MICHIGAN DEFENSE
QUARTERLY

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P.O. Box 66
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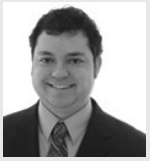
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Editor's Notes

Editor:
Michael James Cook
michael.cook@ceflawyers.com

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

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



Associate Editor:
Matthew A. Brooks
mbrooks@smithbrink.com

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

By: D. Lee Khachaturian, *The Hartford*

D. Lee Khachaturian, Managing Attorney
Law Offices of Diana Lee Khachaturian
Employees of a Subsidiary of The Hartford Financial Services Group, Inc.
5445 Corporate Drive, Suite 360
Troy, MI 48089
248-822-6461
Diana.Khachaturian@thehartford.com

Ya Gotta Have Heart

People are the heart of an organization – profit and non-profit alike. I've always believed that people are important. But as a leader of a volunteer organization, I realize that people are everything. Without the members, there would be no organization. This, of course, doesn't just apply to volunteer organizations. It also applies in the business world – and yes, that includes law firms. I think people forget this. I think people forget that running a business or organization is all about the people.

It's easy to do. To forget the importance of people. We live in a capitalistic society, where it's natural – perhaps expected – to prioritize revenue, expenses, and developing business (among other things) over people. But that's a mistake. Because at the end of the day, without your people, you don't have clients or customers, you don't have revenue, and you certainly don't have any business development. In fact, you don't have anything.

I think law firms are particularly susceptible to undervaluing their people. Most lawyers haven't been trained and don't have experience in business, much less in managing and leading an organization. Many leaders at law firms got their position not because they demonstrated leadership or management skills but because they have a big book of business. Yet there's no inherent connection between these two skill sets: Just because someone is good at generating business doesn't mean they'll be a good leader or manager.

In this same vein, monetary compensation isn't everything. While this clearly applies to volunteer organizations like MDTC, it applies equally in the business world. Some leaders tend to grossly overestimate the importance of money to job satisfaction and grossly underestimate the power of respect and a few kind words. Managing people isn't a one-size-fits-all proposition. Different people value different things differently. Some value time off. Some value a title. Some value increased responsibility. Some value recognition and praise. Some value a combination of these factors. And yes, some do value money.

But even then – even when money is a priority – it's not always as simple as a person wanting to make a lot of money for the sake of making a lot of money. Sometimes, the amount of money a person makes is the only form of feedback he or she gets with respect to his or her performance. As a result, money is perceived as a measure of the organization's value of and respect for that individual. I actually believe that for many, feeling valued and being treated respectfully is more important than being paid a lot of money.

But I digress.

People are the heart of an organization, and a leader must be good at asking questions and reading people. Paying attention to what motivates them. Paying attention to what drives them. And publically and privately recognizing their value to

People are the heart of an organization – profit and non-profit alike.

the organization. This last factor is especially important in a volunteer organization like MDTC, where value cannot be conveyed through or measured by monetary compensation.

So, as I begin the process of closing out my term as President, allow me to publically thank some of the people who have helped to materially advance MDTC's goals during this past year.

A special thanks to the Executive Committee – Vice President **Hilary Ballentine** (Plunkett Cooney), Treasurer **Rick Paul** (Dickinson Wright PLLC), Secretary **Josh Richardson** (Foster Swift Collins & Smith PC), and Past President **Mark Gilchrist (**Smith Haughey Rice & Roegge PC) – for being the driving force behind our firm sponsorship packages, for their faithful attendance at and participation in our monthly meetings, and for their continuous efforts to promote MDTC's mission and improve the organization. These people lifted MDTC to new heights over this past year.

Thanks to our Lansing Regional Chair **Mike Pattwell** (Clark Hill) for organizing our first official Defense Network event in Lansing, which was a resounding success. We look forward to putting on similar events around the state to give our members (and prospective members!) the opportunity to network with fellow lawyers in their community.

Thanks to **Gary Eller (**Smith Haughey Rice & Roegge PC) and Rick Paul for working to get our facilitator database off the ground. This online database will provide our members with a go-to list of facilitators, accompanied by a list of people you can contact to learn more about each named facilitator. This promises to be a very useful MDTC resource.

Thanks also goes to Gary Eller and Rick Paul for finalizing our outstanding Annual Meeting program (May 12-13 at The Atheneum in Detroit), "Unlocking Discovery: Legal and Technology Updates to Maximize Your Practice," which will culminate in our Awards Banquet during which **J. Brian MacDonald** (Cline Cline & Griffin PC) and **Ralph F. Valitutti** (Kitch Drutchas Wagner Valitutti & Sherbrook PC) will be awarded MDTC's Excellence in Defense Award, and **Amber L. Girbach** (Hewson & Van Hellemont PC) and **Paul D. Hudson** (Miller Canfield Paddock & Stone PLC) will be awarded MDTC's Young Lawyers Golden Gavel Award.

Finally, and arguably most importantly, my everlasting thanks to our Executive Director **Madelyne Lawry** and her team **Valerie Sowulewski**, **Kyle Platt,** and **Caleb Sands**. Through their tireless efforts this year, MDTC has, among other things, implemented a fast and easy online registration process, updated our section listserv so there's an easily-accessible group of lawyers to run issues or questions by, and increased our social-media presence, all of which increase the value of our organization and help keep us relevant in a constantly-evolving competitive environment.

I've been fortunate enough to work with some great people during the course of my legal career. It began with The Honorable John Corbett O'Meara (and his chambers), United States District Court for the Eastern District of Michigan, for whom I interned and eventually clerked. And it has continued up through now, as my term as MDTC President begins to come to a close. Since Jim Lozier (Dickinson Wright PLLC) introduced me to MDTC leadership many years ago, MDTC has been an integral part of my legal career due, in large part, to the fabulous people who have been and continue to be the heart of this outstanding organization. I'm so grateful that I've had this opportunity.

Ex Parte Communication in a Post-HIPAA World

By: Matthew J. Thomas, *Rutledge, Manion, Rabaut, Terry & Thomas, P.C.*

Executive Summary

Ever since the Health Insurance Portability and Accountability Act went into effect in April 2003, Michigan's long-history of wide-open and liberal discovery has been under attack. For years, ex parte meetings with a plaintiff's medical providers have been an acceptable means of informal discovery; however, plaintiffs have used HIPAA to impede defendants' access to a plaintiff's medical providers. While our appellate courts have taken steps to protect a defendant's right to this type of discovery, some plaintiffs continue to fight to preclude equal access to treating physicians, and motions for qualified protective order must be sought.

Matthew J. Thomas is a partner and trial attorney with the law firm of Rutledge, Manion, Rabaut, Terry & Thomas, P.C., located in Detroit, Michigan. Mr. Thomas focuses his practice on the representation of defendants in professional and general liability actions, including medical, legal and other professional malpractice; premises liability litigation; first and third party auto actions; and other complex litigation. In addition to his trial practice, Mr. Thomas has an active appellate practice. He is a member of the Michigan Defense Trial Counsel; Association of Defense Trial Counsel; and the Negligence Section of the State Bar. Mr. Thomas also sits as a Committee Member for the Detroit Catholic Central Shamrock Bar Association, and he holds an AV Preeminent® (highest) Peer Review Rating from Martindale-Hubbell.

INTRODUCTION

In April 2003, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) went into effect.[1] Generally, HIPAA regulates the use and disclosure of protected health information by covered entities.[2] The implementation has wreaked havoc on medical-malpractice and other personal-injury litigation, and the obstacles it has created for defense counsel have been described as being "analagous to sending a boxer into the ring wearing a blindfold!"[3] Specifically, HIPAA has impacted preexisting state rules governing informal discovery and, in many instances, has severely restricted defense counsel's access to a plaintiff's relevant health information.

What follows is a brief look into the history of HIPAA and its effect on discovery practices and where it has taken us in Michigan.

HIPAA PRIVACY RULE

As noted above, HIPAA regulates the use and disclosure of protected health information by covered entities.[4] Protected Health Information (PHI) includes any information relating to healthcare treatment or payment that contains any element of information that may have a potential to relate to an identifiable patient.[5] Entities covered by HIPAA include healthcare providers, as well as healthcare plans and healthcare clearinghouses.[6]

Under HIPAA, whenever a covered entity uses or discloses PHI, the use or disclosure must comply with the provisions of the act. HIPAA mandates disclosure in only two instances—when requested by either the patient or by the Secretary of Health and Human Services in order to enforce the act.[7] All other uses or disclosures are permissive in nature, including those made within the course of any judicial or administrative proceeding.[8] These permissive disclosures fall under so-called public-interest disclosures.[9] This exception permits covered entities to use or disclose PHI in litigation circumstances without written authorization under the following circumstances:

1. The covered entity may disclose PHI pursuant to a court order or order from an administrative tribunal, but any such disclosure may not exceed what is directed by the order;[10]

2. The covered entity may disclose PHI pursuant to an attorney's subpoena or discovery request, if the covered entity obtains "satisfactory assurances" from the party seeking the disclosure that the requestor has made "reasonable efforts" to notify the individual of the request;[11]

3. The covered entity may disclose PHI if it obtains "satisfactory assurances" from the party seeking the disclosure that the requestor has made "reasonable efforts" to obtain a qualified protective order, which prohibits the disclosure of the PHI for any reason other than the litigation and requires the return or destruction of the health information at the end of the litigation;[12] or

4. If the covered entity does not receive either a court order directing the disclosure or the above-described satisfactory assurances, then the covered entity itself may make reasonable efforts to notify the individual or to seek a qualified protective order.[13]

Despite the fact that HIPAA expressly permits disclosures under the above circumstances, it became a weapon utilized by plaintiffs' lawyers to challenge the legality of *ex parte* meetings with healthcare providers in this state, which once welcomed and encouraged informal discovery. To do so, the plaintiffs' bar relied upon HIPAA's preemption clause, which makes clear that HIPAA reigns supreme over any contrary state laws.[14] To determine whether a law is contrary, and thus, preempted by HIPAA, one should look to whether it would be impossible for a covered entity to comply with both HIPAA and the state requirements in disclosing or not disclosing PHI.[15] If the state law stands as an obstacle to the purpose and objectives of HIPAA, then the state law is preempted.[16] The most relevant inquiry to determine whether HIPAA preempts state law is whether the state rules are more stringent than HIPAA. If not, HIPAA reigns supreme.

It is with this preemption clause that plaintiffs began to utilize HIPAA to challenge defense counsel's right to *ex parte* communication with healthcare providers in personal injury and medical malpractice actions. Indeed, Michigan trial courts, which historically permitted such informal discovery, became split on whether HIPAA, by way of its preemption clause, ended counsel's right to *ex parte* meetings under state court rules and statute. In Michigan, HIPAA sparked a several-year battle between plaintiffs, defendants and the trial courts.

PRE-HIPAA MICHIGAN

Michigan courts have a long history of encouraging wide open discovery. In *Domako v Roe*,[17] the Michigan Supreme Court specifically held that defense counsel could properly and lawfully conduct *ex parte* interviews with a plaintiff's treating physician once the physician-patient privilege is waived. In that case, the Court noted that discovery was governed by the Michigan Court Rules, which provide that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...."[18] Since the challenged *ex parte* communication was relevant to the issues in that case, the information could only be shielded from discovery by the plaintiff through an assertion of privilege.

The physician-patient privilege in Michigan is statutorily granted.[19] However, the statute also expressly provides for a waiver of that privilege if a patient brings an action for malpractice or personal injuries and produces any physician as a witness.[20] The Court noted that the purpose of providing for waiver when a patient's physical or mental condition is in controversy is to prevent the suppression of evidence and provide for equal access to relevant evidence.[21]

In the *Domako* case, the Court held that the controlling law in Michigan is that *ex parte* meetings with medical providers are an acceptable and permissible form of discovery. The Court noted that restricting parties to so-called formal discovery would not "aid in the search for truth", but would rather only "complicate trial preparation."[22] The Court concluded by finding that, while *ex parte* and other means of informal discovery were not expressly provided for in the Michigan Court Rules, "prohibition of all *ex parte* interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost-effective litigation."[23]

Similarly, courts have historically held that a plaintiff does not have the right to control how a defendant conducts its investigation or how a defendant prepares his or her defense to an action. In *Davis v Dow Corning Corp*,[24] the plaintiff's attorney attempted to convince a treating physician not to meet with the defense attorney without plaintiff's counsel being present. The Michigan Court of Appeals expressly rejected this tactic and noted that prohibition of *ex parte* interviews with treating physicians is inconsistent with the purpose of providing equal access to relevant evidence.

POST-HIPAA MICHIGAN

This right to equal access to relevant medical information went unchallenged until HIPAA went into effect. At that time, the practice of unfettered access to a plaintiff's treating physicians was halted. Medical providers began refusing to meet with counsel, absent an authorization specifically providing for *ex parte* oral communication. Plaintiffs refused to sign such authorizations, leading to motions being filed in almost every medical-malpractice and personal-injury case. Further, trial courts were inconsistent in their rulings on such motions, while some permitted *ex parte* communications; others flat out rejected any attempts by the defense to have access to treaters absent plaintiff counsel's attendance.

As more and more trial courts rejected defense counsels' petitions to compel plaintiffs to execute authorizations permitting *ex parte* communication, the defense bar turned to seeking qualified protective orders, which would permit a healthcare provider to meet with counsel

As more and more trial courts rejected defense counsels' petitions to compel plaintiffs to execute authorizations permitting *ex parte* communication, the defense bar turned to seeking qualified protective orders, which would permit a healthcare provider to meet with counsel without an authorization from the patient.

without an authorization from the patient. Like the motions to compel authorizations, however, the trial courts were inconsistent and many were blanketly denying the requests under the guise of HIPAA's preemption clause.

In 2005, the Michigan Court of Appeals in its unpublished opinion in *Belote v Strange*[25] held that under the provisions of HIPAA, and unlike Michigan law, a plaintiff in a malpractice or personal-injury action could not informally waive the physician-patient privilege. Accordingly, Michigan law was preempted by the federal statute. As such, the Court held that the defendant's failure to first obtain written authorization or to follow other discovery procedures as outlined in the act prior to engaging in *ex parte* communications with plaintiff's treating surgeon was, in and of itself, a violation of HIPAA.

Less than a month later, however, the Honorable Nancy G. Edmunds of the United States District Court for the Eastern District of Michigan clarified the process by which a defendant could seek an *ex parte* meeting absent a written authorization. Specifically, Judge Edmunds issued an Order in the matter of *William Croskey v BMW of North America*,[26] wherein she held that in order to conduct *ex parte* interviews with a treating physician under HIPAA, defense counsel must first obtain a waiver of the privilege by plaintiff **or** obtain a qualified protective order from the court. Judge Edmunds further held that HIPAA requires that any qualified protective order include the following in order to be lawful:

- that defendants are prohibited from using or disclosing PHI for any purpose other than in the litigation;
- that defendants are required to return or destroy the protected information at the end of the litigation;
- that the qualified protective order covers only the interview of plaintiff's treating physicians;
- that the treating physicians shall be informed that the *ex parte* meeting is not being requested by the patient, but rather defense counsel and that the treating physician is not obligated to meet with and discuss plaintiff's care and treatment with defense counsel;
- that the meeting is for the purpose of gaining information to assist in defense of a lawsuit brought by plaintiff; and
- that the treating physician may have their own attorney present during the meeting.

This ruling gave new life to the defense bar; however, state trial courts were still hesitant to grant qualified protective orders permitting *ex parte* communication. There were still great divides between how each individual trial judge ruled on requests for qualified protective orders, and the appellate courts gave little instruction. In 2006, the Michigan Court of Appeals, in an unpublished decision in *Barnes v Beattie*,[27] for the first time explicitly acknowledged that even without the written consent or authorization permitting *ex parte* communications, HIPAA may permit *ex parte* communications under the permissive disclosure provisions of the act. This, however, did little to impact the trial courts.

Despite the *Croskey* decision setting forth the parameters for qualified protective orders, plaintiffs' attorneys continued to argue at the trial court level that *ex parte* meetings violated HIPAA and the preemption clause. In response, many judges simply would not enter a qualified protective order or would do so only if the qualified protective order also permitted a plaintiff's attorney to be present at any informal meeting. These orders were worthless as they negated the entire purpose behind a request for "*ex parte*" communication. Moreover, medical providers were hesitant to meet with counsel absent such an order, even if "reasonable assurances" were provided that such a qualified protective order was sought, as permitted under HIPAA.

Finally, in 2008 the Michigan Court of Appeals addressed these arguments, at least in part, in a published decision. In *Holman v Rasak*,[28] plaintiff's counsel argued to the trial court that *ex parte* communication violated HIPAA. The trial court agreed and ruled that HIPAA precluded *ex parte* meetings. The appellate court granted leave to appeal and found that defense counsel may conduct *ex parte* meetings with a plaintiff's treating physician if a qualified protective order, consistent with HIPAA, is first sought. The Court's opinion was affirmed by the Michigan Supreme Court,[29] which concluded:

> "...informal interviews are routine practice and that there is no justification for requiring costly depositions…without knowing in advance that the testimony will be useful."

The Supreme Court confirmed that Michigan law permits *ex parte* interviews of treating physicians and that with the filing of a personal-injury lawsuit, any privilege associated with the medical information is waived.[30] Citing its own decision in *Domako,* the Supreme Court reiterated:

> "Prohibition of all *ex parte* interviews would be inconsistent with the purpose of providing equal access to relevant evidence and efficient, cost effective litigation.[31]"

The Court then examined HIPAA and the various enumerated ways whereby

medical information, including oral information, could be obtained. Specific to information obtained orally, such as during an *ex parte* meeting, the high court stated:

> "We see no logical reason that protected health information maintained in a physician's records and conveyed verbally by a physician during an *ex parte* interview cannot be subject to a qualified protective order under 45 CFR 164.512(e)(1)(v).[32]"

Also instructive was the Court's indication that:

> "[w]hile HIPAA is obviously concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of all other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations.[33]"

Ultimately the court held in relevant part:

> "Accordingly, we conclude that Michigan's approach to informal discovery, which permits defense counsel to seek an *ex parte* interview with a plaintiff's treating physician, is not "contrary" to HIPAA. An *ex parte* interview may be conducted and a covered entity may disclose protected health information during the interview in a manner that is consistent with HIPAA, as long as the covered entity received satisfactory assurance that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).[34]"

Following the decision in *Holman,* there was little debate that qualified protective orders could be sought and that they should be granted. As such, plaintiffs began seeking restrictions on *ex parte* communications, to include that counsel be given advance notice of any meeting and be permitted to attend such meeting. The Court of Appeals, however, in *Szpak v Inyang*,[35] found that there was no good-cause basis for the trial court to place added restrictions such as those outlined above. Further, the Court of Appeals found that the inclusion of those restrictions, i.e. advance notice of time and place of meeting, and permitting plaintiff's counsel to attend, constituted an abuse of discretion by the trial court.

In Michigan, it appears that the restrictions on informal discovery have come full circle with the decisions in *Holman* and *Szpak*. Since these opinions were released, plaintiffs are rarely challenging defense counsel's right to *ex parte* meetings; however, the plaintiffs' bar has recently been taking a new tactic—arguing that plaintiffs are entitled to know the identity of those treaters with whom defense counsel has met, as it is necessary so that the patient/plaintiff can monitor who has disclosed PHI.

Further, there seems to be an increase, at least in Michigan, of suits against physicians for unauthorized disclosures of PHI. While HIPAA does not provide for a private civil action against a covered entity,[36] Michigan does recognize a tort for unauthorized disclosure of privileged information.[37] These new strategies are just another attempt at blocking defendants' access and intimidating physicians. Whether such attempts will be successful remains to be seen.

Conclusion

Since there have been no significant appellate Court decisions on this issue since *Holman* and *Szpak,* the landscape has not changed and *ex parte* meetings with plaintiffs' treating physicians continue without pre- or in-meeting restrictions. Trial courts are routinely allowing post-meeting notification of the identity of the treater met with in order to "throw plaintiff a bone." Many plaintiffs are serving interrogatories asking who was met with and what they said as an alternative to post-meeting notice. Some judges at the trial court level still impose improper restrictions on *ex parte* meetings, but these restriction have been peremptorily reversed by the Court of Appeals. Since there has been no distinction between meeting with healthcare providers[38] in medical-malpractice claims or in any personal-injury claims, practitioners should continue to move for qualified protective orders in order to conduct *ex parte* meetings with treating physicians in all cases of negligence. The experience to date is that trial court judges more often than not grant the motion regardless of the type of negligence action alleged. This invaluable tool should be the part of any defense practitioner's arsenal in attempting to limit plaintiff's damage claims.

Endnotes

1 See 45 CFR 164.534.
2 See 45 CFR 164.502(a).
3 *Croskey v BMW of N Am*, unpublished order of the United States District Court for the Eastern District of Michigan, issued Nov. 10, 2005 (Docket No. 02-73747); 2005 WL 4704767.
4 Id.
5 See generally, 45 CFR 164.500.
6 See 42 USC 1320d(2), (3) and (5).
7 See 45 CFR 164.502(a)(2)(i) and (ii).
8 See 45 CFR 164.512(e)(1).
9 See 45 CFR 164.512.
10 See 45 CFR 164.512(e)(1)(i).
11 See 45 CFR 164.512(e)(1)(ii).
12 See 45 CFR 164.512(e)(1)(iv).
13 See 45 CFR 164.512(e)(1)(vi).
14 See 45 CFR 160.203.
15 See 45 CFR 160.202.
16 Id.
17 *Domako v Roe*, 438 Mich 347; 475 NW2d 30 (1991).
18 See MCR 2.302(B)(1).
19 See MCL 600.2957.
20 Id.
21 *Domako*, 438 Mich at 355-356.
22 *Id*. at 360.
23 *Id*. at 361-362.
24 *Davis v Dow Corning Corp*, 209 Mich App

287; 530 NW2d 178 (1995).

25 *Belote v Strange*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 25, 2005 (Docket No. 262591); 2005 WL 2758007.

26 *Croskey v BMW of N Am*, unpublished order of the United States District Court for the Eastern District of Michigan, issued Nov. 10, 2005 (Docket No. 02-73747); 2005 WL 4704767.

27 *Barnes v Beattie*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 266468); 2006 WL 2089215.

28 *Holman v Rasak*, 281 Mich App 507; 761 NW2d 391 (2008).

29 See *Holman v Rasak*, 486 Mich 429, 433; 785 NW2d 98 (2010).

30 *Id.* at 436-437.

31 *Id.* at 435, citing *Domako*, 438 Mich at 361-362.

32 *Id.* at 444.

33 *Id.* at 446.

34 *Id.* at 446, citing 45 CFR 164.512(e)(1)(ii)(B).

35 *Szpak v Inyang*, 280 Mich App 711; 803 NW2d 904 (2010).

36 HIPAA does not provide a private cause of action for improper disclosures of medical information, but rather provides civil and criminal penalties which must be enforced by the Department of Health and Human Services. See *Pritchett v Office of Attorney General*, unpublished order of the United States District Court for the Eastern District of Michigan, issued Oct. 3, 2006 (Docket No. 05-10206-BC); 2006 WL 2828656. Congress did not provide for a private cause of action in HIPAA, and instead violations can only be pursued by the Secretary of Health and Human Services. *LSD v Genesee Co, Com'y Mental Health*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Aug. 11, 2006 (Docket No. 05-71844); 2006 WL 2347612.

37 See *Saur v Probes,* 190 Mich App 636; 476 NW2d 496 (1991).

38 E.g. *Charter v Fata*, unpublished order of the Court of Appeals, issued May 21, 2015 (Docket No. 324907), wherein the Court reversed the trial court's imposition of a pre-meeting notice requirement. Specifically, the Court held "[i]n lieu of granting leave to appeal, pursuant to MCR 7.205(E)(2), the Court orders that the Oakland Circuit Court's decision to require defense counsel to notify plaintiff no later than 24 hours before any *ex parte* interview with plaintiffs treating physicians and health care providers is REVERSED and the language of the fourth paragraph of the circuit court's November 14, 2014 qualified protective order requiring such notice is STRICKEN from the qualified protective order. *Szpak v Inyang*, 290 Mich App 711; 803 NW2d 904 (2010). Plaintiff's desire for notice can be accomplished through traditional methods of discovery. MCR 2.309; MCR 2.302(E)(l)(b)(ii), (c)."

The On-Demand Workforce: Spotlight on Employee Misclassification

By: Patricia Nemeth and Kellen Myers, *Nemeth Law, P.C.*

Contingent workers, more recently called on-demand workers or even micro-entrepreneurs, continue to be a growing force in the labor market. These workers are relied upon almost entirely by sharing-economy companies like industry giant Uber. However, such companies classify on-demand workers as independent contractors and not as employees. This has resulted in a host of lawsuits against Uber and other sharing-economy companies (such as Handy and Lyft) where on-demand workers argue that they are employees entitled to greater benefits under the law such as overtime or unemployment benefits.

In addition to these lawsuits, on-demand workers have engaged in protests around the country (and the world) combatting what they argue is unfair treatment and purposeful misclassification. These events have not gone unnoticed by the public or the press. The result: the topic of worker misclassification, previously limited to law-review articles and human-resource memos, has become the subject of a nationwide debate. Add to this the fact that the Department of Labor (DOL) recently declared that "most workers are employees" under the Fair Labor Standards Act (FLSA), meaning that companies, and their attorneys need to be acutely aware of the relationship they have with their workers—whether they are independent contractors or employees.

More than ever before, contingent workers (a group generally comprised of freelancers, independent professionals, independent contractors, on-demand workers, and temporary workers) account for a greater percentage of the American workforce. The Government Accountability Office (GAO) estimates these workers comprised 35% of all employed workers in 2006 and nearly 41 percent in 2010.[1] Similarly, *Forbes* recently reported that the number of Americans working on-demand jobs will more than double by 2020, from 3.2 million to 7.6 million according to one survey.[2] As the contingent workforce has increased, so too has litigation over worker misclassification. Each year there is a new record high number of FLSA lawsuits filed in federal court – many of which are collective actions representing multiple employees and significant potential damages for employers.[3] Additionally, because the state and federal government do not collect payroll taxes for independent contractors, misclassification of workers as independent contractors has also led to lower tax revenues. The Internal

Patricia Nemeth, an attorney since 1984, specializes in the labor and employment arena as a mediator, arbitrator, litigator, consultant, and negotiator. Her areas of expertise include, but are not limited to investigations, religious, ethnic, and gender discrimination, workplace sex, race, ethnic harassment, wrongful discharge, union organizing activities and multi-party lawsuits. Industries served include healthcare, nursing homes, retail, manufacturing, gaming, insurance, and government entities. Ms. Nemeth serves as a certified mediator for all types of civil litigation matters, including employment. She also serves as an employment arbitrator and commercial arbitrator. Her email address is pnemeth@nemethlawpc.com

Kellen Myers focuses his practice on management labor and employment law. Areas of particular interest include wage and hour and traditional labor law.
His email address is kmyers@nemethlawpc.com

Revenue Service estimates that the federal government loses out on billions of dollars per year due to worker misclassification.[4] As such, not only has there been an increase in private litigation, government agencies have stepped up their scrutiny over worker classification in recent years to combat this loss of tax revenue.

Despite this, some workers prefer these non-traditional work relationships. In fact, that same *Forbes* survey indicates that 54% of on-demand workers are satisfied with their work status. Thus, the growth of contingent workers and non-traditional employment may be driven in part by a millennial workforce seeking flexibility and greater work-life balance. On-demand work platforms in particular take advantage of those traits.

> More than ever before, contingent workers (a group generally comprised of freelancers, independent professionals, independent contractors, on-demand workers, and temporary workers) account for a greater percentage of the American workforce.

For example, on-demand work platforms (basically, an app on a smart-phone) provided by sharing-economy companies like Uber and Handy allow workers to simply log in (or out) at any time and perform tasks for consumers such as driving passengers to a location, performing handy-man services, cleaning homes, or completing odd-jobs such as assembling IKEA furniture. The consumer pays for the service through the app, the company takes a cut of the fee and the rest is passed on to the worker.

Because of how the system is structured, an on-demand worker has no obligation to show up at a particular time, work from a specific location, or even work for a specific company. An on-demand worker can simply log off the application and take the afternoon, day, weekend or even just a few hours off from work almost any time he or she chooses. This provides a level of flexibility for workers not possible under a traditional 9-5 work relationship with a central location or office.

Ultimately, the problem for employers and companies is the inherent difficultly in properly classifying on-demand workers under the current bifurcated independent contractor/ employee approach. The two primary tests used by courts to determine whether a worker is an independent contractor or employee are the common-law control test and the economic-realities test. The common-law control test, which arose from agency law, analyzes how much control the employer has over the manner and means of work performed by the individual. The economic-realities test analyzes whether a worker is in business for him or herself, or is economically dependent upon the employer.

On-demand workers fall into the grey area between these two tests. An on-demand worker has the freedom to choose when and what apps to log into to perform work but, when logged in, he or she may be subject to significant control by the employer over things such as the pay rate or how to interact with consumers. Thus, even if an employer or company wants to properly classify these workers it faces a difficult task.

While the issue is becoming clearer, the solution is much less so. Some pundits have advocated for the introduction of a third classification—dependent-contractor. Countries such as Germany and Canada have used this third classification for some time to the benefit of both workers and employers.

Under the dependent-contractor classification, the primary characteristic of these workers is economic dependence on a single employer. If the worker's primary source of income is from one employer, but the worker also has many of the traits of an independent contractor, he or she could be classified as a dependent contractor and would have additional legal protections. Such legal protections could be some, or many, of the same benefits that employees receive.

In this way, the on-demand "in-between" class of workers who are more susceptible to economic volatility would receive protection. In turn, employers would have greater certainty as to their legal obligations. Such clarity (as compared to the ambiguity that currently exists) would likely lead to a decrease in costly litigation for employers—a current concern for many. Additionally, the use of a dependent-contractor classification would provide some structure for sharing-economy companies to survive and for the United States to compete in a global economy where other countries are benefiting from recognizing a third worker classification.

The current on-demand worker debate is at the forefront of modern workplace issues. Because of this, the

Additionally, the use of a dependent-contractor classification would provide some structure for sharing-economy companies to survive and for the United States to compete in a global economy where other countries are benefiting from recognizing a third worker classification.

legal system is being forced to reexamine the traditional legal tests of employment, with some arguing that the current approach is unable to cope with the impact of changing technology on the modern workplace. Although it is unclear whether the traditional classification system will change, what is clear is that it is straining to cope with the shifting dynamics of employer-employee relationships. As such, employers and their attorneys must be aware of this hot-button issue and make business plans that take it into account.

Endnotes

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The Reverse Side Always Has a Reverse Side: Learning to See from Another's Viewpoint

By: Joe Basta, *Basta Resolutions PLLC*

Joe Basta is president of Basta Resolutions PLLC, a private mediation firm and current chair of the ADR Section of the State Bar of Michigan. He was a trial lawyer at Dykema Gossett for over 34 years, litigating a wide variety of complex commercial matters before focusing exclusively on mediation work. He is a member of Professional Resolution Experts of Michigan (http://premiadr.com/).

The key to successful negotiation, whether mano a mano or with the help of a mediator, is understanding that the person with whom you are in conflict sees the situation differently than you do. Sounds simple enough. What could be easier you say? Unfortunately, your hard-wiring is working against you. We are built to see things our own way and to assume that others see things our way too. This alone begets conflict.

R.J. Rummel coined the term "subjectivity principle" to explain how conflict often flows from our different perceptions of the same event. Law students taking evidence are sometimes treated to a mock classroom fight to illustrate the unreliability of eyewitness testimony-that different people can see the same event differently. Perhaps you've seen the You Tube video of basketball players in a pickup game totally unperturbed by a person walking through their midst in a gorilla suit-so focused on the game they fail to see the obvious about them. Both scenarios demonstrate that intelligent people can honestly see the same event differently or not at all.

Rummel notes there are a number of reasons people see the same event differently. Your visual perspective or vantage point may be different than mine. Witness the use of video replay to reduce a referee's error. We also invest different meaning and value in what we perceive. Language, for example, enables us to break the outside world into cogent elements we can manipulate, and we may regard these elements as good or bad, safe or unsafe, pleasant or unpleasant. Perceptions also differ because we each have unique experiences and learning abilities we bring to them, even where we share the same culture. Rummel adds what he believes is an even more basic reason for differing perceptions: we unconsciously transform them in order to maintain psychological harmony among them. We see what we want to see, those things that are consistent with our beliefs. Psychologists refer to it as the "halo effect." If we think a person or group is good, we see the positive things they do and tend to ignore the negative. The converse is also true. I'm convinced this quest for psychological balance is one reason we strive mightily to make sense of phenomena like terrorism, school shootings, natural disasters, and other events that we often cannot comprehend.

Brain science, behavioral psychology, and behavioral economics buttress Rummel's views. Among recognized psychological tricks and traps that complicate negotiation and dispute resolution are:

- Confirmation Bias: We credit information consistent with our pre-

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existing beliefs and ideas. We resist information that contradicts existing beliefs or values. As a conservative, I may like the Wall Street Journal editorial page because it agrees with my views; as a liberal, you may like the New York Times.

- Projection (or Consensus Error): We think that others see the world as we do and share our values. We think they like what we like and want what we want.
- Loss Aversion: We feel losses more painfully than we value equivalent gains. A drop in the stock market may cause panic; a rise in the market produces a yawn. We overvalue our position, or what we might have to give up, and undervalue our adversary's. Loss aversion is also known as status quo bias, our tendency to resist change.
- Naïve Realism: Somewhat like confirmation bias, we tend to believe that how we see the world is the way it really is, and those who disagree with us are naïve.
- Overconfidence: We tend to overrate our abilities and talents. We also overweight what we know and underweight what we do not know. Each of us thinks of ourselves as above average, like the children of Lake Wobegon.
- Reactive Devaluation: We immediately view negatively something proposed by our opponent. Republicans resist legislation proposed by Democrats; and Democrats resist legislation proposed by Republicans.

You get the idea. As some have observed, given our hard-wiring, the wonder is that we are able to communicate with one another at all.

How do we as negotiators and mediators overcome the subjectivity principle and our ingrained psychological traps? First, recognize that they exist. Second, know that we are all subject to them, that means you and me too. Third, incorporate this knowledge into your negotiating and mediating strategies. This undoubtedly means bringing a new humility and reflective attitude to our practices. You are not as smart as you think you are or know as much as you think you do. Fortunately, neither does anybody else. Your counterpart in conflict is not a bad, ignorant, or naïve person. He or she may simply see the world differently than you do. Acknowledging this may enable you to focus on the problem, not the person, and improve immeasurably the quality of your negotiations and mediations.

The Event Data Recorder – A Powerful Tool in Collision Analysis

By: Donald Parker, *Exponent, Inc.*

Executive Summary

The modern automotive Event Data Recorder (EDR), found in most recent and new automobiles and light trucks, can be a powerful tool in helping to understand the nature and substance of a vehicle collision. This article presents a short history of the EDR and a brief synopsis of what they can do and how they can contribute to a case.

Mr. Parker is a Principal in Exponent's Vehicle Engineering Practice in the Detroit area. With over 40 years of experience in the automotive industry and consulting, he is recognized as an expert in mechanical and automotive design engineering, and accident reconstruction. He has assisted clients with a broad level of expertise in many diverse areas, including product design, design defect claims, failure analysis, accident investigation and reconstruction, intellectual property issues, and organizational management. Mr. Parker holds MS and BS degrees in Mechanical Engineering. He is well qualified to apply proper engineering judgement and analysis to EDR data.

Contact:
Exponent, Inc.
39100 Country Club Drive, Farmington Hills, MI 48331
(248) 324-9104
dparker@exponent.com

Introduction

The automotive Event Data Recorder (EDR), often but erroneously referred to as a "black box" in the media, is defined by the National Highway Traffic Safety Administration (NHTSA) as "a device installed in a motor vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during, and after a crash."[1] By contrast, the black boxes in airplanes, trains, and ships are more sophisticated devices that record a much broader spectrum of data continuously throughout the operation of the vehicle, and in some cases can record sounds and conversations.

EDRs were first introduced in production in some model-year 1998 General Motors vehicles. Today, most cars and light trucks on the road have some form of an EDR.

EDR data, in conjunction with physical and testimonial evidence, can provide valuable insight in analyzing the nature and substance of a vehicular collision. It can be used to help define and quantify the collision, or in some cases whether a collision happened at all in the way claimed.

The NHTSA has estimated that approximately 96% of 2013 model year passenger cars and light trucks contain EDRs. Moving forward, passenger-vehicle-collision litigation will increasingly use information from the EDRs in the involved vehicles, and more commonly involve arguments about that data.

Historical Overview

From the earliest application of airbag-supplemental-restraint-system technologies in 1972, the on-board computer that controls airbag deployment, or airbag control module (ACM), usually had capacity to record and retain some data about the conditions that led to a deployment command. But they did not record any pre-crash information.

General Motors was the first vehicle manufacturer to make the data retained by the ACM in their vehicles publicly accessible. They introduced that capability in various Buick, Cadillac and Chevrolet brand models in model year 1994, and expanded over other GM brands in the following years. In 1998, GM introduced a new concept for safety research that used ACM capacity to additionally record certain pre-crash data for later download and analysis. GM called these new modules with expanded capability "Event Data Recorders" (EDRs). The term has become commonly used in the industry and by the NHTSA, although other manufacturers have used other names for their specific control modules.

Two examples of an EDR-capable ACM are shown in Figure 1. As can be seen, ACMs are relatively small devices. They are often located under the center console or under the front passenger seat in a vehicle.

Figure 1 - EDR-capable ACMs

Ford introduced EDR capability in some of their vehicles lines in model year 2001, and Chrysler in 2005. Several other manufacturers included EDRs in their airbag control systems in the subsequent years prior to 2012.

EDRs (and also ACMs) over the years, in their various forms from different manufacturers, had little consistency in terms of what data was recorded, the conditions under which that data would be recorded, and whether it was publicly accessible. Even within a given manufacturer, there was notable inconsistency from model year to model year and from model line to model line due to rapidly evolving technology.

GM called these new modules with expanded capability "Event Data Recorders" (EDRs). The term has become commonly used in the industry and by the NHTSA.

Older vehicles with ACMs will typically record event data to indicate whether the internal-algorithm criteria for airbag deployment had been met, some information about the accelerations experienced during the event, and whether the front seat belts were buckled. In later vehicle models with EDRs, data is also recorded indicating select vehicle parameters for a period of seconds prior to the event, such as vehicle speed, and throttle and/or brake application. In addition, more than one event can sometimes be stored.

The standard publicly-available tool for accessing recorded ACM or EDR data, when it is accessible, has been the Crash Data Retrieval (CDR) tool by Bosch (www.boschdiagnostics.com). The CDR tool is a software and hardware package that allows an investigator to connect to the vehicle's data connector, usually under the instrument panel, with a personal computer. The PC and the CDR software are used to create an image of the data stored in the EDR, without altering or removing the data, and to translate the computer-ese hexadecimal data into a readable format. In cases where the vehicle's electrical system has been compromised by collision damage, the ACM/EDR can be removed from the vehicle and imaged directly. The CDR software can also be used to print a report that includes a tabulation of the data, as well as a listing of limitations on that data.

Federal Rule 49 CFR Part 563

Effective September 1st of 2012, the NHTSA enacted Federal Rule 49 CFR Part 563 – Event Data Recorders. Among other things, the rule specifies uniform requirements for EDRs in light passenger vehicles, and requires the EDRs be compatible with commercially available tools to image the retained data.

Part 563, however, does not require all applicable vehicles to incorporate an EDR. It places conditions and requirements on the nature and function of the EDR, but **only if** the manufacturer chooses to include one. Even today, certain manufacturers choose not to utilize an EDR in their airbag control systems.

Similarly, Part 563 does not dictate the type of tool that can be used to image the data. Most manufacturers have designed their systems to be compatible with the Bosch CDR system. Some manufacturers, most notably Hyundai and Kia, have opted to utilize a brand-specific tool.

Because of rule 49 CFR Part 563, most cars and light trucks manufactured today, estimated by the NHTSA as high as 96% of production, include an EDR. As older vehicles leave the active fleet, the percentage of vehicles with accessible EDR data continues to rise.

Recorded Event Data

Stored event data includes important information such as:

- Vehicle indicated speed before and at impact
- Seat belt buckle status (buckled or unbuckled)
- Brake pedal application status before and at the time of impact
- Accelerator or throttle position before and at the time of impact
- Change in vehicle velocity (Delta-V) during the impact phase of the event versus time, as calculated by the crash sensor
- Whether multiple events were detected, and if so, in what order

Many people assume that if the airbags did not deploy in a crash, no event data will be recorded. This is not

true. In most cases, a Delta-V of approximately 5 mph within a certain time interval (typically 0.15 seconds) will trigger the event to be recorded, independent of any airbag deployment. How, and for how long, the data for a non-deployment event is retained in EDR memory varies by manufacturer, car model, and car model year. The recorded data is often retained for only a certain number of on/off cycles of the ignition, or until it is displaced by a subsequent event. Deployment events are locked in memory, and require replacement of the EDR as part of repairs.

Some vehicle models contain EDRs that record the date or odometer mileage at the time of the event, which makes the data easier to link to a particular occurrence. If the vehicle ignition is turned off at the time of the incident, the airbag system is not active, and the EDR will not record anything. This can in itself be good information when investigating, for example, a potentially staged or fraudulent incident.

Three types of data are included in the typical CDR crash event report. These include:

- Data Limitations Information
- Pre-Crash Data
- Crash Event Data

Data Limitations Information

The data limitations information is not really data, but is an extremely important part of the CDR report. It explains the characteristics of the data reported, and gives direction on how the data is internally taken and processed. What triggers a recording, the recording time length, data sampling rates, how long recorded data is retained and acceleration directionality are typical items explained in the data limitations information. The data limitations are often ignored or poorly understood by people interpreting the tabulated data reports, and can have a major impact on the validity of the interpretation.

Pre-Crash Data

Vehicle speed is always an important part of an accident reconstruction, as is an understanding of what happened in the seconds before the impact.

One of the most significant benefits of an EDR is the ability to capture and record certain pre-crash data. The EDR is capable of recording data for a short period (usually 5 seconds) prior to an event at a set sampling rate, often once per second.

The EDR pre-crash data generally includes accelerator (gas pedal) percent application, indicated vehicle speed, and if the brake pedal was applied (on/off only, not application intensity). On some models, the pre-crash data may include other things such as information on steering wheel angle, front seat belt use, passenger seat occupancy, and Antilock Brake System (ABS) activation status.

EDR data can supplement and corroborate other reconstruction calculation methods. It helps establish the state of the vehicle prior to the impact, and highlights any evasive or mitigating actions that were or were not taken by the driver.

Another important point is that recorded event data from the EDR supplements (and can **potentially supplant**) eye witness and operator statements with more factual data. The EDR does not record any personal information that can identify the driver of the vehicle.

Crash-Event Data

The crash-event data consists of information such as the type of crash (front, side, rear, rollover), if it was a deployment event, and how many events occurred. Many reports contain graphs of either velocity or acceleration versus time during the crash, which can supplement and verify reconstruction results.

The event data also provides information on crash severity, including a calculated Delta-V. Further, it provides a time between impacts in multiple impact scenarios, and information on sequencing the events. This can be very useful in understanding why specific safety devices deployed or did not deploy.

Crash-event data typically also includes information on seat belt status at the time of the incident. It will indicate whether the front seat belts were buckled or not, but not whether the belt was being properly worn.

Modern vehicles often incorporate a "smart" airbag system with sensors to determine driver position and passenger seat occupancy, in order to enhance occupant safety in the case of an airbag deployment. Accordingly, some vehicle models will also provide information on the fore-aft positioning of the driver's seat, and whether the passenger seat was occupied.

Ownership and Disclosure of EDR Data

Ownership of EDR data and related disclosure requirements are a privacy concern, and a matter of state laws – which can vary considerably. In general, the owner of the vehicle is considered to be the owner of the data retained in that vehicle's EDR, and must give permission for legal access to that data. Some insurance companies have contract terms related to access of EDR data, and courts can subpoena EDR data through court orders. In some states, law enforcement officers are authorized to collect EDR data under existing state laws governing crash investigations.

Summary

While often referred to as a "black

box," the EDR is only very generally comparable to the devices found in airplanes, trains and ships. An EDR records vehicle technical data for a brief period of time in the event of a collision.

Correctly interpreted by a qualified analyst, EDR data can be a powerful asset in fully understanding the nature and substance of a collision. It can be used to validate accident reconstruction calculations and estimates based on the physical data, and can provide valuable assistance in understanding why specific safety devices, such as airbags, did or did not deploy. It can also be used, in concert with physical evidence, to test the veracity of eyewitness statements and claims with respect to the incident.

As noted earlier, the exact nature of the data that might be retained in a particular vehicle's EDR is difficult to know in advance, particularly in vehicles prior to the 2013 models. Also, the data may only be retained temporarily. It is important for attorneys and insurance claims professionals to know that if they have questions about the facts of the incident, any EDR data should be secured as quickly as possible. It can always be decided later how (or whether) to use the data.

It is also important for attorneys and claims professionals to obtain the proper authorization for accessing the EDR data, to avoid admissibility issues.

A Case Study

In this specific incident, the owner of a 2003 Cadillac CTS testified that they had been cut off by a large pickup truck that pulled out in front of them. They were unable to slow in time, and struck the rear of the pickup truck, which then fled the scene. They were claiming head and neck injuries from the collision.

In this instance, the damage to the front of the Cadillac, shown in Figure 2, was consistent with impacting the rear of another vehicle, such as a pickup truck. There was even a square imprint in the plastic front bumper cover of the Cadillac that was suggestive in shape, size and height of the trailer hitch receiver found below the rear bumper on many pickups. The imprint is circled in Figure 2. From other photographs, it was apparent that the Cadillac's frontal airbags had not deployed.

Figure 2 – Cadillac front end damage

Impact severity could be calculated based on vehicle crush measurements and crash test data, but this vehicle also contained an EDR, which was imaged using the Bosch CDR tool. The EDR data told an entirely different story.

The EDR contained a single event, that being a non-deployment event. As noted earlier, a non-deployment event is an event that is significant enough to "wake up" the EDR system, but not significant enough to cause the airbags to be deployed.

The EDR pre-crash data indicated that for the 5-second interval preceding the collision, the Cadillac was sitting stationary, with the engine idling at 640 rpm, with no throttle or brakes applied. Event data indicated that at the time of the incident, the driver's seat belt was unbuckled, and the vehicle experienced a rearward Delta-V of approximately 5 mph.

By physical evidence alone, everything was consistent with the collision as claimed. In conjunction with the EDR data, a different picture emerged that was totally inconsistent with the claimed collision scenario. The Cadillac was sitting still, idling, when it was impacted in the front end by what could have been another vehicle, perhaps even the rear end of a pickup truck. It was probably a staged collision, which puts it in a completely different perspective. Without the EDR data, it would have been much more difficult to make that determination.

Endnotes

1 Additional information and research about EDRs is available on the NHTSA EDR web site at: http://www-nrd.nhtsa.dot.gov/edr-site/index.html

It is important for attorneys and insurance claims professionals to know that if they have questions about the facts of the incident, any EDR data should be secured as quickly as possible. It can always be decided later how (or whether) to use the data.

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

MDTC Legislative Report

T. S. Eliot wrote that April is the cruelest month, but in Michigan this year, that distinction should probably be given to March. As I finish this report on March 16th, the snow is gone (for this week at least) and with the warmer weather I am again hearing the sound of shouting from the lawn of the Capitol across the street, most of it angry. The tone is not surprising in light of the ongoing saga of the Flint water crisis and the increasing polarization of our society now made more uncomfortably apparent as this year's presidential campaign unfolds. I have watched with great interest and trepidation as the Grand Old Party has seemed to disintegrate in a slow-motion train wreck that has been painful to witness, while my Democratic friends have struggled with a less dramatic but equally significant identity crisis of their own.

Since my last report in January, the attention of our legislators has been focused primarily upon finalizing the budget for the next fiscal year. That task is always difficult and contentious when money is short, and has been made more so this year by the need to find large amounts of additional funding to deal with the crisis in Flint. Significant attention has also been devoted to hearings and legislation intended to identify the causes of the problem and ensure that it is not repeated. And, of course, there has been considerable political grandstanding and finger pointing in pursuit of efforts to assign and avoid the blame when there appears to be plenty of that to be shared. In the midst of all this, the Legislature has managed to address a few other issues, which will be addressed below.

2015 Public Acts

The final count now lists 269 Public Acts of 2015, only two of which were signed and filed after my last report on January 5th. Those Acts do not impact the practice of civil litigators, but are of general interest nonetheless.

2015 PA 268 – Senate Bill 13 (Knollenberg – R) has amended the Michigan Election Law over vigorously expressed opposition from the Democrats, to eliminate the option of straight party ticket voting in general elections. The Act also includes an appropriation of $5,000,000 from the general fund for the stated purpose of purchasing voting equipment "to implement the elimination of straight party ticket voting" and perhaps, as well, to insulate this amendatory act from challenge by referendum.

2015 PA 269 – Senate Bill 571 (Kowall – R) has amended several provisions of the Michigan Campaign Finance Act regulating political campaign contributions. But this amendatory act is most noteworthy for additional provisions added in a bill substitute, introduced and approved by both houses over strenuous objection from Democratic members on the last day of the 2015 session, which prohibit public bodies and their officials and employees from using public funds or resources for any communication by means of radio, television, mass mailing, or prerecorded telephone message, making reference to a local ballot proposal and targeted to the relevant electorate, within the 60-day period before an election in which the local ballot proposal is on the ballot.

The inclusion of this provision prompted a firestorm of protest from local

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

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governments urging Governor Snyder to wield his veto pen to prevent the adoption of this new limitation of their ability to secure the passage of necessary millage renewals and bonding proposals. The Governor signed the legislation in spite of those objections, with an assurance that he would ask the Legislature to promptly pass a "trailer bill" to limit the scope of the new prohibitions. To date, five bills have been introduced for that purpose – two in the Senate and three in the House – but none have progressed to final passage.

2016 Public Acts

As of this writing, there are 50 Public Acts of 2016. The few that may be of interest include:

2016 PA 46 – House Bill 4314 (Singh – D), which has amended the Vehicle Code, MCL 257.601d, to extend the act's prohibitions and penalties for causing death or serious impairment of a body function by the commission of a moving violation to all moving violations committed by operation of a vehicle upon a highway or any other place open to the general public, including, but not limited to, an area designated for the parking of motor vehicles. This amendatory act will take effect on June 13, 2016.

2016 PA 40 - Senate Bill 444 (Stamas – R) has amended the Public Health Code to add a new Part 209A, addressing "Critical Incident Stress Management Services." The new provisions will apply to services provided to emergency-service providers by members of a "Critical Incident Stress Management (CISM) Team" to help them cope with stress resulting from a "Critical Incident," defined by the legislation as "an actual or perceived event or situation that involves crisis, disaster, stress or trauma." The new provisions will provide for confidentiality of statements made by emergency-service providers to CISM team members, and records kept by team members in relation to the services provided, subject to specified limitations. They will also provide CISM team members with limited immunity from civil liability for damages or loss related to their performance of CISM services. This amendatory act will also take effect on June 13, 2016.

2016 PA Nos. 17 through 20 – House Bill 5070 (Leutheuser – R), House Bill 5071 (Somerville – R), House Bill 5072 (Jenkins – R) and **House Bill 5073 (Garcia – R)**, have amended provisions of the Michigan Occupational and Safety Act, 1978 PA 390, pertaining to payment of wages and fringe benefits; the Workforce Opportunity Wage Act; and the Michigan Employment Security Act, to clarify the relationship and responsibilities between franchisors and franchisees with respect to employees of franchisees. Each of these amendatory acts has amended the act's definition of "employer" to specify that, except as otherwise specifically provided in the franchise agreement, as between the franchisee and franchisor, the franchisee is considered to be the sole employer of workers for whom the franchisee provides a benefit plan or pays wages. These amendatory acts will take effect on May 23, 2016.

Old Business and New Initiatives

In this second year of the current legislative session, all of the bills and joint resolutions that were not passed before the end of 2015 have been carried over to 2016. The pending bills of interest include:

Senate Bills 632 and 633 (Schuitmaker – R) would amend provisions of the Revised Judicature Act and the Estates and Protected Individuals Code defining the jurisdiction of the Court of Appeals and the probate courts, to provide the necessary statutory authorization for previously proposed court rule changes that would transfer jurisdiction over all appeals from final orders and judgments of the probate courts to the Court of Appeals. The amendments would also replace the automatic stay provision of MCL 600.867 with new language providing for an automatic stay of enforcement of the order appealed from for a period of 21 days only, unless a motion for stay is granted. These bills were passed by the Senate without amendment on January 28, 2016, and now await consideration by the House Judiciary Committee.

Senate Bill 672 (Hansen – R) would amend the Estates and Protected Individuals Code, MCL 700.5109, which allows parents and guardians of minors to release sponsors and organizers of recreational activities, and paid or volunteer coaches conducting such activities, from liability for injuries sustained by the minor in the course of those activities. The proposed amendments would expand the statute's definition of "recreational activity" to include active participation in a "camping activity," defined as "an outdoor recreation activity planned and carried out by the owner and operator of a camp," in addition to "active participation in athletic

Senate Bill 851 (Young – D) would amend the Insurance Code of 1956 to add a new Chapter 49, which would require gun owners to carry liability insurance similar to no-fault auto insurance coverage for bodily injury or death arising from the discharge of their firearms.

or recreational sport." This bill was passed by the Senate and referred to the House Judiciary Committee on March 3, 2016.

House Bill 5219 (Lyons – R), one of the "trailer bills" previously discussed with respect to 2015 PA 269, would amend the Michigan Campaign Finance Act, MCL 169.257, to modify the recently enacted limitations placed upon communications by local governments and public officials regarding local ballot proposals – limitations that have now become widely characterized as the "gag order" legislation. As passed by the House on February 23, 2016, this bill would eliminate the existing 60-day period to allow application of the modified limitations at any time, but would create exceptions for communications regarding the language of the ballot proposal, the date of the election, and "factual and neutral information concerning the purpose or direct impact of a local ballot question on a public body or the electorate, except if the communication can reasonably be interpreted as an attempt to influence the outcome of a local ballot question." The bill would also replace the currently applicable misdemeanor penalties with civil fines.

House Bill 5219 has been referred to the Senate Committee on Elections and Government Reform, but has not been scheduled for hearing as of this writing. Critics have suggested that the proposed modifications do not suffice to cure the current statute's potential for infringement of First Amendment rights. It may be expected that the discussions of these issues will continue, although the urgency has been eliminated by U.S. District Court Judge John Corbett O'Meara's recent preliminary injunctive order enjoining enforcement of the new limitations.

Senate Bill 851 (Young – D) would amend the Insurance Code of 1956 to add a new Chapter 49, which would require gun owners to carry liability insurance similar to no-fault auto insurance coverage for bodily injury or death arising from the discharge of their firearms. This bill was introduced on March 9, 2016 and referred to the Senate Government Operations Committee.

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.

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
pderosier@dickinsonwright.com; trent.collier@cefLawyers.com

Appellate Practice Report

Questions Presented and the Risk of Waiver

Every part of an appellate brief is an opportunity for advocacy. A Table of Contents, done with care, can present your legal argument in a single page. A Jurisdictional Statement can set a tone of credibility—or not. The Relief Requested section can do more than tell the court what you're asking for; it can close with a decisive rhetorical blow.

The Questions Presented section is more than just an opportunity for advocacy. It's a critical and sometimes overlooked step in presenting arguments to an appellate court. In fact, failure to raise a legal argument in the Questions Presented section can prompt a court to conclude that you've waived that issue — even if that issue is covered in the Argument section of your brief. For a recent example, see the Court of Appeals' unpublished opinion in *Castillo v Vannuil* (2015).[1]

The governing court rule

For Michigan's appellate courts, the significance of the Questions Presented section arises from Michigan Court Rule 7.212(C)(5). This rule requires that an appellant's brief contain

> [a] statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it.[2]

This rule speaks in mandatory terms ("Each question **must** be … numbered separately …"). Consequently, Michigan's appellate courts have held that failure to raise an issue in the Questions Presented section is a waiver of that issue.[3]

Exceptions to the waiver rule

Courts sometimes overlook deficiencies in an appellant's Questions Presented. It's not uncommon for an appellate panel to conclude that it could simply skip an argument because it wasn't raised in the Questions Presented, but to consider the argument anyway.

Unfortunately, this practice rarely offers appellants much comfort. Opinions considering a waived argument typically conclude that the waived argument lacked merit anyway.[4] For example, see the Court of Appeals' unpublished opinion in *Johnson Controls, Inc v Atlantic Automobile Components, LLC* (2015):

> In this issue, defendant raises a number of arguments that are related to the trial court's post-trial findings. Defendant did not separately identify these arguments as a question presented. … A party's failure to properly identify an issue in the statement of questions presented waives the issue for appellate review. … Although we decline to address the issues, we note that we have reviewed each of the arguments and find them to be without merit.[5]

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

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

This waiver rule can create some difficult judgment calls for appellate lawyers. The more questions an appellant raises, the less effective each question becomes—and the more it seems like the attorney has taken a scattershot approach to appellate argument.

A panel may also look past an appellant's failure to raise an issue in its Questions Presented if the proper resolution of the case hinges on a question of law that the appellant failed to raise.[6]

For example, in *Tolbert v Isham*, an unpublished opinion from 2003, the trial court entered a default judgment against the defendant in an auto-negligence case. The defendant's attorney couldn't appear for trial because he had another trial scheduled that day and was unable to adjourn either proceeding. The primary issue on appeal was whether the trial court abused its discretion in entering a default judgment when the defense attorney wasn't at fault for his inability to appear at trial.

In their briefs and at oral argument, the parties also disputed whether the plaintiff had a "serious impairment of bodily function" sufficient to maintain an action for non-economic loss under Michigan's no-fault law.[7] The appellant didn't raise this issue in his Questions Presented. Nevertheless, after holding that the trial court abused its discretion in entering a default judgment, the Court of Appeals considered whether the plaintiff had a cause of action in the first place.

The panel explained that consideration of this issue was appropriate, despite its absence from the appellant's Questions Presented, because it was a question of law and it was fully briefed and argued.[8] (Presiding Judge Cooper dissented in part because she saw no need to consider an issue that the appellant didn't raise in his Questions Presented.)

Strategy considerations

This waiver rule can create some difficult judgment calls for appellate lawyers. The more questions an appellant raises, the less effective each question becomes—and the more it seems like the attorney has taken a scattershot approach to appellate argument. But saying too little raises the risk of waiver.

Although there are no hard rules about navigating between this Scylla and Charybdis, case law suggests a few key practices.

First, make sure your Questions Presented section addresses every **order** from which your client is seeking relief. In the Court of Appeals' unpublished opinion in *United Elec Supply Co, Inc v Terhorst & Rinzema Const Co* (2008), for instance, the court declined to consider an order granting a motion for summary disposition because the Questions Presented focused only on a motion for reconsideration.[9]

Second, consider including a separate "question presented" for each discrete legal error or basis for reversal. It may be tempting to combine related issues into a single question—for example, something like "Should this Court reverse the $2 million verdict and remand for further proceedings where the trial court admitted numerous statements in violation of the Michigan Rules of Evidence?" But whatever that kind of statement offers in efficiency, it loses in effectiveness. It doesn't identify any specific errors and therefore creates a risk that the panel will conclude that certain claims of evidentiary error have been waived.

Third, don't miss an opportunity to address the underlying merits when an appeal focuses on a procedural issue. *Tolbert* highlights the importance of addressing both threshold legal issues (in *Tolbert*, whether the trial court abused its discretion in entering a default judgment) **and** dispositive legal issues (in *Tolbert*, whether the plaintiff stated a tenable no-fault claim at all).

There's no magic formula. But these steps may minimize the chance of inadvertently waiving an issue by failing to raise it in the Questions Presented. And for Heaven's sake, don't write your Questions Presented as run-on, all-caps sentences. That makes your Questions Presented virtually unreadable, and an unreadable Question Presented does no one any good.

Supreme Court Orders as Binding Precedent

The Michigan Supreme Court has a well-known practice of issuing peremptory orders on pending applications for leave to appeal that decide the application without actually granting leave. Consider this recent order in *DiLuigi v RBS Citizens NA*:[10]

> On order of the Court, the application for leave to appeal the September 9, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1),[11] in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. The Court of Appeals erred in holding that a genuine issue of material fact existed regarding notice. To the extent that the Court of Appeals rested its holding on the proposition that MCL 600.3204(4)(a), as amended by

Does a peremptory order issued by the Supreme Court constitute binding precedent in the same manner as a full-blown opinion? The answer depends on whether the order contains a rationale that can be understood.

> 2009 PA 29, requires a borrower to receive actual notice of his or her right to seek a home loan modification, see MCL 600.3205a to MCL 600.3205d [repealed by 2012 PA 521], the Court of Appeals is mistaken. As Judge Riordan's dissenting opinion correctly observes, MCL 600.3205a(3) simply requires that notice be given "by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address." Because it is undisputed that defendants complied with the statutory requirements by providing plaintiffs with both forms of mailed notice, summary disposition in favor of defendants was proper. For these reasons, we REINSTATE the May 31, 2012 judgment of the St. Clair Circuit Court that granted the defendants' motion for summary disposition.

Does a peremptory order issued by the Supreme Court constitute binding precedent in the same manner as a full-blown opinion? The answer depends on whether the order contains a rationale that can be understood.

Const 1963, art 6, § 6 provides that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision." The seminal Supreme Court decision construing this provision is *People v Crall*.[12] In *Crall*, the Supreme Court held that the Court of Appeals erred in rejecting a Supreme Court order as "not binding precedent."[13] The order, issued in *People v Bailey*,[14] found that "[t]he defendant waived the issue of entrapment by not raising it prior to sentencing." Finding "no basis" for the Court of Appeals' conclusion that the order in *Bailey* was not binding precedent, the Supreme Court in *Crall* observed that "[t]he order in *Bailey* was a final Supreme Court disposition of an application, and the order contains a concise statement of the applicable facts and the reason for the decision."[15] Thus, the *Crall* Court held that the Court of Appeals should have followed *Bailey* and rejected a similarly unpreserved entrapment issue.[16]

Numerous Court of Appeals' decisions since *Crall* have variously stated that a peremptory Supreme Court order constitutes binding precedent if the Court of Appeals "can determine the applicable facts and the reason for the decision,"[17] if the order "can be understood,"[18] or if the order contains "an understandable rationale."[19]

This also includes situations where the Supreme Court's "rationale" is actually contained in **another** decision incorporated into the order by reference. In *DeFrain v State Farm Mut Auto Ins Co*,[20] the Supreme Court confirmed that the requirements of Const 1963, art 6, § 6 "can be satisfied by referring to another opinion."[21] The Court of Appeals has recognized this as well. In *Mullins v St Joseph Mercy Hosp*,[22] the Court of Appeals observed that it "consistently has adhered to the principle that the Michigan Supreme Court's summary disposition orders constitute binding precedent when they finally dispose of an application and are capable of being understood, even by reference to other published decisions."[23]

Sometimes a Supreme Court order may even reference a Court of Appeals' dissenting opinion – as in *DiLuigi*. Such orders also constitute binding precedent. As the Supreme Court explained in *DeFrain*, when the Court references a Court of Appeals' dissent, it has "adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own."[24] Thus, in *Evans & Luptak, PLC v Lizza*,[25] the Court of Appeals relied on an analysis of an ethical rule contained in a Court of Appeals dissent because the Supreme Court's order reversing the Court of Appeals majority's decision expressly stated that it "agree[d] with the Court of Appeals dissent's discussion of [the] principles pertaining to [the ethical rule]."[26]

In sum, so long as the Supreme Court's rationale for a decision can be understood and applied beyond the circumstances of the particular case, it is binding precedent regardless whether the decision takes the form of an order or an opinion.

Endnotes

1 *Castillo v Vannuil*, unpublished opinion per curiam of the Court of Appeals, issued October 20, 2015, Case No. 323581); 2015 WL 6161860.

2 MCR 7.212(C)(5).

3 See, e.g., *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004); *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

4 See, e.g., *Copeland v Genoa Tp*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket No. 301442); 2011 WL 2586278; *In re Hawkins*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2005 (Docket No. 255172); 2005 WL 156240; *People v Scott*, unpublished opinion per curiam, issued April 19, 2002 (Docket No. 225944); 2002 WL 652126.

5 *Johnson Controls, Inc v Atl Auto Components, LLC*, unpublished opinion per

> [S]o long as the Supreme Court's rationale for a decision can be understood and applied beyond the circumstances of the particular case, it is binding precedent regardless whether the decision takes the form of an order or an opinion.

curiam, issued October 13, 2015 (Docket No. 321172); 2015 WL 5945382.

6 *See, e.g., Tolbert v Isham*, unpublished opinion per curiam of the Court of Appeals, issued May 29, 2003 (Docket No. 231424); 2003 WL 21246634. *See also Feyen v Grede II, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2012 (Docket No. 304137); 2012 WL 1368192.

7 *Tolbert*, unpub op at 4.

8 *Id*.

9 *United Elec Supply Co, Inc v Terhorst & Rinzema Const Co*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 276290); 2008 WL 684782.

10 *See DiLuigi v RBS Citizens NA*, 497 Mich 1042; 864 NW2d 146 (2015).

11 Now MCR 7.305(H)(1).

12 *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993).

13 *Id*. at 464, n 8.

14 *People v Bailey*, 439 Mich 897; 478 NW2d 480 (1991).

15 *Crall*, 444 Mich at 464, n 8.

16 *Id*.

17 *Weschler v Wayne Co Road Comm'n*, 215 Mich App 579, 591 n 9; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997). See also *Dykes v William Beaumont Hospital*, 246 Mich 471, 483; 633 NW2d 440 (2001) ("An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent.").

18 *People v Edgett*, 220 Mich App 686, 693 n 7; 560 NW2d 360 (1996). See also *People v Phillips (After Second Remand)*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997) ("Supreme Court peremptory orders are binding precedent when they can be understood."); *Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61; 613 NW2d 733 (2000) (same), overruled on other grounds *Kurtz v Faygo Beverages, Inc*, 466 Mich 186; 644 NW2d 710 (2002).

19 *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006) (rejecting reliance on a Supreme Court order because it could not be "understood as expressing an opinion on how the issue should be decided").

20 *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359; 817 NW2d 504 (2012).

21 *Id*. at 369.

22 *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006), rev'd on other grounds 480 Mich 948 (2007).

23 *Id*. at 508.

24 *DeFrain*, 491 Mich at 369.

25 *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002).

26 *See Abrams v Susan Feldstein*, PC, 456 Mich 867; 569 NW2d 160 (1997). See also *Love v Detroit*, 270 Mich App 563, 566; 716 NW2d 604 (2006) (relying on a peremptory Supreme Court order that in turn had adopted the Court of Appeals dissent).

Death of a Legend—
David Conrad Coey

By James Lozier, Tony Smith, and Jim White

Legendary trial lawyer, David Conrad Coey, died in a Florida hospital on January 23, 2016, at age 85. Dave and his wife, Barbara, wintered in Cape Coral Florida for several years but considered East Lansing, Michigan home.

Dave was born in Chicago on October 20, 1930. He lived on the "South side" where he became "street smart" and learned the importance of hard work. One of his jobs was as a grave digger and he happened to be on the crew that dug the grave for Al Capone.

When he was 17, Dave's family moved to East Lansing where he attended East Lansing High School, played football, and, in a short time, made many lifelong friends.

After graduation, Dave attended Michigan State University for two years before he entered the United States Navy where he served for four years. He saw the world and learned navigation. He was such a natural student that he was given responsibilities normally reserved for officers. He earned the confidence placed in him and his naval experiences led to his lifelong passion for sailing.

After the Navy, Dave returned to Michigan State University where he excelled in the classroom, earned a BA degree, and became a Spartan for life. He matriculated at the University of Michigan Law School and earned his LLB. During the summers throughout law school, Dave worked dangerous underground construction to pay the bills.

Dave returned to Lansing to commence a law practice that would extend over 50 years. He began with the Foster, Foster, Campbell and Lindemer firm and became a named partner with the firm's name changing to Foster, Swift, Collins and Coey. He later became Senior Counsel for Dickinson Wright PLLC's Lansing office. His practice was varied but, most of all, he wanted to be in the courtroom where his litigation skills were legend. Over the years, he tried many cases, including criminal, worker's compensation, products liability, negligence, environmental, corporate, insurance and commercial cases. He tried cases all over Michigan and in several other states. He had a brilliant mind and never tired of learning. He loved the law and trying cases. He often said he was happy to be an attorney and could not imagine anything he would rather do. He was a true lawyer's lawyer.

A fierce competitor, Dave never compromised ethics and always followed the rules of the game. He believed it was important to learn his clients' businesses, including the operation of their equipment. Considering his great mind and hard work, mixed with his sense of humor, it is no wonder he was so successful. He took complicated facts and problems and explained them so that anyone could understand them. One of his many great attributes and skills was his ongoing desire and tireless effort to mentor and educate younger lawyers. Beyond merely serving as a tremendous role model, he allowed them to share in his personal court room achievements, promoted them to clients, and built their self-confidence to zealously represent their clients in an ethical, classy, and humanistic manner. He did it with style and grace and his mentees became lifelong friends.

Over his illustrious career, Dave received many honors. He was named the Leo Farhat Outstanding Attorney, the highest honor bestowed by the Ingham County Bar Association. He also received the Excellence in Defense Award, the top honor of the Michigan Defense Trial Counsel. In addition, he was honored by being inducted as one of the select and very few attorneys to become a Fellow of the National American College of Trial Lawyers. He was a member of the Defense Research Institute. He was also selected to several other prestigious, invitation-only legal fellowships and memberships, including the American Board of Trial Advocates, The American Bar Foundation, and the Michigan State Bar Foundation.

When not practicing law, Dave loved to sail, especially throughout the Great Lakes. He also sailed at various places around the world. He and Barb loved to travel and shared fun adventures in Europe, Asia, and the Caribbean. Dave also loved automobiles. He studied all the different models, maintained those he owned meticulously, and was willing to share his expertise with others when asked. A staunch and proud Democrat, he was always ready for a spirited debate. He loved life and, in particular, enjoyed telling jokes and making people laugh.

Dave is survived by his loving wife of 43 years, Barbara, sons David and Kurt, daughter Deborah, and six grandchildren.

A memorial celebration of his life was held on Thursday, May 12, 2016 at the University Club in East Lansing.

MDTC Member Victories

MDTC members are among the best and most talented attorneys in Michigan. In this section, we highlight significant victories and outstanding results that our members have obtained for their clients. We encourage you to share your achievements. From no-cause verdicts to favorable appellate decisions and everything in between, you and your achievements deserve to be recognized by your fellow MDTC members and all of the *Michigan Defense Quarterly*'s readers.

No-Cause Verdict—Dale A. Robinson, *Rutledge, Manion, Rabaut, Terry and Thomas, P.C.*

A Macomb County jury rendered a verdict absolving the defendant psychiatrist of any malpractice in the monitoring of a schizoaffective disorder patient who developed a known complication of his Depakote medication, hemorrhagic pancreatitis, which resulted in death. Successfully defending the physician was MDTC member Dale A. Robinson of Rutledge, Manion, Rabaut, Terry and Thomas, P.C., in Detroit.

The plaintiff alleged the valporic acid level taken 14 days before his death was elevated and should have caused more specific monitoring of the patient by the group home staff at the direction of the doctor. The defense argued successfully that the valporic acid level does not scientifically correlate to the development of pancreatitis, that it was a false level due to the time it was taken, and that the patient did not exhibit signs of pancreatitis until 10 days after the doctor last treated the patient in person.

No-Cause Verdict—Randy Juip & Kim Sveska, *Foley, Baron, Metzger & Juip, PLLC*, and Tim Dardas, *Hackney, Grover, Hoover and Bean, P.L.C.*

A Grand Traverse County jury returned a no-cause-of-action verdict in favor of three physical-medicine-and-rehabilitation physicians and their professional corporation, DBMJ, on November 5, 2015. The nine-day trial was tried as a class action by agreement of the parties with the consent of the court. It concerned 169 Michigan residents who were given a preservative-free steroid compound made by Massachusetts-based New England Compounding Center (NECC). In 2012, NECC produced tainted batches of the compound, which killed 64 people and sickened more than 800 people nationwide. This was the first case in the nation to go to trial with allegations against physicians and a medical practice that used the tainted batches of steroids. The successful defense of the physicians and practice was carried out by Randy Juip and Kim Sveska, both of Foley, Baron, Metzger & Juip, PLLC, and Tim Dardas of Hackney, Grover, Hoover, and Bean, P.L.C.

DBMJ ordered and used preservative-free MPA (the steroid) in the treatment of their patients within the course of their professional practice. However, on September 26, 2012, NECC faxed DBMJ a voluntary recall of two specific lot numbers of preservative-free MPA that DBMJ received from NECC due to a concern for "foreign particulate matter" in the steroids. It was later determined that those particular lots were contaminated with fungus. This recall was the first notice DBMJ had of any problems with the NECC product after enjoying a history of nearly eight years of consistent, reliable, safe, problem-free injections using that medicine on DBMJ's patients.

The plaintiffs claimed that the individually named physicians and DBMJ were professionally negligent in connection with the selection, ordering, and administering of preservative-free MPA to the members of the class. They alleged that they never

would have given consent to being injected with a compounded rather than a manufactured steroid and that DBMJ should not have been doing business with NECC.

The defendants argued that the individually named physicians and DBMJ acted reasonably in selecting an appropriate medication for treatment of patients who were undergoing indicated fluoroscopic steroid injection treatment. The defendants further argued that they acted reasonably in relying upon the federal and state licensing boards to monitor the Massachusetts-based compounding pharmacy that was conducting business in Michigan. Moreover, the defendants argued that they were reasonable in relying upon an independent microbiology testing facility to properly test and report whether the steroids were sterile. The defendants maintained that it would be unreasonable and, in fact, impossible to practice medicine if the standard of care required physicians to take on the redundant duty of checking, double-checking, and triple-checking the scope and veracity of each of their medical supply vendors. The defendants argued they had a right to rely on already existing safeguards as well as common sense when selecting, ordering, and administering medications to their patients.

No-Cause Verdict—Paul Manion & Matt Thomas, ***Rutledge, Manion, Rabaut, Terry and Thomas, P.C.***

A Wayne County jury returned a no-cause verdict in favor of an emergency-room physician and local hospital accused of failing to order a CT scan on a 12-year-old patient presenting with a ten-day history of vomiting and remote history of headaches. The physician and hospital were represented by MDTC members Paul Manion and Matt Thomas of Rutledge, Manion, Rabaut, Terry & Thomas, P.C., in Detroit.

In the case, the plaintiff alleged that the defendant physician should have pursued diagnostic testing to rule out increased intracranial pressure, which would have resulted in the discovery of a brain tumor and prevented the patient from suffering brain herniation and death approximately one-week later. The defense argued to the jury that there were no clinical indications that the patient was suffering from an intracranial lesion or increased intracranial pressure, and, as such, there was no reason to order a CT scan of the patient's head. Following a short deliberation, the jury returned a verdict finding no negligence and exonerated the physician and hospital.

To share an MDTC Member Victory, send a summary to Michael Cook (Michael.Cook@ceflawyers.com).

New Member Benefit MDTC Facilitator Database

If you know a good defense lawyer facilitator and would like to add them to our Facilitator Database, please contact us at info@mdtc.org with their name, address and email.

MEMBER NEWS - Work, Life, and All that Matters

Collins Einhorn Farrell PC, a leading defense litigation firm in Southfield, Michigan, is pleased to announce that our partner **David C. Anderson** has been named a 2016 Leader in the Law by *Michigan Lawyers Weekly*. Anderson, selected for his dedication, leadership, and going above and beyond the call in support of his clients and his firm, is one of 30 distinguished lawyers who were chosen to receive this prestigious award. "They are the lawyers in Michigan setting the example for other lawyers," writes Michigan Lawyers Weekly's James K. Williams, Jr. "Clients from all over the country entrust their legal matters to David," states Michael J. Sullivan, President of Collins Einhorn Farrell PC. "He has the ability to stay cool and in control under very trying circumstances, and has a confident way of handling both clients and opposing counsel. His success in the courtroom and at the bargaining table is testament to the depth of his talent. His selection as a 2016 Leader in the Law is well deserved."

Anderson was formally honored at an awards ceremony hosted by Michigan Lawyers Weekly on March 17th at Detroit Marriott Troy, and was profiled in the March 21st edition of Michigan Lawyers Weekly.

***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).*

MDTC E-Newsletter Publication Schedule

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

For information on article requirements, please contact:

Scott Holmes
sholmes@foleymansfield.com

Michigan Defense Quarterly Publication Schedule

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

For information on article requirements, please contact:

Michael Cook
Michael.Cook@ceflawyers.com, or

Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

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

Legal Malpractice Update

Conclusory allegations are insufficient to state the causation element of a legal-malpractice claim. Thus, the plaintiffs' failure to plead factual allegations identifying how the attorney's purported malpractice caused the alleged injury required summary disposition under MCR 2.118(C)(8). Similarly, the plaintiffs' failure to comply with MCR 2.111(B)(1), which requires a claimant to reasonably inform the adverse party of the nature of the claims it is being called on to defend, warranted dismissal of newly contrived theories of professional negligence that were not contained in the complaint.

Osprey SA Ltd v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued December 10, 2015 (Docket No. 324001); 2015 WL 8540970.

Facts: Wayne Webber ("Wayne") formed several entities in 1975 ("Webber Entities") and, at that time, retained Attorney Defendant MJB to provide various legal services. Years later, in 2002, Wayne and MJB began discussing the possible creation of a real-estate business. As part of those discussions, Wayne indicated he was only interested in "a short-term investment." MJB assured Wayne the investment would last no more than five years and further represented that "an exit strategy" would be put in place for the Webber Entities.

As dialog about the business continued to progress, MJB suggested that Wayne obtain counsel outside of MJB's firm ("BOFC") to represent him in the negotiations and formation of the business. Despite that recommendation, Wayne insisted on representation by one of MJB's colleagues at BOFC. On July 15, 2003, a "waiver of conflict of interest and consent to representation letter" was presented to Wayne (and eventually signed by Wayne), indicating that MJB's colleague would represent the Webber Entities and that MJB would represent Osprey SA Ltd. ("Osprey SA")—an entity in which MJB had a financial interest—with respect to the formation and funding of the newly proposed limited liability company: Osprey East, LLC. ("Osprey East"). After several months of negotiations, the parties executed an operating agreement on September 1, 2003. As part of that agreement, each member was afforded the right to "put" their interest in Osprey East, in the event the member desired to sell its interest. Upon the invocation of that right, "nonputting" members were given the opportunity to purchase the exercising member's interest at a preferential rate. The agreement further provided that if none of the "nonputting" members purchased the exercising member's interest within 180 days, Osprey East would be liquidated.

Once Osprey East was formed, it began to acquire real estate, and with each purchase, a new limited liability company was created to hold title of that purchase. Attorney Defendant SAC, also an attorney at BOFC, was given the responsibility of preparing the operating agreements for each of the newly created limited liability companies.

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

The Court not only agreed that Plaintiffs failed to properly plead allegations of negligence as to MJB and BOFC, but it further held that their conclusory allegation regarding causation was insufficient to state a claim for legal malpractice.

Sometime in late 2007, Wayne advised MJB that he believed it was "the perfect time to sell," and in fact, that he "wanted out" of Osprey East. In reply, MJB reminded Wayne the "put" provision was available if he wished to sell his interest. Wayne, however, took no action. The Webber Entities subsequently learned that MJB and Osprey SA were allegedly diverting large sums of money away from Osprey East for their own benefit. Moreover, it was discovered that MJB, as the day-to-day manager of Osprey East, had allegedly "engaged in unauthorized intercompany loans, improperly allocated overhead expenses, and engage[d] in business transactions involving conflicts of interest in violation of the [LLC's] operating agreement." When Wayne confronted this misconduct by requesting Osprey East's financial records, MJB responded, on June 1, 2010, by "putting" Osprey SA's membership interest.

Three days later, the Webber Entities attempted to also avail themselves of the put provision, which prompted MJB and Osprey SA to file a complaint against Wayne and the Webber Entities, "seeking declaratory relief regarding [MJB] and Osprey SA's conduct"—including a determination that Osprey SA's put option was properly exercised and that neither MJB nor Osprey SA had acted improperly. Wayne and the Webber Entities responded by filing a third-party complaint against MJB, SAC, and their firm, BOFC, alleging, *inter alia*, legal malpractice. In support of that claim, Wayne and the Webber Entities (hereinafter collectively "Plaintiffs" asserted that MJB, SAC, and BOFC breached the standard of care by "intentionally meld[ing] their role as legal advisor[s] … with their role as business advisor," failing to disclose various conflicts of interests that arose out of representing the Webber Entities, Osprey SA, and Osprey East, and "engaging in various business related acts 'through Osprey East.'"

SAC moved for summary disposition under MCR 2.116(C)(8) and (C)(10), primarily arguing that a violation of the Michigan Rules of Professional Conduct did not give rise to an independent cause of action in tort, and that Plaintiffs could not otherwise establish that they suffered actual damages proximately caused by SAC's alleged professional negligence. In response to that motion, Plaintiffs alleged for the first time that SAC failed to include "put" language in the subsequent LLC operating agreements, failed to act appropriately "in the face of glaring conflicts of interest," and complied with "[MJB's] actions despite the fact he was acting illegally and in violation of his professional obligations." The trial court held that Plaintiffs were unable to satisfy the fourth element of a legal-malpractice claim—proving the fact and extent of the injury alleged—and therefore granted summary dismissal as to SAC.

Thereafter MJB and BOFC also moved for summary disposition under MCR 2.116(C)(8) and (C)(10). In support of that motion, they argued: (1) the "conflict of interest claims" required dismissal because Wayne had voluntarily waived all conflicts of interest; (2) the alleged malpractice did not occur during a time that either MJB or BOFC were representing Plaintiffs; and (3) Plaintiffs could not otherwise demonstrate that MJB's purported malpractice proximately caused the alleged damages. In response to that motion, Plaintiffs—similar to their response to SAC's dispositive motion—raised several new theories of negligence, including that MJB and BOFC failed to include "put" language in the subsequent LLC operating agreements, impermissibly disclosed confidential information, and engaged in a business transaction with a client in violation of the Michigan Rules of Professional Conduct. In ruling on the motion, the trial court first noted that several of the claims asserted arose out of MJB's capacity as the day-to-day manager of Osprey East—not MJB's or BOFC's representation of Plaintiffs—and thus summary disposition of those claims was warranted. The trial court further held that Plaintiffs failed to plead a count of legal malpractice, finding their conclusory paragraph regarding causation and damages insufficient, and otherwise failed to establish a genuine issue of material fact as to causation. Finally, the court refused to address the newly pled negligence claims, concluding that they were barred under MCR 2.111(B)(1).

After entry of a final order, Plaintiffs appealed.

Ruling: The Court of Appeals affirmed the trial court's ruling as to each motion. The Court not only agreed that Plaintiffs failed to properly plead allegations of negligence as to MJB and BOFC, but it further held that their conclusory allegation regarding causation was insufficient to state a claim for legal malpractice. The Court similarly opined that Plaintiffs did not properly plead

[A] claimant who brings such an action must plead factual allegations giving rise to the purported malpractice, including factual allegations regarding how that malpractice caused the injuries alleged—not just a conclusory paragraph to that effect.

their theories of negligence as to SAC, and even assuming they had, they failed to carry their burden of creating a genuine issue for trial regarding the fact and extent of injury alleged.

The Court first held that because Plaintiffs' complaint made no reference to the operating agreements of the subsequently formed limited liability companies, any theory of negligence against MJB and BOFC in relation thereto was not properly pled. Under MCR 2.111(B)(1), a claimant must plead allegations necessary to reasonably inform the adverse party of the nature of the claims it is being called on to defend. But because Plaintiffs' complaint failed to appropriately apprise MJB and BOFC of the later-asserted negligence, such violation of MCR 2.111(B)(1) warranted summary dismissal as to that claim.

The Court similarly determined that the remaining allegations of professional negligence against MJB and BOFC were properly dismissed for failure to state a claim upon which relief could be granted. Looking to the specific language utilized by Plaintiffs in their complaint, which indicated that MJB was acting "through Osprey East," those allegations undoubtedly pertained to MJB's performance of day-to-day duties as manager of Osprey East—not MJB's or BOFC's legal representation of Plaintiffs. Consequently, Plaintiffs could not sustain a claim for legal malpractice and therefore summary disposition was proper.

Citing to the well-established principle that "[a] mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action" for legal malpractice, as espoused in *Kloian v Schwartz*, 272 Mich App 232, 234; 725 NW2d 671 (2006), the Court of Appeals further held that Plaintiffs' conclusory allegations regarding causation as against MJB and BOFC were just that—"insufficient to state the causation element of a legal malpractice claim." In support of their legal malpractice claim, Plaintiffs generally alleged: "As a direct, natural, proximate, and foreseeable consequence of the foregoing, [they] suffered damages in excess of $25,000 …." Noticeably absent, however, were any factual allegations regarding how specific instances of the alleged professional negligence caused the purported injuries. Thus, like the complaint in *Kloian*, summary disposition of Plaintiffs' complaint was required.

Plaintiffs' legal-malpractice claim against SAC fared no better, as the Court of Appeals again concluded that because the various theories of negligence were not pled in Plaintiffs' complaint (let alone any facts in support thereof), such failure to comply with the notice pleading requirements of MCR 2.111(B)(1) warranted dismissal of those theories. The Court further held that dismissal of the malpractice claim was otherwise warranted because no genuine issue of fact existed regarding the fact and extent of the injuries alleged. While Plaintiffs' submitted an affidavit signed by their legal expert, who averred that SAC had breached various rules of the Michigan Rules of Professional Conduct, absent was any opinion as to "the fact and extent of the injuries suffered by [Plaintiffs]," and thus the affidavit did nothing to save their claim. Plaintiffs' reliance on their answers to interrogatories, wherein they stated an expert would testify that they "suffered damages of approximately $42.2 million due to the decline in the value of assets owned by Osprey East … as a result of [SAC's] malpractice," was similarly unavailing. Although that evidence identified the fact and extent of the injury alleged, it was never presented to the trial court for consideration in ruling on the motion for summary disposition. And because appellate review is limited to the evidence that was properly before the trial court, Plaintiffs were precluded from using those answers to establish a genuine issue for trial on appeal. Dismissal of the malpractice claims was therefore appropriate.

Practice Note: Michigan is a "notice-pleading" state and an action for legal malpractice is not subject to heightened pleading standards. But a claimant who brings such an action must plead factual allegations giving rise to the purported malpractice, including factual allegations regarding how that malpractice caused the injuries alleged—not just a conclusory paragraph to that effect.

Endnotes

1 The authors acknowledge the valuable assistance of Jason M. Renner, an associate of the firm.

Ronald M. Sangster, Jr., *The Law Offices of Ronald M. Sangster PLLC*
rsangster@sangster-law.com

No-Fault Report

Why Do We Insure Vehicles We Don't Own? A Life Lesson On Paying Something For Nothing

One of the things I enjoy talking about when teaching the no-fault course at the Western Michigan University Thomas M. Cooley School of Law – Auburn Hills are the various "life lessons" we can learn from dealing with no-fault. One very important "life lesson" that has come to light in recent years is the ramifications of insuring vehicles we do not own. We see this often when a friend or family member is attempting to help out another friend or family member, who probably cannot afford insurance on their automobiles. As noted below, this can have serious consequences if the actual owner of the motor vehicle is involved in a motor-vehicle accident.

Consider the following scenario:

> Jim and Mary buy a car for their son, Johnny, when he turns 16 years old. Jim and Mary title the vehicle in their names, and insure the vehicle through their family automobile insurance policy. Taking the advice of their agent, they also designate Johnny as an "additional driver" on the insurance policy covering the family's motor vehicles.
>
> Johnny continues to drive the vehicle throughout his high school years. He even drives the vehicle while attending college. After graduating from college, Johnny decides to move out and rent an apartment. He even goes so far as to take most of his personal belongings, such as computers, gaming systems, electronics and clothing with him to his new apartment. He changes his address on his driver's license and his voter registration information to reference his new apartment. Jim and Mary sign over the title to the motor vehicle to Johnny, and Johnny duly takes the title to the Secretary of State's Office and transfers the vehicle into his name. However, because Johnny cannot afford the insurance on his own, Jim and Mary continue to keep Johnny's vehicle on the family auto policy, and continue to list Johnny as an "additional driver."
>
> Six months after establishing domicile at his apartment address, Johnny is involved in a serious automobile accident. Jim and Mary file a claim for no-fault benefits with their family auto insurer.

What happens next? Under recent case law, the family's auto insurer may very well deny coverage for this loss, despite the fact that Jim and Mary have paid premiums to insure Johnny's vehicle for many years! To understand why this occurs requires an understanding of two key priority provisions found in the Michigan No-Fault Insurance Act at MCL 500.3114(1) and MCL 500.3114(4), as well as an understanding as to why specific words matter when interpreting statutes.

The "general rule" for no-fault priority is MCL 500.3114(1). This section is really the starting point for any analysis of no-fault priority. This section currently provides:

Ron Sangster concentrates his practice on insurance law, with a focus on Michigan No-Fault Insurance. In addition to teaching Michigan No-Fault law at Thomas J. Cooley Law School, Ron is a highly sought after speaker on Michigan insurance law topics. His email address is rsangster@sangster-law.com.

For many years, practitioners simply assumed that because the vehicle itself was insured, no-fault coverage had to flow from that insurer. However, recent case law has amply demonstrated that despite the fact that premiums may have been paid for such coverage, an insurance company will not be liable to pay Johnny's no-fault benefits because the policy issued to Jim and Mary simply did not insure the "owner," "registrant," or "operator" of the motor vehicle – Johnny himself.

(1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.

If there is no insurance at this level, the next level of priority for occupants of motor vehicles is found at MCL 500.3114(4), which states:

> Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the **owner or registrant** of the vehicle occupied.
>
> (b) The insurer of the **operator** of the vehicle occupied.

Under the scenario referenced above, simply being named as an "additional driver" on a policy does not render a person a "named insured" under that policy, unless the policy specifically so provides. See *Transamerica Ins Corp v Hastings Mut'l Ins Co*, 185 Mich App 249; 460 NW2d 291 (1990); *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983). Because Johnny is not domiciled with his parents either, there would be no coverage under MCL 500.3114(1).

One very important "life lesson" that has come to light in recent years is the ramifications of insuring vehicles we do not own.

With regard to coverage under MCL 500.3114(4), it is important to note that the statute does not reference "the insurer of the vehicle occupied" by the injured party. