France-based Manitou BF. The trial involved McCormick's claims against Manitou under the Michigan Farm and Utility Equipment Act, MCL 445.1451, and the Michigan Antitrust Reform Act, MCL 445.771.

Business Courts and Early Neutral Evaluation

By: Hal O. Carroll, *www.HalOCarrollEsq.com*

Executive Summary

Business Courts create an opportunity and framework for a new type of ADR, tailored to the needs of the specific types of cases that fall within the scope of the newly-created Business Courts. For those who have expertise in these types of cases, this is an opportunity to participate as neutral evaluators and as counsel in a process that offers an avenue to early and less expensive resolution of these complex cases.

Hal Carroll is a former member of the board of directors of MDTC, and a co-founder and first chairperson of the Insurance and Indemnity Law Section of the State Bar. He practices in the area of insurance coverage and indemnity law, and was designated a Super Lawyer® again in 2012. His website is www.HalOCarrollEsq.com and his email address is HOC@HalOCarrollEsq.com.

The "Business Courts" created by MCL 600.8031, et seq. embrace a broad range of cases that arise in the commercial context. The premise that underlies the creation of the Business Courts is that this class of cases is different and merits being handled in a different way.

Origin of the Idea

The idea for Business Courts is not new. Back in 2001, Governor Engler proposed the creation of "cyber courts" to "allow business or commercial disputes to be resolved with the expertise, technology and efficiency required by the information age economy."[1] The disputes included within the purview of the "cyber courts" included disputes "arising out of business or commercial insurance policies."[2]

The cyber court was effectively still born, however, because it was not funded. The funding was to come from the Supreme Court budget, but that budget was tight and the money did not come forth.

But the idea did not die. In late 2001, the State Bar's Business Law Council set up an ad hoc committee to study the question of setting up a specialized Business Court.[3] This resulted in a pilot proposal in 2003 and the introduction of a bill in 2005 (which died in committee). In 2009, the State Bar established a "Judicial Crossroads Task Force," which recommended in 2010 that the Supreme Court create pilot programs in at least two courts. Macomb, Kent and Oakland Counties established pilot projects.

Ultimately legislation was introduced in 2011 and has now taken effect. As a result, the act that established the Business Courts simultaneously gave the cyber courts a decent burial.

Scope

The act embraces a broad range of business-related cases.

(2) Business or commercial disputes include, but are not limited to, the following types of actions:

(a) Those involving information technology, software, or website development, maintenance, or hosting.

(b) Those involving the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers.

(c) Those arising out of contractual agreements or other business dealings, including licensing, trade secret, intellectual property, antitrust, securities,

noncompete, nonsolicitation, and confidentiality agreements if all available administrative remedies are completely exhausted, including, but not limited to, alternative dispute resolution processes prescribed in the agreements.

(d) Those arising out of commercial transactions, including commercial bank transactions.

(e) Those arising out of business or commercial insurance policies.

(f) Those involving commercial real property.[4]

Specialized Litigation, Specialized ADR

All of these categories share the common characteristic of requiring specialized knowledge and expertise in presenting, handling and resolving them. This provides an opportunity for practitioners with specialties that touch on one of the Business Courts' areas of responsibility.

These cases can benefit from the application of substantive, legal expertise in the ADR process itself. The ADR process would take the form of "early neutral expert evaluation." This is qualitatively different from current forms of ADR. Case evaluation under the court rules has long been recognized as ineffective in these types of cases. The panel will seldom have the expertise or the time to devote to the effort of sorting through the documents and reaching a resolution. Equally important, case evaluation comes late, at the end of the process, so it does little to reduce costs. Finally, case evaluation success rates languish around 20 percent, according to the Supreme Court Administrative Office.[5] Mediation does a better job, with success rates between 50 and 70 percent.[6]

Mediation and facilitation do a better job because they can draw out the parties' arguments and get them to listen more closely to each other. But the facilitator's skills are about process rather than substance. Depending on the skill of the facilitator, the process can be merely a form of shuttle diplomacy.

Moreover, facilitation is generally treated as something to be done after the case is "ripe," that is after discovery is completed or at least far along. By that time, the expense of the litigation has risen, and the parties' positions have become more entrenched, because of the time and money that each has invested in it.

The idea for Business Courts is not new. Back in 2001, Governor Engler proposed the creation of "cyber courts" to "allow business or commercial disputes to be resolved with the expertise, technology and efficiency required by the information age economy."[1]

> [I]n Michigan, despite strong evidence that when parties talk, cases dispose, ADR has largely remained confined to the near final event before trial, even though at that moment its efficacy of saving time and money is largely lost, since 98 percent of the cases would most likely be disposed without anything but the final settlement conference.[7]

Business Court cases are natural candidates for a different kind of alternate dispute resolution, one that is (1) early, (2) by a neutral expert, and (3) hands-on.

Early Evaluation

Many Business Court cases are based on documents. Contracts of one kind or another lie at the basis of many of these disputes. This means that little discovery, if any, is needed before neutral evaluation can take place. In a dispute between insurers or between an insured and its insurer, the underlying facts are seldom in dispute. And even if there is a dispute over some underlying fact, such as degree of fault, analysis can still proceed on alternative scenarios.

Many cases of this type can be diverted to Neutral Evaluation within weeks of the answer being filed. The documents can be exchanged and the case assigned to the neutral evaluator.

This avoids the expense of litigation, and the problem of the attorneys, and especially the litigants, becoming wedded to a position because of their investment of time and money.

> The creation of the business court, with its attendant goals of early and active intervention, provides the framework for an early triaging opportunity to pose to the parties the types of questions asked in the Early Intervention Conferences.[8]

Another advantage of conducting the evaluation early in the process is that it takes place at a time when the parties are more amenable to a business solution. That opportunity is often lost if the process is delayed until traditional case evaluation or facilitation, when positions and attitudes have solidified.

The Neutral Expert

The system would use an evaluator rather than a facilitator. The evaluator would be chosen for his or her expertise, rather than procedural skills. There is no shortage of expertise in the State Bar to handle these types of cases. Several State Bar sections are devoted to issues that commonly arise in Business Courts. Many of the attorneys who handle Business Court cases will be acquainted with colleagues who have expertise and can serve as neutral evaluators.

The ADR Process: Hands-On

As the term "evaluators" suggests, the process calls for the evaluator to take an active part in the discussions. Far from conveying messages and drawing out positions from each side, the evaluator would engage each party on the strength or weakness of its position. The discussion would be detailed and focused on the merits of each particular argument.

Within this broad framework, different forms of evaluation can take place. The evaluator might speak to each party separately while offering a candid analysis, or engage them both in the discussion. If the parties choose, the neutral expert could provide a written evaluation of each of the arguments, while leaving ultimate resolution to the parties. The evaluation also could include the evaluator's suggested resolution.

In some cases the parties might ask the evaluator to function as an arbitrator, while in others the process could be closer to conventional facilitation.

The parties would also agree whether the written evaluation, if one is prepared, should be provided to the court.

In many cases this early intervention will bring about a resolution. In cases where it doesn't the process will at least refine and focus the parties' arguments

Conclusion

The creation of the Business Courts creates an opportunity and framework for a new type of ADR, tailored to the needs of the types of cases that fall within the Business Courts' scope of responsibility. For practitioners who have expertise in one of the Business Courts' cases, it provides an opportunity to participate as neutral evaluators and as litigants' counsel in a process that offers a pathway to early and less expensive resolution of these complex cases.

Endnotes

1. Dougas L. Toering, "Business Courts in Michigan: 2001–2013," *The Journal of Insurance and Indemnity Law*, Vol 6 No 1, at 3.
2. *Id*.
3. *Id*.
4. MCL 600.8031(2).
5. Doug Van Epps, "Business Courts and ADR: SCAO Research Supports Early ADR Intervention." *The Journal of Insurance and Indemnity Law*, Vol 6 No 1, at 3.
6. *Id*.
7. *Id*. at 7.
8. *Id*. at 7.

The SMART Act: How a New Federal Law Could Fast Track Your Settlements

By: Matt Garretson and Sylvius H. Von Saucken, *Garretson Resolution Group*

Executive Summary

The recently enacted SMART Act is expected to be a much-needed improvement to the 2007 Medicare, Medicaid and SCHIP Extension Act with regard to Medicare recovery in settlements. Its objective is to accelerate and clarify the Medicare reimbursement process. This article highlights the changes in this process.

You've answered discovery, deposed key witnesses, and agreed with opposing counsel on a dollar figure for settlement. The problem is the parties cannot finalize the settlement until they learn whether Medicare is going to claim a reimbursement lien,[1] and if so, how much repayment will be demanded. The parties are eager to put the case to rest and are growing increasingly frustrated. Now, a new federal law aims to hasten the process.

Under the Strengthening Medicare and Repaying Taxpayers Act, or "SMART" Act, Medicare will face tight deadlines for claiming reimbursement once parties report they are near a settlement.[2] The law's sponsors hope that these new deadlines, which are outlined in this article, will shorten the overall reimbursement timeline. But, the law's full impact will not be known until Medicare officials actually implement the new regulations that the SMART Act requires.

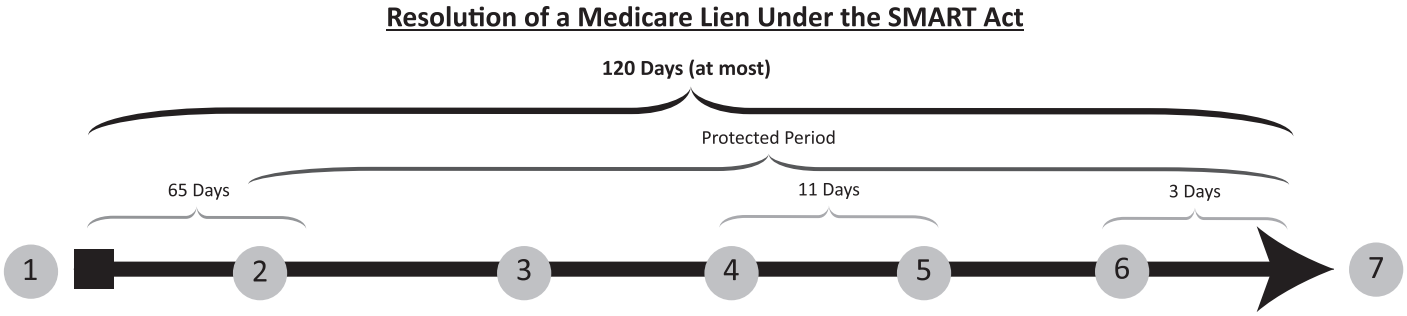
Background of Medicare Reimbursement

When Medicare legislation was first enacted in the 1960's, it made Medicare the primary payer for Medicare-covered services (aside from workers' compensation claims), regardless of whether the patient had private health insurance.[3] However, faced with skyrocketing medical costs, Congress passed a law in 1980 aimed at reducing the amount of Medicare payouts when a primary payer existed for liability claims. The Medicare Secondary Payer Act (or "MSP") required private insurers to be the first (or primary) payer for beneficiaries' claims.[4] The idea was that Medicare would cover only the health care costs that the beneficiaries' private insurance companies failed to pay.[5] Under the MSP, Medicare could also make conditional payments to beneficiaries if the primary payer did not promptly pay for claims. When the payment was ultimately made, Medicare would in turn be repaid. Through this process, the MSP was meant to ensure that Medicare would be the payer of last resort when other healthcare coverage was available or a primary payer existed.[6]

Congress intended the MSP to provide the government with a means of obtaining reimbursement from a third party such as a private insurer or a self-insured party settling a liability claim.[7] Upon receipt of payment in the form of a settlement, judgment or award, beneficiaries were obligated under the Act to repay Medicare for any conditional payments made on their behalf. However, Congress had to amend the law to provide the government a means of actually obtaining reimbursements from third parties for those payments that Medicare made.[8] Yet, for decades these repayment provisions for Medicare weren't fully enforced, and parties generally failed to reimburse Medicare as mandated by the MSP Act.[9] Eventually, Congress passed legislation which provided additional enforcement tools to better protect Medicare's reimbursement rights.

Matt Garretson is the founding partner and CEO of Garretson Resolution Group (GRG), which provides mass tort/class action settlement allocation, fund administration, and lien resolution services. He has served as the special master and/or administrator of settlement funds nationwide, and is the author of *Negotiating and Settling Tort Cases*: *Handling Healthcare Liens, Medicare Set-Asides, and Settlement Planning*. Garretson is a graduate of Yale University and The Salmon P. Chase College of Law.

Sylvius H. Von Saucken is the Garretson Resolution Group's Chief Compliance Officer & Fiduciary. He leads the firm's internal protocol development and addresses operational decisions for qualified settlement funds and other settlement fund vehicles. Von Saucken is a graduate of Miami University and The Salmon P. Chase College of Law.



Settlement Timeframe Under the SMART Act:

1. Notify Secretary of Potential Settlement / Judgment / Award
2. Secretarial Response Posted on CMS Website
3. First Downloaded Statement of Lien
4. Dispute Period to Seek Alternate Lien Amount Begins
5. Dispute Period Ends
6. Final Lien Calculation Posted
7. Settlement / Judgment / Award Date - Payment Made

In 2007, President George W. Bush signed the Medicare, Medicaid and SCHIP Extension Act (MMSEA), explicitly aimed at strengthening the procedures through which Medicare's interest is protected in personal injury claims.[10] Under the MMSEA, insurers and third party administrators or fiduciaries had to report settlements with beneficiaries and notify the Centers for Medicare and Medicaid Services (CMS) of payments made in cases involving medical expenses.[11] Along with these new reporting requirements, the MMSEA also levied stiff penalties for failure to comply, including mandatory fines of $1,000 per day per claimant until the settlement is reported.[12] While the MMSEA helped Medicare recoup costs, the legislation also resulted in significant settlement delays as attorneys engaged in dialogue to address what requirements Section 111 of the MMSEA specifically imposed on their settling clients.

