MICHIGAN DEFENSE
QUARTERLY

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

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President's Corner

By: Mark A. Gilchrist, *Smith Haughey Rice & Roegge*

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On February 18, 2015, the Michigan Supreme Court issued an Order, ADM File No. 2014-09, seeking comment on proposed amendments to MCR 7.215(A)-(C). The proposals were submitted by the Michigan Court of Appeals. The amendments of MCR 7.215(A) and MCR 7.215(B) seek to further define the term "unpublished" and offer clarification for Court of Appeals judges with respect to when an opinion should be published. The revisions to MCR 7.215(C)(1) address the precedential value of unpublished opinions, and the Court of Appeals requests a significant restriction of the use and authority of unpublished opinions.

Significantly, the amendment to the rule adds that "citation to such [unpublished] opinions in a party's brief is disfavored unless the unpublished opinion directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal." The suggested rule would further require that a party who cites an unpublished opinion "explain why existing published authority is insufficient to resolve the issue." Practitioners who rely upon the use of unpublished opinions in their briefs will undoubtedly recognize how changing the authority of unpublished opinions from "persuasive" to "disfavored" will have a significant impact on the use and value of unpublished decisions.

MCR 7.215 states specifically that unpublished opinions are not precedential, however, it is generally understood and has been my experience in the vast majority of trial courts that unpublished opinions can be persuasive. Similar to a federal court opinion or even one from out of state, if the facts are analogous, the legal reasoning is solid, and the suggested rule comports with Michigan jurisprudence, it is not clear why use of an unpublished Court of Appeals decision should be codified as "disfavored." There are a number of Michigan Supreme Court justices who have previously served on the Court of Appeals. Certainly, their unpublished opinions carry a fair amount of weight when trial courts are deciding issues of first impression and trying to predict how Michigan's appellate courts would rule on a given issue.

Historically, there were issues of fairness regarding the use of unpublished opinions as each was not widely disseminated and it was perceived that larger or more well connected law firms could create their own data bank of unpublished opinions that were not accessible to all. That situation, of course, no longer exists as all unpublished opinions are accessible to any practitioner via the Court's website, every legal research software site I have ever heard of, or by performing a simple Google search. As unpublished opinions are equally available to every practitioner, their use can no longer be questioned under notions of fairness or accessibility.

Likely as a result of an overall decline in litigation, the actual number of published Court of Appeals decisions continues to decline. Filings are down, and the Court is actually deciding fewer and fewer cases. Even if the percentage of published versus unpublished decisions remains constant, the number of actual published decisions has declined. Unpublished decisions, therefore, remain a vital aspect of advocacy and brief writing.

Unpublished decisions, therefore, remain a vital aspect of advocacy and brief writing.

Lastly, while certain areas of law are richly developed and have a long history of consideration by Michigan's appellate courts, other areas offer much less instruction from the higher courts and the utilization of unpublished decisions is even more critical. Unpublished opinions are critical in furthering a trial court's assessment of how the appellate courts would rule on an issue which has not been previously established as precedential through a published opinion.

Unpublished opinions from the Michigan Court of Appeals should remain persuasive, rather than disfavored. The use of unpublished opinions is no longer one of fairness or accessibility, as every practitioner in the state has access to these opinions. The actual number of published Court of Appeals opinions is declining and the use of unpublished opinions is critical for instructing trial courts on issues that have not been previously decided via published opinions in the Michigan Court of Appeals. Certain areas of law are more undeveloped than others, and unpublished opinions can be very instructive for trial courts in their assessment of how a Michigan appellate court would rule on a new issue. As a result, I think the suggested amendments to MCR 7.215(C)(1) should be declined.

MEMBER NEWS

Work, Life, and All that Matters

During the March meeting of the Oakland County Bar Association Probate, Estate and Trust Committee, attorney **Phillip E. Seltzer** was invited to speak on three "hot topics" on the defense side of legal malpractice law: (1) The status of the law concerning limitations on lawsuits by non-clients who pursue claims of negligent drafting of testamentary documents, (2) Risk management issues relating to "conflicts of interest" that can confront an Estate Planner, and (3) The new six year statute of Repose for legal malpractice claims. Seltzer has practiced professional liability law for more than twenty-eight years, and is a Principal of Lipson, Neilson, Cole, Seltzer, Garin, P.C. To learn more about the topics addressed by Phillip E. Seltzer please email him at pseltzer@lipsonneilson.com, or you can call him at (248) 593-5000.

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 (Diana.Khachaturian@thehartford.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

The "Innocent Third Party" Rule Remains Alive, as Applied to Michigan PIP Claims… But for How Long?

By: Ronald M. Sangster, Jr., *Law Offices of Ronald M. Sangster, PLLC*

A version of this was Previously published in the October 2014 issue (Vol 7, No 4) of the Journal of Insurance and Indemnity Law

No-fault practitioners previously questioned whether the Michigan Supreme Court's holding in *Titan Ins Co v Hyten*, 491 Mich 547, 817 NW2d 562 (2012) could be extended into the realm of PIP claims. In *Hyten*, the Supreme Court held that a no-fault insurer could avail itself of traditional common law remedies, including rescission or reformation, where an insurance policy had been procured through fraud in the insurance application. *Hyten*, of course, dealt with a situation where the insurer attempted to reform its bodily injury policy limits of $100,000/$300,000 to the statutorily required minimum policy limits of $20,000/$40,000, based upon the misrepresentation in Ms. Hyten's insurance application regarding the status of her driver's license.

In *Frost v Progressive Michigan Ins Co*, unpublished opinion of the Court of Appeals issued September 23, 2014 (Docket No. 316157), the Court of Appeals concluded that the no-fault insurer could rescind coverage based upon the fraudulent misrepresentations of its insured, even though an "innocent third party" (the applicant's 10-year-old daughter) could no longer recover PIP benefits through Progressive. Instead, the "innocent third party" would need to (and did) avail herself of no-fault benefits through the Michigan Assigned Claims Plan, which had assigned Citizens Insurance Company to handle the claim for benefits. In that case, the insured falsely represented at the time she applied for insurance through Progressive Michigan Insurance Company that she lived in Eastpointe, when in fact she lived in Detroit. The Court of Appeals remanded the matter to the Wayne County Circuit Court to allow Progressive to establish proper grounds for rescission.

Counsel representing Progressive asked the Court of Appeals to publish its decision, given the fact that it dramatically altered prior practice regarding PIP benefits for "innocent third parties." The Court of Appeals denied the publication request. Citizens Insurance Company, the Michigan Assigned Claims Plan insurer, subsequently filed an Application for Leave to Appeal with the Michigan Supreme Court.

While Citizens' Application for Leave to Appeal in *Frost* was pending, another panel of the Court of Appeals ruled that a no-fault insurer could ***not*** rescind coverage as to an "innocent third party" – reaching the opposite conclusion from the *Frost* panel. In *State Farm v Michigan Municipal Risk Mgmt Authority*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket No. 319709), a motorcyclist was struck by an uninsured motor vehicle that was being chased by a Parchment Police vehicle. The vehicle that collided with the motorcyclist

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was owned by one Whitney Gray. Whitney Gray was the statutory "owner" of another motor vehicle, not involved in the accident, which was insured by QBE.

State Farm, as the motorcyclist's personal motor vehicle insurer under MCL 500.3114(5)(c), filed suit against QBE, arguing that QBE occupied a higher order of priority as the insurer of the "owner" of the motor vehicle involved in the accident with the motorcyclist. State Farm also filed suit against the insurer of the Parchment Police vehicle, Michigan Municipal Risk Management Authority ("MMRMA"), arguing that the police vehicle was likewise "involved" in the accident with the motorcyclist.

QBE argued that it was entitled to rescind the policy because Gray had supplied false information in the insurance application regarding ownership and registration of the vehicle. QBE asserted that if it had known that its insured was not the titled owner or registrant of the motor vehicle, it never would have issued the policy. The lower court denied QBE's motion for summary disposition and QBE filed an interlocutory appeal, which was granted by the Court of Appeals.

In affirming the lower court's decision, the Court of Appeals referenced a number of prior decisions that held that a no-fault insurer's ability to rescind a policy "ceases to exist once there is a claim involving an innocent third party," citing *Katinsky v ACIA*, 201 Mich App 167, 505 NW2d 895 (1993) and *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 369 NW2d 243 (1985). With regard to QBE's argument that the "Innocent Third Party" doctrine was abrogated by the Supreme Court's decision in *Hyten*, the Court of Appeals disagreed with this interpretation and noted:

> In *Titan*, our Supreme Court held that an excess insurance carrier may avail itself of the equitable remedy of reformation (of contract) to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even though the fraud was easily ascertainable and the claimant is a third party, so long as the remedies are not prohibited by statute. [Citation omitted].
> Bongers's entitlement to PIP benefits is statutory, however, not contractual. See *Harris v ACIA*, 494 Mich 462, 472; 835 NW2d 356 (2013); MCL 500.3114(5). The insurer in *Titan* did not seek to avoid payment of statutorily mandated no-fault benefits; in fact, that insurer acknowledged its liability for the minimum liability coverage limits. *Id.* at 552 n 2. Nor did *Titan* address a claim for PIP benefits for an innocent third party. Thus, the holding of *Titan*, that an insurance carrier may seek reformation to avoid liability for *contractual* amounts in excess of statutory minimums, does not compel a finding that *Titan* overruled the many binding decisions of this Court applying the "innocent third-party rule" in the context of PIP benefits and an injured third party who is statutorily entitled to such benefits. *Id.* at 552. QBE has provided this Court with no authority for the proposition that *Titan* overruled these decisions. We therefore affirm the trial court's denial of summary disposition in Docket No. 319710 relative to the "innocent third-party rule." [*State Farm v Michigan Municipal Risk Mgmt Authority*, slip op at 9-10].

It is unclear whether the court's earlier, unpublished decision in *Frost* was brought to the panel's attention or not. Because *Frost* was unpublished, and therefore not binding, it may not have made a difference in the long run.

On March 31, 2015, the Michigan Supreme Court issued an order in *Frost* regarding Citizens' application for leave to appeal. In its order, the Supreme Court vacated the September 23, 2014, judgment of the Court of Appeals and remanded the matter back to the Court of Appeals for reconsideration, as follows:

> On order of the Court, the application for leave to appeal the September 23, 2014, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, and we REMAND this case to the Court of Appeals for reconsideration of the intervening plaintiff's issue of whether the insurance policy issued by the defendant can be voided *ab initio*. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *Bazzi v Sentinel Ins Co* (Court of Appeals Docket No. 320518). After *Bazzi* is decided, the Court of Appeals shall reconsider the intervening plaintiff's issue in light of *Bazzi*.

A review of the docket entries regarding the *Bazzi* appeal indicates that briefing is not yet complete, so it may be some time before this issue is ultimately resolved by the Court of Appeals.

So where do matters stand now? Given the Supreme Court's order vacating the Court of Appeals' prior unpublished opinion, it appears that the "Innocent Third Party" rule is very much alive with regard to claims for Michigan PIP benefits – at least for the time being. If, however, no-fault practitioners encounter a situation involving an "innocent third party," where the underlying policy may have been procured by fraud, it may be prudent to place the Michigan Assigned Claims Plan on notice of this issue within one year from the date of loss. If, in the end, an appellate court rules that a no-fault insurer is entitled to rescind coverage under a fraudulently procured insurance policy, even though an innocent third party may be affected, the innocent third party will still continue to receive their benefits through the Michigan Assigned Claims Plan.

New Legislative Enactments

In late 2014, the lame duck legislature passed two bills that amend the Michigan No-Fault Insurance Act in a number of important respects, which are discussed separately below.

2014 PA 489

Public Act 489, effective January 13, 2015, modifies the "Unlawful Taking" exclusion set forth in MCL 500.3113(a) and the Non-Resident exclusion set forth in MCL 500.3113(c). It also adds a new exclusion for "Named Excluded Drivers."

The "Unlawful Taking" exclusion now reads:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> (a) The person was willingly operating or willingly using a motor vehicle or motorcycle that was taken unlawfully, and the person knew or should have known that the motor vehicle or motorcycle was taken unlawfully.

This enactment appears to have been taken in response to the Michigan Supreme Court's decision in *Rambin v Allstate Ins Co*, 495 Mich 316, 852 NW2d 34 (2014), where plaintiff claimed that he did not know the motorcycle that he was riding had been stolen. The action also appears to have been taken in response to a number of earlier Court of Appeals decisions where passengers who were occupants of a stolen vehicle would be able to claim benefits by simply claiming that they were not involved in the "unlawful taking" of the vehicle. Now, passengers who are riding in a vehicle with, say, a punched out ignition switch (or other tell-tale signs of a stolen vehicle) will be barred from recovering no-fault benefits.

The amendment to MCL 500.3113(c), involving the Non-Resident exclusion, was designed to legislatively reverse the Court of Appeals' decision in *Perkins v Auto-Owners Ins Co*, 301 Mich App 658, 837 NW2d 32 (2013). In *Perkins*, a Kentucky motorcyclist was operating his motorcycle in the State of Michigan when he was involved in an accident with a Michigan resident insured by Auto-Owners Insurance Company. Perkins' motorcycle was insured by Progressive Northern Insurance Company, which did not file a certification under MCL 500.3163(1) or (2). However, Mr. Perkins owned a motor vehicle in Kentucky that was insured with State Farm. The prior version of MCL 500.3113(c) precluded recovery of Michigan no-fault benefits if:

> The person who is not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and was not insured by an insurer which has filed a certification in compliance with §3163.

In *Perkins*, the Court of Appeals held that the term "insurer," as utilized in the last clause of MCL 500.3113(c), modified the noun "the person" that appears at the beginning of the statute. Therefore, because the "person" (Perkins) was "insured by an insurer which has filed a Certification in compliance with §3163" (State Farm), Perkins was eligible to recover Michigan no-fault insurance benefits.

This holding has now been overruled, and the insurance requirement is now tied to the specific vehicle being operated by the non-resident. The current version of MCL 500.3113(c) now precludes Michigan no-fault benefits if:

> The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and the motor vehicle or motorcycle was not insured by an insurer that has filed a certification in compliance with §3163.

Accordingly, the loophole created by the legislature when it originally drafted MCL 500.3113(c) has now been closed.

Finally, 2014 PA 489 adds an entirely new exclusion. This amendment precludes an individual from recovering Michigan no-fault insurance benefits if:

> The person was operating a motor vehicle or motorcycle as to which he or she was named as an excluded operator as allowed under §3009(2).

This provision is designed to legislatively overrule Insurance Bulletin 79-11, where the Insurance Commissioner had ruled that, except for owners of motor vehicles who designated themselves as a "Named Excluded Driver" under the policy, the "Named Excluded Driver" provision could not be used to preclude a claim for no-fault benefits incurred by that "Named Excluded Driver." As a result, youthful drivers who may have been using the family vehicle under which they were designated as a "Named Excluded Driver" could still recover no-fault benefits (assuming that they were not regular operators of that vehicle) even though the insurer would not be obligated to afford liability coverage for any accidents involving that vehicle. In light of this amendment, anyone who is operating a motor vehicle while a "Named Excluded Driver" is now barred from recovering PIP benefits, regardless of how often they were operating the motor vehicle.

Again, these changes took effect on January 13, 2015.

2014 PA 492

This legislative enactment added a number of new definitions to the No-Fault Insurance Act. These changes likewise took effect on January 13, 2015.

As a result, certain devices that can be operated on a public highway and are powered by something other than muscular power are no longer considered to be "motor vehicles." Furthermore, this legislation adds a statutory or constructive "ownership" definition for motorcycles.

No-fault practitioners are already aware that a "motor vehicle" does not include motorcycles, mopeds, farm tractors or other implements of husbandry, or ORVs. Three more items have been added to the list of things that are not "motor vehicles" under the Michigan No-Fault Insurance Act, and are thus not required to be insured if they are operated on the public highways of this state. These additional items include golf carts, "power-driven mobility devices" and "commercial quadricycles." See MCL 500.3101(2)(h)(v), (vi) and (vii).

A "golf cart" is defined as "a vehicle designed for transportation while playing the game of golf." See MCL 500.3101(2)(c). A "power-driven mobility device" is defined as "a wheelchair or other mobility device powered by a battery, fuel, or other engine and designed to be used by an individual with a mobility disability for the purpose of locomotion." See MCL 500.3101(2)(l). Finally, a "commercial quadricycle" is defined as a vehicle which has "fully operative pedals for propulsion entirely by human power," has "at least four wheels and is operated in a manner similar to a bicycle" and is powered "either by passenger providing pedal power to the drive train of the vehicle or by a motor capable of propelling the vehicle in the absence of human power." See MCL 500.3101(2)(b).

With regard to the definition of the term "owner," previously set forth in MCL 500.3101(2)(h)(i), the provision regarding those individuals who "have the use" of a motor vehicle for a period of time greater than thirty days remains unchanged, except for being re-designated as MCL 500.3101(2)(k)(i). This definition of the term "owner" is reproduced below:

A person renting a motor vehicle or having the use of a motor vehicle, under a lease or otherwise, for a period that is greater than 30 days.

However, with regard to motorcycles, the legislature added the following definition, which provides more specificity regarding the criteria used to determine whether or not one is a statutory or constructive "owner" of a motorcycle:

> A person renting a motorcycle or having the use of a motorcycle under a lease for a period that is greater than 30 days, or otherwise for a period that is greater than 30 consecutive days. A person who borrows a motorcycle for a period that is less than 30 consecutive days with the consent of the owner is not an owner under this subparagraph.

This provision legislatively overrules the Court of Appeals' earlier decision in *Auto Owners v Hoadley*, 201 Mich App 555, 506 NW 2d 595 (1993), which held that the only "owner" of a motorcycle was one who "holds the legal title" to the motorcycle. This was because prior to this recent amendment, the "having the use" definition of the term "owner" pertained only to "motor vehicles" and, as we all know, motorcycles are not "motor vehicles" for purposes of the No-Fault Insurance Act.

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September 15	Board Meeting – Okemos
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October 7-11	DRI Annual Meeting – Washington, D.C.
October 7-9	SBM Annual Meeting – Novi Expo Center
November 12	Past Presidents Dinner – Sheraton, Novi
November 13	Winter Meeting – Sheraton, Novi

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May 12-14	Annual Meeting – The Atheneum, Greektown
September 21	Respected Advocate Award Presentation – Grand Rapids
September 21-23	SBM Annual Meeting – Grand Rapids
October 19-23	DRI Annual Meeting – Boston
November 10	Past Presidents Dinner – Sheraton, Novi
November 11	Winter Meeting – Sheraton, Novi

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Back in Proportion:

The Scope of Discovery Under Proposed Federal Rule 26(b)(1)

By: Tom Isaacs and Jodi Schebel, *Seipp, Flick & Hosley LLP*

Discovery costs in the digital age continue to reach new heights, with substantial effects not only on parties' litigation strategies but on their ability to litigate at all. As the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has reported, recent surveys of plaintiff and defense attorneys suggest that as many as 94% of practitioners in small cases and 41% of practitioners in large cases believe that litigation costs are disproportionate to the value of their cases, and nearly 60% of attorneys report that at least one client settled a case they would not have but for their excessive litigation costs, including discovery.[1]

Another survey found that nearly half of all lawyers believe that discovery is abused in nearly every case.[2] Indeed, as the Rules Committee concluded, practitioners generally believe that civil litigation costs too much and takes too long, with one of the primary culprits being excessive discovery.[3] These findings point to overly broad discovery as a malignant and persistent problem in civil litigation.

The proposed amendments to Federal Rule 26(b)(1) attempt to address the issue of unbounded discovery in several ways, including by eliminating the phrase "reasonably calculated to lead to the discovery of admissible evidence" from the scope of discovery and removing language regarding the discovery of sources of information.[4] But the problem of excessive discovery may be most directly tackled by the provisions of proposed Rule 26(b)(1) that explicitly make proportionality a factor in determining the scope of discovery.

Proportionality as a Limitation in Discovery

Under current Rule 26(b)(1), discovery is allowed, within certain parameters, regarding any non-privileged matter that is relevant to any party's claim or defense.[5] And Rule 26(b)(2)(C) already contains a proportionality provision listing several factors that courts and parties are instructed to consider when determining the frequency and extent of discovery, including the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[6] But as the Rules Committee[7] and Sedona Conference[8] have observed, these proportionality factors are somewhat buried and are not highly enforced, and exceedingly broad discovery is ever more becoming the norm.[9]

The proposed amendments to Rule 26(b)(1), which the Supreme Court has recently approved, seek to change the status quo and limit the scope of discovery by putting a new emphasis on proportionality. Proposed Rule 26(b)(1) reads as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ***and*** *proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of*

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the discovery in resolving the issues, and whether the burden or expensive of the proposed discovery outweighs its likely benefit.[10]

The proposed Rule highlights proportionality by moving and re-ordering the factors formerly located in Rule 26(b)(2)(C) (and by adding one more factor – the "parties' relative access to relevant information") directly into the scope of discovery as defined by Rule 26(b)(1). This change breathes new life into the proportionality standard, making it, in the words of the Rules Committee, an "explicit component of the scope of discovery, requiring parties and courts alike to consider them when pursuing discovery and resolving discovery disputes."[11]

Proposed Rule 26(b)(1) aims to clarify and, in effect, restrict the scope of discovery in order to ensure the just, speedy, and inexpensive determination of every action. The Rule's limiting effect on discovery is exemplified by one of the primary public concerns the Rules Committee considered – and ultimately dismissed – when discussing the proposal: namely, that proportionality would now be used as a new limit on discovery that would favor defendants.[12]

Adair v. EQT Production Co. – A Sign of Things to Come?

Although this proposed change to Rule 26(b)(1) has yet to be officially implemented, at least one court has offered a potential "sneak preview" of its application. In *Adair v. EQT Production Co*., 2015 WL 505650 (W.D. Va. 2015), the United States District Court for the Western District of Virginia partially relied on the reenergized proportionality standard in proposed Rule 26(b)(1) to limit discovery.

The class plaintiffs in *Adair* sought additional discovery on purported class certification issues.[13] The defendants opposed further discovery, asserting that the discovery sought was burdensome in light of the expenses the parties already incurred during discovery and because the discovery did not address the class certification questions at issue – in essence, a proportionality argument.[14] The court agreed with the defendants, recognizing that discovery "must be measured against the yardstick of proportionality."[15]

Importantly, when discussing proportionality, the court cited proposed Rule 26(b)(1), noting that although the proposal has not yet been adopted, it "provides guidance as to the scope of discovery and emphasizes that discovery must be proportional to the needs of the case."[16] The court, relying on the proportionality standard, went on to find that the additional discovery was unwarranted, primarily because the burden on the defendants to respond outweighed the conceivable benefits to the plaintiffs.[17]

Whether the *Adair* decision foreshadows a future where discovery is more constrained by proportionality remains to be seen. But even if other courts are not as eager as *Adair* to fully embrace and utilize the rejuvenated proportionality factors, at the very least the proposed changes will draw new attention to the limits on discovery imposed by proportionality and should influence courts to take a closer look at proportionality where they may not have before. And parties and clients concerned about excessive discovery stand to benefit from proposed Rule 26(b)(1) in a number of other ways.

For example, the proposed Rule gives litigants a further opportunity to object to and try to preclude overly broad discovery. The Rule also provides additional leverage for parties during the meet and confer process, as proportionality should take center stage when weighing the appropriateness of discovery. Such developments – even if incremental - can only be good news for practitioners and clients alike concerned about the excessive scope and cost of discovery.

The proposed Rule, of course, has not yet been implemented, so the precise manner in which it will be interpreted by litigants and applied by the courts remains unknown. Yet the early signs are encouraging. The Rules Committee recognized that there is a persistent problem with the ever increasing costs of discovery, and is attempting to address the problem with the rule change. And at least one federal court has already referenced the proposed Rule 26(b)(1) in limiting a party's ability to take discovery. The practical result of the rule change, therefore, may be that courts more actively manage and potentially limit discovery, and parties who find that the results of their cases are influenced more by discovery costs than the merits of the action obtain some relief.

Endnotes

1 *Report of the Proceedings of the Jud. Conf. of the U.S.,* Rules App. B–6, B-7 (Sept. 2014).
2 *Id.* at App. B-6.
3 *Id.*
4 Id. at App. B–4.
5 Fed. R. Civ. P. 26(b)(1).
6 Fed. R. Civ. P. 26(b)(2)(C).
7 *Report of the Proceedings of the Jud. Conf. of the U.S.,* Rules App. B–7-8 (Sept. 2014).
8 *The Sedona Conference Journal*, Volume 11, Fall 2010 at 293.
9 See *Report of the Proceedings of the Jud. Conf. of the U.S.,* Rules App. B–6 (Sept. 2014), where the Rules Committee analyzes a survey that found "more lawyers agreed than disagreed with the proposition that judges do not enforce Rule 26(b)(2)(C) to limit discovery."
10 *Id.* at App. B–30 at 10 (proposed language emphasized).
11 *Id.* at App. B-8.
12 *Id.* at App. B-5.
13 2015 WL 505650 at *4.
14 *Id.* at *5.
15 *Id.*
16 *Id.* at fn 3.
17 *Id.* at *5.

The Internet and Municipal Broadband Network Systems

By: Michael J. Watza, *Kitch Drutchas Wagner Valitutti & Sherbrook, P.C*

Executive Summary

The Federal Communications Commission ("FCC") recently issued the Open Internet Order and the companion FCC Municipal Broadband Order on March 12, 2015. With these orders, the FCC has enacted strong rules to ensure that individuals reap the economic, social, and civic benefits of the internet. These orders will have a significant impact on the use of and access to the internet and will greatly impact municipalities, in particular, in the future.

The original intent of this article when it was conceived in the Summer and Fall of 2014 was to identify and discuss briefly a variety of recent and anticipated changes in telecommunications law as they affect municipalities. Roughly 1000 pages of new FCC orders and rulings, combined with recent Michigan law, have compelled the narrowing of the focus of this article to that of the title alone, thus proving the 1995 quote foreshadowing the development of the internet and its impact on "everything."

It is important to note, however, that a host of other issues recently have developed in the area of telecommunications. These issues all deserve more than a footnote given their impacts on local communities, but such is where they have ended up here, simply in an effort to provide some general information regarding issues to watch for in the future, even absent adequate explanation. We leave these issues for discussion in future articles.2

Included here is a simple summary of the March 12, 2015 FCC Open Internet Order,3 as well as the companion FCC Municipal Broadband Order,4 and some comments regarding their potential impact on various policy issues.

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Mr. Watza also serves as general counsel to PROTEC and the Mobile Technology Association of Michigan, Special Projects Counsel to the Michigan Municipal Risk Management Authority, and board member to the Michigan Gaming Control Board, Chairman of the Novi EDC, Chairman of Attorney Grievance Commission Grievance Panel #9, and Chair of the Public Corporation Law Section of the State Bar and Chairman of the International Municipal Lawyers Technology Committee.

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In 2013, Mr. Watza provided the legal components to the development of the first new Michigan Municipal Fiber to the home and business (FTTH) project.

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"The internet changes everything"[1]

The FCC Open Internet Order

The Commission's long awaited 400 page open internet submission, including its 282-page order and 1777 footnotes, as well as certain appendices and supportive and dissenting comments, can be boiled down to just five points included in just a few pages of the order. All five of the primary rules emanate from the FCC invocation of Title II of the Federal Communications Act, which is how our landline-based phone companies are still largely governed.[5]

The first three rules are referred to in the order as bright-line rules, the fourth rule is considered a "General Conduct Rule," and the fifth rule is a reiteration of an earlier transparency rule which was upheld in the recent Federal DC Appeals Court Ruling.[6]

These few Open Internet Rules now include:

1. "No-blocking" of lawful content.
2. "No-Throttling" or "impairing or degrading lawful internet traffic on the basis of content, application[s], service or use."
3. "No-Paid Prioritization" but for those instances subject to "narrow waiver."

4. A "No-Unreasonable Interference/Disadvantage Standard," designed primarily to protect the innocent consumer and edge providers from potentially harmful internet service provider ("ISP") conduct, to be decided on a case by case basis.
5. "Transparency Requirements" imposed upon ISP's to "disclose accurate information regarding network practices to consumers and edge providers, so they in turn can make informed choices regarding use of such services.[7]

These rules also are deemed to apply generally to mobile networks as well as landline or "fixed" systems.[8]

The FCC Municipal Broadband Order

Meanwhile, and particularly pertinent to telecommunications issues unique to municipalities, the FCC also struck down state laws in North Carolina and Tennessee that purported to limit the ability of municipalities to build and provide broadband fiber networks for the benefit of their own and neighboring residents.[9]

While Michigan's laws[10] imposing certain obstacles to municipal broadband networks were not specifically addressed in the FCC order, the statement of preemption applicable to North Carolina and Tennessee law is equally applicable here, in principle at the least. Whether it will actually be necessary for Michigan communities to specifically seek the shelter of a similar FCC order is as yet undetermined and hopefully, unnecessary.

By releasing two internet-related orders on March 12, 2015, the FCC has agreed to regulate the internet under Title II of the Federal Communications Act, and start the process of allowing some serious competition in the internet marketplace.

In the Open Internet Order, the FCC has started to address a very urgent subject in this country concerning the state of our internet access, both in terms of speed and cost for small business and residents alike. Up to this point, the internet has been "regulated" almost exclusively by the monopolies that own the wires (often referred to as "the pipes") connecting all of us to the internet. These include AT&T, Comcast, Verizon, Charter and Time Warner, for the most part, in their own respective territories. Without competition, there has been no incentive for these monopolies to upgrade their networks or to keep prices fair and reasonable. As a result, the U.S. has fallen from first in Broadband speak to thirty-fifth globally.[11]

This point is driven home by the fact that South Korean school children this year are scheduled to fully abandon their textbooks for entirely electronic notebooks or similar network dependent devices, given that every home in that country is now connected with high speed low cost fiber networks.[12]

By invoking the Commission's historic telecommunications regulatory jurisdiction, as suggested by the U.S. DC Circuit Court of Appeals last year, the Open Internet Order now imposes firm rules on these monopolies regarding a variety of actual and potential abuses of internet end users like you and I, as well as the interests of what are known as "edge users," or those larger entities that populate the internet with many of the products and applications we wish to use (e.g., Google, Netflix, etc.).

There have been a number of public fights between these two groups over additional fees or premiums the wire owners want to charge these large bandwidth users. The resulting differential is sometimes referred to as the creation of fast and slow lanes. Consumers like us and edge providers argued this was a double dip by the monopolist providers holding all the connective wires between all internet users.

The FCC now appears to have barred this parceling out of the internet and what would likely have resulted in internet-based haves and have-nots, where the haves would (and in some cases already did) pay for greater speed and access of their products versus the have-nots – the newer or smaller entrepreneurs who could not afford these faster lanes and therefore would be shut out of the internet-based marketplace. The end of fast and slow lanes should be largely resolved now, which seems to be a good thing for ultimate users and consumers.

And while the FCC backed away from directly imposing internet rate regulation for the benefit of consumers in its Open Internet Order, what the FCC left on the cutting room floor in the Title II Order, it provided more quietly in the companion proceeding concerning the encouragement and unshackling from restrictive state laws of Municipal Broadband Networks. Across the country, more than 100 communities have built their own internet access systems or partnered with private entities to achieve the same goal in the face of overpriced and slow bandwidth internet access offered by monopoly providers.[13]

This is a similar model followed by communities 100 years ago in the face of similar problems with the electric industry's slow provision of that essential service at a reasonable pace and price.

However many communities interested in building their own broadband systems have been stymied by state laws written by and for the very "influential" provider industry, which

either barred such systems or imposed onerous conditions on same. Michigan is one of a couple dozen States with these types of laws. By striking down such laws, the FCC has authorized and encouraged a very significant economic tool for these communities. And, perhaps most importantly, by now freeing these communities to build on their own or partner with such high speed and low cost internet-friendly private partners as Google, which has been actively pursuing such systems where incumbent monopoly providers have not, it is clear that the FCC is aggressively supporting rate control by the best alternative option in a free market: Competition!

In fact, Michigan already has its first Gigabit Community Network in Sebewaing, and there is now talk of a new private network in Detroit with Dan Gilbert's Rocket Fiber. The Midwest Energy Cooperative near Adrian, Michigan also is actively pursuing similar plans.

One important partner in all this in the State of Michigan is the Merit Network. In Michigan and some other states where an organization of universities known as GIG-U exists, we also have another advantage in the form of a State University Internet Back Bone (think large fiber-based networks available to communities at or near cost). The Merit Network is available to assist with ubiquitous internet access in any Michigan community, whether seeking a wholly owned broadband system or a public private partnership. This additional partnership opportunity should further spur the monopoly providers both to build the high speed systems needed and to keep prices reasonable.

A Note on Municipal WIFI

Municipal WIFI can be a good beginning to a community internet access network. Though not capable of the hi-speeds provided by fiber networks, a number of Municipal sponsored and operated WIFI systems are popping up around Michigan. Traverse City, for example, has such a system at or near operational status. The rules applicable to the installation of wired networks are not necessarily the same as land-line networks, but care should be taken in establishing these hybrid systems nonetheless.

Endnotes

1 Business Week, December 4, 1995, quoting J. Neil Weintraut, managing director for technology research at Hambrecht & Quist Inc.

2 **I. Cell Towers:**

(a) FCC Treatment of Distributed Antenna Systems ("DAS") and small cell towers popping up in municipal rights of way along with accompanying support structures, FCC Acceleration of Broadband by Wireless Report and Order Dated October 17, 2014, Released October 21, 2014 See http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1021/FCC-14-153A1.pdf, interpreting in part Section 6409 of the MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT OF 2012 PUBLIC LAW 112–96—FEB. 22, 2012 adding 47 USC 1455 http://www.gpo.gov/fdsys/pkg/PLAW-112publ96/pdf/PLAW-112publ96.pdf,

(b) As well as a needed analysis of the interplay between these federal pronouncements and recently enacted Michigan law changes including: Public Safety Towers 2014 PA 564; MCL 28.283 et seq, HAM Radio Towers 2014 PA 556;125.3205(a) and a 2012 zoning amendment affecting collocation on Michigan based cell towers 2012 PA 143;MCL 125.3514 as amended, and Michigan Metro Authority Determination #1 at http://www.michigan.gov/documents/Distributed_Antennae_Network_Systems_126177_7.pdf, as well as the fact the Metro Authority is no more, since creation of the Local Community Stabilization Authority pursuant to 2014 PA 86/88.

II. Cable Law: Including:

(a) A discussion of the $26.7 million dollar settlement of the *US District Court ED Detroit v Comcast* litigation as well as discussion of the Michigan Attorney General's position in the case regarding the ability of local communities to reject the Uniform Video Services Local Franchise Act 2006 PA 480; MCL 484.3301 et seq,

(b) A review or comment on the status of the Comcast/TimeWarner Merger and related Midwest Cable Co./Charter "deals,"

(c) Review of the status of the AT&T audit being conducted by a dozen Michigan communities and finally, a look at the currently pending FCC MVPD NPRM in MB Docket No. 14-261, which could redefine the definition of cable and over the top (IP based) video to the benefit or great detriment of local government revenues.

3 *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28.

4 *In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340, et seq.*, WC Docket No.14-115; and *The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket No. 14-116.

5 47 USC 201, et seq; see also 47 USC 154. Interesting too will be the impact of the FCC internet regulation under Title II upon Michigan's 2014 effort to deregulate local phone service requirements, scheduled to occur January 1, 2017. 2014 PA 52; MCL 484.2313, et seq.

6 *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17911, para. 14 (2010) (*2010 Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

7 FCC open Internet Order supra, primarily at sec C. par's 104-109, pp 45-47 but explained further thru par 185 p. 82.

8 FCC Open Internet Order, supra at par 88 p. 35.

9 *The Electric Power Board of Chattanooga et al*, *supra*.

10 MCL 484.3114 and 484.2252.

11 The Global Competitiveness Report 2013–2014, World Economic Forum, 2013.

12 Technology, Broadband and Education: Advancing the Education for All Agenda, A report by the Broadband Commission, United Nations (2013).

13 Broadband Networks Institute for Local Self-Reliance http://www.muninetworks.org.

Legal Trends:
Employer Criminal Background Check Policies

By: Patricia Nemeth and Kellen T. Myers, *Nemeth Law*

In December, Michigan enacted two laws which impact employers' criminal background check procedures. The first law requires that the Michigan Department of Corrections issue "Certificates of Employability" to ex-convicts upon their release from prison if they meet certain criteria. The second law makes it easier for offenders to expunge their records.

The purpose of these laws is to increase employment opportunities for ex-convicts. Nearly 30 percent of adult Americans have criminal records according to the Michigan House Committee on Criminal Justice. Studies have also shown that approximately two-thirds of employers will not knowingly hire a person with a criminal conviction. As a result, ex-convicts often have little to no job prospects for years after their release leading many to again engage in criminal behavior. The new laws attempt to balance employers' legitimate concerns in hiring ex-convicts with ex-convicts' ability to find jobs.

Michigan's Recent Legislative Action to Increase Job Prospects of Ex-Convicts

Michigan's Certificate of Employability Requirements and Limitations (Public Act 359 of 2014)

Under the new certificate of employability law, upon release from prison an ex-convict that meets certain criteria will receive a certificate of employability from the Michigan Department of Corrections. The following factors, among others, are considered:

- The criminal history of the prisoner.
- The institutional history of the prisoner (misconduct, successful completion of counseling, attainment of a GED or other educational degree).
- The job skills of the applicant, including institutional work record.
- Other information considered relevant by the department.

While some employers legally obligated cannot hire a person convicted of certain crimes, other employers choose not to hire an individual with a criminal record due to concerns about liability (negligent hiring/retention). The new certificate of employability law provides employers with extra defenses when hiring an ex-convict.

For example, in the event of a lawsuit, employers who knowingly hire an ex-convict with a certificate of employability can rely on the certificate as evidence that the employer exercised due care and acted in good faith when the employer hired or retained the ex-convict. In a lawsuit requiring proof that the employer acted negligently in hiring/retaining the ex-convict, employers can use the certificate to ***conclusively establish*** the employer did not act negligently.

Importantly, if the employer becomes aware that an ex-convict with a certificate of employability subsequently demonstrates that s/he is a danger to individuals or

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property, or is convicted/pleads guilty to a felony, and the employer retains the employee, the employer cannot then rely conclusively on the certificate.

An employer is not legally required to hire an ex-convict that has a certificate of employability. Likewise, an employer required to conduct a background check by another law (such as in healthcare or education), is not relieved of the responsibility to conduct a background check by the new law.

Michigan's Second-Chance Criminal Legislation (Public Act 463 of 2014)

Prior to this law, Michigan had some of the most restrictive requirements in the nation for setting aside criminal convictions. Previously, a person with only one criminal conviction could apply to have that conviction expunged five years from the date of the sentencing or the completion of the imprisonment (whichever was later) but only if that was the sole conviction on the person's record. There was also a limited exception which allowed expunction if a person had, at most, two other convictions which were minor offenses (those with maximum sentences of 90 days in jail or a fine of $1,000 and happened when the person was age 21 or younger). Only certain convictions could be set aside. Criminal sexual conduct, felonies punishable by life imprisonment, and traffic offenses could not be expunged.

The new law, dubbed the "second-chance" law, allows for multiple criminal records to be expunged in a single application. Now, in addition to allowing expunction for an individual with only one criminal conviction, the legislation allows expunction of a criminal record for a person who has two or less misdemeanors (no longer limited to minor offenses), and allows for two misdemeanor convictions to be expunged in a single petition. The law still requires a five year waiting period. It also adds new categories which cannot be expunged, including felony convictions for domestic violence, certain traffic offenses such as operating while intoxicated, and criminal sexual conduct in the fourth degree.

What does an expunged criminal record mean to an employer considering whether to hire an ex-convict? If an ex-convict is able to expunge her/his criminal record it means there is no public record and nothing will show up on a background check (the record is still available to certain government branches including law enforcement agencies if the individual applies for employment). Such a record would not be subject to Freedom of Information Act ("FOIA") requests.

Significantly, there is nothing in the legislation that makes it unlawful for an ex-convict with an expunged criminal record to answer "No" when asked if they have ever been convicted of a crime; nor is there anything explicit in the statute (as there is in some states) that affirmatively allows a person with an expunged record to respond to such inquiries as though the conviction never occurred. As such, it likely is not unlawful or a misrepresentation by the ex-convict to withhold or deny information of a criminal record that has been expunged.

Employer Considerations

The new laws in Michigan are one way that Michigan is trying to decrease recidivism rates. While it is clear that a lower recidivism rate is beneficial for everyone – both for employers and employees, and for society as a whole, the new laws place greater burdens on employers with little incentive to shoulder these burdens. The key question then, is whether the cost of reducing recidivism and helping the job prospects of ex-convicts should be placed at the feet of employers or may be better addressed in a different way.

Whether these laws will be effective remains to be seen. Employers that currently exclude individuals with criminal backgrounds for legitimate business reasons for certain jobs (or because required by law), likely will not hire an ex-convict simply because s/he has a certificate of employability.

For employers, it is important to continue to follow the changing legal landscape relating to criminal background checks. There is an emphasis in Michigan and throughout the country to reduce recidivism rates, enhance job prospects for ex-convicts, and to require that employers place less emphasis on a job applicant's criminal record when hiring.

Employers reviewing their criminal background check policies should also look at the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records. These guidelines state that an employer should:

- Eliminate policies that wholly exclude people from employment based on ***any*** criminal record.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct that is job related to the position in question and consistent with business necessity.
- Determine the duration of exclusions for criminal conduct based on all available evidence and include an ***individualized assessment*** for each applicant.
- Record the justification for the policy and procedures.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.
- Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with state and federal anti-discrimination laws.

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Photos from the event:

By: Kyle Platt
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Technology Corner:
Hackcess to Justice, Venmo, and iTriage Health App

Hackcess to Justice

The Hackcess to Justice is a hackathon put on by the ABA Journal. For those of you who do not know what a hackathon is, it is an event where computer programmers and others come together to collaborate intensively on projects, usually for several days. This hackathon started because of the actions taken by The Legal Service Corporation.

The Legal Service Corporation got together with more than 75 people of many disciplines for two sessions in 2012 and 2013 to delve into the ways technology can benefit justice. A couple of months after the second session, they released a "Report of the Summit on the Use of Technology to Expand Access to Justice," which portrayed five main strategies to achieve this goal. The strategies they came up with are the following:

- Creating in eacha state a unified "legal portal" which directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process.
- Deploying sophisticated document assembly applications to support the creation of legal documents by service providers and by litigants themselves.
- Taking advantage of mobile technologies to reach more people more effectively.
- Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable.
- Developing "expert systems" to assist lawyers and other services providers to get access to authoritative knowledge through a computer and apply it to particular factual situations.

The Hackcess to Justice had its first hackfest in Boston, Massachusetts on August 7th and 8th of 2014. The top three hacks were awarded a cash prize. First place received $1,500, second received $1,000, and third was awarded $500. The second hackathon took place March 21st and 22nd of 2015 in New Orleans, Louisiana. This was co-directed by the ABA and Louisiana State Bar Association.

The Hackcess to Justice has a twitter account where they tweet interesting articles and upcoming events that relate to the legal industry and technology. I recommend following this account; it could lead you to some very helpful information or tools.

Venmo

Have you ever been in a situation where you needed to send/receive money to/from someone but it was a very complicated process? Personally, I have had this challenge multiple times being I live over an hour away from any of my family members. A company called Venmo believes they have the solution to this.

Venmo is a payment sharing application that allows you to send or request money for free. It is similar to PayPal, which actually owns Venmo, but puts a twist on money transfers by making it into a social media app that is simpler, faster, and feeless. Transactions can be shared publicly, to friends, or just with the two parties involved. Don't worry, the amount is not shared; only the two people involved and the message attached to the transaction is displayed.

There is a public feed, friend feed, and personal feed on your user face. On these feeds you can like and comment on transactions shown. Venmo, along with many users, see this as a fun way to track your spending and keep record of memories you've made with certain people. Others find this somewhat creepy because by looking at someone's transactions you could get an idea of who they are with and what they are doing. For those of you who think like this remember there is the private transaction system available.

When they say free transactions they mean it for the most part, but there are outliers to be aware of. Credit cards and non-major debit cards are charged a 3% processing fee per transaction, but most debit cards and all bank accounts are totally free. Most transaction processing companies charge around 3% or more for all debit and credit cards, which Venmo is using as a large competitive advantage.

To give you an idea of the process in a real situation, I setup a Venmo with my bank account and had my mom set one up with her debit card. The photo below shows my feed with the transaction on it after I sent it. I sent my lovely mother five dollars for a coffee to pay it forward for all she does for me. As you can see there is the description with the coffee emoji, the two parties, who are my mom and me, the date, and the price. This was a public transfer so anyone can poten-

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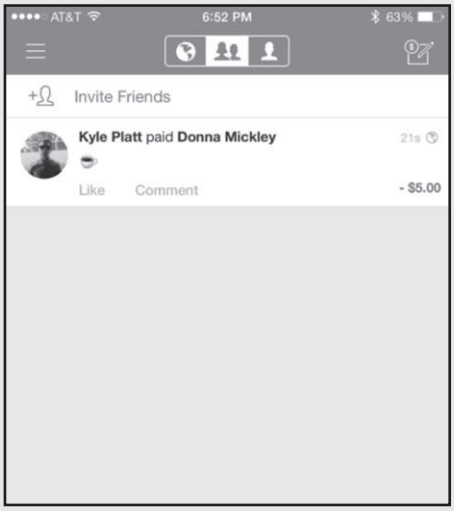
Health is a very important part of all of our lives. A very convenient and useful tool to track and search many aspects of your health is the iTriage health app.

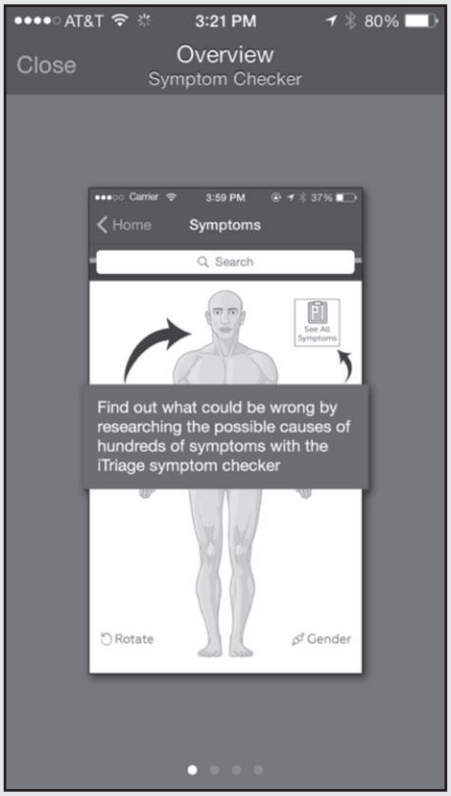
tially see it, but that five dollars is only shown to my mother and me.



Coffee breaks and restaurants seem to be a very common use for Venmo. Other common uses are taxi rides, rent to landlords, and recently, payments for NCAA March Madness Brackets.

An illegal use that has came up within Venmo and has resulted in an arrest is the use of selling illegal drugs. A Columbia University student was arrested in early April for selling drugs through the app. He had over 270 public transactions on his feed that gave some pretty obvious clues on what he was doing. One student told capitalnewyork.com that he had one rule, and that was that the "description has to be funny." The list of transactions included, "To puff a butterfly," "Kale salad," "Cooking supplies," "Snoop Dogg's shizzle," and an array of many more descriptions. Although they could not prove the drug charges through Venmo, he was charged with four accounts of possession.

Other than this case the app has been doing great things. Helping friends and family members transfer money at a quick rate with no charge is awesome in my opinion. I often tell my friends or family to download Venmo if we go out to eat or if they need to borrow some money. It cuts out the trip to the bank or ATM and saves some of my time. So if you believe an app like this can make your life more efficient you may want to try using Venmo next time a situation comes up where money needs to change hands.



iTriage Health App

Health is a very important part of all of our lives. A very convenient and useful tool to track and search many aspects of your health is the iTriage health app. The features of the app are symptoms, doctors, facilities, conditions, medications, procedures, My iTriage, hotlines, and news. I will explain my two favorite features, which are the symptoms section and the My iTriage section.

Within the symptoms area there is an interactive full body diagram that you can click on certain locations to see different symptoms for that part of the body. There is both male and female genders for the diagram. Also, you can rotate to the back of the human diagram to view symptoms like back pain. If you do not want to use the interactive version you can also view a full list of all the symptoms within the app. I think these diagrams are very cleaver and a cool way to be able to search certain symptoms depending on which part of the body you are concerned with.

The My iTriage area is where you can add any of your medications or conditions and all the other uses of the app for your own personal use. Health is a very in-depth study and for some people it can be challenging to keep track of medications, doctors, and conditions. The iTriage app can simplify all of this by adding it all into one area that you can simply check by pulling out your phone.

I highly recommend this app to people who could use some help managing their health information or who often find themselves doing research on different medications, procedures, or doctors. It really is a great source for general information and even personal information like recommended specialty doctors in your area. You can find the iTriage App on the Apple App Store and on Google Play.

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MDTC Legislative Report

In the first months of this new session, our legislators have proceeded at a moderate pace with the usual work on the next fiscal year's budget and selected items from the Republican wish list. Although substantial progress has been made on the budget, their work on that project has now become considerably more challenging and complex in the wake of the widely anticipated but still stunningly spectacular failure of Proposal 1, which will now require them to quickly come up with a new "Plan B" for fixing Michigan's crumbling roads and bridges.

A variety of possible explanations have been offered for the failure of the road funding proposal at the polls, but the post-mortem analysts are in general agreement that the voters were angry with the legislators of both parties for their failure to resolve the issue on their own. I've been watching the front lawn of the Capitol from my vantage point across the street, and have not yet seen any assembly of electors with torches and pitchforks, but there has been a sheepish acknowledgement that our legislators had better plan on doing some additional work over the summer, in lieu of the traditional summer recess, to get the road funding issue resolved. A number of alternatives have been discussed, with most legislators expressing a preference for raising most of the necessary funding by means of additional budget cuts. How all of this will be resolved, if indeed it can be resolved this time around, remains to be seen.

2014 Public Acts

When the dust finally settled from last year's session, there were 572 Public Acts of 2014. Many of these were the product of last fall's lame duck session, and thus, although the Legislature got off to its customarily deliberate start in the first days of the new session, the Governor was busy; 95 of the new Public Acts of 2014 were approved after my last report in January, and 20 of the bills passed in the lame duck session were vetoed. The new 2014 Public Acts of interest include:

2014 PA 478 – Senate Bill 74 (Anderson – D), which has amended the Revised School Code, MCL 380.1310b, to **include "cyberbullying" within the statutory definition of "bullying" and requires school districts, intermediate school districts and public school academies to amend their anti-bullying policies required by that provision to include cyberbullying as a form of prohibited school bullying**.

2014 PA 489 – Senate Bill 1140 (Smith – D), which has amended the Insurance Code, MCL 500.3113, to **clarify the list of persons who are not entitled to receive PIP benefits.** As amended, the statute excludes a person who willingly operates or uses a motor vehicle or motorcycle that was taken unlawfully if the person knew, or should have known, that the motor vehicle or motorcycle was taken unlawfully. Also excluded is any person who, at the time of an accident, was operating a motor vehicle or motorcycle for which he or she was named as an excluded driver.

2014 PA 542 – Senate Bill 891 (Casperson – R), which has **amended several provisions** of Part 201 of the Natural Resources and Environmental Protection Act, **governing remediation of releases of hazardous substances**.

2014 PA Nos. 553 and 554 – Senate Bills 658 and 659 (Ananich – D). Effective

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Among the most notable changes are the elimination of the county gun boards and reassignment of their responsibility for processing and approval of concealed weapon licensing applications.

October 1, 2015, this legislation, sometimes referred to as the "Mainstreet Fairness Package," will **amend the General Sales Tax Act and the Use Tax Act to establish statutory presumptions to facilitate collection of sales and use tax on internet purchases and other remote sales**.

2015 Public Acts

As of this writing on May 13th, there are 20 Public Acts of 2015. The 2015 Public Acts of interest include:

2015 PA 3 – Senate Bill 34 (Green – R), which has effected numerous amendments to the Concealed Weapons Licensing Act, 1927 PA 372. Among the most notable changes are the **elimination of the county gun boards and reassignment of their responsibility for processing and approval of concealed weapon licensing applications**. Under the law as amended, applications will be filed with the county clerks, who will now have the responsibility for processing applications and issuance of licenses, but will have no discretion to deny issuance of a license to an applicant who satisfies the statutory criteria. Necessary investigation required to determine eligibility will be conducted by the Michigan State Police. The prompt enactment of this legislation was a response to Governor Snyder's veto of similar legislation passed in last fall's lame duck session for its failure to provide adequate protection against issuance of concealed weapon licenses to individuals subject to personal protection orders for prevention of domestic abuse.

2015 PA 12 – Senate Bill 54 (Casperson – R) and 2015 PA 13 – Senate Bill 55 (Pavlov – R), which have amended provisions of Part 401 of the Natural Resources and Environmental Protection Act to **prohibit the use of drones or other unmanned vehicles or devices in the air, or on or under the water, for the taking of fish or game, and to prohibit the use of any such devices to hinder or harass hunters or fishermen in their lawful pursuit of hunting or fishing activity**. These amendatory Acts will take effect on July 13, 2015.

2015 PA 14 – House Bill 4119 (Garcia – R), which has amended the Revised Judicature Act, MCL 600.4012, to provide that a **garnishment of periodic payments shall remain in effect until the balance of the judgment is satisfied** (as opposed to the 182-day limit specified in MCR 3.101) and establish new statutory procedures for processing and enforcement of such garnishments.

New Initiatives

The legislation now under consideration is a mixture of new initiatives and old business. The bills and resolutions of interest include:

Senate Bill 289 (O'Brien – R), which **would create a new "bad-faith patent infringement claims act" to provide new protections against "patent trolls"** – individuals or entities that assert unfounded claims of patent infringement in bad faith to extort payments of royalties from businesses which often feel compelled to acquiesce rather than bear the considerable cost of defending threatened infringement litigation. This bill was introduced on April 22, 2015, and referred to the Senate Judiciary Committee where it is expected to receive prompt consideration.

Senate Bill 248 (Hune – R), which proposes numerous amendments of the no-fault automobile insurance provisions of the Insurance Code. The main purpose of this legislation, which remains a priority for Governor Snyder, is to **achieve a reduction in the cost of no-fault insurance by adoption of provisions designed to save costs**. It carries forward some of the reforms proposed in the last session by House Bill 4612 (Lund – R), without the controversial cap on medical benefits which was largely responsible for the inability to garner the support required for final passage. Like last session's legislation, **SB 248 proposes new cost containment measures, including limitations on provider reimbursements and payments for attendant care services; creation of a new non-profit corporate entity to replace the existing Michigan Catastrophic Claims Association; and creation of a new Michigan Automobile Insurance Fraud Authority.**

This legislation was introduced on March 26, 2015, and referred to the Senate Committee on Insurance. In a move reminiscent of the lightning-swift passage of the Court of Claims legislation in October of 2013, the bill was added to the agenda of the Insurance Committee meeting of April 15th with virtually no notice to the public, and a Bill Substitute (S-2) was reported to the full Senate on that date with minimal testimony and discussion. The next day, before opposition could be effectively mobilized, the Senate suspended its rules to vote on final passage, and the bill was passed on a party-line vote. The bill was referred on the same day to the House Committee on Insurance, which reported the bill with a Bill Substitute (H-3)

The main purpose of this legislation, which remains a priority for Governor Snyder, is to achieve a reduction in the cost of no-fault insurance by adoption of provisions designed to save costs.

on April 23rd. The bill now awaits consideration by the full House on the Second Reading Calendar, but the momentum for quick passage appears to have stalled as parties in opposition have succeeded in peeling away some of the necessary Republican votes.

Senate Bill 3 (Robertson – R), which **would repeal the prevailing wage law, 1965 PA 166, which requires payment of the prevailing wages and benefits – the wages and benefits prevailing in the area – to construction workers employed for work on state projects.** Although Governor Snyder has stated that this legislation is not a part of his agenda, there has been renewed interest in the concept in the wake of the recent rejection of Proposal 1. The bill was reported with Bill Substitute (S-1) by the Committee on Michigan Competitiveness on May 13, 2015, and now awaits consideration by the full Senate.

Senate Bill 4 (Shirkey – R), which **proposes the creation of a new "Michigan religious freedom restoration act."** Governor Snyder has indicated that this is another bill that is not on his agenda, and in the wake of the recent uproar in Indiana over the passage of similar legislation there, he has elaborated on that position to say that he will veto this bill unless it comes to him with a companion bill extending the scope of the Elliott-Larsen Civil Rights Act to include protection against discrimination based upon sexual orientation or gender identity. This bill has been referred to the Senate Judiciary Committee, which held a hearing on the day that the challenges to the state constitutional ban of gay marriage was argued before the U.S. Supreme Court, but no vote was taken, and further consideration of the bill has not been scheduled to date.

Senate Joint Resolution J (Bieda – D), which **proposes an amendment of Const 1963, art 6, § 19, to eliminate the constitutional provision prohibiting election or appointment of a person to judicial office after age 70.**

What Do You Think?

Our 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

Michigan Defense Quarterly Publication Schedule

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

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Appellate Practice Report

Date of "Entry" of an Order or Judgment for Purposes of Appeal

Recently on the SBM Appellate Practice Section listserv, there was discussion about the date of "entry" of trial court judgments and orders for purposes of filing an appeal. Under MCR 7.204(A), "'entry' means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions." This means that if a judge signs a judgment or order on one day, but then the court clerk delays entering the order on the court's docket for a few days, the appellant in a civil case can rely on the later date in calculating the appeal periods under MCR 7.204(A)(1).

The definition of "entry" is different, however, when it comes to filing post-judgment motions in the trial court, which may toll the time to file an appeal (in the case of motions for new trial, for rehearing or reconsideration, or for other relief from the order or judgment appealed, MCR 7.204(A)(1)(b)), and which may even be necessary to preserve an issue for appeal. Under MCR 2.602(A)(2), the "date of signing an order or judgment is the date of entry."

The difference between these "entry" dates is summarized in 3 Longhofer, Michigan Court Rules Practice, § 2602.3 (6th ed):

> The date of entry of a judgment or order is very important. Several court rules provide for limited periods of time within which post-trial actions must be taken, with the time commencing upon "entry of judgment." MCR 2.602(A) specifies that judgments and orders are considered "entered" the date they are signed by the court, whether or not they are also filed with the clerk of the court on that date….
>
> For purposes of subchapter 7.200 of the MCR, which includes the important deadlines for taking appeals, "entry" is defined somewhat differently. Under MCR 7.204(A), "entry" means "the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions."

One final note of caution. While MCR 2.602 and MCR 7.204 focus on the date of "entry" of a circuit court judgment or order and the timing for filing an appeal from circuit court to the Court of Appeals, other triggering dates may apply in appeals from specialized tribunals or administrative agencies. See, e.g., MCR 7.116(B) (providing that appeals to the circuit court under the Michigan Employment Security Act must be filed "within 30 days after the mailing of the commission's decision"). Thus, it is important to consult the rules that apply to the particular court, tribunal, or agency from which an appeal is being taken to determine where and when the appeal should be filed.

Precedential Value of Published Court of Appeals Decisions That Conflict With Supreme Court Precedents

MCR 7.215(J)(1) provides that "[a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued

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But what if the prior decision was itself contrary to other binding precedents? Does a subsequent Court of Appeals panel still have to follow it? The answer would appear to be "no."

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 if the prior decision was itself contrary to other binding precedents? Does a subsequent Court of Appeals panel still have to follow it? The answer would appear to be "no."

While MCR 7.215(J)(1) governs a Court of Appeals panel's obligation to follow the published decision of a prior panel, this necessarily assumes that the prior decision "established" a "rule of law." This cannot be the case if there was already *existing* precedent that the prior decision itself failed to follow. If, for example, the prior opinion conflicts with case law from the Supreme Court, *those* decisions must be followed notwithstanding MCR 7.215(J)(1). See *Hauser v Reilly*, 212 Mich App 184, 187; 536 NW2d 865 (1995) ("A decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself.").

The Court of Appeals' decision in *Ostroth v Warren Regency GP, LLC*, 263 Mich App 1; 687 NW2d 309 (2004), illustrates this. In *Ostroth*, the Court of Appeals considered whether it was bound by its prior decision in *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994), on an issue involving application of the statute of repose and statute of limitations for negligence actions against architects, contractors, and engineers. The *Ostroth* panel acknowledged that, as a general matter, MCR 7.215(J)(1) would require it to follow *Witherspoon*. The problem, however, was that *Witherspoon* was contrary to the Supreme Court's decision in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). *Ostroth* thus concluded that "[p]ursuant to the doctrine of stare decisis," it had to reject *Witherspoon*. See also *Oliver v Perry*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 2011 (Docket No. 296871) (declining to follow otherwise binding Court of Appeals decisions in light of a contrary Supreme Court order).

The same can be said about a published Court of Appeals decision that does not follow controlling precedents from that Court. In *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 234 (2009), the Court of Appeals considered the "current viability of the continuing wrongs doctrine in the context of nuisance and trespass claims." *Id.* at 282. *Froling Trust* observed that while a prior panel in *Schaendorf v Consumers Energy Co*, 275 Mich App 507; 739 NW2d 402 (2007), had already concluded that "the continuing-wrongful-acts doctrine is no longer viable with respect to claims arising beyond the period of limitations," and applied its ruling to uphold the dismissal of a nuisance claim, two other panels had failed to follow *Schaendorf*. See *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654; 741 NW2d 857 (2007); *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346; 760 NW2d 856 (2008). The *Froling Trust* panel explained that *Bulk Petroleum* and *Waterous* were obligated to follow *Schaendorf*, and that because they did not, it was "obligated to reject [them]." *Id.* at 286.

Lech v Huntmore Estates Condo Association on Interest and Recoverable Attorney's Fees

On April 16, 2015, the Michigan Court of Appeals issued a published opinion in *Lech v Huntmore Estates Condo Association*.[1] *Lech* expands on the Michigan Supreme Court's 2005 opinion in *Haliw v Sterling Heights*,[2] and provides guidance on two issues: (1) whether appellate costs are included in offer-of-judgment sanctions, and (2) whether Michigan's judgment-interest statute applies to sanctions awards. Spoiler: it answered both questions with "no."

In *Haliw,* the Michigan Supreme Court held that attorney fees incurred on appeal are not included when a party is entitled to case-evaluation sanctions under MCR 2.403. The *Haliw* court's ruling, as *Lech* explains, was grounded in the language and logic of Rule 2.403: (1) the rule governing case evaluation sanctions is found in the chapter of the Michigan Court Rules that discusses trials, not the chapter applicable to appeals; (2) the sanctions rule is tied to the verdict, rather than the outcome on appeal; (3) a party seeking case evaluation sanctions must request them before an appeal is completed; and (4) the rule requires a "causal nexus" between the rejection of a case-evaluation award and the incurred expenses.[3]

The Court in *Lech* reasoned that each of these rationales applies equally to offer-of-judgment sanctions under Rule 2.405. Consequently, appellate costs and fees are not included in offer-of-judgment sanctions.

A sanctions award, according to Lech, is "properly characterized as an order directing that an act be done." Moreover, sanctions are awarded in post-judgment proceedings. Consequently, the Lech court concluded that sanctions are not subject to Michigan's judgment-interest statute.

As for judgment interest, the Court of Appeals turned to the text of MCL 600.6013 and caselaw defining the term "money judgment." MCL 600.6013 states that "[i]nterest is allowed on a money judgment recovered in a civil action, as provided in this section." Quoting the Michigan Supreme Court's opinion in *In re Forfeiture of $176,598,* the *Lech* court held that "a money judgment in a civil action is a judgment 'that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred.'"[4]

A sanctions award, according to *Lech,* is "properly characterized as an order directing that an act be done." Moreover, sanctions are awarded in *post-judgment* proceedings. Consequently, the *Lech* court concluded that sanctions are not subject to Michigan's judgment-interest statute.

It remains to be seen whether the defendants in *Lech* will seek review from the Michigan Supreme Court.

Transcript Pitfalls in the Michigan Court of Appeals

One of the more common mistakes in the Michigan Court of Appeals is ordering only part of the record. This usually occurs when appellants assume that they only need to order transcripts relevant to their appellate issues. The Michigan Court Rules actually impose broader responsibilities, while also providing procedures for departing from these default rules. The key points are summarized below.

1. The appellant must order the complete record. The Michigan Court Rules place the burden of ordering the complete record squarely on the appellant.[5] Specifically, the appellant must "order from the court reporter or recorder the *full transcript* of testimony and other proceedings in the trial court or tribunal."[6] Appellants may not make their own determination about what is and is not relevant. As stated in the Court's Internal Operating Procedures, "The appellant is responsible for securing the timely filing of the *complete* transcript for appeal, not just the transcript(s) that the appellant believes are relevant to the appeal."[7]

2. Cross-appellants are not required to order transcripts. Because the Michigan Court Rules require appellants to order the complete record, cross-appellants are ordinarily not required to order transcripts. The Court of Appeals makes this fact plain in its Internal Operating Procedures: "Note that under MCR 7.207(D), the cross-appellant is not responsible for the production and filing of the transcript unless the appellant abandons the initial appeal or it is dismissed."[8]

3. Appellants are required to provide copies of transcripts to appellees. Appellants are responsible for providing transcripts to appellees. Rule 7.210(F) states: "Within 21 days after the transcript is filed with the trial court clerk, the appellant shall serve a copy of the entire record on appeal, including the transcript and exhibits, on each appellee."

4. There are procedures for approving a partial record. An appellant may be excused from the responsibility of ordering a complete record if the parties stipulate, if they agree on a statement of facts, or if the trial court orders that "some portion less than the full transcript… be included in the record for appeal."[9] An appellant must secure this order by filing a motion "within the time required for filing an appeal."[10]

5. Appellees have an incentive to be reasonable. It can be tempting for appellees to demand that an appellant order the complete record, even when some transcripts are patently irrelevant to any issues that might arise on appeal. Aside from the usual principles of civility, there is a reason for appellees to stipulate to ordering a partial record. Prevailing parties are often entitled to costs under Michigan Court Rule 7.219, and transcripts are included in recoverable costs. That means there is always a risk that the appellee who forces an appellant to order unnecessary transcripts will ultimately be footing the bill.

These principles apply to *most* civil appeals—which means it is always a good idea to read Michigan Court Rule 7.210 and the corresponding Internal Operating Procedures for special rules that might apply to particular cases.

Endnotes

1 *Lech v Huntmore Estates Condo Ass'n*, ___ Mich App ___ (2014) (Docket No. 320028, issued April 16, 2015).

2 *Haliw v Sterling Hts,* 471 Mich 700; 691 NW2d 753 (2005).

3 *Lech, supra.*

4 *Lech, supra,* quoting *In re Forfeiture of $176,598,* 465 Mich 382, 386; 633 NW2d 367 (2001).

5 MCR 7.210(B)(1).

6 *Id.* (emphasis added).

7 See IOP 7.210(B)(1) (emphasis in original).

8 IOP 7.210(B)(1)-1.

9 MCR 7.210(C).

10 *Id.*

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Legal Malpractice Update

The doctrine of collateral estoppel bars a plaintiff from relitigating issues in a legal malpractice action, including factual determinations previously made during arbitration proceedings. The wrongful conduct rule further bars a malpractice action to the extent a plaintiff's damages are a result of his own wrongful conduct.

Thomas v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2014 (Docket No. 314374)

The Facts: Plaintiffs were comprised of several individuals and the various businesses they owned, referred to as the CBW Entities. Plaintiffs entered into an asset purchase agreement with Computer Business World, owned by Dr. Paviz Daneshgari, which entailed the purchase of the CBW Entities in exchange for payment of $2.7 million and the assumption of nearly $1.4 million of bank debt. The purchase agreement allocated various amounts of the purchase price to specific categories, including working capital, which the parties agreed would be adjusted post-closing. The purchase closed in June 2006, and Plante & Moran subsequently determined the working capital needed to be adjusted downward by about $677,500. Daneshgari thereafter learned that plaintiffs had engaged in a practice of fabricating invoices and advertisements in order to take advantage of reimbursement programs offered by suppliers of computer parts. Moreover, the CBW Entities were subsequently barred from participating in a favorable pricing program with two large suppliers after it was discovered that prior to the closing they were selling products to foreign countries in violation of the terms of the program.

By September 2007, the CBW Entities had failed and creditors brought suit against Computer Business World, which then prompted Computer Business World to commence an action against plaintiffs. That action was placed into binding arbitration. The arbitrator made numerous factual findings, including a determination that plaintiffs were aware of the foregoing business practices yet purposefully did not disclose them to Daneshgari with the intention that he would rely upon them in purchasing the CBW Entities. The arbitrator awarded $2.8 million in damages to Computer Business World. This award was confirmed by the trial court, and later affirmed on appeal.

Several of the individual plaintiffs filed chapter 11 bankruptcy petitions, and Computer Business World filed an adversary proceeding, claiming the judgment against plaintiffs was not dischargeable because of the arbitrator's finding of fraud. The bankruptcy court agreed, and applying the principle of collateral estoppel, it held the debt was nondischargeable.

Plaintiffs then filed suit against attorney defendant for legal malpractice, alleging that they had informed attorney defendant about their various business practices and that attorney defendant—not plaintiffs—failed to convey this information to Computer Business World. Plaintiffs further asserted that in the absence of attorney defendant's "substandard representation, legal malpractice and breach of

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Thus, the arbitrator's findings of fact were considered as established in the present action because the issue of fraud with respect to the asset purchase agreement "was actually litigated and determined by a valid and final judgment and was essential to that judgment."

standard of practice," the $2.8 million arbitration award never would have entered against them.

Attorney defendant filed a motion for summary disposition on the basis that plaintiffs' claims were bared by the doctrine of collateral estoppel and the doctrine of *in pari delicto*. Attorney defendant also filed a motion in limine, seeking an order that would preclude plaintiffs from introducing any evidence at trial that contradicted the arbitrator's prior factual findings. The trial court denied the dispositive motion, reasoning that the allegations of legal malpractice were not previously litigated at arbitration. But the trial court granted attorney defendant's motion in limine, and as part of that ruling, it identified the set of facts that had been determined by the arbitrator. These facts amounted to a finding that plaintiffs engaged in fraudulent conduct with respect to the asset purchase agreement entered into with Computer Business World. After several days of trial proceedings, the court granted attorney defendant's motion for a mistrial, which was brought on due to "confusion regarding application of collateral estoppel." The court basically granted the parties a "do over," in which they were allowed to reargue the previous motions.

Attorney defendant again moved to have certain facts deemed admitted, arguing the doctrine of collateral estoppel prevented plaintiffs from re-litigating the arbitrator's factual findings of fraud, and furthermore, the application of collateral estoppel, the wrongful conduct rule and the principle of *in pari delicto* required dismissal of plaintiffs' claims. Plaintiffs opposed the motion, maintaining the elements of collateral estoppel were not met because the issues being litigated in the present matter were different than those decided by the arbitrator and involved different parties. The trial court agreed with plaintiffs, concluding collateral estoppel did not apply. Attorney defendant then filed a motion in limine requesting that the trial court allow it to assert the wrongful conduct defense, which plaintiffs opposed—primarily on the grounds there was not a sufficient nexus between the alleged misconduct and the damages being claimed. The trial court also denied this motion, and in response, attorney defendant filed an application for leave to appeal. The Court of Appeals granted the application.

The Ruling: The Court of Appeals vacated the trial court's order denying attorney defendant's motion in limine. It held the doctrine of collateral estoppel barred plaintiffs' claims against attorney defendant "to the extent those claims [arose] from their own wrongful conduct," and therefore, as a matter of law, plaintiffs could not proceed "on any of their malpractice actions that touch[ed] upon their own misconduct."

Applying the doctrine of collateral estoppel, the Court held that plaintiffs were barred from relitigating the issue of whether they committed fraud. "Collateral estoppel…precludes litigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." This principle equally applies to arbitration proceedings. Thus, the arbitrator's findings of fact were considered as established in the present action because the issue of fraud with respect to the asset purchase agreement "was actually litigated and determined by a valid and final judgment and was essential to that judgment." Although the arbitrator did not address plaintiffs' claim for legal malpractice, he did address the primary issue of plaintiffs' fraudulent conduct. And because the resolution of plaintiffs' legal malpractice claim hinged on the application of the wrongful conduct rule, whether plaintiffs committed fraud was specifically at issue—the same determination that was required in the underlying action. Thus, to the extent that plaintiffs' fraudulent conduct was in dispute in the present action, they were precluded from relitigating that issue.

The Court further held that applying the doctrine of collateral estoppel, the wrongful conduct rule precluded plaintiffs from "proceeding on any of their malpractice claims that touch[ed] upon their own misconduct." Under the wrongful conduct rule, a plaintiff's claim is barred if it is entirely, or even partially, founded upon his own illegal conduct. Such conduct must actually be "prohibited or entirely prohibited under a penal or criminal statute," and furthermore, "a sufficient causal nexus" must exist between that conduct and the plaintiff's asserted damages. Because plaintiffs' actions in relation to the underlying transaction amounted to the crime of false pretenses under MCL 750.218, the wrongful conduct rule was implicated. There was also a sufficient casual nexus between this conduct and the damages asserted because the $2.8 million arbitration award against plaintiffs was due to a finding of fraud, and the legal malpractice claim was

The Court further held that applying the doctrine of collateral estoppel, the wrongful conduct rule precluded plaintiffs from "proceeding on any of their malpractice claims that touch[ed] upon their own misconduct."

"premised on the fact they were held liable for fraud." Plaintiffs were therefore, on remand to the trial court, barred from advancing a legal malpractice claim that was premised on their own wrongful conduct.

Practice Note: When examining the viability of a legal malpractice claim, compare the issues presented with those that were already litigated in the underlying action to determine whether a plaintiff is estopped from advancing certain arguments in the present action.

The wrongful conduct rule is an effective way to bar actions brought by badly behaving plaintiffs. Notably, encompassed within this rule is the doctrine of *in pari delicto*, which applies to bar a claim between parties when the parties, including an attorney, are equally in the wrong.

An attorney-client relationship, if conditioned on the performance of a certain act by the client, will continue upon fulfillment of that condition.

Beckett Family Rentals v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued December 9, 2014 (Docket No. 316658)

The Facts: Plaintiffs, Beckett Family Rentals, LLC ("rental company") and Beckett Investments, LLC ("investment company"), initiated a legal malpractice action against attorney defendants on October 5, 2012. Defendant attorneys contended that the claim was barred by the applicable two year statutory period of limitations, asserting that the attorney-client relationship had been terminated as a result of a June 17, 2009, letter sent to the investment company. That letter stated: "At this point I am ordering that this law firm not provide any further legal services to Becket [sic] Investments, LLC until such time as it retains a securities attorney who will then give an opinion as to your literature, marketing, and activities with investors. This firm can no longer represent Becket [sic] investments, LLC until this recommendation is acted upon."

Primarily relying upon this correspondence, attorney defendants filed a motion for summary disposition as to both plaintiffs, claiming that more than two years had elapsed since the termination of the attorney-client relationship, thus barring the claim. The trial court agreed and granted the motion.

The Ruling: The Court of Appeals vacated the trial court's order granting attorney defendants' motion for summary disposition and remanded the matter for further proceedings. The Court held that although the June 17, 2009 letter served as an affirmative notification to the investment company that attorney defendants were terminating their representation, there was sufficient evidence to create a genuine issue as to whether the company complied with the terms set forth therein, thereby resulting in the continuation of the attorney-client relationship. The Court further held that because the correspondence was *only* addressed to the investment company, it did not serve as a notice of termination as to the rental company.

The Court first concluded that there was a genuine issue of material fact as to whether the investment company had an ongoing attorney-client relationship with attorney defendants. "A legal malpractice action accrues on the last day of [an] attorney's professional service in the underlying…matter out of which the negligence arose." Special rules have been developed in an effort to precisely pinpoint when attorneys discontinue serving their client in a professional capacity for purposes of calculating the statutory period of limitations. "In general, an attorney's representation continues until the attorney is relieved of that obligation by the client or the court." Such relief may occur when a client retains replacement counsel or when the attorney completes the specific legal service he was retained to perform. The attorney-client relationship may also be terminated by an affirmative notification of withdrawal sent by the attorney to the client.

Although the June 17, 2009 correspondence sufficiently served as an "affirmative notification" that attorney defendants were terminating their relationship with the investment company, the company's subsequent retention of several securities attorneys presented conflicting evidence as to whether it had fulfilled attorney defendants' condition for continued representation and whether such retention ultimately constituted "replacement counsel"—an act that would suffice to terminate the attorney-client relationship. Moreover, there was some evidence to suggest that attorney defendants continued to provide legal services to the investment company beyond the completion of a "specific, discrete service" relating to the formation of the company. Accordingly, the Court held that summary disposition as to the investment company's malpractice claim was not appropriate.

The Court also held there was a

Citing to the well-known principle that a claim for legal malpractice requires the attorney's negligence to proximately cause the plaintiff's injury, the Court held that no such connection was present.

genuine issue of material fact as to when the attorney-client relationship between attorney defendants and the rental company ceased, if ever. Notably, the June 17, 2009 correspondence did not serve as an "affirmative notification" of termination as to the rental company since it was *only* addressed to the investment company. And it was the investment company—not the rental company—that retained the securities attorneys, thus belying the assertion that the rental company had replaced attorney defendants as counsel. Due to the conflicting evidence presented, the Court held that summary disposition as to the rental company was also inappropriate.

Practice Note: Providing written notice to clients that your services are complete (or that you no longer wish to provide your services), thus bringing the matter to a close, may provide additional security against a subsequent action. By memorializing the termination of the attorney-client relationship, a dispute as to the last date of services rendered can be minimized.

A plaintiff must present evidence sufficiently connecting the attorney's negligent acts to the injury alleged, so as to satisfy the crucial element of proximate cause in an action for legal malpractice.

Bear v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2014 (Docket No. 313378)

The Facts: Plaintiff fell victim to a fraudulent investment scheme carried out by Lee S. Ruhl and, represented by attorney defendants, brought an action against Ruhl Real-Estate Investments ("Ruhl") and Golden Mortgage Corporation ("Golden Mortgage") to recover damages. Plaintiff settled with Ruhl, but the claim against Golden Mortgage, which was premised on vicarious liability for the acts of Ruhl, was summarily dismissed by the trial court. Attorney defendants then filed a motion for reconsideration, presenting additional evidence in support of plaintiff's claim. This new evidence included four affidavits signed by independent witnesses, as well as an amendment to an affidavit previously signed by plaintiff, the original of which was heavily relied upon in trying to defeat Golden Mortgage's dispositive motion. The trial court affirmed its original ruling, and the Court of Appeals affirmed, finding that plaintiff had not presented sufficient evidence to demonstrate Golden Mortgage's involvement in Ruhl's investment dealings.

Plaintiff then initiated a legal malpractice action against attorney defendants, alleging they failed to timely file the aforementioned affidavits and conduct adequate discovery. Plaintiff asserted that had this additional information been available for the trial court's review prior to the hearing on Golden Mortgage's motion, her claims would have survived. Attorney defendants moved for summary deposition, arguing that the attorney judgment rule—as set forth in *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995)—shielded them from liability. Relying on *Simko*, the trial court ruled that attorney defendants' "failure to timely file the affidavits constituted a mere error of judgment," and in any event, plaintiff could not establish this failure proximately caused her damage as the new affidavits "did not recite any facts supporting Golden's vicarious liability for Ruhl's actions."

The Ruling: The Court of Appeals affirmed, concurring in the trial court's proximate cause analysis.

Citing to the well-known principle that a claim for legal malpractice requires the attorney's negligence to proximately cause the plaintiff's injury, the Court held that no such connection was present. Although the affidavits at issue further detailed Ruhl's scheme, and even alleged that plaintiff had met with Ruhl at Golden Mortgage's office, they did not present factual allegations tying Ruhl's actions to Golden Mortgage. "While the affidavit averments support[ed] an inference that Golden [Mortgage] may have offered incentives to Ruhl to act in ways that furthered [its] business, no evidence support[ed] that Golden [Mortgage] controlled Ruhl's investment activities or possessed any awareness of its details." The Court therefore affirmed the trial court's granting of attorney defendants' motion for summary disposition, holding that plaintiff could not establish the necessary connection between attorney defendants' alleged negligence and the claimed injury.

Practice Note: Establishing proximate cause continues to be one of the biggest obstacles faced by litigants bringing legal malpractice actions, and as such, close attention should be given to this crucial element—the absence of which is fatal to a plaintiff's claim.

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No Fault Report

As we begin another year of litigating Michigan no-fault insurance claims, those of us who have been practicing in this area for over 25 years can recall that one of the purposes behind the enactment of the Michigan No-Fault Insurance Act in 1973 was to reduce the amount of litigation stemming from motor vehicle accidents. Forty-one years later, issues involving first-party coverage under the No-Fault Insurance Act continue to be one of the most heavily litigated areas of law in this state.

The Michigan Supreme Court has not issued any decisions impacting on the No-Fault Act in some time. However, the U.S. Sixth Circuit Court of Appeals recently clarified, once and for all, whether diversity of jurisdiction exists when a Michigan resident files suit against an insurer domiciled in another state. The Michigan Court of Appeals also issued two decisions that impact medical providers and their ability to file suit against a claimant's no-fault insurer directly, and to recover benefits in the event the claimant has engaged in fraudulent conduct. Finally, the Court of Appeals has issued a number of unpublished decisions that involve evidentiary issues and trial court decisions regarding the relationship between an individual's claimed condition and their involvement in a motor vehicle accident.

Sixth Circuit Court of Appeals Approves Federal Court Jurisdiction in Matters Involving Michigan Residents and Insurers Domiciled Outside the State of Michigan Under Diversity Jurisdiction

Ljuljdjuraj v State Farm Mutual Automobile Ins Co, 774 F3d 908 (CA 6, 2014)

In *Ljuljdjuraj*, Elvira Ljuljdjuraj and a relative, Drana Lulgjuraj, were occupants of a motor vehicle owned by one Bardhyl Mullalli and insured with State Farm. The Drana Lulgjuraj case was filed first in federal district court and was assigned to Judge Rosen. Judge Rosen dismissed the action for lack of subject matter jurisdiction, pursuant to the "direct action" division of the Federal Diversity Jurisdiction Statute, 28 USC §1332(C)(1), on the basis that Mullalli's Michigan citizenship was imputed to State Farm. State Farm eventually appeared in the Elvira Ljuljdjuraj suit and requested to have the case transferred to Judge Rosen. State Farm then filed a motion to dismiss for lack of subject matter jurisdiction, based upon Judge Rosen's earlier ruling in the companion litigation.

Both plaintiffs filed an appeal with the United States Court of Appeals for the Sixth Circuit. State Farm, apparently having a change in heart, subsequently argued that the court did, in fact, have subject matter jurisdiction, as both plaintiffs were residents of the State of Michigan and State Farm was domiciled in Illinois.

In holding that the federal courts had subject matter jurisdiction, and were therefore entitled to hear both lawsuits, the Sixth Circuit examined the text of 28 USC §1332(C)(1), the so-called "direct action" proviso, which provides:

> In any direct action against the insurer of a policy or contract of liability insurance …to which action the insured is not joined as a party-Defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen…

Observing that the "direct action" statute was "designed to prevent local tort suits from overwhelming the federal courts," the Sixth Circuit Court of Appeals noted

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Forty-one years later, issues involving first-party coverage under the No-Fault Insurance Act continue to be one of the most heavily litigated areas of law in this state.

that a liability action is not the same as a claim against one's own no-fault insurer for payment of no-fault benefits. Essentially, the Court distinguished between a first party lawsuit (which is not a liability claim) and a third party lawsuit (which generally involves a liability claim).

The Sixth Circuit also distinguished its earlier decision in *Ford Motor Co v Ins Co of North America*, 669 F2d 421 (CA 6, 1982), which did not involve a claim for first-party, no-fault PIP benefits but rather, Property Protection Insurance ("PPI") benefits under MCL 500.3121 *et seq*. In doing so, the Court noted that a claim for PPI benefits is a substitute for a claim for property damage, caused by an automobile, which would otherwise have been filed under the common law. As noted by the Court of Appeals:

> Stated differently, suits against insurance companies by owners of damaged property are far more similar to direct action suits based on liability insurance than suits by car occupants who are listed in the insurance policy pursuant to the statute as 'insured' prior to the occurrence of the accident. It follows that, while we are bound by our published holding in *Ford*, that holding binds most with respect to the Property Protection benefits that were at issue in that case. Thus, the direct action proviso of the federal diversity statute does not apply in this case, notwithstanding our holding in *Ford*. *[Ljuljdjuraj* at 913].

Given that the Sixth Circuit Court of Appeals has now clarified this area of the law, it remains to be seen whether there will be an increase in the number of first-party PIP lawsuits being filed in the federal court system, or transferred from the state court to the federal court system by insurers domiciled outside the State of Michigan.

Court of Appeals Affirms Right of Medical Providers to File Their Own Lawsuits Against No-Fault Insurers

Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co, ___ Mich App ___ (2014) ((Docket No. 317876, issued December 9, 2014)

In *Wyoming Chiropractic*, the no-fault insurer challenged a medical provider's right to file its own cause of action against a no-fault insurer, where the injured individuals failed to do so. Essentially, Auto-Owners attempted to argue that the medical providers lacked standing because the provider was not the "real party in interest." The lower court had denied Auto-Owners' motion for summary disposition, based primarily on the Court of Appeals' decisions in *Munson Medical Ctr v ACIA,* 218 Mich App 375, 544 NW2d 49 (1996); *Lakeland Neurocare Ctrs v State Farm*, 250 Mich App 35, 645 NW2d 59 (2002) and *Regents of Univ of Mich v State Farm*, 250 Mich App 719, 650 NW2d 129 (2002).

On appeal, the Court of Appeals reaffirmed each of these earlier decisions and rejected Auto-Owners' argument that the issue of standing was not squarely before the Court in those cases. Auto-Owners also raised a number of "public policy" arguments, which were likewise rejected by the Court of Appeals:

> In addition, the public policy goals of the no-fault act support allowing a healthcare provider to have standing to sue an insurer for PIP benefits. Auto-Owners argues that this rule will force insurers to defend multiple lawsuits at different times and in different courts. Auto-Owners also points out that insurers face an increased risk of having to pay penalty interest if healthcare providers have standing to sue because insurers will not be able to concentrate their efforts on paying insured individuals on time and at "fair and equitable rates." However, as discussed above, this Court interpreted the plain language of MCL 500.3112 as allowing healthcare providers to maintain direct causes of action against insurers to recover PIP benefits under the no-fault act. Thus, the Michigan legislature addressed the public policy issues related to healthcare provider standing when it drafted MCL 500.3112. Furthermore, public policy favors provider suits. The goal of the no-fault act is "to provide victims of motor vehicle accidents with assured, adequate, and prompt reparation for certain economic losses." The no-fault act was designed to remedy "long delays, inequitable payment structure, and high legal costs" in the tort system. Allowing a healthcare provider to bring a cause of action expedites the payment process to the healthcare provider when payment is in dispute. Thus, provider standing meets the goal of prompt reparation for economic losses. Healthcare provider standing also offers healthcare provider a remedy when an insured individual does not sue an

The trial court agreed with the insurer's argument, to the effect that no reasonable minds could differ as to whether or not plaintiff Bahri submitted fraudulent household replacement service claim forms, and granted summary disposition in favor of the insurer.

> insurer for unpaid PIP benefits, thus preventing inequitable payment structures and promoting prompt reparation. Therefore, public policy supports this Court's prior opinions. [*Wyoming Chiropractic*, slip op at 8-9 (footnotes omitted)].

Auto-owners filed an application for leave to appeal with the Michigan Supreme Court, which remains pending at this time.

Court of Appeals Affirms Dismissal of Plaintiff's Entire Cause of Action, Including Claims for Medical Expenses Filed by Intervening Medical Providers, Where Claimant Submits Fraudulent Household Replacement Service Claims

Bahri v IDS Property Casualty Ins Co, ___ Mich App ___ (2014) (Docket No. 316869, rel'd for publication December 9, 2014)

In *Bahri*, plaintiff was involved in a motor vehicle accident on October 20, 2011. As a result, he filed a claim for no-fault benefits with his insurer, IDS Property Casualty Insurance Company, including claims for household replacement service expenses. These claims turned out to be fraudulent in the following respects:

> In order to substantiate her claims for replacement services, plaintiff presented a statement indicating that services were provided by "Rita Radwan" from October 1, 2011 to February 29, 2012. Because the accident occurred on October 20, 2011, on its face, the document plaintiff presented to defendant in support of her PIP claim is false, as it sought recoupment for services that were performed over the 19 days preceding the accident.
> Moreover, defendant produced surveillance evidence depicting plaintiff performing activities inconsistent with her claimed limitations. Plaintiff was observed bending, lifting, carrying objects, running errands, and driving—on the dates when she specifically claimed she needed help with such tasks. Of particular note, on November 11, 2011, plaintiff represented that she required assistance vacuuming, cooking, dishwashing, making beds, grocery shopping, taking out the garbage, driving, and running errands. Yet, surveillance videos captured her performing various activities, such as lifting, carrying, and dumping a large bucket of liquid in her yard. On December 19, 2011, plaintiff sought replacement services for various household activities, including grocery shopping. But, on that day, she was observed running several errands from 11:05 a.m. until 7:00 p.m. Plaintiff indicated that on December 29, 2011, she required the assistance of Rita to drive her and perform multiple household activities. However, surveillance video on that day captured plaintiff driving her own vehicle on errands. Similar discrepancies were noted for December 30, 2011.
> This evidence belies plaintiff's assertion that she required replacement services, and it directly and specifically contradicts representations made in the replacement services statements. [*Bahri,* slip op at 4].

Defendant insurer moved for summary disposition, based upon its general fraud exclusion, which provided:

> We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy.

The trial court agreed with the insurer's argument, to the effect that no reasonable minds could differ as to whether or not plaintiff Bahri submitted fraudulent household replacement service claim forms, and granted summary disposition in favor of the insurer.

Plaintiff and her medical providers (who had intervened in the lawsuit) appealed to the Court of Appeals. In a landmark decision, the Court of Appeals affirmed the decision of the trial court to grant summary disposition in favor of the insurer. In addition to excluding plaintiff's individual claims for all no-fault benefits, the Court also dismissed the claims presented by the medical providers, stating, "Because intervening plaintiffs stood in the shoes of the named insured, if plaintiff cannot recover benefits, nor can intervening plaintiffs." [*Bahri*, slip op at 2].

This statement stems from the Court of Appeals' earlier decision in *TBCI PC v State Farm*, 289 Mich App 39, 795 NW2d 229 (2010).

Finally, the Court of Appeals affirmed the dismissal of plaintiff's claim for uninsured motorist benefits, based not only on the fraud exclusion, but also on the fact that she failed to prove direct physical contact between her automobile and the "hit-and-run" vehicle that purportedly caused the subject accident.

On appeal to the circuit court, the circuit court voided the judgment entered in Redmond's case, because Redmond had been requesting damages far in excess of the $25,000 jurisdictional limit of the district court.

An application for leave to appeal to the Michigan Supreme Court, filed by the intervening plaintiffs/medical providers, remains pending.

Practice Note: Those of us on the defense side have seen, all too often, claims for household services for cutting grass in January, and shoveling snow in July. Unfortunately, some, but certainly not all, of our colleagues on the plaintiff side have been less than diligent when it came to submitting claims for household services. Given the fact that *Bahri* is now a published decision, plaintiff attorneys are well advised to advise their clients to put together legitimate household replacement service claim forms that accurately reflect precisely what was done on any given day. Failure to be more diligent in the submission of household replacement service claims can result in a dismissal of one's entire claim for no-fault benefits under this case.

Court of Appeals Reaffirms Earlier Decision in *Moody v Home-Owners Ins Co*, 304 Mich App 415, 849 NW2d 21 (2014) and Voids District Court Judgments for the Individual Claimant and the Transportation Company, Even Though Only the Individual's Verdict Exceeded the District Court Jurisdictional Threshold

Redmond v State Farm, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2014 (Docket No. 313413)

In *Redmond,* plaintiff filed suit in the 36th District Court for the City of Detroit to recover no-fault benefits from her no-fault insurer, State Farm. A transportation company, Destinee's Transportation, filed a separate action to recover payment of the transportation expenses incurred by Redmond as a result of her injuries. Both actions were later consolidated for trial. At trial, the jury rendered a verdict in favor of plaintiff Redmond in the amount of $63,793, and in favor of Destinee's Transportation in the amount of $8,750.68. No-fault penalty interest was likewise awarded to both plaintiffs. The Court also awarded no-fault penalty attorney fees, at the rate of $400.00 per hour, to Redmond's attorneys, and at the rate of $200.00 per hour to Destinee's Transportation's attorneys.

On appeal to the circuit court, the circuit court voided the judgment entered in Redmond's case, because Redmond had been requesting damages far in excess of the $25,000 jurisdictional limit of the district court. The circuit court, however, affirmed the district court's judgment in favor of Destinee's Transportation because that particular judgment was less than the $25,000 jurisdictional limit of the district court. State Farm subsequently filed an application for leave to appeal to the Court of Appeals, which was granted.

On appeal, the Court of Appeals affirmed the circuit court's decision to void the district court judgment that had been rendered in favor of plaintiff Redmond and, in doing so, reaffirmed its earlier decision in *Moody v Home-Owners Ins Co*, 304 Mich App 415, 849 NW2d 31 (2014).

With regard to the transportation company's lawsuit, the Court of Appeals observed that, because the transportation company's lawsuit was consolidated with Redmond's lawsuit for purposes of trial, "there is virtual identity between Destinee's Transportation's claims and Redmond's claims such that they all could have been brought in a single action involving a single judgment, and because these separately filed actions were consolidated in the district court, just as in *Moody*, we likewise conclude that these claims were merged for the purposes of determining the amount in controversy pursuant to MCL 600.8301(1)." As a result, the Court of Appeals reversed the decision of the circuit court and vacated the district court's judgment on the transportation company's claim.

Judge Shapiro issued a vigorous dissent, arguing that *Moody* was wrongly decided. Judge Shapiro indicated that, but for the fact that the Michigan Supreme Court has granted the plaintiff's application for leave to appeal in *Moody*, he would request that a special conflict panel of the Court resolve the issue pursuant to MCR 7.215(J)(2). Although the Supreme Court granted plaintiff's application for leave to appeal in *Moody* on September 26, a motion to dismiss the appeal was filed by plaintiff's counsel on November 21, 2014, which the Court granted on February 4, 2015.

The plaintiff in *Redmond* filed an application for leave to appeal in the Michigan Supreme Court on January 8, 2015. On March 31, 2015, the Supreme Court issued an order holding the application in abeyance pending a decision in the case of *Hodge v State Farm Mutual Ins Co* (Docket No. 149043) because "the decision in that case may resolve an issue raised in the

As noted by the Court of Appeals, "we disagree with the trial court's unstated premise that it is appropriate to sanction a party for a non-party witness's failure to comply with a subpoena duces tecum" requiring the production of financial documents.

present application for leave to appeal."

Court of Appeals Reverses Lower Court's Decision to Strike Defense Medical Expert's Testimony, Based Upon Expert's Failure to Produce Financial Information

Hubbert v ACIA, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2014 (Docket No. 314670)

Prior to trial, the Wayne County Circuit Court struck the testimony of AAA's defense medical expert, Dr. Phillip Friedman, as a sanction for Dr. Friedman's failure to comply with a subpoena, issued by plaintiff's counsel, requiring him to produce financial documents pertaining to the income he derived from performing independent medical evaluations. As a result, the jury returned a judgment in favor of plaintiff and AAA appealed.

On appeal, the Court of Appeals reversed the decision of the lower court, on the basis that Dr. Friedman was not a party to the litigation, but rather was simply a defense medical expert. As noted by the Court of Appeals, "we disagree with the trial court's unstated premise that it is appropriate to sanction a party for a non-party witness's failure to comply with a subpoena duces tecum" requiring the production of financial documents. The Court observed that under MCR 2.113(D)(2), sanctions may be imposed when a party or an officer, director or managing agent of a party fails to obey an order to provide or permit discovery. However, these sanctions were simply not applicable in a case involving a defense medical expert. Because it was Dr. Friedman, not the insurer, who failed to produce the required documents, the appropriate sanction would have been to hold Dr. Friedman in contempt under MCR 2.506(E)(1) and the court's earlier decision in *McGee v Macambo Lounge Inc*, 158 Mich App 282, 404 NW2d 242 (1987).

Furthermore, the Court of Appeals noted that the lower court's decision to strike Dr. Friedman as an expert witness affected the "substantial right of a party [AAA]," and was "inconsistent with substantial justice." As noted by the Court of Appeals:

> The trial court's striking of Dr. Friedman's testimony affected defendant's substantial rights because it deprived defendant of its sole expert witness who could dispute plaintiff's new causation theory introduced during Dr. Jawad Shah's deposition testimony. In particular, Dr. Shah testified that the motor-vehicle accident played a causal role in plaintiff's infection-induced paraplegia because he suffered cervical disc trauma in the accident, which made him more prone to an infection in that location. By contrast, Dr. Friedman opined that there was no medical basis to causally connect plaintiff's infection to the accident, given the amount of time that had passed since the accident. [*Hubbert*, slip op at 5-6].

Judge Michael Kelly vigorously dissented, arguing that AAA did, in fact, have control over its defense medical expert, Dr. Friedman, because it was AAA that "actually took action to protect Friedman from having to disclose his finances."

Court of Appeals Affirms Bench Trial Determination that the Need for 24-Hour-Per-Day Attendant Care Did Not Arise Out of Injuries Suffered in a 2003 Motor Vehicle Accident

Farm Bureau v Warriner, unpublished opinion per curiam of the Court of Appeals, issued November 25, 2014 (Docket No. 317674)

In *Warriner*, the Court of Appeals reviewed the findings of the Hillsdale County Circuit Court, which determined that the need for 24-hour-per-day attendant care did not arise out of a motor vehicle accident occurring on August 21, 2003, which resulted in the onset of a traumatic brain injury. This case was essentially a "battle of the expert witnesses," and the Court of Appeals went to great length to compare and contrast the expert medical testimony presented by Dr. Firoza VanHorn Ph.D., Dr. Joseph Hornyak M.D., Dr. James Rowan Ph.D., and Dr. Walter Sobota Ph.D., who testified on behalf of defendant Warriner.

The Court also summarized the results of the independent medical evaluations performed by Dr. Robert Fabiano Ph.D., Dr. Steven Putnam Ph.D., and Dr. Elliot Wolf M.D. In affirming the findings of the circuit court, sitting as the trier of fact, the Court of Appeals simply noted that the trial court was free to weigh the findings and opinions of the various medical experts as it saw fit. Reviewing the matter under a "clear error" standard, the Court of Appeals noted that the injured party had failed to leave the appellate court "with a definite and firm conviction that a mistake was made."

As plaintiff was pulling on the fabric strip attached to the door, she lost her balance and fell off of the ladder. Plaintiff filed a claim for no-fault benefits with her no-fault insurer, which was denied based upon the Parked Vehicle Exclusion set forth in MCL 500.3106(1).

Court of Appeals Affirms Jury Verdict Awarding Plaintiff Less than $10,000 in the Face of a $630,000 Demand

Blacksher v State Farm, unpublished opinion per curiam of the Court of Appeals, issued December 4, 2014 (Docket No. 312701)

In *Blacksher*, plaintiff filed an appeal from a jury verdict awarding less than $10,000 to plaintiff and her medical provider, McLaren Regional Medical Center, in the face of a $630,000 requested verdict. In doing so, Blacksher and McLaren challenged the jury trial judgment, claiming that it was internally inconsistent and against the great weight of the evidence. State Farm appealed from the denial of its request for no-fault defense attorney fees under MCL 500.3148(2).

In affirming the decision of the lower court, the Court of Appeals summarized, in great detail, some of the medical testimony that was presented at trial. For example, the Court of Appeals noted that plaintiff had withheld vital information from her treating physician, Dr. Sabbagh. Specifically, plaintiff informed Dr. Sabbagh that she had never suffered bouts of dizziness in the past. Six years earlier, however, plaintiff had sought treatment for dizziness, headaches and body aches connected to a sinus infection.

The Court of Appeals also commented that, even though Blacksher's MRI and CT scans of the head were negative, Dr. Atty, who conducted the initial evaluation for admission into the McLaren head injury program, diagnosed Blacksher with a mild traumatic brain injury. The Court also summarized the defense medical expert testimony presented by Dr. Leonard Sahn M.D., Dr. Lisa Metler Ph.D., Dr. Joseph Femminineo M.D. and Dr. Robin Hanks Ph.D.

After analyzing the evidence presented to the jury, the Court of Appeals simply concluded that it was not prepared to disturb the jury's verdict. The Court of Appeals likewise affirmed the lower court's decision not to award no-fault defense attorney fees to State Farm, noting that, "although the disparity between the amount demanded and the ultimate award may comprise *evidence* that the initial claims were excessive, that does not mean that the disparity *conclusively* established that the claims were excessive." *Blacksher*, slip opinion at page 14.

Court of Appeals Determines that One of the Three Statutory Exceptions to the Parked Vehicle Exclusion Found in MCL 500.3106(1) Must Be Satisfied Before No-Fault Benefits are Payable for Injuries Arising Out of a Parked Motor Vehicle

Kalo v Home Owners Ins Co, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2014 (Docket No. 316442)

Plaintiff was helping her daughter move her belongings into a rented U-Haul truck, in preparation for her daughter's move to Chicago. Plaintiff was standing on an aluminum ladder at the rear of the U-Haul truck, attempting to fix the latch so the door would close. As plaintiff was pulling on the fabric strip attached to the door, she lost her balance and fell off of the ladder. Plaintiff filed a claim for no-fault benefits with her no-fault insurer, which was denied based upon the Parked Vehicle Exclusion set forth in MCL 500.3106(1). The lower court granted summary disposition in favor of the injured party, and the defendant insurer filed an appeal with the Court of Appeals.

The Court of Appeals reversed the decision of the lower court and remanded the matter back to the lower court for entry of summary disposition in favor of the insurer. In doing so, the Court of Appeals observed that in *Miller v Auto-Owners Ins Co*, 411 Mich 633, 309 NW2d 544 (1981), the Supreme Court held that in cases involving maintenance on a parked vehicle, compensation was required pursuant to MCL 500.3105, without regard to the Parked Vehicle Exclusion and the statutory exceptions thereto found in MCL 500.3106(1). The Court noted, however, that the rationale in *Miller* was inconsistent with later decisions from the Michigan Supreme Court, including *Frazier v Allstate Ins Co*, 490 Mich 381, 808 NW2d 450 (2011) and *LeFevers v State Farm*, 493 Mich 960, 828 NW2d 678 (2013).

In light of the more recent Supreme Court jurisprudence, the Court of Appeals held that in order for any injured claimant to recover benefits arising out of a parked motor vehicle, the claimant must demonstrate compliance with one of three statutory exceptions to the Parked Vehicle Exclusion set forth in MCL 500.3106(1):

> Here, plaintiff cannot recover pursuant to MCL 500.3105 alone. Any analysis of plaintiff's claim involving her injury required a complementary analysis of MCL 500.3106(1), because plaintiff's

Because plaintiff failed to demonstrate that her injury fell within one of the three statutory exceptions to the Parked Vehicle Exclusion, set forth in MCL 500.3106(1), she was ineligible to obtain no-fault insurance benefits.

injury arose out of her contact with a parked vehicle. [Citations omitted]. Accordingly, we reject plaintiff's argument on appeal that plaintiff can collect no-fault benefits for her vehicle pursuant to MCL 500.3105(1) without consideration of MCL 500.3106.It is undisputed that plaintiff's vehicle was parked at the time of plaintiff's injuries. Therefore, to determine whether plaintiff was entitled to no-fault personal protection benefits as a matter of law pursuant to MCL 500.3105(1) and MCL 500.3106(1), we first look to whether plaintiff's injury meets one of the requirements of MCL 500.3106(1). [*Kalo*, slip op at 3 (footnotes omitted)].

Because plaintiff failed to demonstrate that her injury fell within one of the three statutory exceptions to the Parked Vehicle Exclusion, set forth in MCL 500.3106(1), she was ineligible to obtain no-fault insurance benefits.

Practice Note: This author respectfully submits that the Court of Appeals properly applied the actual statutory language utilized in MCL 500.3105(1) and MCL 500.3106(1). The Supreme Court's holding in *Miller*, to the effect that at least with regard to maintenance injuries, such injuries are compensable under MCL 500.3105(1) without regard to MCL 500.3106(1), is contrary to the actual statutory text which, in fact, precludes compensation for "maintenance" injuries arising out of a parked motor vehicle unless one of the three statutory exceptions to the Parked Vehicle Exclusion are met.

Supreme Court

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Supreme Court Update

The Motor Vehicle Exception to Governmental Immunity Allows for Recovery of Noneconomic Damages, Such as Pain and Suffering

On December 19, 2014, the Michigan Supreme Court held in consolidated cases that, under the motor vehicle exception to governmental immunity, a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements for tort liability under the No-Fault Act have been met. *Hannay v DOT*, 497 Mich 45 (2014).

Facts: Plaintiff Hannay was involved in a motor vehicle accident with a salt truck owned by defendant Michigan Department of Transportation ("MDOT") and driven by an MDOT employee. Hannay brought an action in tort against MDOT, seeking work-loss benefits. MDOT raised governmental immunity as an affirmative defense.

The trial court ruled that MDOT was liable for work-loss damages. The Court of Appeals affirmed, concluding that the trial court did not err by awarding Hannay economic damages and that work-loss benefits, to the extent those damages exceed those compensable by the no-fault insurer, are awardable against governmental entities.

Plaintiff Hunter was involved in a motor vehicle accident when a dump truck owned by defendant City of Flint Transportation and driven by Flint's employee sideswiped Hunter's vehicle. Hunter brought suit against Flint, claiming noneconomic damages, including pain and suffering. Flint raised governmental immunity as an affirmative defense.

The trial court concluded that "bodily injury" encompasses noneconomic damages associated with the bodily injury. The Court of Appeals reversed the trial court, holding that noneconomic damages are precluded under the motor vehicle exception to governmental immunity because noneconomic damages "do not constitute physical injury to the body."

Holding: The Supreme Court affirmed the *Hannay* panel's conclusion that work-loss benefits, to the extent those damages exceed those compensable by the no-fault insurer, are available against a governmental entity; and reversed the panel's decision in *Hunter* that noneconomic damages do not fall within the category of damages compensable under the motor vehicle exception.

In reversing the panel's decision in *Hunter*, the Court explained that "the phrase 'liable for bodily injury' within the motor vehicle exception means that a plaintiff who suffers a bodily injury may recover for items of tort damages that naturally flow from that physical or corporeal injury to the body, which may include both economic and noneconomic damages." The Court, however, explained that "'bodily injury' in the motor vehicle exception is not a threshold requirement that opens all doors of potential liability for tort damages; rather, it is a *category* of injury for which items of tort damages that naturally flow are available, as confined by the limitations of the no-fault act." The Court clarified that the threshold under the No-Fault Act for third-party tort liability (i.e., that the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement) must still be met

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The Court clarified that the threshold under the No-Fault Act for third-party tort liability (i.e., that the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement) must still be met when the tortfeasor is a governmental entity.

when the tortfeasor is a governmental entity. Therefore, the Court held that "a plaintiff may bring a third-party tort action for economic damages, such as work-loss damages, and noneconomic damages, such as pain and suffering or emotional distress damages, against a governmental entity if the requirements under [the No-Fault Act] have been met."

Significance: Governmental entities could now find themselves liable for noneconomic damages, such as pain and suffering, under the motor vehicle exception to governmental immunity.

Recordings Obtained from Third-Parties Are Not Shielded from FOIA

On December 16, 2014, the Michigan Supreme Court held that video surveillance recordings created by third-parties and retained by a city and its police department as evidence to support the issuance of a misdemeanor criminal citation are public records within the meaning of FOIA. *Amberg v City of Dearborn & Dearborn Police Dep't*, __ Mich __; __ NW2d __ (2014).

Facts: Plaintiff made a Freedom of Information Act ("FOIA") request for copies of video surveillance recordings related to pending misdemeanor criminal proceedings that were in the possession of the City of Dearborn. The materials included video surveillance recordings created by private businesses that the city had collected as evidence to support the issuance of a citation. The city denied the request, reasoning that the recordings were not public records because they were recorded by private parties. Plaintiff filed suit to compel the disclosure of the recordings, at which point the city produced the requested recordings. The lawsuit proceeded.

The circuit court found that the recordings were not public records within the meaning of FOIA and did not need to be disclosed. The Court of Appeals affirmed the circuit court in an unpublished split decision, finding that because the defendants did not obtain the recordings until after they issued the citation, the recordings were not used in the performance of an official function (the issuance of the citation).

Holding: The Supreme Court reversed, concluding that the recordings were public records within the meaning of FOIA, and the defendants were thus required to produce them in response to plaintiff's FOIA request. The Court agreed with the Court of Appeals that "what ultimately determines whether records in the possession of a public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." The Court, however, explained that while the defendants did not obtain the recordings until after they issued the citation, the recordings were collected as evidence to support the decision to issue the citation. Therefore, the recordings were retained by defendants in the performance of an official function and were public records within the meaning of FOIA.

Significance: The Michigan Supreme Court broadened the reach of FOIA requests by clarifying that information obtained from third-parties is not necessarily shielded from FOIA, and by expounding upon what is considered "performance of an official function."

Court Costs and Attorney Fees Are Not Recoverable for an Action Brought Under the Open Meetings Act Unless the Person Is Successful in Obtaining Injunctive Relief

On December 22, 2014, the Michigan Supreme Court held that a person cannot recover court costs and attorney fees under section 11 of the Open Meetings Act ("OMA") unless he or she succeeds in obtaining injunctive relief in the action. *Speicher v Columbia Twp Bd of Trs,* 497 Mich 125 (2014).

Facts: Plaintiff, a property owner in the township, brought suit against defendant township board of trustees and the township planning commission, seeking (1) a declaration that defendants violated the OMA, (2) to enjoin defendants from further noncompliance with the OMA, and (3) costs and attorney fees under section 11 of the OMA. Section 11 of the OMA provides in relevant part that, "[i]f a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action."

The trial court denied plaintiff's requests for declaratory relief and injunctive relief, and, consequently, his request for costs and attorney fees. The Court of Appeals affirmed in part and reversed in part, holding that the trial court erred by failing to grant declaratory relief to plaintiff, but that the trial court properly denied injunctive relief. The Court of Appeals initially

On December 16, 2014, the Michigan Supreme Court held that video surveillance recordings created by third-parties and retained by a city and its police department as evidence to support the issuance of a misdemeanor criminal citation are public records within the meaning of FOIA.

found that plaintiff was not entitled to costs or attorney fees. On reconsideration, however, the Court of Appeals held, in a published opinion, that plaintiff was entitled to costs and attorney fees because he was successful in obtaining declaratory relief. The Court of Appeals, however, noted that it reached this conclusion only because it was bound by prior Court of Appeals decisions, including *Ridenour v Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981), and its progeny.

Holding: The Supreme Court reversed, holding that "a person cannot recover court costs and actual attorney fees under [section 11 of the OMA] unless he or she succeeds in obtaining injunctive relief in the action." The Court explained that, from the plain language of the OMA, "it is clear that the Legislature only intended for a person to recover court costs and actual attorney fees if the person succeeds in obtaining injunctive relief."

Justice Cavanagh dissented, stating that he would have upheld *Ridenour* and its progeny. Justice Cavanagh reasoned that "in the context of public bodies, a judgment for declaratory relief is the 'functional equivalent of an injunction,'" in that it acts to restrain public bodies from further noncompliance with the OMA. Justice Cavanagh suggests that, under the majority's holding, a public body need only concede defeat to preclude injunctive relief and therefore an award of costs and attorney fees. Additionally, Justice Cavanagh reasoned that the fact that the Legislature has taken no steps to amend section 11 of the OMA after *Ridenour* and its progeny is evidence that those cases are consistent with legislative intent.

Significance: The Court expressly overruled *Ridenour* and its progeny to the extent those cases allow for the recovery of attorney fees and costs under section 11 of the OMA when injunctive relief is not obtained. This decision decreases the potential for costs and attorney fees to be awarded under the OMA, which could result in less OMA litigation.

Courts Must Give More Deference to ALJ and MCAC Factual Findings in Unemployment Benefits Entitlement Decisions

On February 6, 2015, the Michigan Supreme Court held that lower courts erred by reevaluating both an ALJ's and the MCAC's factual findings and reweighing the evidence in order to reach a different conclusion in deciding whether a claimant was entitled to unemployment benefits. *Hodge v US Sec Assocs*, 497 Mich 189 (2015).

Facts: Claimant was employed as a security guard with a security agency and was stationed at Detroit Metropolitan Airport. After being hired, claimant signed an acknowledgement of the agency's "Security Officer's Guide," which provided that "unauthorized use of client…computers…may result in immediate termination." Claimant subsequently accessed the airport client's computer system in order to assist a passenger by retrieving flight information that was otherwise public information. Citing this computer use, the agency terminated claimant's employment for violation of the agency's policy set forth in the "Security Officer's Guide." Claimant was subsequently denied unemployment benefits. An administrative law judge ("ALJ") affirmed the denial, finding that claimant's unauthorized computer access constituted misconduct and that she was therefore disqualified from receiving unemployment benefits under MCL 421.29(1)(b). The Michigan Compensation Appellate Commission ("MCAC") affirmed the ALJ's decision.

The circuit court reversed. The Court of Appeals affirmed the circuit court and held that claimant's violation of the rules did not constitute misconduct under MCL 421.29(1)(b) because she merely accessed public, non-sensitive information, evincing the fact that the rule violation was simply a good-faith error and not misconduct within the meaning of the statute.

Holding: The Michigan Supreme Court reversed, reinstating the judgment of the MCAC. The Supreme Court concluded that the lower courts erred by departing from the applicable standard of review. The Court explained that the circuit court erred when, contrary to the ALJ's determination, it discounted the agency's policy prohibiting the unauthorized use of clients' computers. The Court further explained that the Court of Appeals erred by concluding that claimant's actions actually benefited the agency, despite the fact that the ALJ had concluded that claimant's actions were against the agency's interest. Thus, the Court held that "[i]nstead of determining whether factual assessments made by the agency were supported by substantial evidence, both the lower courts engaged in an unbridled effort to reevaluate the ALJ's factual findings." "The lower courts should have given deference to the ALJ and the MCAC by reviewing those decisions only to ensure

Thus, the Court held that "[i]nstead of determining whether factual assessments made by the agency were supported by substantial evidence, both the lower courts engaged in an unbridled effort to reevaluate the ALJ's factual findings."

conformity with the law and the existence of competent, material, and substantial evidence." Thus, the Court concluded that "the lower courts improperly discounted the ALJ's findings to apply their own factual assessments, in violation of Const 1963, art 6, § 28 and MCL 421.38(1)."

Significance: This case serves as a strong clarification by the Michigan Supreme Court of the appropriate standard of review courts are to employ in reviewing ALJ and MCAC decisions in unemployment matters.

Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
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Michigan Court Rules

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

2014-40 - Electronic service of subpoena

Rule affected: 2.506
Issued: April 29, 2015
Comments to: August 1, 2015

This would provide for electronic service of a subpoena or request on specified governmental agencies – the Michigan Department of Corrections, Michigan Department of Health and Human Services, Michigan State Police Forensic Laboratory, other accredited forensic laboratory, law enforcement, or other governmental agency – only if there is in existence a "memorandum of understanding between the parties." The electronic service would be valid only if the recipient confirmed receipt by letter within 48 hours, and that confirmation must be filed with the court.

2013-26 - Stay of proceedings

Rule affected: 7.209
Issued: April 29, 2015
Comments to: August 1, 2015

There are two alternative proposals regarding stay bonds. The staff comment is as follows:

> MCR 7.209 is ambiguous whether filing a stay bond automatically stays enforcement proceedings, or whether a stay of proceedings is wholly within the discretion of the trial court and Court of Appeals. In this administrative file, the Court is publishing for comment two alternative proposals. Alternative A would clarify the rule so that it is clear that only a trial court judge or the Court of Appeals may order a stay of proceedings. Alternative B, modeled loosely on the recent revisions of the circuit court appeals rule (specifically MCR 7.108), would amend the rule to establish the principle that, like appeals to circuit court, filing a bond automatically stays further proceedings in a case, including enforcement of a judgment or order.

2014-09 - Citing unpublished opinions

Rule affected: 7.215
Issued: February 18, 2015
Comments to: June 1, 2015

This would modify the criteria for the designation of published decisions of the Court of Appeals, adding the following language to the rule:

> Citation to such opinions in a party's brief is disfavored unless the unpublished opinion directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.
>
> A party who cites an unpublished opinion shall explain why existing published authority is insufficient to resolve the issue…

This modification would apply solely to briefs on appeal, not to briefs filed in the circuit or district courts.

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: Carson J. Tucker, Co-Chair, MDTC Amicus Committee

Amicus Commitee Report

Carson J. Tucker is the Chair of the Appeals and Legal Research Group at Lacey and Jones, LLP, a law firm that has been providing legal services in Michigan for 100 years. Mr. Tucker handles all types of appellate matters and assists other lawyers with complex litigation and insurance coverage issues. Mr. Tucker represents local and state governmental entities, national and international businesses and insurance companies, and global corporations.

The MDTC is involved in amicus briefs for two important medical malpractice cases for consideration by the Michigan Supreme Court.

The MDTC submitted an amicus brief late last year in the case of *Furr v McCleod*, ___ Mich. ___ (2015) (pending on application before the Supreme Court). **Kimberlee Hillock** submitted the brief for MDTC. The case is addressing a Court of Appeals decision after a conflict panel was impaneled to address a long-standing issue concerning the propriety of allowing a trial court to amend pleadings in a medical malpractice action under MCL 600.2301 for a premature filing of a complaint before expiration of the tolling period in MCL 600.2912b. Oral argument was held on May 5, 2015 and a decision is pending.

The MDTC also recently received an invitation from the Michigan Supreme Court to write an amicus brief in the case of *Jeffrey Cullum v Frederick L Lopatin, DO*, which is on oral argument to address whether (1) the trial court was required to consider all of the factors outlined in MCL 600.2955(1) in light of *Edry v Adelman*, 486 Mich 634 (2010); (2) the trial court abused its discretion in holding that plaintiff's expert's opinion was inadmissible under MRE 702 because it was based on speculation; and (3) the Court of Appeals applied the correct standard of review.

By: Timothy A. Diemer, *Jacobs and Diemer, P.C.*
tad@jacobsdiemer.com

DRI Report

Tim Diemer is a partner with the appellate team at Jacobs and Diemer, P.C. He is a Past President of MDTC and currently serves as the DRI State Representative for Michigan.

Last month, both I, as the DRI State Representative for Michigan, as well as Edward Perdue, my predecessor and current DRI Director for the Central Region, attended a Joint Meeting with the other members of the Central Region (Ohio and West Virginia) as well as the North Central Region (Indiana, Illinois, Minnesota, Wisconsin, North Dakota and South Dakota) at the Greenbrier Resort in West Virginia.

In addition to providing wonderful social and networking opportunities, the Central Region Meeting is an opportunity for leaders of the various State Defense Organizations to share stories, swap strategies for boosting membership and attendance, as well as introduce new ideas and speakers for annual meeting topics.

Ed Perdue made a compelling presentation on "Channeling Your Inner Napoleon, Applying the Principles of War to Your Litigation Campaigns." The presentation was as unique as indicated by the title and was not your common fare for legal leadership meetings. My role was much less as I updated the other attendees on what MDTC has been involved in and where it sees itself going in the future.

Unlike past Central Region meetings where the Michigan Report had elements of pessimism, I am happy to report that the presentation this year was full of optimism for the legal profession in Michigan, the City of Detroit, as well as the economic progress of the State of Michigan as a whole. It was a change to be able to report that law firms in Michigan are hiring new lawyers in droves (compared to stagnation or worse in the past), that the City of Detroit is thriving with a flood of private investment and young people relocating to the City, as well as the economic turnaround in the entire state that is boosting all residents and, indirectly, lawyers who are benefitting from the additional economic activity.

In terms of MDTC's prospects, the other attendees were amazed that despite being one of the very few states without mandatory Continuing Legal Education, MDTC membership remains high and the spirit of volunteerism in the group is as strong as it ever was under President Gilchrist's leadership. Some of the other states, particularly West Virginia, reported that tort reform measures are on the agenda in their state legislatures, and I was happy to share some of our experiences with tort reform in Michigan, including the efforts of MDTC to support, oppose, or approve upon various tort reform measures over the last few years. Because Michigan's no fault system is unique, the leaders from other states were interested to hear whether current efforts to reform the No Fault Act will be successful this time around.

The Central Region Meeting is always educational, and I have always left the meeting with new ideas to share with MDTC. This year was no exception.

For details on upcoming DRI seminars or 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. tad@jacobsdiemer.com / 313-965-1900.

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INDEMNITY AND INSURANCE ISSUES

Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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Please send notices and any suggestions to Lee Khachaturian, Editor, at info@mdtc.org. Checks should be made payable to "Michigan Defense Trial Counsel."

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Annual Awards Banquet

Friday, May 15, 2015
The H Hotel, Midland, MI

Photos from the event:

June 5, 2015

Dear Friends:

We want to bring to your attention a matter of great concern to the defense bar.

In 2012, the Uniform Law Commission drafted "model" legislation called The Uniform Asset Freeze Order Act and in 2013 sent it to the states for enactment. After it was defeated, withdrawn, or tabled in the first three states in which it was introduced (North Dakota, Colorado, and DC), the ULC made minor amendments and retitled it "The Uniform Asset Preservation Orders Act ."

It has since been pulled from the legislative calendar in Alabama and a New Jersey legislative commission is considering whether to recommend it to the New Jersey legislature. (The New Jersey Defense Lawyers Association testified against the bill). DRI has worked very closely with the SLDOs in DC, New Jersey, and Alabama to provide research and support. Tellingly, the legislation has now been slowed or stopped in every legislative body in which it has been introduced as we have made legislators more familiar with its provisions.

While we don't doubt the ULC's good intentions, the Uniform Asset Preservation Orders Act would be extremely harmful to the defense bar and our clients.

Consider the following.

The Act Is Breathtaking in Scope

- The Act would allow a plaintiff to potentially freeze a defendant's assets, long before any judgment is entered against a defendant or any jury's determination of fault is made.
- An asset freeze order can be entered even before any discovery is commenced.
- The Act broadly defines "assets" to include "anything that may be subject of ownership, whether real or personal, tangible or intangible, legal or equitable, or any interest therein."
- It would even allow assets to be frozen in which an innocent co-owner has an interest.

The Act Is Draconian in Nature

- A party who is subjected to an asset freeze order must apply for a court order permitting the payment of the party's "ordinary living expenses, business expenses, and legal representation."
- To obtain an asset freeze order a court must find that there is a substantial likelihood of the plaintiffs prevailing on the merits of the underlying claim. However, plaintiffs can request, and the courts grant, an asset freeze order without hearing any evidence or even commencing discovery so, on what basis can courts make a "likelihood of prevailing"" determination.
- The Act would allow an asset freeze order to be entered without notice to the defendant.

The Act Affects Non-Parties and Has Extraterritoriality Provisions

- The Act authorizes the service of an asset freeze order on a nonparty who has "custody or control" of an asset subject to the order. It provides that once served, a nonparty "shall freeze" the assets of the party "until further order of the court."
- The Act requires a court to recognize an asset freeze order issued by a court in another state and even another country. Section 10 of the Act literally provides that an asset freeze order is entitled to full faith and credit in the same manner as a judgment.

Other Concerns

- No fraudulent intent is required to obtain an asset freeze order. The Act potentially can be applied to anyone with insufficient assets to satisfy a future verdict.
- A party's assets should not be frozen based on a court's best guess as to the potential value of a cause of action. How can a court possibly address the impact of comparative fault or contributory fault principles on the value of a claim before any discovery has occurred?
- The term "ordinary business expenses" is undefined. Many types of critical business transactions needed to keep a company solvent in today's tough economy may be blocked by the Act. The Act will limit a company's ability to sell or transfer its assets in the ordinary course of its business.
- Will a company under a freeze order be allowed to raise capital, enter into transactions or incur expenses that might expand its business? The cost of running a small business could skyrocket if a court must be consulted every time a company seeks to acquire or convey an asset.

- Will the Act preclude a family from buying a new car, putting a new roof on the house, taking a vacation, or paying for a child's college education? The head of a household who is subject of an asset freeze order may need to seek a court approval to pay for these types of expenses.

- In some jurisdictions it can take 4-5 years before a suit goes to verdict. It is unfair to permit a defendant's assets be frozen before the merits of a claim against it is resolved.

- The imposition of an asset freezing order will likely cause more cases to be settled for reasons having nothing to do with the merits of a claim. Defendants will be pressured to settle a claim just to get out from under a freeze order and avoid financial ruin.

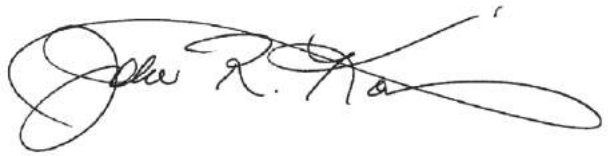
DRI will not intervene directly in individual states unless requested to do so by the state's SLDOs. We see our primary role as 1) informing you of the nature of the model legislation, 2) alerting you to the potential for its introduction into your state legislatures so that you can be ready to mobilize against it, and 3) providing any assistance that you may request.

We do have a favor to ask. Since our ability to monitor the entire country from afar is limited, we request your assistance in monitoring your state legislature for the possible addition of the act to the legislative calendar.

We have found this to be a highly successful approach thus far. Working together, we can prevent this legislation, extremely detrimental to defendants, from being institutionalized in any of our judicial jurisdictions.

Please let me know if you have any questions.

Sincerely,



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