MICHIGAN DEFENSE QUARTERLY

Volume 32, No. 1 - 2015

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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 Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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President's Corner

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It Takes a Village

MDTC owes its reputation and standing in the Michigan legal community to the many volunteers who dedicate their time to advancing MDTC's mission and goals. Some of those members have a long history with MDTC; some only recently joined the organization but have jumped in feet first. The success of any organization depends on just the right mix of these levels of experience to balance tradition with new ideas, institutional knowledge with thinking outside the box, and custom with innovation.

The *Michigan Defense Quarterly* is an excellent example of that important mix. Without the faithful and persistent work of **Jenny Zavadil (Bowman and Brooke)** and **Beth Wittmann (Kitch)** over many years, the *Michigan Defense Quarterly* would not be where it is today. And without **Mike Cook** (**Collins Einhorn**) as its new Editor and **Kathy Jozsa (James G. Gross PLC)** as its new Content Coordinator, both of whom recently joined the team, the *Michigan Defense Quarterly* would not be poised to continue its tradition of excellence.

The MDTC 2016 Annual Meeting Committee likewise has that mix that's sure to result in both an educational and fun program in May of 2016, at The Atheneum in Greektown. **Stephanie Arndt** (**Ottenwess, Taweel & Schenk**) is leading the charge, assisted by **Gary Eller (Smith Haughey Rice & Roegge), Sarah Walbun (Secrest Wardle)** and **Rick Paul (Dickinson Wright)**. While Stephanie, Gary, and Sarah are relatively new to MDTC, Rick Paul has been an active member for years, having planned many successful programs and now serving as its Treasurer.

Also significant to the success of an organization is people getting involved in different parts of the organization. This keeps them engaged and helps the organization stay fresh, while at the same time maintaining the continuity necessary to sustain the longevity of the organization. One example of that is **Kim Hillock (Willingham & Coté)**. Kim, who previously edited and submitted articles for the *Michigan Defense Quarterly*, is currently planning our November Winter Meeting at the Sheraton in Novi, and just recently joined the Amicus Committee. As many of you know, MDTC's amicus work is a critical part of its mission. MDTC is often invited to brief issues raised before the Michigan Supreme Court. Kim is joining a committee led by **Carson Tucker**, MDTC's Amicus Committee Chair, and supported by **Jim Brenner (Clark Hill)**. It's through the efforts of Carson, Jim, and now Kim, that amicus opportunities are vetted, brought before MDTC's Executive Committee, and divvied up among MDTC volunteers who, in turn, put in many hours to brief issues of interest to the defense bar. **Irene Hathaway (Miller Canfield)** has been one such author.

The continued involvement of old and new members is critical to the growth, advancement, and success of an organization. That's, in part, why each year the

MDTC gives out a President's Award and Volunteer Award. This year, these awards are going to **Jim Gross (James G. Gross PLC)** and **Graham Crabtree (Fraser Trebilcock Davis & Dunlap, P.C.)**, respectively, for their dedication and contribution to the MDTC. Jim has served in many roles with the MDTC, most notably as Past President, Minister of Fun, and Golf Committee Chair. Most of Graham's work has been behind the scenes, writing engaging legislative reports for the *Michigan Defense Quarterly*, and routinely advising the board on legislative issues and happenings in Lansing.

In short, it takes a village – not only to raise a child, but also to ensure the long-term success of any organization. MDTC has been fortunate enough to have a long-standing history of being a part of just such a village, chock full of dedicated members and volunteers, only a few of whom are mentioned here but all of whom are pivotal to MDTC's success. Because of the efforts of these people, MDTC continues to expand its reach and presence in the Michigan legal market.

If you'd like to join our charge as we move into fall and the second quarter of MDTC's year, or contribute to it through MDTC's recently-developed firm sponsorship program, please contact me or any member of leadership. Or better yet, join us for our Winter Meeting November 13 at the Sheraton in Novi – we'd love for you to hop on board.

Court Holds that Regular, Predictable On-Site Attendance is Essential to Most Jobs

By: Deborah Brouwer and Erin Behler, *Nemeth Law, P.C.*

Employers in Michigan, Ohio, Tennessee, and Kentucky received confirmation today from the U.S. Sixth Circuit Court of Appeals that the Americans with Disabilities Act (ADA) "does not endow all disabled persons with a job – or a job schedule – of their choosing." In its eight-to-five, *en banc* decision in *EEOC v Ford Motor Co*, 782 F3d 753 (CA 6, 2015), the Court reinstated a trial court's dismissal of Jane Harris's complaint that Ford violated the ADA when it refused to let her telecommute up to four days a week (which she would not agree to schedule in advance). Harris, a resale buyer of steel for Ford with irritable bowel syndrome (IBS), also would not agree in advance to come to work on her telecommuting days, if needed.

Applying case law, EEOC regulations and guidelines, and – most refreshingly – common sense, the Court concluded that regular, in-person attendance is an essential function of most jobs, especially interactive ones such as Harris's. As a resale buyer, Harris was required to meet with suppliers at their sites, and with Ford employees and stampers at Ford's site. When her IBS worsened, Harris asked Ford to let her work at home for up to four days each week, though she did not know which four days she would not be on-site. Ford found Harris's request to be unreasonable and offered other options, which Harris rejected. Harris instead filed a charge with the EEOC, which ultimately sued Ford on Harris's behalf. The trial court granted summary judgment to Ford, which was reversed by a three-judge Sixth Circuit panel. Ford sought *en banc* review, which was granted, and a majority of the Sixth Circuit agreed that Harris had no claim.

The majority's decision made a number of critical points: first, for most jobs, being at work is an essential part of the job. Second, it is the employee's obligation to propose a reasonable accommodation that permits her to perform the essential functions of her job. Third, an accommodation is not reasonable simply because the employee says it is. Here, Harris testified that she believed that she could perform her job from home. Ford disagreed, based on several trial-telecommuting periods that it granted Harris, which had all failed. It also was Ford's business judgment that resale buyers should generally work on site, to be available for meetings with internal and external customers and sources. The Court found Ford's assessment of its business needs to be more persuasive than Harris's unsupported-subjective opinion, because Ford's position was supported by its words, policies, and practices.

The Court next rejected the EEOC's argument that because it had allowed others to telecommute, Ford could not refuse to let Harris do the same. While Ford did

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Erin Behler focuses her practice on management labor and employment law. She also conducts workplace investigations and trains employers' workforce on discrimination and harassment in the workplace and other employment issues. In addition, Ms. Behler has represented clients in litigation before state and federal courts, administrative agencies, and arbitrators.

permit other resale buyers to telecommute, those arrangements involved only one day a week and a commitment by the employee to come in to work if needed. According to the Court, the EEOC's view would force employers to deny all telecommuting requests, out of fear that such arrangements could become a weapon in subsequent cases.

The Court also dismissed the argument that advances in technology had eliminated the line between working on-site and at home, at least in Harris's case. Recognizing that there might be situations in which technology would allow an employee to perform all essential functions off-site, the Court found no evidence in the case before it that "a great technological shift … made [Harris's] highly interactive job one that can be effectively performed at home."

While there are a number of takeaways from this decision, certainly one of the most important is something that most employers already knew: that "most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation." And for an employer to be able to rely on that principle, it should ensure that its job descriptions and written policies accurately reflect that being at work is necessary to get that specific job done.

As the Court also noted, ADA accommodation requests are fact intensive, requiring employers to reach individualized decisions in each situation.

MDTC Schedule of Events

2015

September 11	Golf Outing – Mystic Creek
September 15	Board Meeting – Okemos
October 7	Respected Advocate Award Presentation – Novi
October 7-11	DRI Annual Meeting – Washington, D.C.
October 7-9	SBM Annual Meeting – Novi Expo Center
November 12	MDTC Board Meeting – Sheraton, Novi
November 12	Past Presidents Dinner – Sheraton, Novi
November 13	Winter Meeting – Sheraton, Novi

2016

January 29	Future Planning Meeting – Soaring Eagle, Mt. Pleasant
January 30	Board Meeting – Soaring Eagle, Mt. Pleasant
May 12-14	Annual Meeting – The Atheneum, Greek Town
September 21-23	SBM Annual Meeting – Grand Rapids
September 21	Respected Advocate Award Presentation – Grand Rapids
October 6	MDTC Meet the Judges – Sheraton, Novi
October 19-23	DRI Annual Meeting – Boston
November 10	MDTC Board Meeting – Sheraton, Novi
November 10	Past Presidents Dinner – Sheraton, Novi
November 11	Winter Meeting – Sheraton, Novi

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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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MDTC Legislative Report

The summers of odd-numbered years when no elections are looming in the fall have usually been a good time for our legislators to relax, reflect, plan, and connect with constituents in their districts. The slower pace in Lansing this summer has been consistent with that tradition. There have been only a few session days, although the discussions about how to fund the desperately needed rejuvenation of the State's roads have continued. The House and Senate have each passed their own plan which the other is unwilling to approve, and the discussions continue with no specific compromise in sight. There have been the usual side-shows in Lansing this year to supplement the considerable entertainment provided by the presidential campaigns – a Democratic Senator who faces criminal charges for allegedly shooting up his ex-wife's car during a late-night domestic row, and an evolving scandal involving a pair of Tea Party Representatives who are alleged to have engaged in an extra-marital affair and a bizarre plan to cover-it up. Life is never dull in this town.

2015 Public Acts

As of this writing on August 14, 2015, there are 130 Public Acts of 2015. The new 2015 Public Acts of interest include:

2015 PA 36 – House Bill 4038 (Forlini – R), which has amended Chapter 57 of the Revised Judicature Act, MCL 600.5718, to **allow service of eviction notices by electronic communication if the tenant has provided written consent** to be served in that manner and the consent has been confirmed by an electronic communication sent to the tenant and acknowledged by electronic reply.

2015 PA 41 – House Bill 4017 (Farrington – R), which has amended 2000 PA 92 – the "Food Law" – to add a new section, MCL 289.5104, which will **provide limited immunity from criminal and civil liability for retail-food establishments, farmers, wholesalers, wholesale processors, distributors or other persons who donate food for use or distribution by a nonprofit organization or corporation** that collects donated food and distributes it to another nonprofit organization or corporation free of charge, or for a nominal fee.

2015 PA 79 – Senate Bill 100 (Brandenburg – R), which has amended 1941 PA 122 – the "Revenue Act" – MCL 205.22, to **eliminate the former statutory requirement that an aggrieved party first pay the disputed tax**, including any applicable penalties and interest, under protest **before pursuing an appeal of an assessment, decision or order of the Department of Treasury to the Court of Claims.** The Act has also increased the time allowed for taking an appeal to the Tax Tribunal from 35 to 60 days.

2015 PA 87 – House Bill 4175 (Johnson – R), which has amended the "Equine Activity Liability Act," MCL 691.1665, to **expand the scope of the limited immunity granted to equine activity sponsors and equine professionals for liability resulting from an inherent risk of equine activity.** This amendatory legislation has modified one of the statutory exceptions to that immunity to provide that an equine activity sponsor or equine professional will not be liable for death or injury resulting from an inherent risk of equine activity unless that person has committed an act or omission that constitutes a willful or wanton disregard for the safety of the injured

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[A]n equine activity sponsor or equine professional will not be liable for death or injury resulting from an inherent risk of equine activity unless that person has committed an act or omission that constitutes a willful or wanton disregard for the safety of the injured participant.

participant. Persons other than equine activity sponsors and equine professionals remain liable for injury or death proximately caused by any merely negligent act or omission.

Old Business and New Initiatives

The legislation now under consideration is a mixture of new initiatives and familiar 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 reported by the Senate Judiciary Committee with a Bill Substitute (S-2) on July 1, 2015, and now awaits consideration by the full Senate on the General Orders Calendar. The same initiative has also been introduced in the House as **House Bill 4587 (Callton – R)**.

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. 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 quickly passed by the Senate on a party-line vote on April 16, 2015. It was referred to the House Committee on Insurance, which reported the Bill with a Bill Substitute (H-3) on April 23rd. The House has not taken any further action on this legislation, although discussions have continued.

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. On May 13, 2015, the Bill was reported by the Senate Committee on Michigan Competitiveness with a Bill Substitute (S-1), which added a $75,000 appropriation for the Department of Licensing and Regulatory Affairs – an addition which was believed by many to have been made for the purpose of insulating the legislation from challenge by referendum. The Bill was passed by the full Senate the next day over vigorous opposition from the Democratic caucus, joined by a handful of Republicans, and now awaits consideration by the House Committee on Commerce and Trade.

Senate Bill 390 (Robertson – R), a reintroduction of last session's **House Bill 5505,** would amend the Revised Judicature Act, MCL 600.308a, to **allow local units of government to bring an action to enforce provisions of the Headlee Amendment** (Const 1963, art 9, §§ 25 to 31), **and to require that all such actions, and all actions brought by taxpayers under Const 1963, art 9, § 32, be filed as original actions in the Court of Appeals.** The Bill would also add six new sections establishing procedures for processing and adjudication of those actions. This Bill was introduced on June 9, 2015, and referred to the Senate Government Operations Committee.

House Bill 4658 (McCready – R), based upon last session's **House Bill 5511,** proposes amendment of the Revised Judicature Act to **create a new section MCL 600.6096, which would establish new provisions requiring collection of amounts owed for tax liabilities and other known liabilities to the State, support payments, garnishments directed to the State, IRS levies, and repayment of benefits received under the Michigan Employment Security Act from payments made in satisfaction of judgments against the State or its Departments.** This Bill was introduced on June 2, 2015, and referred to the House Committee on Families, Children, and Seniors.

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**

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.

judicial office after age 70. This Joint Resolution was reported by the Senate Judiciary Committee without amendment on June 3, 2015, and now awaits consideration by the full Senate on the General Orders Calendar. The proposed constitutional amendment will be presented to the voters for approval at the next general election if approved by both houses of the legislature by the required two-thirds vote.

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.

MEMBER NEWS

Work, Life, and All that Matters

David Carl Anderson has been elected President of the Oakland County Bar Association for the 2015/2016 bar year. The Oakland County Bar Association is the largest voluntary bar association in the state of Michigan. Mr. Anderson is the founder and president of the Law Offices of David C. Anderson, P.C. in Troy, Michigan. Mr. Anderson's law practice involves civil defense work, mediation and arbitration.

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 Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).*

By: Phillip J. DeRosier, *Dickinson Wright*, and Trent B. Collier, *Collins Einhorn Farrell, P.C.*
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Appellate Practice Report

When Does a Case Become Moot on Appeal?

Although appellate courts are generally obligated to address the issues that are properly brought before them, that is not the case when it comes to issues that have been rendered moot by subsequent developments – either in the case or in the law.

As the Michigan Court of Appeals explained in *B P 7 v Bureau of State Lottery*, 231 Mich App 356; 586 NW2d 117 (1998), an appellate court ordinarily "will not decide moot issues." *Id*. at 359. "A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights." *Id*. "An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief." *Id*. The Sixth Circuit has similarly concluded that "[i]f events occur during the case, including during the appeal, that make it 'impossible for the court to grant any effectual relief whatever to a prevailing party,' the appeal must be dismissed as moot." *Fialka-Feldman v Oakland Univ Bd of Trustees*, 639 F3d 711, 713 (CA 6, 2011).

The mootness doctrine applies to both factual and legal developments. In *B P 7*, for example, it was a statutory amendment. *B P 7*, 231 Mich App at 359. In *Fialka-Feldman*, it was the fact that a learning-disabled student challenging a university's denial of his request for on-campus housing had "completed the program and left the University with no plans of returning." *Id*. at 713.

There is an exception to the mootness doctrine, but it is limited. It has been said that an issue is not moot if it is "capable of repetition, yet evading review." *Chirco v Gateway Oaks, LLC*, 384 F3d 307, 309 (CA 6, 2004). See also *Franciosi v Michigan Parole Bd*, 461 Mich 347, 348 n 1; 604 NW2d 675 (2000) ("Although plaintiff has apparently been paroled, we issue this opinion because the issue is capable of repetition while evading our review, the issue has been briefed, defendant has not argued the case is moot, and the Court of Appeals opinion is published."). That exception, however, most commonly applies in cases involving the government. *Chirco*, 384 F3d at 309. "When the suit involves two private parties … the complaining party must show a reasonable expectation that he would again be subjected to the same action by the same defendant." *Id*.

Moreover, speculating that an issue "could" recur is not sufficient. In *Mich Dep't of Educ v Grosse Pointe Farms Pub Sch*, 474 Mich 1117; 712 NW2d 445 (2006), the Michigan Supreme Court emphasized that the test is whether the issue is "likely to recur." See also *In re Sterba*, 383 BR 47, 51 (CA 6 BAP, 2008) (holding that in order to avoid mootness, the appellant "must establish a demonstrated probability that the same controversy will recur").

There is one important area in which Michigan and federal courts appear to diverge. The Sixth Circuit has said that under the "case-or-controversy" requirement of Article III of the United States Constitution, mere "public interest" in an issue does not warrant review "when there is no reasonable expectation that the wrong will be repeated." *Fialka-Feldman*, 639 F3d at 715 (citation and internal quotation marks omitted). Michigan courts, however, appear to recognize a stand-alone "public interest" exception. See *Mead v Batchlor*, 435 Mich 480, 487; 460 NW2d 493 (1990) ("[T]he refusal of a court to decide a moot case or to determine a moot question is

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"When the suit involves two private parties … the complaining party must show a reasonable expectation that he would again be subjected to the same action by the same defendant."

not based on lack of jurisdiction to do so. … [A] court will decide a moot case or determine a moot question where this appears to be in the public interest, as for guidance in future cases.") (citation and internal quotation marks omitted), abrogated on other grounds *Turner v Rogers*, ___ US ___; 131 S Ct 2507 (2011).

In any event, these cases demonstrate that regardless where the appeal is pending, appellate courts are generally not inclined to consider issues that have become moot.

Effect of a Change in the Law on Appeal

On occasion, a development in the law while a case is pending on appeal may present an additional argument to raise. Although the general rule is that an appellant cannot raise issues for the first time on appeal, Michigan and federal courts have recognized an exception for changes in the law.

As a general matter, an issue that is not preserved in the trial court will not be considered on appeal.[1] As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), "[u]nder our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court," such that "a failure to raise an issue waives review of that issue on appeal." *Id.* at 386. See also *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (explaining that to preserve an issue for appeal, a party must specifically raise it before the trial court). The rule is the same in federal court. See *American Bank, FSB v Cornerstone Community Bank*, 733 F3d 609, 615 (CA 6, 2013) ("For the first time on appeal, Cornerstone adds several new theories . . . . But this is too late and too little. It is too late because Cornerstone did not raise these arguments below. Cornerstone thus forfeited the arguments.").

At the same time, however, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotation marks omitted). The Sixth Circuit expressed the same view in *Golden v Kelsey–Hayes, Co*, 73 F3d 648, 657–658 (CA 6, 1996):

> We will deviate from [the rule requiring issues to be raised in the trial court] only in exceptional circumstances, such as when following the rule would cause a miscarriage of justice, and particularly where the question is entirely legal and has been fully briefed by both parties. We have also made exceptions when the proper answer is beyond doubt, no factual determination is necessary, and injustice might otherwise result.

The exception permitting issues to be raised for the first time on appeal appears to include a change in the law affecting the outcome of the case.[2] In *Morris v Radley*, 306 Mich 689; 11 NW2d 291 (1943), the Michigan Supreme Court addressed whether a governmental entity that was not entitled to immunity at the time the case was tried should be able to take advantage on appeal of a new decision recognizing the availability of immunity to the claim at issue. The Court began by reciting the general rule: "It is axiomatic that an objection not properly and timely presented to the court below will be ignored on review. . . ." *Id.* at 699 (citation and internal quotation marks omitted). The Court noted, however, that "in the exercise of supervisory control over all litigation, appellate courts have long asserted the right to consider manifest and serious errors although objection was not made by the party who appeals." *Id.* (citation and internal quotation marks omitted). Finding that it would be "remiss in doing justice" if it allowed the judgment to stand, the Court set it aside. *Id.* at 700.

The United States Supreme Court has likewise recognized that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. … In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.'" *Carpenter v Wabash Ry Co*, 309 US 23, 27; 60 S Ct 416; 84 L Ed 558 (1940) (citation omitted).

So while appellants should always be wary of making arguments that were not raised in the trial court, changes in the law occurring after the judgment has been entered can provide an appropriate basis for doing so.

Make sure that you have a pin cite whenever possible and re-shephardize your cases to make sure you're citing current caselaw.

The Typo Under the Stairs

Finalizing an appellate brief can sometimes feel like a bad horror movie. Just when you think every typo has been vanquished and every citation checked, you notice a spelling error peering hungrily from the shadows. You, the beleaguered hero, realize that your job isn't done. And unless you dispatch every last grammatical mistake and misspelled word, one of them will survive to lumber wide-eyed and off-balance, like an extra in *The Walking Dead,* toward an unsuspecting appellate judge.

What's an appellate practitioner to do? There's no substitute for checking, re-checking, and re-re-checking for typos and grammatical errors. But don't forget that some real terrors can be found in dark, unexplored corners like these:

1. *The caption.* This is one of the easiest parts of your brief to overlook. You've seen it over and over. But it's important to re-read the caption like you're reading it for the first time. Is everyone's name spelled correctly? Is it current? Does it include a request for oral argument? Mistakes in a caption may not make or break your case but an erroneous caption certainly doesn't create an ideal first impression.
2. *The table of contents*. Read the table of contents to see if it provides a roadmap for the court. If the table of contents describes your key legal and factual arguments, and points the court toward the conclusion you want it to reach, then it's doing its job. If not, you're missing an opportunity to advocate for your client. That may not be the worst horror, but big problems can lurk in seemingly innocuous places. See Stephen King, *The Shining.*
3. *The jurisdictional statement.* Are the dates correct? Did you cite the relevant statutes? Did you give the Court everything it needs to conclude that it really has jurisdiction (or that it doesn't, if that's your argument)? Remember that the Michigan Court of Appeals obtains jurisdiction through statutes, not through court rules.
4. *The index of authorities.* Is your index of legal authorities both accurate and readable? Make sure you don't cram all of the case titles together. Give them a little room to breathe and you'll make life easier for the judges and clerks who will be reading your brief.
5. *Questions presented.* These are the movie trailers of your brief. Craft them right and you'll draw your audience in. Draft them carelessly and you'll cast your brief as more *Ishtar* than *Poltergeist.* Are your questions written in a way that *you'd* want to read? Or did you stick various clauses together to make an incomprehensible, run-on sentence that would make Victor Frankenstein shudder?
6. *Citations.* Follow the Michigan Appellate Opinion Manual (or the Bluebook for federal appeals) and, at the very least, make sure your citation formats are consistent. Make sure that you have a pin cite whenever possible and re-shephardize your cases to make sure you're citing current caselaw. One of the worst horrors—and we're talking *Exorcist*-level nightmare—is citing a case that has already been overruled.
7. *The conclusion*. Will the Court know what you're asking for? Have you suggested some language for the Court to work with when crafting an order, or is the Court going to feel like a lifeguard on a beach as a dorsal fin approaches a flailing swimmer?
8. *The exhibits.* Did you provide page numbers? Did you highlight the relevant portions to make the judges' lives easier? Do your exhibit descriptions let the court know what you're citing, or do you leave the court guessing what "Exhibit A" is? (See "flailing swimmer" in Number 7).
9. *Section headings.* Your section headings are critical in giving the court a roadmap and framing your arguments. But if you leave a heading at the end of a page, removed from the text that it's framing, you'll have a sad, lonely, and largely purposeless heading. And if there's one thing we've learned from H. P. Lovecraft, the lonely, forgotten monsters are often the creepiest.
10. *Between the lines.* Think about your tone when you re-read your brief. Zingers and snappy responses can be very satisfying to write, especially when your opponent has been overly aggressive. But once you've had

What about *Mullins* and its rejection of the very rule that supported the Court of Appeals' decision in *Kidder? Mullins*, the Court of Appeals explained, **overruled** a line of cases. It didn't **reverse** or **vacate** the adverse decision in *Kidder*. And that made all the difference.

time to cool down, you might find that your snappy comeback is shrill or overly acrimonious. Read your brief with an eye toward tone and see what sort of picture you're painting. If it looks like Dorian Gray, you might consider presenting the Court with something more pleasant.

Following these steps won't make your brief perfect. But they may help you avoid the most dangerous breed of monster: the kind that escapes your office and colonizes the Michigan Court of Appeals or the Michigan Supreme Court.

The Overruled Opinion Versus the Vacated Opinion

Although lawyers sometimes use the terms "overruled" and "reversed" interchangeably, these terms have different meanings. The Michigan Court of Appeals explained this key distinction in *Kidder v Ptacin*, 284 Mich App 166; 771 NW2d 806 (2009).

The plaintiff in *Kidder* filed her medical malpractice complaint in 2002. The defendant filed a summary disposition motion after the Michigan Supreme Court issued *Waltz v Wyse*, 469 Mich 642, 650; 677 NW2d 813 (2004), an opinion that made the plaintiff's complaint untimely—assuming, that is, that *Waltz* applied retroactively.

The trial court held that *Waltz* wasn't retroactive, and the defendant in *Kidder* appealed. In the meantime, the Michigan Court of Appeals addressed *Waltz*'s retroactivity in *Mullins v St. Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006), holding that it did, in fact, apply retroactively. Consequently, when *Kidder* reached the Michigan Court of Appeals, the Court of Appeals followed *Mullins* and applied *Waltz* retroactively to hold that the plaintiff's cause of action was time-barred. The plaintiff chose not to appeal this decision to the Michigan Supreme Court.

Nevertheless, the Michigan Supreme Court provided a new wrinkle. It reversed *Mullins*, and held that *Waltz* did **not** apply to certain cases filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000). This decision sounded the death knell of the rule on which the Court of Appeals' opinion in *Kidder* relied.

Hoping to capitalize on this new rule, the plaintiff in *Kidder* re-filed her complaint. But there was a problem. The plaintiff hadn't appealed the Michigan Court of Appeals' decision in her case to the Michigan Supreme Court. That meant that the Court of Appeals' conclusion that the complaint was untimely was the last word in *Kidder*. It was, in other words, the law of the case. *Kidder*, 284 Mich App at 170.

What about *Mullins* and its rejection of the very rule that supported the Court of Appeals' decision in *Kidder? Mullins*, the Court of Appeals explained, **overruled** a line of cases. It didn't **reverse** or **vacate** the adverse decision in *Kidder*. And that made all the difference.

"Reversing or vacating the decision," the court wrote, "changes the result in this specific case for an appellate court." *Id.* at 171. "Overruling," on the other hand, "affects not only the specific case before the appellate court, but also future litigation. A decision to overrule is an appellate court's declaration that a rule of law no longer has precedential value." *Id.* at 170.

Kidder was never reversed or vacated. It relied on a legal doctrine that the Michigan Supreme Court's decision in *Mullins* overruled, but it remained a valid judgment **in the Kidder case itself**. As such, the plaintiff's cause of action was still time-barred, notwithstanding its reliance on a rule that the Michigan Supreme Court later rejected.

The lesson here is that parties can't take advantage of changes in case law to revive dead cases. A decision overruling a legal doctrine applies only to that particular case and to subsequent cases.

Endnotes

1 This discussion is limited to issue preservation in civil cases, as the rules differ somewhat when it comes to criminal cases, particularly when a claimed constitutional violation is at issue.

2 This necessarily assumes, of course, that the change in law can validly be applied as a matter of substantive law. At least in civil cases, judicial decisions are typically given full retroactive effect. See *Harper v Virginia Dept of Taxation*, 509 US 86, 94; 113 S Ct 2510; 125 L Ed 2d 74 (1993) ("'[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.'"), quoting *Robinson v Neil*, 409 US 505, 507; 93 S Ct 876; 35 L Ed 2d 29 (1973); *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002) (observing that "the general rule is that judicial decisions are given full retroactive effect"). On the other hand, determining retroactive application of statutes can be tricky. See generally *Landgraf v USI Film Prods*, 511 US 244, 264; 114 S Ct 1483; 128 L Ed 2d 229 (1994) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 166; 403 NW2d 527 (1987) ("Generally, a statute is presumed to operate prospectively unless the Legislature either expressly or impliedly indicates an intention to give the statute retroactive effect.").

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Legal Malpractice Update

Because the plaintiffs were presumed, as a matter of law, to have known the contents of their insurance policy, the Attorney Defendants were not negligent for failing to tell the plaintiffs what they already knew.

Stevens v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2015 (Docket No. 319449); 2015 WL 2214150

Facts: The plaintiffs' home, insured by Farm Bureau, was destroyed by a fire in February 2008. The insurance policy afforded plaintiffs two types of payment for their loss—cash value and replacement costs—and included two limitation periods and conditions for those payments. First, consistent with MCL 500.2833(1)(q), the policy specified that an action could not be commenced against Farm Bureau unless there had been "full compliance with all the terms under [the] policy and the suit [was] started within one year after the date of loss." The one-year time limitation for commencing an action was tolled from the date of notification until the issuance of a formal denial of liability. Second, the policy provided that Farm Bureau would pay no more than cash value for a covered loss unless "actual repair or replacement [was] completed" or "the cost to repair or replace the damage [was] less than $2,500."

In accordance with the above terms, Farm Bureau issued a check to the plaintiffs for $215,000, which represented the cash value of their home. The plaintiffs subsequently negotiated terms for an additional payment of $164,792 to cover replacement costs. Despite the policy language requiring completion of the "actual repair or replacement," Farm Bureau agreed to issue payment of $82,500 upon completion of certain structural components of the new home. It further expressed a willingness to "arrange for periodic withdrawals for monies requested during the reconstruction process." These terms were memorialized in a letter dated December 14, 2009, which the parties signed. The following day, Farm Bureau sent a second letter to the plaintiffs, indicating that it was increasing the balance of replacement costs to $168,292, but that payment was conditioned upon the plaintiffs beginning construction of their new home by May 1, 2010.

On May 3, 2011, the plaintiffs retained the defendants after discussing whether Farm Bureau could "set a construction deadline as a condition precedent to the payment of replacement-cost benefits." Indeed, as of that date, the plaintiffs had yet to begin construction on their new home. The defendants drafted a letter to Farm Bureau objecting to the May 1, 2010 construction deadline. Yet, instead of utilizing this letter, the plaintiffs drafted and sent their own, dated May 25, 2011, requesting payment of the replacement costs so that they could begin the new construction. Farm Bureau denied that request on June 6, 2011, noting that the plaintiffs neither responded to the December 14, 2009 correspondence nor began construction by May 1, 2010. More than a year later, the plaintiffs renewed their request for payment on June 19, 2012, but Farm Bureau again denied it for the same reasons.

The plaintiffs then initiated a legal-malpractice action against the defendants. The thrust of the plaintiffs claim was that the defendants failed to advise them of

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Citing to the well-established law that "[a]n insurance policy holder is responsible for knowledge of the terms of his policy, and is presumed to know those terms," the Court held that the defendants had no obligation to inform the plaintiffs of the mandates of MCL 500.2833(1)(q).

the timing requirement set forth in MCL 500.2833(1)(q), and had they known of that mandate, they would have timely filed a suit against Farm Bureau for the replacement costs. The defendants moved for summary disposition on two grounds: (1) the substantive provisions of MCL 500.2833(1)(q) were contained in the policy at issue, and thus the plaintiffs were presumed—as a matter of law—to have knowledge of those provisions; and (2) any claim against Farm Bureau would have failed for the reason that the plaintiffs never commenced construction on a new home within a reasonable time of claiming benefits, as required by the policy. The trial court granted the motion, and the plaintiffs appealed.

Ruling: The Court of Appeals affirmed the trial court's ruling, holding that the defendants were not negligent and, even if they were, the plaintiffs could not establish that such negligence was the proximate cause of their injury.

Citing to the well-established law that "[a]n insurance policy holder is responsible for knowledge of the terms of his policy, and is presumed to know those terms," the Court held that the defendants had no obligation to inform the plaintiffs of the mandates of MCL 500.2833(1)(q). Because the language of the policy tracked the statute, the Court opined that the plaintiffs should have known they were precluded from bringing suit against Farm Bureau unless they complied with all terms of their policy and initiated an action within one year of the date of loss. And since "[the defendants] had no obligation to inform plaintiffs of what they already knew as a matter of law," their representation could not be considered negligent in that respect.

The Court further held that even if the defendants' conduct was negligent, the plaintiffs could not establish that such negligent representation was the proximate cause of their injury. Necessary to any action for legal malpractice is the element of causation, which requires a plaintiff to "show that, but for the attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit"—a difficult task that imposes the burden of proving two cases within a single proceeding. In accordance with the terms of their policy and the December 2009 agreement, the plaintiffs were obligated to begin construction of their new home by May 1, 2010. Yet as of 2013 they still had not fulfilled this condition for recovery of replacement costs. Accordingly, any suit the plaintiffs would have initiated against Farm Bureau would have necessarily failed due to this inaction. And because it was the plaintiffs' inaction—and not the defendants'—that caused the alleged injury, the plaintiffs could neither establish cause in fact nor proximate cause. Thus, they could not maintain an action for legal malpractice and summary disposition was appropriate.

Practice Note: While the absence of proximate cause often serves as grounds for summary dismissal, whether professional negligence actually occurred should not be overlooked. Like any other cause of action alleging negligence, a claimant must prove the existence of a legal duty and a breach thereof—the failure of which will also warrant dismissal.

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Medical Malpractice Report

Notices of Intent and the 182-Day Waiting Period

Tyra v Organ Procurement Agency of Mich, ___ Mich ___; ___ NW2d ___; 2015 WL 4472767 (2015) (Supreme Court Nos. 148079, 148087, 149344) (on application for leave to appeal from *Tyra v Organ Procurement Agency of Mich*, 302 Mich App 208; 840 NW2d 730 (2013) and *Furr v McLeod*, 304 Mich App 677; 848 NW2d 465 (2014)).

Facts: In *Tyra*, the plaintiff sent defendants a notice of intent (NOI), and then filed a complaint 112 days later, despite MCL 600.2912b's mandatory 182-day waiting period. One of the defendants filed affirmative defenses that included a statement that "Plaintiff failed to comply with the notice provisions of MCL 600.2912b … and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition." The other defendants did not mention the statute at all. The defendants moved for summary disposition, which the trial court granted, relying on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) (a complaint filed before the expiration of the mandated waiting period under MCL 600.2912b neither commences a medical malpractice action nor tolls the statute of limitations).

In *Furr*, the plaintiffs filed their complaint 181 days after serving a notice of intent. The trial court denied the defendants' motion for summary disposition, relying on *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009) (invoking MCL 600.2301 to excuse a complaint filed 1 day too soon). After that ruling, the defendants filed an application for leave to appeal to the Court of Appeals. In the interim, the Supreme Court decided *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), which reaffirmed that *Burton* still applied despite the Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) (permitting a court to either ignore or allow a plaintiff to remedy defects in the substance of NOIs). In lieu of granting leave, the Court of Appeals remanded to the trial court for reconsideration of the summary disposition motion under *Driver* and *Burton*. After the trial court again denied summary disposition, the Court of Appeals granted leave to appeal.

In *Tyra*, the Court of Appeals, in an opinion authored by Judge Amy Ronayne Krause and joined by Judge Cynthia Stephens, first found fault with the affirmative defenses of all defendants, including the affirmative defense specifically asserting the failure to comply with MCL 600.2912b as a ground for relief, and held that the defendants had not properly preserved any statute of limitations defense. As to the grant of summary disposition itself, the Court of Appeals held that the trial court properly granted summary disposition, but should have permitted plaintiff to move for, and argue in favor of, somehow "amending the filing date of her complaint and affidavit of merit" under MCL 600.2301 and *Zwiers*. The panel reversed the grant of summary disposition and remanded for further proceedings. Judge Kurtis Wilder filed a dissenting opinion, asserting that *Zwiers* was no longer good law in light of *Driver*. He also concluded that the defendants had not waived (and could not waive) their defense that the complaint was prematurely filed.

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As to the grant of summary disposition itself, the Court of Appeals held that the trial court properly granted summary disposition, but should have permitted plaintiff to move for, and argue in favor of, somehow "amending the filing date of her complaint and affidavit of merit" under MCL 600.2301 and *Zwiers*.

In *Furr*, the Court of Appeals, in an opinion authored by Judge William Whitbeck and joined by Judge Michael J. Kelly, concluded, similarly to Judge Wilder in *Tyra*, that *Driver* and *Burton* compelled the dismissal of the plaintiff's complaint, and that those cases essentially invalidated *Zwiers* and the proposition that MCL 600.2301 could somehow be used to change the date of service of an NOI or the filing of a complaint. The panel noted, however, that *Tyra* was binding under the "first-out" rule of MCR 7.215(J). Accordingly, it held that though it would have reversed the denial of summary disposition, it was constrained by *Tyra* to affirm instead. The majority[1] asserted that it believed *Tyra* to be wrongly decided, and called for a conflict panel under MCR 7.215.

[T]he majority pointed out that while a cross-appeal is not required to provide an alternate basis for the same relief, it is required when an appellee seeks greater relief, and that's what the *Tyra* plaintiff was seeking.

The Court of Appeals entered an order vacating *Furr* under MCR 7.215(J)(5), and ordered a special panel convened under MCR 7.215(J) to resolve the conflict between the *Tyra* and *Furr* decisions. The conflict panel concluded that it wasn't clear that *Driver* had overruled *Zwiers*, and it thus affirmed the trial court's denial of summary disposition. *Furr v McLeod*, 304 Mich App 677; 848 NW2d 465 (2014).

Applications for leave to appeal were filed in both cases, and the Supreme Court heard oral argument on the applications.

Ruling: After argument, the Supreme Court reversed the Court of Appeals opinions in both *Tyra* and *Furr*. In *Tyra*, the Court reinstated the summary disposition order reversed by the Court of Appeals, and in *Furr*, it ordered the trial court to grant the defendants summary disposition.

In so holding, the Court also explicitly stated that *Driver* overruled *Zwiers*. Contrary to the *Zwiers* panel's conclusion that *Bush* gives plaintiffs a pass for **any** error relating to NOIs, the Court stressed that "*Driver*, 490 Mich at 258 n 68, held that '*Bush* repeatedly recognized that [an] NOI must be timely filed,' that *Bush* only held that MCL 600.2301 can be applied 'when an NOI fails to meet all of the **content** requirements under MCL 600.2912b(4),' *id*. at 252, and that MCL 600.2301 only applies to **pending** actions or proceedings, *id*. at 264." *Tyra*, ___ Mich at ___, slip op, pp 18-19 (emphasis in the original). Notwithstanding the Court of Appeals' difficulty in discerning any conflict between *Driver* and *Zwiers*, the Supreme Court emphasized that "*Driver* and *Zwiers* are clearly inconsistent with one another, and *Driver* controls over *Zwiers*." *Id.* at ___, slip op, p 19.

The Court also asked the parties to address whether, in *Tyra*, the defendants had waived their affirmative defenses by not stating with sufficient detail the basis for them. The Court ultimately concluded, in a 4-3 decision, that the plaintiff in *Tyra* had abandoned the issue, and thus the Court declined to consider it or to overrule its earlier order in *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007) in which the Court held that defendants need not plead affirmative defenses when a plaintiff fails to comply with the medical-malpractice statutory procedural requirements.

Practice Note: In my view, the Court's holding that *Driver* overruled *Zwiers* is both obvious from study of *Bush*, *Burton*, *Driver*, and *Zwiers*, and long overdue. Even review of *Bush* alone makes clear that the *Bush* Court only intended to apply MCL 600.2301 to **content**-based errors related to NOIs. The Court's later decision in *Driver* only made that more clear. But the Court of Appeals majorities in both cases, for whatever reasons, saw differently (over some strident dissents). The portion of the decision stating that *Zwiers* had been overruled by *Driver*[2] was not at all surprising to me.

What did surprise me is the minor kerfuffle over the waiver issue. Almost as soon as the decision came out, some in the appellate-practice community began some hand-wringing over the notion that *Tyra* has somehow done away with the general principle that an appellee need not file a cross-appeal to urge alternative grounds for affirming a lower-court order. That hand-wringing was fueled in part by Justice Viviano's dissent in *Tyra* in which he asserted that the majority was, in fact, doing that. In my view, the hand-wringers and (respectfully) Justice Viviano are reading too much into the majority's conclusion

In short, in my view, the rule that a cross-appeal is not needed to urge an alternative ground for relief is still safe.

that the *Tyra* plaintiff abandoned the issue.

As the majority itself pointed out in responding to the dissent, the *Tyra* plaintiff never briefed the issue in the Supreme Court, despite having more than one opportunity to do so. Leaving aside the fact that the plaintiff had not cross-appealed, the plaintiff also did not answer the defendants' application. And leaving that aside, once the Court granted argument on the applications, and gave the parties the opportunity to submit supplemental briefs, the plaintiff in *Tyra* **still** didn't brief the issue, despite the fact that the plaintiffs did file a supplemental brief on the *Driver/Zwiers* issue. Also, the majority pointed out that while a cross-appeal is not required to provide an alternate basis for the same relief, it is required when an appellee seeks greater relief, and that's what the *Tyra* plaintiff was seeking. That's because the *Tyra* plaintiff sought a ruling that the defendants had waived the statute-of-limitations defense altogether, which foreclosed any possibility of the defense obtaining summary disposition, whereas the Court of Appeals' ruling that it was not clear that *Zwiers* had been overruled left open the possibility that the defense could have convinced the trial court that it had. Completely eliminating the statute-of-limitations defense was a different form of relief than the plaintiff had obtained by simply having summary disposition denied based on the conclusion that *Zwiers* had not been overruled.

In short, in my view, the rule that a cross-appeal is not needed to urge an alternative ground for relief is still safe. In *Tyra*, the plaintiff had not urged an alternative ground for relief with respect to the waiver issue—or urged anything at all. That said, practitioners will need to carefully consider whether what they are asserting is really a mere "alternative ground for the same relief" or whether they're trying to obtain greater or different forms of relief—cross-appeals have always been needed for the latter.

Endnotes

1 Judge O'Connell concurred with the majority that *Tyra* was binding, but dissented from the part of the opinion characterizing *Tyra* as wrongly decided and calling for a conflict panel.

2 Interestingly, *Zwiers* itself remains pending on application to the Supreme Court.

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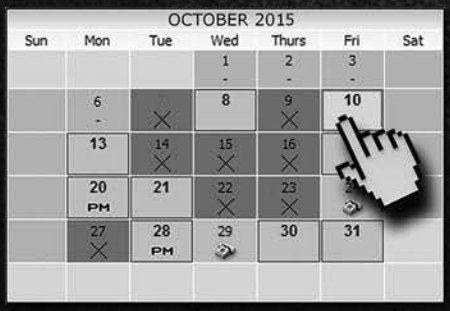

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Supreme Court Update

A Law Firm Representing Itself Cannot Be Awarded Attorney Fees in Case Evaluation Sanctions

On June 3, 2015, the Michigan Supreme Court held that a law firm whose members represent it in litigation cannot recover a "reasonable attorney fee" as a case evaluation sanction. *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265; __ NW2d __ (2015) (Supreme Court Nos. 148931-3).

Facts: Law firm Fraser Trebilcock Davis & Dunlap, P.C. (Fraser Trebilcock) brought a breach of contract action against former clients who refused to pay in full for legal services rendered. Fraser Trebilcock was represented throughout the litigation by one shareholder of the firm and other lawyers affiliated with the firm (member lawyers). The case proceeded to case evaluation, where the resulting award of $60,000 in favor of Fraser Trebilcock was accepted by the firm and rejected by the defendants. The case proceeded to trial, where Fraser Trebilcock was awarded $73,501.90. Fraser Trebilcock moved for case evaluation sanctions, including a "reasonable attorney fee" for legal services rendered by its member lawyers. The trial court granted the firm's motion and ultimately awarded Fraser Trebilcock $80,434 in attorney fees. The defendants appealed. The Court of Appeals affirmed the trial court, reasoning that case law holding that an individual-attorney litigant may not recover attorney fees for self-representation was distinguishable, and applying the reasoning found in a United States Supreme Court footnote.

Ruling: The Michigan Supreme Court reversed, holding that Fraser Trebilcock cannot recover a "reasonable attorney fee" as a case evaluation sanction for legal services performed by its member lawyers. The Court refused to apply the non-binding dictum of the United States Supreme Court case upon which the Court of Appeals relied. Citing the Michigan Supreme Court case *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423; 733 NW2d 380 (2007), which held that an individual attorney who represents himself cannot receive attorney fees under the Open Meetings Act, the Court reasoned that the term "attorney" contemplates an agency relationship between attorney and client. The Court further reasoned that there must be a distinction in identity between the attorney and client for such an agency relationship to exist. Applying this reasoning, the Court concluded that Fraser Trebilcock and its member lawyers did not have separate identities as attorney and client, and thus held that there was no agency relationship sufficient to give rise to an attorney fee.

The Court noted that it saw no more of a relationship in this case than in the case of an individual attorney representing himself, noting the fact that Frasier Trebilcock routinely identified itself as its attorney throughout the litigation, making no distinction between the firm and its member lawyers. The Court also noted that there was no indication that the member lawyers viewed or treated the firm as a client distinct from themselves, and that the firm sought fees in the form of lost opportunity to serve other clients. Notably, however, the Court stated that "[w]hether and under what circumstances a law firm may recover fees for representation

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The Michigan Supreme Court reversed, holding that Fraser Trebilcock cannot recover a "reasonable attorney fee" as a case evaluation sanction for legal services performed by its member lawyers.

provided to it by in-house counsel is not before us, and we decline to reach that question here."

Practice Note: The Court addressed an issue of first impression in a decision that could have a significant impact on law firm structure and management, and how firms pursue unpaid legal fees.

"Own Use" Simply Means That a Defendant Employed the Property for Some Purpose Personal to Defendant

On June 17, 2015, the Michigan Supreme Court held that, in order to succeed on a statutory-conversion claim, a plaintiff must show that the defendant converted the property to the defendant's own use – meaning that the defendant employed the converted property for some purpose personal to the defendant. *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc,* 497 Mich 337; __ NW2d __ (2015) (Supreme Court Nos. 148907, 148909).

Facts: The plaintiff, Aroma Wines & Equipment, Inc., entered into an agreement with the defendant, Columbian Distribution Services, Inc., to rent a climate-controlled warehouse that Aroma would use to store its wine. Per the agreement, Columbian was required to maintain the wine within a certain range of temperatures, and was not permitted to transfer the wine to a different warehouse complex without notice to Aroma. When Aroma began falling behind on its rental payments, Columbian asserted a lien over the wine, refusing Aroma access to the wine until Aroma paid the past-due amount. During their dispute, Columbian moved the wine to a non-climate controlled environment, in violation of the terms of the rental agreement. Aroma alleged that it was moved so that Columbian could rent the space to higher-paying tenants. Columbian contended that it moved the wine temporarily to perform renovations that would increase storage capacity. While Columbian contended that none of the wine was exposed to extreme temperatures, Aroma alleged that the wine was destroyed due to the change in temperature. Aroma filed suit alleging a number of causes of action, including common-law conversion and statutory conversion. Aroma sought treble damages under its statutory-conversion claim.

The case proceeded to trial and the trial court granted a directed verdict as to Aroma's statutory-conversion claim, finding that Aroma failed to present any evidence that Columbian converted the wine to its own use because Aroma failed to present evidence that Columbian drank or sold the wine or otherwise used it for a purpose intended by the wine's nature. The Court of Appeals reversed, concluding that the trial court's interpretation of the word "use" was too narrow.

Holding: The Supreme Court affirmed the conclusion of the Court of Appeals that the term "use" is not to be so narrowly construed as to require that a plaintiff show that a defendant employed the property for a purpose intended by the product or good's nature. The Court explained that, while common-law conversion has evolved over time to merely require a showing that a defendant exercised dominion and control over the property, statutory conversion still requires a showing that the defendant employed the property for the defendant's own use. The Court, however, explained that converting property for one's own use merely requires one to employ the product for a purpose personal to the defendant's interests. The Court explained that it is irrelevant whether the purpose for which the defendant employed the property was the property's ordinary-intended purpose. As such, the Court held that the trial court erred because there was evidence from which a jury could have concluded that Columbian employed the wine for a use personal to it when it either moved the wine for renovations, to receive higher rent, or as leverage in the rent dispute.

Practice Note: The Court, while clarifying the difference between common-law and statutory conversion, broadened the applicability of statutory conversion by broadening the definition of "own use." This ruling could make it easier for plaintiffs to prove statutory conversion.

Prematurely Filed Medical-Malpractice Complaints Must Be Dismissed with Prejudice after the Statute of Limitations Has Run

On July 22, 2015, the Michigan Supreme Court held that the filing of a medical malpractice complaint prior to the end of the notice period does not toll the running of the statute of limitations, and courts cannot use their power to amend process or pleadings to allow such plaintiffs to avoid dismissal of their time-barred complaints. *Tyra v Organ Procurement Agency of Mich*, __ Mich __; __ NW2d __; *Furr v McLeod,* 2015 WL 4472767 (2015) (Supreme Court Nos. 148079, 148087, 149344).

Facts: In two separate cases, *Tyra v*

Because a plaintiff cannot commence a medical malpractice action prior to the end of the notice period, the Court explained, the *Tyra* and *Furr* plaintiffs' prematurely-filed complaints did not create pending actions or proceedings.

Organ Procurement Agency of Michigan and *Furr v McLeod*, the plaintiffs filed medical-malpractice actions after serving the appropriate Notices of Intent to Sue, but prior to the end of the mandatory waiting period. The defendants in both cases filed for summary disposition, arguing that the complaints should be dismissed since they were prematurely filed, and the complaints cannot be re-filed since the statute of limitations had run.

The *Tyra* trial court granted the defendants' motion and dismissed the complaint. The *Furr* trial court denied the defendants' motion. The *Tyra* Court of Appeals panel, citing *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009), reversed the trial court, finding that the trial court erred in not affording the plaintiffs the opportunity to amend the filing date of their complaint pursuant to MCL 600.2301, which allows a court to amend process or pleadings before judgment where such amendment will not affect the substantial rights of the parties. The *Furr* panel convened a conflict-resolution panel after concluding that the decision in *Tyra* was controlling, though decided incorrectly. Nonetheless, the *Furr* conflict panel affirmed the trial court, finding that *Zwiers* had not been overruled by *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), a Michigan Supreme Court case explaining that MCL 600.2301 only applied to pending actions or proceedings.

Ruling: The Supreme Court reversed the *Tyra* and *Furr* panels, finding that both prematurely filed complaints should have been dismissed. The Court found that *Zwiers* had indeed been overruled by *Driver*. The Court then explained that, as promulgated in *Driver*, MCL 600.2301 only applies to a pending action or proceeding. Because a plaintiff cannot commence a medical malpractice action prior to the end of the notice period, the Court explained, the *Tyra* and *Furr* plaintiffs' prematurely-filed complaints did not create pending actions or proceedings. Therefore, the Court found that MCL 600.2301 was not applicable and the complaints should have been dismissed with prejudice.

Practice Note: This ruling should be favorable to defendants, clarifying the previously unclear state of the law.

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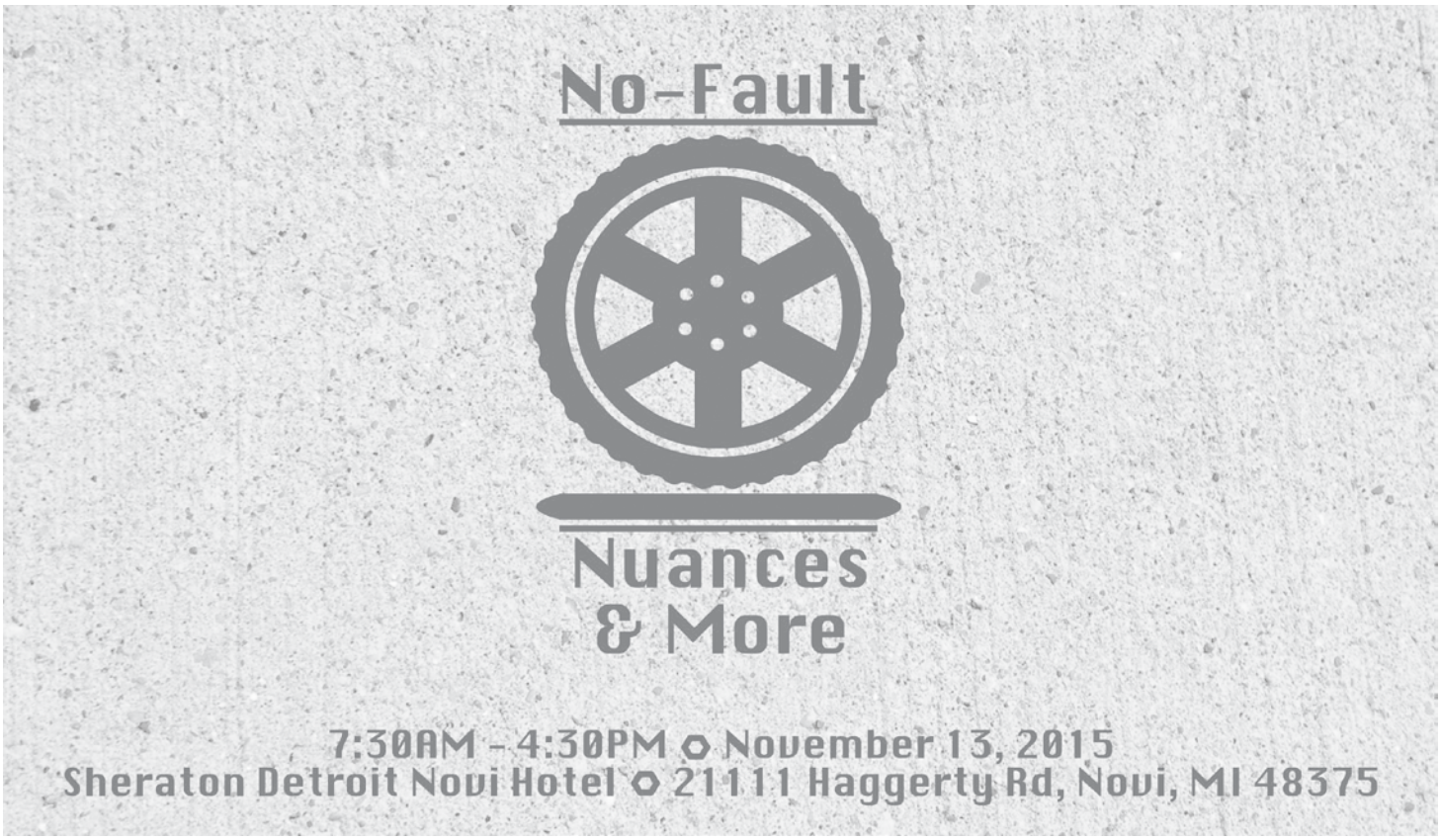

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