The SMART Act

The confusion and delays associated with Medicare's claim recovery process, as well as Medicare's guidance for reporting under the MMSEA prompted this latest legislation called the SMART Act, which President Obama signed into law in January 2013.[13] The SMART Act amends the Social Security Act and modifies the reporting requirement for Medicare by explicitly permitting parties to pre-report a settlement to applicable agencies — and, in turn, to receive information back — before the overall claim has been finalized.[14] It imposes strict timelines for Medicare to seek reimbursement or lose its right to recoupment, and it allows discretion in the imposition of penalties for failure to comply.[15] The law establishes a period of limitations on Medicare's right to claim reimbursement. It also creates a minimum threshold amount that triggers a repayment obligation to Medicare, meaning that claims below the bar will not be subject to reporting or reimbursement.[16] Finally, the Act calls for the reporting obligations to be changed so that insurers (or self-insureds) are not required to access claimants' Social Security or health identification claim numbers in verifying Medicare status.[17] Quite simply, the SMART Act aims to accelerate and clarify the Medicare reimbursement process, although it remains to be seen whether that goal will be accomplished when the "implementing" regulations are finalized by Medicare in the coming months, and in some cases, years.

Changes in the Processing of Medicare Liens

The first provision of the Act, Section 201, outlines what are perhaps the most significant changes for Medicare reimbursement of conditional payments.[18] This part of the measure outlines the early settlement reporting provision and sets deadlines for Medicare to calculate its lien determinations and submit repayment claims. Although lien resolution experts have been advocating early reporting of settlements since the 2007 enactment of the MMSEA, the SMART Act marks the first time the federal government has specifically encouraged and enabled early unrestricted reporting.[19]

Under the new statute, parties are empowered to notify the Department of Health & Human Services ("HHS") that a settlement payment is "reasonably expected" within 120 days.[20] The SMART Act also mandates that HHS create a specific password-protected website whereby parties will submit these early settlement reports.[21] Once the parties report an imminent settlement, that

reporting triggers a 65-day deadline for CMS to determine its lien amount and post that amount on its website.[22] The measure does allow CMS to request a 30-day extension, if needed, to notify parties of the lien amount and make the posting.[23] Once that time period has ended, and CMS has posted the lien amount, the lien will be considered final as long as the settlement takes place within three (3) days of the posting.[24]

It is important to note, however, that it is unknown how or when these changes will ultimately take effect. Even after CMS issues the final regulations, implementation of these new policies could take additional time. Additionally, the new deadlines specified by the statute will require oversight from attorneys and insurers alike to guarantee that reporting and payment timeframes are met.

When the new system is up and running, the SMART Act will enable beneficiaries to challenge the lien amount if necessary. The law — for the first time — codifies and identifies a formal process for parties to dispute CMS's determination (once posting has occurred) and mandates a deadline for CMS to review the disputed claim, and make a final decision.[25] Under the Act, the parties submit documentation in support of the alleged discrepancy in the lien amount and a proposed alternative amount.[26] CMS then has 11 business days to finalize its lien calculation. If CMS does not reject the proposal within that 11 day time frame, the compromise proposal is automatically accepted.[27] The SMART Act obligates CMS to establish an alternate discrepancy resolution plan for situations when CMS rejects the proposal and provide good cause as to why the suggested proposal has not been approved.[28]

While the law does not offer details as to how "good cause" is to be demonstrated or what an alternate discrepancy resolution plan would entail, it is significant that the Act now maps out a formal process for parties to challenge lien calculations. Notably, the law does not go so far as to provide an actual appeal process for disputed claims. The statute specifically states that "in no case" does this process establish a right of appeal, and in fact states that "there shall be no" administrative or judicial review of CMS's final determination of the lien amounts.[29] This dispute process is not the same as a formal appeal process, nor is it intended to replace the five-step administrative appeal process already in place.

The statute also posits that the new CMS website must provide updated claims information and data on payments no later than 15 days after payments have been made.[30] In addition to this new time frame for posting payment information, the law requires CMS to provide as much detail on those payments as possible, including "provider or supplier name, diagnosis codes (if any), dates of service, and conditional payment amounts" with an official time and date stamp.[31] Given the sensitivity of the data being posted, the SMART Act mandates that CMS provide a secure e-mail network for communications with individual beneficiaries and plans involved.[32] The Act provides a planning period for CMS to implement these new procedures. CMS has until October 10, 2013, to issue final regulations that carry out Section 201.[33]

Until CMS issues these final regulations, it is unclear exactly how these new deadlines will affect settlements. It appears that parties (perhaps through outsourcing) will need to utilize management systems that monitor compliance with the reporting and payment deadlines.

> Under the new statute, parties are empowered to notify the Department of Health & Human Services ("HHS") that a settlement payment is "reasonably expected" within 120 days.

Reporting Baseline

Another provision of the SMART Act focuses on the new formal threshold below which Medicare reimbursement and reporting rules would not apply.[34] This new regulation is meant to ensure that the federal government does not spend more money pursuing a secondary payer claim than it could recover from that claim. Beginning in 2014, the law requires the HHS Secretary to annually calculate the threshold at which the reimbursement amount would result in the receipt of funds at or below the government's recovery cost.[35] Medicare currently has a $300 threshold provision on secondary payer obligations, so any settlements worth less than $300 are generally not subject to Medicare secondary payer rules. As CMS typically spends $150–$200 per claim to recover conditional payments, it is anticipated that the reporting bar will remain close to this figure.[36] Given its low dollar figure, this threshold is not expected to be of any benefit to most claims.

Penalty Provisions

Section 203 of the SMART Act has broad ramifications. It revises the penalties for failure to comply with the secondary payer regulations by adding a discretionary component.[37] Previously, federal law imposed mandatory civil penalties of $1,000 for each day of noncompliance per claim. The Act now states that sanctions "may be" levied in an amount "up to $1,000 per day."[38] Consequently, the penalty is no longer absolute, and the

law directs the HHS Secretary to specify guidelines regarding how and when sanctions should be imposed. After soliciting feedback and identifying viable plans, the Secretary is to seek public comment on the proposed guidelines and issue final rules delineating the imposition of sanctions.

Privacy Issues and Timeframes

In addition to lessening the potential penalties for violations, the SMART Act also aims to make the reimbursement process more user-friendly by better protecting beneficiaries' privacy. Section 204 calls on the HHS to modify certain reporting requirements beginning in July 2014, (with yearly extensions if this change cannot be made without running afoul of certain privacy and health care laws), so that reporting parties are permitted, but not required, to utilize claimants' Social Security Numbers when using the CMS website.[39] However, until the HHS Secretary is able to identify another reporting method, reporting parties will still need to obtain the claimants' Medicare ID number or Social Security Number to comply with current law.

Finally, the SMART Act also limits the timeframe in which CMS can pursue a reimbursement claim. Under the new law, CMS will face a three-year period of limitations to seek repayment after the date a likely settlement is reported under Section 111 of the MMSEA. This new statute of limitations takes effect July 10, 2013.[40]

Impact on Outsourced Lien Resolution?

The new improvements to the Medicare contractor's website allow for the user to add authorizations for third parties to resolve the reimbursement claims for beneficiaries. This feature was created, in part, due to the increasing trend toward outsourced lien resolution, as well as the increasing complexities of Medicare's recovery process. These process improvements under the SMART Act raise a question for those who have made the decision to outsource lien resolution: does this impact the basis for my decision?[41]

Previously, federal law imposed mandatory civil penalties of $1,000 for each day of noncompliance per claim. The Act now states that sanctions "may be" levied in an amount "up to $1,000 per day."

Certainly the SMART Act should accelerate the resolution process for traditional (fee for service) Medicare Part A and B reimbursement claims as it moves the audit "bar" based on the time Medicare has to respond to any discrepancies from its current period of 45 to 60 days to 11 business days. The "time" element is often but one factor that firms weigh when making an outsourcing decision. Other considerations include labor and related overhead for in-house subject matter expertise, as well as the costs of investment in technology and the development of risk management protocols for monitoring and complying with the universe of governmental and private health care liens.

The bottom line: the SMART Act should improve the "time" element of Medicare reimbursement claims for firms who choose to handle the Medicare liens in-house as well as for those firms who choose to outsource.

Effective lien resolution requires a 360-degree view of the beneficiary's healthcare history. For example, a client who is initially covered under her employer's health care plan may cycle off the private plan due to a permanent disability, and onto Medicare during the time between the injury and the settlement. Furthermore, many clients who are entitled to Medicare are actually "dual beneficiaries," with Medicaid paying the coinsurance and deductible applicable to their Medicare coverage. Finally, a client who is a Medicare beneficiary may have to deal with four separate health care reimbursement claims (a Medicare plan outsourcing to multiple administrators — Medicare Part A, Part B, Part D, and Medicare Advantage Plans[42] — all with unique rights of recovery, tort recovery departments, and associated protocols to develop, offset, compromise, and perfect claims).

In addition to the nuances of multiple sources of coverage, optimal lien resolution advocacy requires:

- Assessment of the health care plans' right of recovery in light of the facts at hand;
- The subject matter "know how" for auditing and analyzing all reimbursement claims to determine their accuracy and to "carve out" items unrelated to injury or settlement;
- The experience to know when and how to pursue relevant administrative or legal remedies, such as waivers and compromises,[43] to ensure the appropriate recovery for the client; and
- Coordination of other issues related to settlement, such as the dialogue regarding Medicare set-asides (MSAs) — allocations for future injury-related care that Medicare

would otherwise pay[44] — and reporting requirements under the MMSEA.

Many firms who make the outsourcing decision do so after weighing the considerations outlined above. The bottom line: the SMART Act should improve the "time" element of Medicare reimbursement claims for firms who choose to handle the Medicare liens in-house as well as for those firms who choose to outsource.[45]

Conclusion

Overall, the SMART Act may present a more efficient approach to the lien resolution process. By design, it formally encourages the benefits of early action by (a) providing a website as an alternative to the traditional means of communication with Medicare's recovery contractor for those parties who can provide early notice of a settlement, and (b) implementing new deadlines for CMS to upload its expense information on that website. The law could provide much-needed clarity on penalties for non-compliance, by establishing a period of limitations and outlining reporting penalties. Because the law mandates a uniform procedure for challenging lien determinations, it should provide a clearer pathway to a streamlined settlement process.

Of course, the crux of the law's long-term influence will only be determined after CMS issues its final regulations for all parts of the SMART Act and enacts the specific reporting processes for both the Medicare beneficiaries (and their attorneys) and the primary payers. While the SMART Act has great promise, it is only one piece of the compliance challenge. If you or your firm would like assistance or further guidance on the ever-changing lien compliance world, please feel free to contact the authors of this article.

Endnotes

1. For convenience purposes, the authors refer to Medicare's right to be repaid for conditional payments made as "liens," despite the fact that Medicare's recovery rights are more expansive than lien rights under 42 USC 1395y(b)(2) and (b)(3).
2. Strengthening Medicare and Repaying Taxpayers Act of 2012, PL 112-242, 126 Stat 2380.
3. Peter A. Corning, *The Evolution of Medicare from Idea to Law*, Social Security, http://www.ssa.gov/history/corning.html.
4. *Medicare Secondary Payer (MSP) Manual* §10, Centers for Medicare & Medicaid Services, http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/msp105c01.pdf.
5. *Id.*
6. *Id.*
7. Social Security Act §1862(b).
8. *Id.*
9. U.S. Gov't Accountability Office, GAO-04-783, *Medicare Secondary Payer: Improvements Needed to Enhance Debt Recovery Process* (2004).
10. Medicare, Medicaid, and SCHIP Extension Act of 2007 §111, PL 110-173.
11. *Id.*
12. *Id.* For convenience purposes, the term "settlement" refers to a settlement, judgment or other payment.
13. §201, 126 Stat 2380; see also 42 USC 1395y(b); 42 USC 1395y(b)(2)(B)(vii).
14. *Id.*, see also 42 USC 1395y(b); 42 USC 1395y(b)(2)(B)(vii).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Lien resolution advocates have been encouraging early reporting to Medicare's recovery contractor — at least 60 to 90 days prior to settlement — to open the tort recovery file and obtain (and audit) a conditional payment summary. Sec. 201 of the SMART Act creates a statutory mechanism to do the same. And, depending on implementing regulations which are to be in place by October 2013, for those parties who "start early," resolving Medicare's repayment rights using its website could accelerate this process (by up to 45 days) for some settlements that do not require additional administrative remedies — via streamlining the process that leads to a final demand.
20. 42 USC 1395y(b); 42 USC 1395y(b)(2)(B)(vii).
21. *Id.*
22. *Id.*
23. § 201, PL 112-242, 126 Stat 2380.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. §202, PL 112-242, 126 Stat 2380.
35. *Id.*
36. U.S. Gov't Accountability Office, GAO-12-333, *Medicare Secondary Payer: Additional Steps are Needed to Improve Program Effectiveness for Non-Group Health Plans* (2012).
37. §203, PL 112-242, 126 Stat 2380.
38. *Id.*
39. §204, PL 112-242, 126 Stat 2380.
40. §205, PL 112-242, 126 Stat 2380.
41. The authors, who specialize in the lien resolution space, believe that analyzing the impact of any lien resolution process change would be incomplete without a note on the potential impact of that change on the settling parties' ability and decision to outsource lien resolution.
42. Medicare Advantage Plans (sometimes referred to as Medicare Part C) are offered by private companies and approved by Medicare. Members of these plans are still on Medicare. Medicare Advantage Plans provide the same coverage as Part A and Part B. Many also provide extra benefits and Part D prescription drug coverage. Types of the Medicare Advantage Plan include: Preferred Provider Organization (PPO) Plans, Health Maintenance Organizations (HMO) Plans, Private Fee for Service Plans (PFFS), Special Needs Plans and Medicare Medical Savings Account (MSA) Plans. Members of Medicare Advantage Plans do not need Medigap and cannot be enrolled on Medicare Part D.
43. After a settlement, judgment or award, Medicare may grant a full or partial waiver of its recovery amount with respect to the beneficiary. There are two options for Waiver: §1870 (c) Waiver and §1862 (b) Waiver. Criteria for such waivers generally include: 1) the beneficiary being without fault and the recovery, 2) effecting financial hardship or being against equity and good conscience. Prior to a settlement, judgment or award, Medicare also may enter into pre-settlement discussions regarding a compromise of Medicare's reimbursement claim.
44. See Advance Notice of Prop. Rulemaking, Fed. Reg., pages 35917-35921 (June 15, 2012); https://www.federalregister.gov/articles/2012/06/15 (last visited February 28, 2013).
45. Matthew L. Garretson, *Easing Health Care Lien Resolution*, TRIAL, Oct. 2010, at 42.

MCR 2.302(B)(1): A Potential Relevancy Screen to Prevent Turning Over Sensitive Corporate Documents During Discovery

By: Nathan S. Scherbarth, *Jacobs & Diemer, P.C.*

Executive Summary

Michigan courts have long recognized that corporate rules, procedures, handbooks, manuals, and other internal documents setting forth internal corporate policies cannot be used to establish a standard of care or legal duty in a negligence action. Instead of waiting until trial to lodge admissibility challenges, practitioners should proactively use MCR 2.302(B)(1)'s relevancy requirement, along with supporting Michigan case law, to try to prevent the production of these types of documents in the first instance.

Introduction

For more than a century, Michigan courts have consistently held that a corporate defendant's internal rules, manuals, guidelines, written procedures, and handbooks are inadmissible to prove the standard of care or to establish any duty in a negligence action.[1] Inadmissibility at trial does not, however, prevent a plaintiff from potentially obtaining such inherently sensitive documents during the course of discovery, and once released into the hands of plaintiffs, defendants have little control over what happens to their sensitive internal rules, even with the issuance of a protective order. It has become standard practice for plaintiffs' attorneys to seek such sensitive proprietary documents during discovery; such documents may be embarrassing or otherwise sensitive, and once released, could be circulated within the plaintiffs' bar to potential detrimental effect for corporate defendants.

A potential solution and way to prevent disclosure of sensitive internal corporate documents lies in MCR 2.302(B)(1), which imposes a relevancy threshold as to what can be obtained during discovery. This article explores MCR 2.302(B)(1) and related case law as a tool for attorneys to utilize in order to entirely prevent disclosure of a corporate client's internal rules, handbooks, manuals, or other written procedures. The rule represents a potentially valuable tool for attorneys seeking to prevent plaintiffs from obtaining and using for their own purposes sensitive internal corporate rules, handbooks, guidelines, and other documents.

Policy Considerations

The rule that internal guidelines, rules, and other corporate policies cannot be used to establish a standard of care or legal duty is logically compelling — if corporations knew that such documents establishing safety procedures could be forced to be turned over in discovery and later used against them as evidence of negligence through proof of non-compliance therewith, there would be little incentive for corporations to establish such safety procedures in the first place.[2]

As the Michigan Supreme Court in the foundational case of *McKernan v Detroit Citizens Railway Co* recognized, "[I]t would be unfortunate if such a practice were to be penalized by permitting the fact of extraordinary care to increase the responsibility imposed by law, the natural if not inevitable consequence of which would be to induce reluctance to adopt new measures and regulations."[3] And, much more recently in the context of a retailer's internal rules, our Supreme Court noted that:

Nathan S. Scherbarth is an Associate in the Appellate Practice of Jacobs and Diemer, P.C. Mr. Scherbarth can be reached at 313-965-1900 or nss@jacobsdiemer.com.

> Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to Public Policy. ***Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability***.[4]

Thus, preventing parties from using internal rules or guidelines to establish a standard of care or legal duty actually encourages greater self-imposed safety precautions, because corporations can impose such internal rules without fear that they may later be used against them to establish an elevated standard of care.

The policy rationale behind the prohibition on the use of internal policies and procedures in establishing a standard of care or legal duty is closely linked to the policy undergirding MRE 407, the exclusion of evidence of subsequent remedial measures. As the Michigan Supreme Court held in *Smith v ER Squibb and Sons, Inc*:

> Exclusion under [MRE 407] restates a basic tenet which has long been accepted in Michigan. It encourages persons to improve their products, property, services and customs without risk of prejudicing any court proceeding and consequently delaying implementation of improvements.[5]

Logically, if we want companies to undertake greater safety precautions above and beyond their legal duties, they should not be penalized for undertaking subsequent remedial measures or for imposing stringent internal rules and regulations.

Reading MCR 2.302(B)(1) as imposing a relevancy threshold as to such corporate rules, guidelines, policies, handbooks, and other documents similarly encourages companies to implement their own safety rules and procedures, because they can do so without fear that they may have to subsequently turn them over to plaintiffs eager to use such documents for their own devices.

The Underlying Rule, MCR 2.302(B)(1)

Although generally allowing for expansive discovery, MCR 2.302(B)(1) does impose a notable limitation. It provides that only *relevant* matters are discoverable, specifically stating that:

Thus, preventing parties from using internal rules or guidelines to establish a standard of care or legal duty actually encourages greater self-imposed safety precautions, because corporations can impose such internal rules without fear that they may later be used against them to establish an elevated standard of care.

> Parties may obtain discovery regarding any matter, not privileged, ***which is relevant to the subject matter involved in the pending action***, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, under the current formulation of the court rule, a plaintiff can obtain discovery on any matter if it is "relevant" and also "reasonably calculated to lead to the discovery of admissible evidence." While MCR 2.302(B)(1) is certainly formulated to permit expansive discovery, the relevancy requirement cannot be ignored; it can potentially be invoked by counsel to perform a gatekeeper function, completely preventing the turnover of documents that are proven to be *ir*relevant.

Corporate Rules Cannot Be Used to Establish a Legal Duty or Standard of Care: A Century of Consistent Case Law

A particularly germane area of application for the MCR 2.302(B)(1) relevancy screen lies in internal corporate training manuals, rules, handbooks, guidelines, and other internal operating procedures. Michigan courts have uniformly, consistently, and for over a century held that such documents are not in any way relevant to establish, or as evidence of, a standard of care or legal duty in a negligence action. In *McKernan*, the Supreme Court held that "whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party."[6]

The *McKernan* Court's holding has been largely consistently followed to this day. For example, the Court of Appeals in *Gallagher v Detroit-Macomb Hosp Assoc* held that the defendant-hospital's internal rules and regulations were properly excluded by the trial court because they did not establish the applicable standard of care.[7] And in *Zdrojewski v Murphy*, the Court of Appeals recently held again that the internal policies of an institution are irrelevant and simply cannot be used to establish a legal duty in a negligence claim.[8]

Contrary to the generally held rule, the Court of Appeals in *MacDonald v*

PKT, Inc used evidence that defendant Pine Knob had formulated policies to deal with sod-throwing incidents at outdoor concerts to conclude that the defendant had a duty to protect against such incidents.[9] However, another panel of the Court of Appeals quickly called the logic of using internal policies to establish a duty into question,[10] and ultimately, the Court of Appeals' *MacDonald* opinion was reversed by the Supreme Court.[11]

Recently, the Court of Appeals again attempted to stray from the century-old ironclad rule that internal corporate rules cannot be used to establish a standard of care, holding in *Jilek v Stockson*, "that while internal policies and guidelines do not in and of themselves set the standard of care, they should be admitted as long as they are relevant to the applicable specialty's standard of care and to the injury alleged."[12] This attempt to carve out an exception did not last long, however, as the Supreme Court peremptorily reversed the Court of Appeals, concluding that the trial court did not abuse its discretion in excluding the proposed internal policy documents proffered as evidence of a standard of care and adopting the reasoning of Judge Bandstra's dissenting opinion.[13] Thus, the most recent isolated attempt by the Court of Appeals to weaken the long-held *McKernan* rule was completely vaporized, and it remains the rule that the internal policies and procedures of a corporate defendant cannot be used as evidence of or to establish a standard of care or legal duty.

The MCR 2.302(B)(1) Relevancy Threshold in Action

In many cases, courts have not addressed whether internal corporate manuals, rules, procedures, and other documents are admissible until the trial stage.[14] However, as discussed above, ultimate admissibility at trial does not prevent a savvy plaintiff from seeking such documents during discovery. Thus, the MCR 2.302(B)(1) relevancy screen can step in to fill the gap.

In various contexts, Michigan courts have recognized a relevancy threshold in the discovery rule and have consequently held that irrelevant documents are undiscoverable. In *Hartmann v Shearson Lehman Hutton, Inc*, for example, the Court of Appeals held that because the defendant's internal policies were not relevant to the existence of a duty or any question of negligence, they were not discoverable.[15] And, despite the fact that it was decided under the previous "good cause" discovery standard, *Wilson v WA Foote Memorial Hosp* affirmed the denial of discovery of the defendant's internal guidelines, because "[t]he trial judge properly concluded that the internal regulations of this hospital do not establish the applicable standard of care."[16]

In other situations, courts have also held that if the documents or information sought in discovery is not relevant, it is simply not discoverable. For example, in *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, the Court of Appeals held that information about hospital reimbursement amounts from providers of health and workers' compensation coverage was not relevant to determining how much hospitals could charge insurers for services rendered to no-fault insureds, and therefore, the information was not discoverable.[17] And, in *Baker v Oakwood Hosp Corp*, the court held that documents relating to an unrelated abortive research project were not relevant pursuant to MCR 2.302(B)(1), and therefore, the trial court abused its discretion in ordering their production.[18] Finally, in *Pythagorean, Inc v Grand Rapids Twp*, the Court of Appeals again imposed a relevancy threshold, reversing a circuit court order denying a motion to block depositions and holding that the information sought failed the relevancy test of MCR 2.302(B)(1).[19] This strong line of authority, combined with the court rule itself, gives practitioners solid ground for lodging relevancy challenges when confronted with plaintiffs seeking sensitive and potentially damaging internal documents during discovery.

Conclusion

Michigan appellate courts have repeatedly recognized that MCR 2.302(B)(1) contains a relevancy threshold test, and where documents sought are not relevant, they are simply not discoverable. This is of particular utility to practitioners seeking to prevent turning over sensitive corporate rules, procedures, handbooks, manuals, or other internal documents, as Michigan courts have long recognized that such materials cannot be used as evidence of or to establish a standard of care or legal duty in a negligence action; they are simply not relevant. Instead of waiting until trial to lodge admissibility challenges, practitioners can proactively use MCR 2.302(B)(1) to seek to prevent turning over internal rules and procedures in the first place, thus preventing plaintiffs from going on fishing expeditions and potentially misusing such sensitive corporate documents.

Reading MCR 2.302(B)(1) as rendering the irrelevant rules, policies and procedures of a private entity non-discoverable in a negligence action also supports broadly held policy goals. If those corporate documents were relevant and discoverable, there would be no incentive for corporations to establish strict internal safety rules, because they could be held to a much higher and difficult standard of care. Thankfully, the MCR 2.302(B)(1) relevancy threshold encourages, or at least does not punish, corporate defendants who choose to establish their own rules and procedures, as such internal

documents can potentially be completely kept out of plaintiffs' hands on relevancy grounds.

Endnotes

1. See *McKernan v Detroit Citizens Street Ry Co*, 138 Mich 519, 530; 101 NW 812 (1904); *Zdrojewski v Murphy*, 254 Mich App 50, 62-63; 657 NW2d 721 (2003); *Gallagher v Detroit-Macomb Hospital Assoc*, 171 Mich App 761, 766; 431 NW2d 90 (1988).
2. See *Premo v General Motors Corp*, 210 Mich App 121, 124; 533 NW2d 332 (1995) ("To impose liability upon an employer who, by means of work rules, policies, etc., undertakes the problem of alcohol use and/or abuse is clearly against public policy and would encourage employers to abandon all efforts which could benefit such employees in order to avoid future liability.")
3. *McKernan*, 138 Mich at 527.
4. *Buczkowski v McKay*, 441 Mich 96, 99, n. 1; 490 NW2d 330 (1992) (emphasis added).
5. *Smith v ER Squibb and Sons, Inc*, 405 Mich 79, 92; 273 NW2d 479 (1979); see also *Downie v Kent Products, Inc*, 420 Mich 197, 211; 362 NW2d 605 (1984) ("The more important ground for excluding [subsequent remedial measures] evidence 'rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.'"), quoting Advisory Committee Notes, FRE 407.
6. *McKernan*, 138 Mich at 530.
7. *Gallagher v Detroit-Macomb Hosp Assoc*, 171 Mich App 761; 431 NW2d 90 (1988).
8. *Zdrojewski*, 254 Mich App at 62-63; see also *Transportation Insurance Co v Detroit Edison Co*, 2003 WL 22956418, at *2 (2003), holding that "[i]t is well settled in Michigan that internal company manuals, guidelines or rules are not admissible to establish the standard of care in a negligence action."
9. *MacDonald v PKT, Inc*, 233 Mich App 395; 593 NW2d 176 (1999).
10. See *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 682; 593 NW2d 578, 588 (1999) ("We find the consideration in *MacDonald* of the defendant having formulated policies to deal with sod-throwing incidents to be questionable.")
11. *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).
12. *Jilek v Stockson*, 289 Mich App 291, 314; 796 NW2d 267 (2010).
13. *Jilek v Stockson*, 490 Mich 961; 805 NW2d 852 (2011).
14. See, e.g., *Premo*, *supra*; *Gallagher*, *supra*; *Zdrojewski*, *supra*, all addressing admissibility at trial rather than whether internal corporate rules, manuals, etc. are discoverable.
15. *Hartmann v Shearson Lehman Hutton, Inc*, 194 Mich App 25; 486 NW2d 53 (1992).
16. *Wilson v WA Foote Memorial Hosp*, 91 Mich App 90, 95; 284 NW2d 126 (1979).
17. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 55; 555 NW2d 871 (1996).
18. *Baker v Oakwood Hosp Corp*, 239 Mich App 461; 608 NW2d 823 (2000).
19. *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525; 656 NW2d 212 (2002).

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

MDTC Legislative Report

As I finish this report, the Legislature has completed its work on the FY 2013–2014 budget, and there are only a few more session days left before the summer recess. There is still a lot to be done, of course, but most of it will have to wait until September. The difficult questions about new revenue sources for road improvements, expansion and reform of the state's Medicaid program, no-fault insurance reform, and several other interesting topics of the day can be pondered, and solutions discussed with interested parties, during the summer months.

With no one running for election or re-election this year, it's been pretty quiet in Lansing this spring. There's been the usual assortment of gatherings on the Capitol lawn, most of them now relatively peaceful and quiet. There have been a few silly political sideshows as usual, but none that can compare with the cut-throat gamesmanship seen in an election year. We are not fooled, though, because we know that there is often a pleasant calm before a storm. The fact remains that essential trust and working relationships have been damaged by the events of last year, and that this damage has not been repaired. Regrettably, willingness to compromise is viewed by many on both sides of the aisle as inexcusable weakness, or worse. Thus, in this new age, the political party that hopes to have its way must take it all; to remain relevant, it must at least secure the number of votes needed to block the accomplishment of the other side's agenda. For myself, I'm planning to enjoy the quiet for as long as it will last. An intense us-versus-them struggle for political control will be in full swing this time next year. Stay tuned.

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

2013 Public Acts

There are now 50 Public Acts of 2013. The new Public Acts of interest include:

2013 PA 4 and 2013 PA 5 – Senate Bills 61 (Hune – R) and 62 (Smith – D) have amended the Nonprofit Health Care Corporation Reform Act and the Insurance Code to **allow Blue Cross and Blue Shield of Michigan to become a nonprofit mutual disability insurance company**. Bills to accomplish this objective (former Senate Bills 1293 and 1294) were passed during last year's lame duck session, but Governor Snyder vetoed them because he did not approve of language, added by amendment, restricting the availability of coverage for abortions.

2013 PA 19 – House Bill 4123 (Victory – R) has amended the Revised Judicature Act to add a new Section 600.2977, which will **provide limited immunity from tort liability for liquefied petroleum gas businesses**. Under this new provision, a liquefied petroleum gas business will not be liable for personal injury, death or property damage if it has operated in compliance with the requirements of applicable statutes and safety regulations and the personal injury, death or property damage at issue has resulted from alteration, modification or repair of liquefied petroleum gas equipment without the defendant's knowledge or consent or the use of a liquefied petroleum gas appliance or equipment in an improper or unintended manner.

2013 PA 23 – House Bill 4093 (LaFontaine – R) has amended the Vehicle Code to **maintain its current threshold for unlawful blood alcohol content at .08 grams per 100 milliliters of blood**, 210 liters of breath or 67 milliliters of urine until October 1, 2018. This has been accomplished by extending the sunset which would have caused the threshold level to revert to .10 grams per 100 milliliters of blood, 210 liters of breath or 67 milliliters of urine on October 1, 2013. The primary reason for the prior reduction of the threshold to .08 grams was to avoid loss of federal highway funding. The sunset has been extended for the same purpose.

New Initiatives

House Bill 4612 (Lund – R) would amend the Insurance Code to effect numerous reforms of its no-fault insurance provisions. Most notably, **the changes would replace the current unlimited lifetime medical and rehabilitation benefits for injured persons with a new maximum of one million dollars**. The bill proposes other changes, including, but not limited to, new language limiting payment of PIP benefits to payments for products, services and accommodations that are "medically appropriate," as opposed to "reasonably necessary" for an injured person's care, recovery or rehabilitation; new cost containment measures, including limitations on provider reimbursements and attendant care services; creation of a new non-profit Michigan

The fact remains that essential trust and working relationships have been damaged by the events of last year, and that this damage has not been repaired.

Catastrophic Claims Corporation to replace the existing Michigan Catastrophic Claims Association; a required premium reduction of at least $150.00 per vehicle to reflect anticipated cost savings; and creation of a new Michigan Automobile Insurance Fraud Authority.

House Bill 4612 was reported by the House Insurance Committee with a Substitute (H-1) by a party-line vote on May 2nd after two public hearings featuring substantial testimony in opposition. The bill now awaits consideration by the full House on the second reading calendar. It appears that further revisions may be made before final passage, as there may yet be a number of Republican members to be brought on board.

House Bill 4126 (Johnson – R) would **amend the Equine Activity Liability Act, MCL 691.1665, to expand the scope of the Act's immunity from civil liability for injury, death or property damage resulting from an inherent risk of equine activity**. In its present form, the Act includes an exception stating that the immunity provided therein does not apply to any person who commits a negligent act or omission that constitutes a proximate cause of the injury, death or damage. The proposed amendment would limit the scope of that exception to acts or omissions that constitute "a willful or wanton disregard for the safety of the participant." This bill was passed by the House on April 18th and has now been referred to the Senate Judiciary Committee.

Senate Bill 309 (Brandenburg – R) would amend the revised Judicature Act to add a new Section MCL 600.2912I, which would **require the plaintiff to file an affidavit of merit, similar to those required in medical malpractice cases, in support of a complaint alleging malpractice or negligence against an architect or engineer**. This bill was introduced on April 11th and referred to the Senate Judiciary Committee.

Senate Bill 364 (Robertson – R) would amend 1963 PA 17 to add a new Section MCL 691.1508, which would provide **immunity from civil liability for physicians or emergency medical technicians providing emergency care at a duly authorized boxing or mixed martial arts contest or event**, unless the act or omission of the physician or emergency medical technician amounts to gross negligence or willful or wanton misconduct. This bill was introduced on May 16th and referred to the Senate Committee on Regulatory Reform.

House Bill 4704 (Pettalia – R) would amend the Uniform Budgeting and Accounting Act to establish **new procedures for lawsuits by or against local legislative bodies and courts or local government officials** regarding the sufficiency, administration, execution and enforcement of general appropriations acts of local governments, and to specify that such lawsuits must be brought as original actions in the Court of Appeals. This bill was passed by the House with a Substitute (H-1) on June 5th and referred to the Senate Committee on Government Operations.

Old Business

House Bill 4064 (Heise – R) would **require the State Court Administrative Office to establish and maintain record management policies and procedures for the courts** and allow courts to charge a reasonable fee established by Supreme Court rule for electronic access to court records. This bill was passed by the House on March 6th and referred to the Senate Judiciary Committee.

House Bill 4156 (Potvin – R) would amend the Public Health Code, MCL 333.16184 and 333.16185, to **allow retired nurses to provide uncompensated services to medically indigent persons under a special volunteer license, with the same immunity from liability that is currently provided under section 16185 to physicians, dentists and optometrists** providing such uncompensated care. This bill was passed by the House with a Substitute (H-2) on May 22nd and referred to the Senate Health Policy Committee.

What Do You Think?

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

MDTC 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:

Alan Couture
ajc@runningwise.com

Scott Holmes
sholmes@foleymansfield.com

By: Susan Leigh Brown, *Schwartz Law Firm P.C.*
sbrown@schwartzlawfirmpc.com

No Fault Report

Insurer Not Liable for Entire Cost of Handicapped Modified Van Says Supreme Court

Admire v Auto Owners, __ Mich __ (2013) (Supreme Court Docket No. 142842, May 23, 2013).

In keeping with its earlier opinion in *Griffith v State Farm*, 472 Mich 521 (2005), the Michigan Supreme Court settled the conflict between post-*Griffith* decisions regarding an insurer's obligation to pay for products, services and accommodations which are not used for the care of an injured person and/or not necessitated by the injury in a motor vehicle accident. The court defined and limited what constitutes "allowable expenses" for "an injured person's care, recovery, or rehabilitation" as set forth in MCL 500.3107(1)(a), holding that an expense incurred not "with the object or purpose of" caring for an injured person because he/she is injured is not compensable. A product, service or accommodation which would be "consumed by an uninjured person over the course of his/her everyday life cannot qualify" because it would not have any causal connection to the injury and could not be for the purpose of effectuating care, recovery or rehabilitation for an injury sustained in a motor vehicle accident. The opinion garnered attention in even local non-legal media presumably due to the current debate regarding the potential overhaul of the No Fault Act.

The plaintiff in *Admire* suffered catastrophic injuries in a 1987 auto accident. At issue was whether his no fault carrier, Auto Owners, had an obligation to pay the entire purchase price for a handicapped modified van (to fit a wheelchair) as an allowable expense for his "care, recovery, or rehabilitation." The court ruled that Auto Owners was not obligated to pay the entire price of the van. Rather, it was only obligated to pay the costs associated with modifying a van to be handicap accessible — not the base purchase price.

In reaching this conclusion, the court reasoned that the base purchase price of the van (the purpose of which was basic transportation) was something that plaintiff would have needed regardless of his auto accident — therefore it was not really something needed for his care, recovery, or rehabilitation because of the accident. As the court engaged in its analysis, it used the vernacular of "integrated" versus "combined" products or accommodations. The handicapped van was a "combined" product, because one could easily delineate between the base price of purchasing a van, and the additional cost of modifying it to be handicapped accessible. This was in contrast to an "integrated" product or accommodation such as hospital food or hospital clothing, which are provided as part of a hospital stay and not easily separated from the rest of the service/product.

The opinion reaffirms *Griffith* and its progeny and explicitly overrules the Court of Appeals opinions in *Ward v Titan Ins Co*, 287 Mich App 552 (2010), *Hoover v Mich Mut Ins Co*, 281 Mich App 617 (2008), and *Begin v Mich Bell Tel Co*, 284 Mich App 581 (2009). The majority opinion was by Justice Zahra joined by Justices Young, Markman and Kelly. Justice Cavanagh dissented. Justices Viviano and McCormack took no part in the decision.

Conservator Fees May Be Replacement Services

Susan Leigh Brown is an attorney with Schwartz Law Firm in Farmington Hills. She specializes in insurance defense, employment law, tort defense, credit union law and commercial litigation. Ms. Brown has over 20 years of experience in No Fault and Insurance law, including counseling, coverage disputes, litigation, and appeals, and is a regular contributor to the *Michigan Defense Quarterly*. She has lectured to trade groups on insurance law, employment law and credit union law.

Ms. Brown is a member of MDTC as well as the Labor and Employment and Insurance and Indemnity Law Sections of the State Bar and the Oakland County and Detroit Bar Associations. Her email address is sbrown@schwartzlawfirmpc.com

The court ruled that Auto Owners was not obligated to pay the entire price of the van. Rather, it was only obligated to pay the costs associated with modifying a van to be handicap accessible — not the base purchase price.

Compensable for Only 3 Years at $20 a Day Rather Than "Allowable Expenses" Compensable for Life at the Rate Charged

May v Auto Club Insurance Association, __ Mich App __ (2013) (Court of Appeals Docket No. 292649, April 2, 2013).

A panel of the Michigan Court of Appeals took a similarly narrowing view of "allowable expenses" under MCL 300.3107(1)(a) in *May*. The case returned to the Court of Appeals on remand from the Michigan Supreme Court in *In re Carroll*, 292 Mich App 395 (2011), to be decided in accordance with the Supreme Court's holding in *Johnson v Recca*, 492 Mich 169 (2012) and *Douglas v Allstate Ins Co*, 482 Mich 241 (2012).

Specifically at issue was whether the conservator fees charged by an injured individual's conservator constitute "allowable expenses" recoverable under MCL 500.3107(a). The injured party had suffered a closed head injury. Previously, in *In re Carroll*, 292 Mich App 395 (2011), the Court of Appeals had held that the conservator (attorney Alan May) automatically had a right to recover his fees from the ward/injured person's no fault carrier as they were "allowable expenses" for the injured person's "care." The court reached this decision by relying heavily on the expansive interpretation given to the statutory word "care" (as it appears in MCL 500.3107) in *Heinz v AAA*, 214 Mich App 195, 198; 543 NW2d 4 (1995).

The Michigan Supreme Court vacated and instructed the Court of Appeals to re-examine the issue in light of the holdings in *Johnson* and *Douglas*. Both cases represent a marked curtailment in what constitutes "allowable expenses" for an injured person's "care, recovery, or rehabilitation" under MCL 500.3107(1)(a). In *Johnson*, the court reanalyzed some of its previous rulings and clarified that, while cooking for a person is a replacement service which is compensable for three years at no more than $20 per day pursuant to MCL 500.3107(1)(c), it is not something for an injured person's "care, recovery, or rehabilitation" pursuant to MCL 500.3107(1)(a). *Johnson* at 181. *Johnson* dealt with and reversed a Court of Appeals ruling which found that replacement services could be compensated as an "allowable expense," noting that such a construction ignored the Legislature's own statutory organization that makes clear that allowable expenses and replacement services constitute separate and distinct categories of PIP benefits.

In *Douglas*, the *Johnson* holding was reiterated and the court further explored the distinction between replacement services and attendant care/allowable expenses. Services that were required both before and after the injury, but can no longer be provided by the injured person himself or herself after the injury as a result of the injury, are "replacement services," not "allowable expenses." They are services "in lieu of those that, if he or she had not been injured, an injured person would have performed . . . for the benefit of himself or herself." Allowable expenses "cannot be for 'ordinary and necessary services' because ordinary and necessary services are not 'for an injured person's care, recovery, or rehabilitation'" per *Douglas*.

The *May* court explained that the analysis was a two-step process; first, determine whether the services were necessitated by the injury in the accident. The second, and determining factor in *May* is whether the services were for the "care, recovery or rehabilitation" of the injured person. The court found that the management of the injured person's basic financial affairs and estate, while causally connected to the injury, were not for the injured person's recovery or rehabilitation and, therefore, were not allowable expenses. However, to the extent that the Conservator's services included negotiating with medical providers and managing medical care, "many of Carroll's financial management needs are extraordinary and peculiar to Carroll's status as an injured person. And, because those needs are beyond those which would be ordinarily performed by a member of the household, they are compensable under MCL 500.3107(1)(a) as a service provided for Carroll's care, recovery, and rehabilitation."

PIP Benefits Not Owed Where Second Accident too Remotely Connected to Head Injury in Earlier Accident to "Arise out of" Earlier Accident

McPherson v. McPherson, __ Mich __ (2013) (Michigan Supreme Court Docket No. 144666, April 11, 2013).

McPherson is an interesting case flushing out the outer limits as to causation with respect to whether an injury or condition "arises out" of a motor vehicle accident under MCL 500.3105(1). Plaintiff was injured in a 2007 motor vehicle accident, and developed a neurologic disorder as a result of the injuries he sustained in the accident. A year later,

McPherson is an interesting case flushing out the outer limits as to causation with respect to whether an injury or condition "arises out" of a motor vehicle accident under MCL 500.3105(1).

he had a seizure consistent with the neurologic disorder while driving a motorcycle. He crashed the motorcycle and suffered a severe spinal cord injury. He then sued his PIP carrier claiming that the 2008 spinal cord injury arose out of the 2007 accident because it was caused by the seizure caused by the neurologic disorder caused by the 2007 accident.

The court ruled this was an insufficient causal connection to satisfy the "arising out of" requirement of MCL 500.3105(1); it was not "more than incidental, fortuitous, or but for" and was too remote from the 2007 accident to have "arisen out of the use of a motor vehicle as a motor vehicle" in the 2007 accident. The Supreme Court peremptorily reversed the Court of Appeals' decision and remanded with instruction to enter judgment in favor of the insurer.

The majority opinion was signed by Justices Young, Markman, Kelly, Zahra and McCormack. Justice Cavanagh dissented. Justice Viviano took no part in the decision.

Michigan Defense Quarterly Publication Schedule

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

For information on article requirements, please contact:

Lee Khachaturian
dkhachaturian@dickinsonwright.com, or

Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

MEMBER TO MEMBER SERVICES

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

ALTERNATIVE DISPUTE RESOLUTION

- Negligence
- Professional Liability
- Commercial
- Contract Disputes

Peter Dunlap, PC
4332 Barton Road
Lansing, MI 48917
Phone: 517-321-6198
Fax: 517-482-0887
email: pdunlap65@gmail.com

ADR ARBITRATION/MEDIATION

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

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

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

APPELLATE PRACTICE

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

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

ADR - ARBITRATION/ MEDIATION/FACILITATION

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

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

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

MUNICIPAL & EMPLOYMENT LITIGATION: ZONING; LAND USE

Over 20 years litigation experience.

Employment: ELCRA, Title VII, Whistleblower, PWDCRA.

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

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

By: Geoffrey M. Brown, *Collins, Einhorn, Farrell & Ulanoff*
geoffrey.brown@ceflawyers.com

Medical Malpractice Report

Ordinary Negligence versus Malpractice and Res Ipsa Loquitur

Groesbeck v Henry Ford Health System, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2013 (Docket No. 307069).

The Facts: The plaintiff sued the defendant arising out of injuries suffered by his decedent after she fell while undergoing rehabilitation treatment at the defendant hospital. The decedent, who had suffered a minor stroke, was being evaluated by a licensed physical therapist to determine the proper physical-therapy regimen to help her stand and walk. During this evaluation, the decedent collapsed and fell, hitting her head.

The plaintiff pleaded both ordinary negligence and medical malpractice claims against the defendant, as well as a count asserting a res ipsa loquitur theory. The ordinary negligence claim was premised upon the assertion that the defendant's employees failed to take reasonable care to secure the decedent or to prevent her from falling. The defendant moved for summary disposition on the ordinary negligence and res ipsa loquitur claims, arguing that the issue of when and whether to have an impaired patient try to walk was a matter of professional medical judgment to be exercised by the physical therapist. The plaintiff countered that it was a common-sense matter, and argued, "How medically trained do you have to be to know that you're not supposed to let her fall; that you have to hold her?" The trial court denied the defendant's motion. The Court of Appeals granted leave to appeal.

The Ruling: The Court of Appeals agreed with the defendant that the ordinary negligence claims clearly sounded in medical malpractice because they implicated the professional judgment of the therapist. The court therefore reversed the trial court's denial of summary disposition. The court stressed that "while a juror might have some basic knowledge that a certain degree of care would be needed in dealing with an elderly, infirm patient with balance issues, [the physical therapist] utilized her medical or professional judgment in assessing [the decedent] and in implementing the gait evaluation, causing it to fall within the definition of medical malpractice, not ordinary negligence." The court also emphasized that the "[p]laintiff's own experts testified that [the therapist] exercised professional medical judgment (improvidently or not) in determining whether to perform a gait assessment and in executing the gait assessment." The court concluded, therefore, that "[t]here is simply no way for plaintiff to avoid the conclusion that the claims sound in medical malpractice, regardless of artful wording and argument."

The court also reversed the denial of summary disposition on the res ipsa loquitur count. The court noted that for medical malpractice cases, a res ipsa loquitur claim requires a showing (1) that the event was of a kind that ordinarily does not occur in the absence of negligence; (2) that it was caused by an agency or instrumentality within the exclusive control of the defendant; (3) that it was not due to any voluntary action of the plaintiff; and (4) that evidence of the true explanation of the event was more readily accessible to the defendant than to the plaintiff. The court held that because plaintiff's expert admitted that physical therapy patients can fall during the same kind of evaluation the defendant's therapist was performing even without any negligence, the plaintiff's res ipsa loquitur claim failed as a matter of law.

Practice Tip: Couching claims in terms of ordinary negligence is a common tactic utilized by plaintiffs' attorneys to attempt to avoid the constraints of tort reform. Practitioners should consider bringing a summary disposition motion any time a purported ordinary negligence claim implicates the professional judgment of your client (or one of your client's employees). Likewise, the doctrine of res ipsa loquitur is intended to have a very narrow application in the medical malpractice context. Often, a plaintiff's expert will admit that the claimed injury could occur without malpractice. Res ipsa loquitur requires a showing that the injury could ***only*** have happened if there was malpractice. Accordingly, summary disposition should be pursued when a plaintiff's expert makes this admission.

Causation and Expert-Witness Qualifications

Estate of Stanley v Jain, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2013 (Docket No. 301237).[1]

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

The Court of Appeals agreed with the defendant that the ordinary negligence claims clearly sounded in medical malpractice because they implicated the professional judgment of the therapist.

The Facts: The defendant, a board-certified vascular surgeon, was consulted to place a temporary catheter at the base of the plaintiff's decedent's neck for dialysis. The surgeon had trouble placing the first catheter in the subclavian vein and made two more attempts in the jugular vein. A subsequent x-ray check showed that the catheter had penetrated the vein and entered the chest cavity. The defendant removed the catheter and consulted a cardiothoracic surgeon because he thought the patient might need a thoracotomy, which had to be done by a cardiothoracic surgeon. The cardiothoracic surgeon opined that the patient should simply be observed for the next few hours because she was "clinically stable" at that point. Within a few hours, however, the patient became "extremely unstable" and ultimately died. An autopsy revealed two injuries to the subclavian vein, but none to the jugular.

The medical malpractice trial resulted in a mistrial. Before the second trial was set to begin, the defendants sought to dismiss the action based on causation under *Martin v Ledingham*, 282 Mich App 158; 774 NW2d 328 (2009), rev'd 488 Mich 987 (2010), because the two consulting cardiothoracic surgeons testified that they would not have taken the patient to surgery regardless of whether the defendant had acted as plaintiff claimed he should have. The defendants also argued that plaintiff's expert vascular surgeon was not qualified to testify about what the cardiothoracic surgeons should have done. The trial court granted the defendants summary disposition.

The defendants also moved, successfully, to strike another of plaintiff's experts, who was a board-certified vascular surgeon but did not spend at least fifty percent of his professional time either practicing or teaching that specialty.

The Ruling: The Court of Appeals reversed summary disposition, holding that since *Martin* was reversed by the Supreme Court, defendants were not entitled to summary disposition. Additionally, the court held that under the expert witness qualification statute, MCL 600.2169, the plaintiff's vascular surgery expert was not required to be board certified in cardiothoracic surgery to testify about whether the cardiothoracic surgeons should have taken the decedent to surgery, because the cardiothoracic surgeons were not parties to the action, and MCL 600.2169 only applies to experts testifying for or against parties.

The Court of Appeals also reversed the motion to strike because the second vascular surgery expert was not offering standard of care testimony, but only causation testimony. The court held that MCL 600.2169 only applies to standard of care testimony, and therefore there was no proper basis to strike the expert's testimony under the statute.

Endnotes

1. The defendants' application for leave to appeal to the Michigan Supreme Court was pending at the time of this writing.

By: Phillip J. DeRosier, *Dickinson Wright*, and Trent B. Collier, *Collins Einhorn Farrell & Ulanoff*
pderosier@dickinsonwright.com; trent.collier@ceflawyers.com

Appellate Practice Report

A Primer on Formatting Briefs for Electronic Filing in the Court of Appeals

If participants at this year's Michigan Appellate Bench Bar Conference in April 2013 left with only one message, it was this: lawyers need to format briefs to be read onscreen and on iPads. Michigan's judges and justices are increasingly going paperless and they expect briefs to be formatted appropriately. One suggestion for briefs filed electronically in the Court of Appeals (the Supreme Court does not yet have electronic filing) is that they should be bookmarked.

Fortunately, you need nothing more than Microsoft Word to produce a properly bookmarked brief. There are two main ways to add bookmarks in Word: inserting one word bookmarks or using Word's "Styles" to add headings.

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

Trent Collier is a member of the appellate department at Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His email address is Trent.Collier@CEFLawyers.com.

1. Bookmarking with the "insert" function

To insert a one-word bookmark, begin by highlighting a term in your document. Click "insert" from the upper left corner of the screen, and then select "bookmark."

You can then label the highlighted term — unfortunately, using only a single word — and select "add." With that, you have added a bookmark. Repeat as necessary.

2. Bookmarking using Styles

Instead of using single-word bookmarks, you can also add bookmarks using Word's Styles. Highlight a word or series of words and select "Heading 1" from the upper right corner of the screen:

This text is now a "heading" that will automatically generate a bookmark. Word can add multiple layers of headings and, thus, multiple bookmarks. If you cannot find the heading level you need in the "Styles" box, select the text, then press control-shift-S and type the name of the heading level you want (e.g., "Heading 2" or "Heading 3").

3. Keeping your bookmarks when you convert to a PDF

You are now ready to convert your document to a bookmarked file. The Michigan Court of Appeals only accepts files in PDF or "portable document format." Although there are programs that will convert your Word file to a PDF, Word itself should suffice.

Click the Windows icon in the upper right of your screen, select "Save As" and then select "PDF or XPS."

When a new dialog box opens, select "Options" and make sure that you have selected "Create bookmarks using." If you created bookmarks with the "insert" function (the first option discussed above), select "Word bookmarks." If you used headings, select "headings."

If participants at this year's Michigan Appellate Bench Bar Conference in April 2013 left with only one message, it was this: lawyers need to format briefs to be read onscreen and on iPads.

Word will then save your document as a PDF with bookmarks. You will need to select a location in which to save your file. With that, you will have a bookmarked PDF of your brief.

4. What about appendices?

Michigan's appellate judges want bookmarking in both briefs and appendices. For briefs, you can follow the methods outlined above. Appendices are a different matter. You will need software that will allow you to compile PDFs into a single file and then bookmark the beginning of each separate exhibit. Some examples of this software include Adobe Acrobat or Nitro PDF.

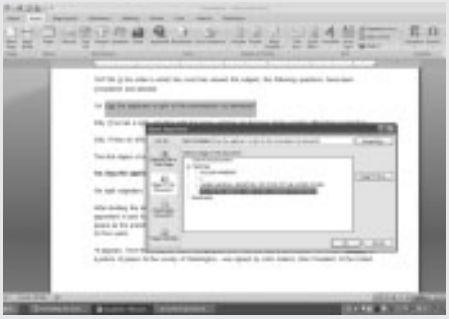
Although there may be a temptation to try to combine briefs and exhibits into a single PDF, the Michigan Court of Appeals currently prefers to keep briefs and appendices separate.[1] Filing briefs and exhibits separately might seem to create a need to switch back-and-forth between documents, but applications like iAnnotate allow multiple tabs onscreen. This feature allows users to easily switch from one electronic document to another while reading on an iPad.

5. Using hyperlinks

The Michigan Court of Appeals encourages the use of *internal* hyperlinks (which take the reader to another location in the same document) but prohibits the use of *external* hyperlinks (which take the reader to a location outside the document).[2] The rationale for this distinction is straightforward: the internet is a vast and sometimes dangerous place. External hyperlinks could lead your reader to malware or compromise the security of courts' internal records. Internal hyperlinks have no such issues, since they only jump to another location in your document.

Hyperlinks are created in Word, before you save your document as a PDF. Select the text you want to use as a launching point, click "insert," and then "hyperlink." In the dialog box that appears, a column on the left side includes various options under "Link to," one of which is "Place in this document."

Selecting "Place in this document" will open a dialog box of the headings or bookmarks you created using methods (1) or (2) above. By selecting a heading or bookmark, you will link the highlighted text to that destination:



6. The final step

There is a critical final step to this process. Before submitting your brief, read the PDF onscreen and make sure that navigation is easy. And given the likelihood that the brief will be read on an iPad (especially in the Court of Appeals), try reading and navigating through your own brief on an iPad if possible. That will alert you to any dead links or unwieldy bookmarks.

7. The future of appellate briefs?

This process—bookmarking and hyperlinking — is a way to accommodate electronic reading of traditional appellate briefs. Presenters at Michigan's 2013 Michigan Appellate Bench Bar Conference (including Robert Dubose, Stuart Friedman, and Scott Bassett) demonstrated that new mediums require lawyers to rethink how they present arguments in the electronic age. Written advocacy may require different strategies when briefs are going to be studied electronically rather than in paper form. Although those strategies are beyond the scope of this article, practitioners should be sure to think about ways to make their briefs more user-friendly when read onscreen.

In the more immediate future, Michigan's appellate courts are going to be adopting a new e-filing platform: TrueFiling by ImageSoft, Inc. This change may lead to new policies and preferences. Fortunately, the Michigan Court of Appeals has been quick to make those changes known and to provide resources for appellate lawyers. The court's website provides a number of guides for appellate lawyers and should continue to do so as practitioners adjust to ImageSoft and the inevitable advances in technology that lie in store.

Use of Unpublished Opinions

A question recently came up on the

While the Court of Appeals has recognized that a party may cite such opinions for their persuasive value, it is important to keep in mind that, under the plain language of the court rule, an unpublished opinion does not become precedential merely because it is later cited or relied upon in a published opinion.

State Bar of Michigan Appellate Practice Section's listserv concerning the use of unpublished opinions from the Michigan Court of Appeals, and the extent to which, if ever, they can be considered precedential (such as if they are later cited by a published opinion from either the Court of Appeals or the Supreme Court).

Under MCR 7.215(C)(1), "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." While the Court of Appeals has recognized that a party may cite such opinions for their persuasive value, see *Zaremba Equipment, Inc v Harco Int'l Ins Co*, 280 Mich App 16, 42 n 10; 761 NW2d 151 (2008) ("[T]this Court may follow an unpublished opinion if it finds the reasoning persuasive."), it is important to keep in mind that, under the plain language of the court rule, an unpublished opinion does not become precedential merely because it is later cited or relied upon in a published opinion. Rather, the *published* opinion (or, in the case of the Supreme Court, published order) should be cited for whatever rule of law it ultimately adopts.

Another important limitation exists when it comes to submitting supplemental authorities released after briefing is completed. Only *published* supplemental authorities are permitted. See MCR 7.212(F)(3). Should a party wish to submit an unpublished opinion as supplemental authority, a motion is required. IOP 7.212(F)-1.

Citing Decisions that Have Been Reversed on Other Grounds — Do They Still Have Precedential Value?

Under MCR 7.215(J)(1), "a panel of the Court of Appeals must follow the rule established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule." But what about decisions that have been reversed, albeit on "other grounds" having nothing to do with the specific "rule" at issue? These decisions are commonly cited and relied upon by parties and courts alike, but do they have any precedential value? Maybe, but maybe not.

In *Maurer v Oakland Co Parks & Recreation (On Remand)*, 201 Mich App 223; 506 NW2d 261 (1993), rev'd 449 Mich 606 (1995), the Court of Appeals held that steps leading to a restroom at a park had to be viewed as part "of" the building for purposes of the public building exception to governmental immunity because the steps were "intimately associated, or connected, with the building itself, because it is impossible to enter or leave the building without going up or down them." *Id*. at 230. In reaching that decision, the *Maurer* Court also rejected application of the open and obvious doctrine. *Id*. at 227.

Addressing the precedential value of *Maurer* in *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 762 (1998), the Michigan Supreme Court observed that *Maurer* was subsequently reversed, with the Supreme Court "finding that the claim was barred by the open and obvious doctrine" and reinstating the trial court's grant of summary disposition to the defendant on that basis. *Horace*, 456 Mich at 754. In light of that holding, the Supreme Court in *Maurer* "specifically did not address the governmental immunity issue." *Id*. According to the *Horace* Court, "under such circumstances, no rule of law remained from the Court of Appeals opinion." *Id*. The *Horace* Court explained that "[t]he Court of Appeals statements regarding the building exception became no more than dictum upon this Court's reversal under the open and obvious danger doctrine. Whether the area where the fall occurred came within the building exception became irrelevant when this Court found the claim barred by the open and obvious danger doctrine." *Id*. at 754-755.

In *Taylor v Kurapati*, 236 Mich App 315; 600 NW2d 670 (1999), the Court of Appeals reached a similar conclusion regarding its prior decision in *Blair v Hutzel Hospital*, 217 Mich App 502; 552 NW2d 507 (1996), rev'd on other grounds 456 Mich 877 (1997), in which the court recognized the viability of "wrongful birth claims" and held that the plaintiff should be permitted to have a jury consider her claim "that she was deprived of a substantial opportunity to learn of the defective condition of her fetus when her physician negligently failed to provide MSAFP screening." *Id*. at 512. The Supreme Court in *Blair* reversed and reinstated the trial court's grant of summary disposition to Hutzel Hospital on the basis of its decision in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997), in which the court declined to recognize a claim for the loss of an opportunity to avoid physical harm less than death. Although the Supreme Court in *Blair* did not address the *Blair* panel's discussion of the continuing viability of "wrongful birth claims," the *Taylor* panel concluded that because the

In *Michigan Millers Mutual Ins Co v Bronson Plating Co*, the court found a prior decision precedential even though it was reversed because the Supreme Court had "expressly declined" to address the part that was dispositive of the issue in *Bronson*.

Blair panel's decision had been reversed "in its entirety . . . under the plain language of MCR 7.215([J])(1), nothing in the *Blair* panel's opinion is binding precedent under that subrule." *Taylor*, 236 Mich App at 346 n 42. The *Taylor* panel observed "that MCR 7.215([J])(1) establishes a bright-line test and that such a test cannot be maintained if every opinion is to be parsed into its smallest components." *Id*. See also *Dunn v DAAIE*, 254 Mich App 265, 262; 657 NW2d 153 (2002) (citing *Taylor* for the proposition that "where a decision of this Court is reversed, even if on other grounds that were decisive of the entire case, this Court is not required to follow the decision").

However, there are also cases going the other way and giving precedential effect to a decision reversed on other grounds. In *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 197 Mich App 482; 496 NW2d 373 (1992), overruled in part on other grounds in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003), the court found a prior decision precedential even though it was reversed because the Supreme Court had "expressly declined" to address the part that was dispositive of the issue in *Bronson*:

> The next question is whether this Court's decision in *Polkow* [*v Citizens Ins Co of America*, 180 Mich App 651; 447 NW2d 853 (1989), rev'd on other grounds 438 Mich 174 (1991)] remains good law. *Polkow* was later reversed by our Supreme Court. *Polkow*, 438 Mich 174 (1991). The Supreme Court did not, however, address the merits of this Court's holding that the administrative mechanisms that had come into play amounted to a "suit" that triggered a duty to defend, but rather expressly declined from review of the issue and reversed the decision on other grounds. See *Polkow*, 438 Mich at 177, n 2. We reject the insurers' argument, made in a supplemental brief, that the Supreme Court's reversal of this Court's opinion in *Polkow* renders the opinion complete[ly] without precedential value. "Just as the discovery of rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all other holdings appearing in that decision." *Rouch* v *Enquirer & News of Battle Creek, Michigan*, 137 Mich App 39, 54, n 10; 357 NW2d 794 (1984), aff'd 427 Mich 157 (1986).

See also *People v Mason*, 22 Mich App 595, 611 n 13; 178 NW2d 181 (1970) ("Since this Court's opinion in *Marsh* was thus reversed on other grounds, its precedential value regarding the issue of whether a confession which is illegally obtained may be used for cross-examination or rebuttal is unaffected by the Supreme Court's reversal.").

So what does all of this mean for practitioners? To be sure, it means that one cannot necessarily assume that a decision reversed on other grounds is binding precedent simply because a particular ruling on an issue of law was not specifically addressed in the reversal. Although *Michigan Millers* suggests that a decision reversed on other grounds retains precedential value if the reversal contains some statement suggesting that its scope is limited, a review of *Horace* and *Taylor* indicates that if a decision is reversed in its entirety, or if the reversal renders the rest of the lower court's decision dictum, then the decision is not precedential.

Endnotes

1. See *10 Tips for E-Filing With the Court of Appeals*, available at: http://courts.mi.gov/Courts/COA/efiling/Documents/COA%20Tips%20for%20E-Filing.pdf (last visited May 30, 2013).
2. See *Preparing a PDF Document for Electronic Filing*, available at: http://courts.mi.gov/Courts/COA/efiling/Documents/Preparing%20a%20PDF%20Document%20for%20Electronic%20Filing%20at%20the%20COA.pdf (last visited May 30, 2013).

MDTC Welcomes New Members!

Fred Dewey, *Dickinson Wright PLLC*, 500 Woodward Avenue, Suite 4000, Detroit, MI 48226, 313-223-3039, fdewey@dickinsonwright.com

Jeffrey Dornbos, *Warner Norcross & Judd LLP*, 85 E. 8th Street, Suite 310, Holland, MI 49423, 616-396-3260, jdornbos@wnj.com

Conor B. Dugan, *Varnum LLP*, 333 Bridge Street NW, P.O. Box 352, Grand Rapids, MI 49501, 616-336-6892, cbdugan@varnumlaw.com

William H. Fallon, *Miller Johnson*, 250 Monroe Ave NW, Grand Rapids, MI 49503, 616-831-1715, fallonw@miller-johnson.com

Gregory R. Grant, *Cummings McClorey Davis & Acho PLC*, 125 S Park St., Suite 415, Traverse City, MI 49684, 231-922-1888, ggrant@cmda-law.com

Daniel W. Linna, Jr., *Honigman Miller Schwartz & Cohn LLP*, 660 Woodward Ave., Suite 2290, Detroit, MI 48226, 313-465-7508, dlinna@honigman.com

Jessica R. Vartanian, *Bush Seyferth & Paige*, 3001 West Big Beaver Road, Suite 600, Troy, MI 48084, 248-822-7800, vartanje@gmail.com

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

Legal Malpractice Update

Where an Attorney Settles a Case Without a Client's Consent, the Client Must Provide Evidence to Support a Finding of Unfair Dealing or Bad Faith and (Assuming the "Suit within a Suit" Concept Applies) Offer More than Mere Speculation that It Would Have Obtained a Better Result at Trial

Attorney Defendants v IGC Management, Inc, unpublished opinion per curiam of the Court of Appeals, issued April, 2013 (Docket No. 308405).

The Facts: IGC retained the attorney defendants to represent them in an action to recover funds that they alleged should have been paid to it as a subcontractor but for the general contractor having absconded with the payments. The attorney defendants also represented other unpaid subcontractors. After the general contractor filed for bankruptcy, and the court determined that LaSalle Bank had a priority mortgage interest of over $3 million against assets of $1.3 million, the court ordered the subcontractors and the owners and financers of the project to mediation to see if the subcontractors might be able to recover some of their costs. The attorney defendants eventually negotiated an agreement settling all of the underlying claims (the "settlement agreement") that had been pleaded in a 12-count second amended complaint. All of the subcontractors other than IGC assented to the settlement agreement, but IGC was held bound to the settlement agreement by one of the attorney defendant's signatures despite its lack of assent. The attorney defendants commenced an action against IGC seeking attorney fees for their representation, and IGC counterclaimed for legal malpractice. The trial court granted summary disposition in favor of the attorney defendants in both actions. IGC appealed.

The Ruling: The Court of Appeals affirmed the trial court's holding, concluding that the record did not support a finding of unfair dealing or bad faith. Instead, the record reflected that one of the attorney defendants intended to sign the settlement agreement on behalf of all claimants ***except*** IGC, and that he expressly and repeatedly informed the facilitator that he was not authorized to sign on behalf of IGC. He also requested that the facilitator place a separate line on the written agreement for IGC which would remain unsigned. Neither IGC nor the attorney defendants disputed that one of the attorney defendants signed the settlement agreement without IGC's consent, and that in so doing, he breached the professional duties he owed to IGC pursuant to MRPC 1.2(a) (settlement of a client's claim without the client's consent is an ethical violation that can lead to disciplinary action). The court noted that it has rejected the argument that a violation of the Code of Professional Responsibility is negligence *per se*, in favor of the proposition that a code violation is rebuttable evidence of malpractice. But, liability in such cases where an attorney settles a case without the client's consent is more commonly held to rest on unfair dealing and bad faith rather than negligence.

IGC also argued that the trial court erred in ruling that it was required to provide expert testimony as to the causation element of its legal malpractice claim, and that IGC had presented undisputed evidence that would have allowed it to prevail on its claims in the underlying lawsuit. The Court of Appeals disagreed. The court noted that IGC misconstrued the trial court in arguing that the trial court's insistence on expert testimony as to the validity and enforceability of construction liens, the process for foreclosing on the liens and selling foreclosed property, and priority between construction liens and mortgage liens was inconsistent with the framework articulated in *Charles Reinhart v Winiemko*, 444 Mich 579; 513 NW2d 773 (1994). Instead, the central issue was whether IGC could have obtained a better result at trial than the attorney defendants obtained for it in the settlement agreement. What the trial court found lacking was expert testimony explaining how, given the facts surrounding the mortgage interest against assets, IGC expected to achieve a better result.

IGC, however, conceded that its omission of expert testimony was intentional because if there are questions of

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.

If the circumstances of a settlement involve a non-assenting client or make unclear whether a non-assenting client would be bound by the terms therein, practitioners should be sure to make an adequate record to refute any allegations of bad faith or unfair dealing.

fact, it should be allowed to proceed to trial to prove causation as part of its "suit within a suit" burden. The Court of Appeals noted that this case was ***not*** one of the enumerated instances where the "suit within a suit" concept has vitality, such as where an attorney's negligence prevents a client from bringing a cause of action, where the attorney's failure to appear causes judgment to be entered against his client, or where the attorney's negligence prevents an appeal from being perfected. IGC instead argued that the "suit within a suit" concepts generally apply where an attorney's actions have been fatal to the claimant's position in the underlying case. Even presuming the "suit within a suit" approach to be applicable, the court concluded that there was not sufficient admissible evidence to raise a genuine issue of fact where all IGC had done was merely speculate that, given the number and nature of charges against the owners and financers of the project, that (1) a judgment of some sort could be won, and (2) that it would be greater than the amount awarded it by the settlement agreement.

Because there was no judicial or other formal determination that the attorney defendants engaged in unethical conduct at any point during their legal representation of IGC that would render the fees subject to forfeiture, the court concluded that summary disposition on this claim in the attorney defendants' favor was appropriate.

Practice Tip: If the circumstances of a settlement involve a non-assenting client or make unclear whether a non-assenting client would be bound by the terms therein, practitioners should be sure to make an adequate record to refute any allegations of bad faith or unfair dealing.

Recent Supreme Court Precedent in *Gunn v Minton* Already Making an Impact on Legal Malpractice Claims in Michigan

Petter, Inc, et al v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued April 9, 2013 (Docket No. 309762).

The Facts: Plaintiff Petter, Inc. was represented by the attorney defendants in a patent infringement action against Hydro Engineering & Supply Company in the U. S. District Court for the Western District of Michigan. After the district court concluded that Petter infringed on Hydro's patents, the parties resolved the litigation with a settlement that was unfavorable to Petter. Petter subsequently fired the attorney defendants and retained new counsel. Petter also filed a legal malpractice action against the attorney defendants in state circuit court. The attorney defendants moved for summary disposition under MCR 2.116(C)(4) for a lack of subject-matter jurisdiction, arguing that, pursuant to 28 USC 1338(a), the federal district court had exclusive jurisdiction over Petter's legal malpractice claim because it arose out of federal patent law. The trial court granted the motion and Petter appealed.

The Ruling: The Court of Appeals reversed the lower court's grant of summary disposition, concluding that the case did not raise a substantial federal issue. The attorney defendants argued that the case involved substantial questions of patent law because the court hearing Petter's malpractice claim would have to, *inter alia*, determine whether the attorney defendants' original advice regarding infringement was proper, and would have to hear expert testimony on the standard of care in patent litigation. The court noted that *Gunn v Minton* (issued by the United States Supreme Court on February 20, 2013) explicitly held that the nature of the substantiality inquiry focuses not on the importance of the federal issue to the resolution of particular case, but to the importance of the federal issue to the federal system as a whole. The attorney defendants offered reasons why the federal questions involved were significant to the resolution of the legal malpractice case, but did not adequately explain why the federal questions involved were of a broader significance to the federal system as a whole. The court determined that, on their face, the reasons advanced by the attorney defendants did not meet *Gunn*'s standard for substantiality.

The court was not persuaded by the attorney defendants' argument concerning Petter's separate patent litigation that was pending in the federal court at the time it filed the malpractice suit. First, the court found that the legal case in which defendants represented plaintiffs had concluded, and Petter sued the attorney defendants two years after the settlement in that case. The court held that the attorney defendants thus were incorrect in asserting that the federal patent litigation here was contemporaneous, and not prior. Moreover, the court ruled that *Gunn* explicitly held that federal courts are not bound by the state court "case within a case" patent ruling in resolving patent questions, and the

Where the court's only resolution of substantive patent law is in the "case within a case" context to determine whether an attorney was negligent in his or her representation of a client, *Gunn* has made clear that this would not raise substantial federal issues.

federal court thus would not have been bound by any determinations made by Michigan state courts in resolving Petter's legal malpractice claim. The court rejected the attorney defendants' assertion that resolving the malpractice claim in state court could, and likely would, have changed the federal litigation which was pending at the time Petter filed the malpractice claim

Practice Tip: Where the court's only resolution of substantive patent law is in the "case within a case" context to determine whether an attorney was negligent in his or her representation of a client, *Gunn* has made clear that this would not raise substantial federal issues. Even if the underlying case was still pending, it is unlikely that a state court would be persuaded to grant summary disposition for lack of subject-matter jurisdiction because the federal court would not be bound by the state court's resolution of the federal issues presented in the malpractice action.

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
sfosmire@garanlucow.com

Michigan Court Rules (and the RJA) Adopted and Proposed Amendments

For additional information on these and other amendments, visit the Court's official site at http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

PROPOSED

2013-20 — Depositions and Discovery for actions pending elsewhere

Amending: MCR 2.305 Issued: 05/22/13
Comments to: 09/01/13

Subparagraph (E) would be amended to remove references to actions pending in other states or territories.

A new subparagraph (F) would be added to deal with other states and territories: "Action Pending in Another State or Territory. A person may request issuance of a subpoena in this state for an action pending in another state or territory under the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 et seq., to require a person to attend a deposition, to produce and permit inspection and copying of materials, or to permit inspection of premises."

2013-18 — Electronic filing

Adding: New rules, standards, administrative order Issued: 05/01/13
Comments to: 09/01/13

This proposal would adopt a series of rules under a new subchapter 2E.000 and a set of "standards for e-filing." The standards call for three phases, with Phase I to be in place by January 2014. Staff notes indicate that the standards are provided "to provide a context" for the proposed rule.

Circuits will not be required to adopt e-filing plans, but will need to secure approval from the Supreme Court for plans that they do adopt.

2012-02 — Discovery-only depositions

Amending: MCR 2.302 Issued: 04/03/13
Comments to: 08/01/13

The proposal is to add new language to MCR 2.302(4) to provide that a deposition of an expert witness may be used for any purpose unless a stipulation or court order provides that it may be available for "limited purposes" including discovery only and impeachment. The order must specify the purposes and provide for an allocation of the fees and expenses of the deposition.

Court staff has once again characterized this substantive change as a "clarification."

2011-26 — Case evaluation sanctions

Amending: MCR 2.403 Issued: 03/20/13
Comments to: 07/01/13

This proposal would include language adding two additional events that would permit the delayed submission of a request for costs under the case evaluation rule: an order regarding rehearing or reconsideration and an order for other post-judgment relief.

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

Supreme Court Update

Michigan Supreme Court Stands Behind Years of Common Law in Holding that Emotional Distress Damages are not Recoverable for the Negligent Destruction of Real Property

In a March 21, 2013, opinion, the Michigan Supreme Court held that a plaintiff could not recover noneconomic damages resulting solely from the negligent destruction of real property. *Price v High Pointe Oil Co*, *Inc*, 493 Mich 238; 828 NW2d 660 (2013).

Facts: In 1975, the plaintiff built a home in Dewitt, Michigan. Between 1975 and 2006, the home was heated by an oil furnace. The oil tank for the furnace was located in the plaintiff's basement and was serviced by High Pointe Oil on its "keep full" list. In 2006, the plaintiff cancelled her oil service with High Pointe Oil and replaced her oil furnace with a propane model. In 2007, High Pointe Oil inadvertently placed the plaintiff back on its "keep full" list and, while the plaintiff was at work, pumped nearly 400 gallons of oil into a fill pipe that remained on the plaintiff's home. After several minutes of pumping oil into the plaintiff's home, a High Pointe Oil employee noticed his mistake. The oil flooded the plaintiff's basement, causing significant contamination to the house and surrounding soil. Remediation efforts required demolition of the plaintiff's entire house.

The plaintiff sued High Pointe Oil, seeking among other things noneconomic damages for High Pointe Oil's negligent destruction of real property. At the conclusion of trial, the jury returned a verdict for the plaintiff in the amount of $100,000. High Pointe Oil moved for judgment notwithstanding the verdict and remitter, which the trial court denied. The Court of Appeals affirmed the jury verdict, holding that "in negligence actions, a plaintiff may recover mental anguish damages naturally flowing from the damage to or destruction of real property." The court explained that noneconomic damages are generally recoverable in all tort actions and it was not convinced there was a basis to remove from the general rule noneconomic damages stemming from the destruction of real property.

Holding: The Michigan Supreme Court reversed and explained that "the long-held common-law rule in Michigan is that the measure of damages for the negligent destruction of property is the cost of replacement or repair." Because this measure of damages is economic in nature, noneconomic damages are not recoverable for the negligent destruction of property. The court noted that no case in the history of Michigan's common law has ever awarded noneconomic damages for the destruction of real property. "[D]espite the fact that throughout the course of our state's history, many thousands of houses and other real properties have doubtlessly been negligently destroyed or damaged, and despite the fact that surely in a great many, if not a majority, of those cases the residents and owners of those properties suffered considerable emotional distress, there is not a single Michigan judicial decision that expressly or impliedly supports the recovery of noneconomic damages in these circumstances."

The court distinguished the present case from prior, personal injury cases relied on by the Court of Appeals by noting that, while personal injury cases employ "general rules" allowing the recovery of noneconomic damages, those rules do not apply to cases involving only property damage.

Joshua K. Richardson is an associate in the Lansing office of Foster, Swift, Collins & Smith, PC. He specializes in employment litigation, municipal law, premises liability and commercial litigation. He can be reached at jrichardson@fosterswift.com or (517) 371-8303.

Although the court's extensive analysis of Michigan's common law can be viewed as providing support for the perpetuation of all existing common law rules, the court was quick to point out that the common law is ever-evolving and should not be applied immutably.

The court then provided a detailed analysis of common law, explaining that, while the "Court is the principal steward of Michigan's common law," traditional rules "must prevail absent compelling reasons for change." Finding no compelling reason to do so, the court declined to alter the long-standing and traditional rule against awarding noneconomic damages for the destruction of property.

In reaching its decision, the court recognized that the destruction of property will often give rise to significant emotional distress, but explained that the traditional rule against the recovery of noneconomic damages "is a rational one and justifiable as a matter of reasonable public policy." Specifically, the court noted that limiting recovery to economic damages provides an easily ascertainable and verifiable measure of compensation not necessarily true of noneconomic damages.

Significance: Although the court's extensive analysis of Michigan's common law can be viewed as providing support for the perpetuation of all existing common law rules, the court was quick to point out that the common law is ever-evolving and should not be applied immutably.

An Employee's Motivation is Irrelevant in Claims under the Whistleblowers Protection Act

On May 1, 2013, the Michigan Supreme Court declared as dicta the language in *Shallal v Catholic Social Services of Wayne County*, 455 Mich 604; 566 NW2d 571 (1997) addressing the motivation of a whistleblower plaintiff, and held that a plaintiff's motivation for engaging in a protective activity is not a factor to be considered in determining the merits of a claim under the Whistleblowers Protection Act ("WPA"). *Whitman v City of Burton*, 493 Mich 303; ___ NW2d ___ (2013).

Facts: The plaintiff was employed as the City of Burton's chief of police between 2002 and 2007. During that time, the plaintiff made repeated complaints to the City of Burton's mayor and city attorney regarding the City's failure to pay the plaintiff for his previously accumulated unused sick and personal leave time.

By ordinance, the City of Burton was obligated to compensate its unelected administrative officials for their unused sick, vacation and personal leave time. In 2003, as a result of budgetary restraints, the mayor reached an agreement with various department heads in the City to forgo future payments of accumulated unused sick, vacation and personal leave time. The ordinance, however, remained unchanged.

The plaintiff objected to the agreement and, in January 2004, repeatedly wrote to and spoke with the mayor, city attorney and other City of Burton employees, expressing his belief that the failure to compensate him for his unused sick, vacation and personal leave time constituted an unexcused violation of the ordinance. The City of Burton eventually agreed that the failure to pay would violate the ordinance and, by the end of January 2004, authorized the payments to the plaintiff and all other officers who requested it. In June 2004, the mayor expressed his displeasure with the plaintiff's complaints and noted in a letter that he was considering removing the plaintiff as police chief based on his pursuit of compensation for unused sick, vacation and personal leave time.

In November 2007, the mayor declined to reappoint the plaintiff as police chief. During a subsequent meeting, members of the police department were allegedly told that the mayor's decision related, at least in part, to the plaintiff's complaints regarding the City's potential ordinance violation. The plaintiff filed suit against the City of Burton and the mayor in his individual capacity, alleging that the decision to not reappoint the plaintiff was based on his ordinance complaints in violation of the WPA.

At trial, the defendants presented evidence that the mayor's decision to not reappoint the plaintiff was unrelated to his complaints and, instead, based on the mayor's dissatisfaction with the plaintiff's performance, including his inadequate discipline of police officers under the plaintiff's control. Despite this evidence, the jury found that the plaintiff's complaints constituted protected activity under the WPA and that the complaints made a difference in the mayor's decision to not reappoint him as chief of police. The jury awarded the plaintiff total damages of $232,500. The trial court denied the defendants' subsequent motion for judgment notwithstanding the verdict, and the defendants appealed.

The Court of Appeals reversed the trial court's denial of the defendants' motion for judgment notwithstanding the verdict and held that, based on the Michigan Supreme Court's prior holding in *Shallal*, the plaintiff could not recover on his WPA claim because the plaintiff's complaints regarding the ordinance violation were "clearly intended to advance his own financial interests." Relying on *Shallal*, the Court of Appeals concluded that a critical inquiry in a WPA action is whether the plaintiff's primary motive for engaging in the protected activity was to inform the public on a matter of public concern.

Regardless of motive, a plaintiff may succeed on a WPA claim so long as the plaintiff can establish a causal connection between the adverse employment action and his or her protected activity.

Because the plaintiff's complaints were private and financial in nature, the Court of Appeals held that his WPA claim failed as a matter of law.

Holding: The Supreme Court reversed, holding that the plaintiff's motivation for engaging in the protected activity is not a proper consideration under the WPA. "Nothing in the statutory language of the WPA addresses the employee's motivation for engaging in protected conduct, nor does any language in the act mandate that the employee's *primary* motivation be a desire to inform the public of matters of public concern."

The Court of Appeals incorrectly relied on dicta within *Shallal* to decide that the plaintiff's WPA claim failed as a matter of law because the plaintiff's primary motivation was personal financial gain rather than a desire to inform the public on a matter of public concern. The court explained that, although *Shallal* did generally discuss the plaintiff's motivation for pursuing a claim under the WPA, it was in the narrow context of causality. The *Shallal* court held only that a plaintiff could not use the WPA to insulate herself from termination "where she knew she was going to be fired before threatening to report her supervisor." Based on the *Shallal* plaintiff's knowledge of her own impending termination, the *Shallal* court held that no reasonable juror could conclude that the plaintiff's termination was causally connected to her threat.

The court held here that, to the extent any language of *Shallal* could be read as requiring an altruistic motive, it is "disavowed as dicta unrelated to the essential holding of the case regarding the causal connection between the protected activity and the adverse employment decision." Regardless of motive, a plaintiff may succeed on a WPA claim so long as the plaintiff can establish a causal connection between the adverse employment action and his or her protected activity. Because the Court of Appeals failed to address the issue of causation when it decided that the plaintiff's WPA claim failed as a matter of law, the court remanded the case to the Court of Appeals for a determination of whether the trial court properly denied the defendants' motion for judgment notwithstanding the verdict.

Significance: By disavowing as dicta the most prominent language of *Shallal*, the court effectively overturned 16 years of WPA precedent premised on *Shallal's* motivation analysis. Going forward, WPA plaintiffs subjected to adverse employment actions as a result of their protected activities may recover even if their motive for pursuing their claims was purely personal.

Causal Connection between Injury and Accident too Remote to Satisfy No-Fault Requirements

On April 11, 2013, the Michigan Supreme Court held that a no-fault plaintiff's injuries, arising from a motorcycle accident that occurred when the plaintiff had a seizure and lost control of his motorcycle, were not sufficiently connected to a prior motor vehicle accident from which the plaintiff's seizure disorder developed. *McPherson v McPherson*, 493 Mich 294; __ NW2d __ (2013).

Facts: In 2007, the plaintiff was riding as a passenger in a vehicle driven by his brother. The plaintiff suffered injuries, including the development of a seizure disorder, when the vehicle struck a freeway guardrail. In 2008, the plaintiff experienced a seizure while riding a motorcycle. The plaintiff lost control of the motorcycle, crashed into a parked car, and suffered a severe spinal cord injury. The spinal cord injury rendered the plaintiff a quadriplegic.

The plaintiff filed suit against the no-fault insurer responsible for his personal injury protection ("PIP") benefits for the 2007 accident, claiming that his new injuries were sufficiently related to the 2007 accident that caused his seizure disorder. Apparently recognizing that PIP benefits would not be recoverable directly from his 2008 motorcycle accident, the plaintiff claimed an entitlement to PIP benefits from the insurer of the 2007 accident by alleging that his spinal cord injury resulted from his seizure disorder, which, in turn, resulted from the 2007 accident.

The parties did not dispute that the plaintiff was entitled PIP benefits for all injuries "arising out of" the 2007 accident. The parties similarly did not dispute that the plaintiff's seizure disorder arose out of that accident and was a compensable injury related to the 2007 accident. The parties disagreed, however, on whether the new spinal cord injury suffered in the 2008 accident "arose out of" the 2007 accident.

The insurer, which denied liability for payment of benefits associated with the plaintiff's spinal injury, filed a motion for partial summary disposition. The trial court denied the motion and the Court of Appeals affirmed, finding that questions of fact existed as to whether the 2008 spinal cord injury arose from the 2007 accident.

Holding: In lieu of granting the insurer's application for leave to appeal, the Michigan Supreme Court reversed the Court of Appeals decision and remanded for entry of summary disposition in favor of the insurer. The court held that "the causal connection between the 2008 spinal cord injury and the 2007

By disavowing as dicta the most prominent language of *Shallal,* the court effectively overturned 16 years of WPA precedent premised on *Shallal's* motivation analysis.

accident is insufficient to satisfy the 'arising out of' requirement" under the no-fault act. The court explained that an insurer is liable for the payment of PIP benefits "only if those injuries 'arise out of' or are caused by 'the ownership, operation, maintenance or use of a motor vehicle.'" For liability to be found, the causal connection between the injury and the use of a motor vehicle must be "more than incidental, fortuitous, or 'but for.'"

The court acknowledged that a limited causal connection existed between the plaintiff's 2008 injury and the 2007 accident, noting that the plaintiff's spinal cord injury occurred as a result of "the 2008 motorcycle crash, which was caused by his seizure, which was caused by his neurological disorder, which was caused by his use of a motor vehicle as a motor vehicle in 2007." The court concluded, however, that under the circumstances, the causal connection was "too remote and too attenuated" to permit a finding that the causal connection was more than "incidental, fortuitous, or 'but for.'"

The court also rejected the plaintiff's argument that the first injury directly caused the second injury. Instead, the court held that the facts alleged by the plaintiff supported only a finding that first *injury* directly caused the second *accident*, and the plaintiff admitted that "absent the intervening motorcycle accident, his spinal cord injury would not have occurred as a direct result of the neurological disorder." According to the court, "had plaintiff been in bed or on the couch when he had the seizure, the . . . injury would not have occurred."

Because the plaintiff's spinal cord injury had only a limited causal connection to the 2007 accident, the injury did not "arise out of" the use of a motor vehicle, as required under the no-fault act.

Significance: This decision clarifies that not all causal connections between an injury and a motor vehicle accident will satisfy the requirements of the no-fault act. Attenuated connections will no longer suffice.

By: Edward Perdue, *Dickinson Wright PLLC*
eperdue@dickinson-wright.com

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 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. The following is a short synopsis of some of the many recent and upcoming DRI events:

August 27, 2013: Modernizing MSP Cost Containment Protocols (Webcast)

Given the vast misconceptions that exist regarding Medicare reimbursement requirements, John V. Cattie will provide participants with key and precise information regarding the Medicare Secondary Payer (MSP) program. Webcast participants will gain a solid understanding of current MSP requirements and will learn how to identify "conditional payments" made by Medicare. Mr. Cattie will discuss the events that trigger MSP recovery obligations and the current penalties and damages that Medicare is entitled to recover for failure to reimburse MSP. Mr. Cattie will also cover the recently enacted Strengthening Medicare and Repaying Taxpayers (SMART) Act and SMART's effect on "set-aside" funds for payment of a claimant's future medical expenses.

September 19, 2013: Nursing Home/ALF Litigation Seminar (Scottsdale, AZ)

DRI's Nursing Home/ALF Litigation Seminar is the preeminent seminar for attorneys in private practice, in-house counsel, claims specialists, and other professionals involved in the defense of claims against long-term care facilities, assisted living facilities, and other aging services providers across the country. This year, we will again host a number of industry counsel meetings and create opportunities for long-term care providers, insurers, risk managers, and defense counsel to exchange ideas and information, collaborate on new and developing trends and strategies in defending claims, and enjoy each other's company while obtaining continuing education credit. Register now to ensure your place at this cutting-edge seminar at the Westin Kierland in Scottsdale, Arizona.

September 19, 2013: Strictly Automotive Seminar (Dearborn, Michigan)

Are Smart Cars truly smarter? Or are we just looking at more and different litigation? DRI's Strictly Automotive Seminar returns to the heart of automotive country, where these and other up-to-the-minute topics will be presented by leading in-house counsel and experts from around the country. Don't miss your chance to mingle with these industry leaders and network with some of the best and brightest automotive product lawyers in the nation. Strictly Automotive is the only DRI seminar dedicated solely to automotive product-related issues and concerns. Come on out to Dearborn and share the knowledge — we'll even teach you the secret Automotive SLG handshake.

We look forward to welcoming you to Chicago for the 18th DRI Annual Meeting and the opportunity to experience the friendliest city in the Midwest, outstanding education and fabulous networking events.

September 25, 2013: Construction Law Seminar (Las Vegas, Nevada)

DRI's Construction Law Seminar is designed to enhance the practice of all construction industry professionals — from experienced defense attorneys, to risk managers, to construction executives, and even to those who are new to construction litigation. This year's program will focus on the experienced litigator seeking to develop advanced skills in construction law. Topics include a roundtable discussion from the nation's largest homebuilders, effective storytelling in a construction case, and emerging trends in construction defect insurance coverage. DRI is proud to present a number of nationally known speakers on all of these timely topics. The seminar also will include a hands-on presentation showcasing a construction technique to provide insight into the actual construction work that underlies the claims. There will also be a Wednesday afternoon session for those new to construction claims. The seminar is a must attend for those involved in the construction industry.

October 16, 2013: DRI Annual Meeting (Chicago, Illinois)

Chicago is a dynamic and vibrant city. The hub of the Midwest and easily accessible by air and land, Chicago is the home of the blues, the truth of jazz and the heart of comedy. It is a city with swagger, and the sophisticated luxuries of theater, shopping, and fine dining have not put a dent in the Midwestern friendliness that abounds. Its picturesque skyline calls across the waters of vast Lake Michigan, a first impression that quickly reveals world-class museums of art and science, miles of sandy beaches, sprawling parks and public art, and perhaps the finest downtown collection of architecture in the world. We look forward to welcoming you to Chicago for the 18th DRI Annual Meeting and the opportunity to experience the friendliest city in the Midwest, outstanding education and fabulous networking events.

For more details on these and other upcoming DRI events, please go to http://www.dri.org/Events. As always, feel free to contact me if you have any questions about DRI or if I can be of any assistance: eperdue@dickinsonwright.com, 616-336-1038.

DRI Annual Meeting — Chicago — October 16–20, 2013

Energizing Your Career: Making Rain in the Windy City

Did you know that Chicago offers locals and guests about 40 museums, more than 150 theaters and over 6,000 restaurants? Plus the Chicago River is the only river in the world that flows backwards!

Now is your chance to see Chicago with 1,000 of your closest DRI friends. The Annual Meeting is the must-attend DRI event of the year. It is the one place where you can identify goals, focus on relevant topics and interact with the DRI Executive Committee and other members. Please join us in Chicago – block out October 16–20 now!

This year DRI will focus on "Energizing Your Career: Making Rain in the Windy City." Some of the headliners for the meeting include:

***New York Times* Best Selling Author, Dan Buettner** discussing the principles of The Blue Zones — the Secrets of Long Life

Pulitzer Prize Winner Charles Krauthammer providing insight into "The Future of Health Care, Medicine and Bioethics"

A panel of experts providing X-Ray Vision into the Minds of Jurors and insight into whether mock trials are worth the expense and effort

Rainmaking Secrets of Top Defense Lawyers

Former Nixon White House Counsel together with a lawyer and historian will present the "The Legacy of Watergate – Ethics of Representing an Entity under Current Model Rules."

You get all of this substance plus networking events, a Caribbean Wrap-Up Party and more!

You'll make contacts, strengthen relationships, learn more about DRI and have fun.

Check out the brochure for more detailed information and sign up now!!

http://dri.org/event_brochures/2013AM.pdf

MDTC LEADER CONTACT INFORMATION

Officers

Raymond Morganti
President
Siemion Huckabay, P.C
One Towne Square Ste 1400
P.O. Box 5068
Southfield, MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

Mark A. Gilchrist
Vice President
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503
616-774-8000 • 616-774-2461
mgilchrist@shrr.com

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

Hilary A. Ballentine
Secretary
Plunkett Cooney
38505 Woodward Ave
Bloomfield Hills, MI 48304
313-983-4419 • 313-983-4350
hballentine@plunkettcooney.com

Timothy A. Diemer
Immediate Past President
Jacobs & Diemer, P.C.
500 Griswold St., Ste 2825
Detroit, MI 48226
313-965-1900 • 313-965-1919
Tim.Diemer@jacobsdiemer.com

Board

Angela Emmerling Boufford boufford@butzel.com 248-258-2504 • 248-258-1439	Butzel Long PC 41000 Woodward Ave. Bloomfield, MI 48304
Barbara Eckert Buchanan beb@kellerthoma.com 313-965-7610 • 313-965-4480	Keller Thoma, P.C. 440 East Congress, Fifth Floor Detroit, MI 48226
Lawrence G. Campbell lcampbell@dickinsonwright.com 313-223-3703 • 313-223-3598	Dickinson Wright P.L.L.C. 500 Woodward Ave., Ste 4000 Detroit, MI 48226
Jeffrey C. Collison jcc@saginaw-law.com 989-799-3033 • 989-799-2969	Collison & Collison PC 5811 Colony Dr North Saginaw, MI 48638
Michael I Conlon MIC@runningwise.com 231-946-2700 • 231-946-0857	Running, Wise & Ford, PLC 326 E State St, PO Box 686 Traverse City, MI 49684
Terence P. Durkin terence.durkin@kitch.com 313-965-6971 •313-965-7403	Kitch, Drutchas, Wagner, Valitutti & Sherbrook 1 Woodward Ave., Ste. 2400 Detroit, MI 48226
Scott S. Holmes sholmes@foleymansfield.com 248-721-8155 • 248-721-4201	Foley & Mansfield PLLP 130 East Nine Mile Road Ferndale, MI 48220
Richard J. Joppich richard.joppich@kitch.com 517-381-7182 • 517-381-4427	The Kitch Firm 2379 Woodlake Dr., Suite 400 Okemos, MI 48864-6032
John Mucha III, Chair jmucha@dmms.com 248-642-3700 • 248-642-7791	Dawda, Mann, Mulcahy & Sadler, PLC 39533 Woodward Ave., Suite 200 Bloomfield Hills, MI 48304
Matthew T. Nelson mnelson@wnj.com 616-752-2539 • 616-222-2539	Warner Norcross & Judd LLP 900 Fifth Third Center, 111 Lyon Street NW Grand Rapids, MI 49503
Joshua Richardson jrichardson@fosterswift.com 517-371-8303 • 517-371-8200	Foster Swift Collins & Smith PC 313 South Washington Square Lansing, MI 48933
Robert Paul Vance pvance@ccglawyers.com 810-232-3141 • 810-232-1079	Cline, Cline & Griffin, PC 503 S. Saginaw St., Ste. 1000 Flint, MI 48503

MDTC LEADER CONTACT INFORMATION

Section Chairs

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

Commercial Litigation: Matthew Allen
allen@millercanfield.com
248-267-3290 • 248-879-2001
Miller Canfield Paddock & Sonte PLC
840 W. Long Lake Rd Ste 200
Troy, MI 48098

General Liability: Tom Aycock
taycock@shrr.com
616-458-8391 • 616-774-2461
Smith, Haughey, Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503

Insurance: Darwin L. Burke, Jr.
dburke@rvnvlaw.com
586-469-8660 • 586-463-6997
Ruggirello Velardo Novara & Ver Beek, PC
65 Southbound Gratiot Avenue
Mount Clemens, MI 48043

Labor & Employment:
Gouri G. Sashital
gsr@kellerthoma.com
313-965-8924 • 313-965-1531
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

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

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

Professional Liability & Health Care:
Michael R. Janes
mrj@martinbacon.com
586-979-6500 • 586-468-7016
Martin, Bacon & Martin, P.C.
44 First Street
Mount Clemens, MI 48043

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

Young Lawyers: Robert E. Murkowski
murkowski@millercanfield.com
313-496-8423 • 313-496-8451
Miller Canfield
150 West Jefferson, Suite 2500
Detroit, MI 48226

Regional Chairs

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

Grand Rapids: Connor Dugan
Varnum LLP
333 Bridge St NW, P.O. Box 352
Grand Rapids, MI 49501
616-336-6892 • Fax: 616-336-7000
cbdugan@varnumlaw.com

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

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

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

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

Southeast Michigan: Nicole DiNardo Lough
Faurecia North American
900 N. Squirrel Road Suite 175
Auburn Hills, MI 48326
248-484-3351
nicole.lough@faurecia.com

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

MDTC 2012–2013 Committees

Golf Outing Committee
Jim Gross, Mark Gilchrist & Tony Taweel

Awards Committee
Chair Mark A. Gilchrist, David M. Ottenwess & Thaddeus E. Morgan

Winter Meeting Committee
Robert Paul Vance
Josh Richardson
Bennet Bush

Annual Meeting Committee
Terry Durkin
Jenny Zavadil
Scott Holmes

Michigan Defense Quarterly
D. Lee Khachaturian, Jenny Zavadil
Beth Wittmann, Kimberlee Hillock

Nominating Committee
Timothy A. Diemer

Supreme Court Updates
Joshua Richardson

Technology Committee / ENewsletter
Angels Emmerling Boufford
Alan Couture
Scott Holmes

Section Chair Liaison
Hilary A. Ballentine

Regional Chair Liaison
D. Lee Khachaturian

Government Relations
Graham Crabtree

Membership Committee
Barbara Eckert Buchanan
Richard Joppich

Future Planning Committee Chair
Mark A. Gilchrist

MAJ Liaison Chair
Terry Miglio

Past Presidents Committee
John P. Jacobs

Judicial Relations Committee
Larry Campbell

Amicus Committee
Carson Tucker & James Brenner

Sponsorship Committee
Michael I Conlon
Nicole DiNardo Lough

Political Advisory Committee
Mark Gilchrist & Graham K. Crabtree

DRI State Representative
Edward P. Perdue

Meet The Judges Event
Larry Campbell
Robert Paul Vance
Terrence Durkin

MDTC
P.O. Box 66
Grand Ledge, MI 48837

PRSRT STD
US POSTAGE
PAID
LANSING, MI
PERMIT NO. 75

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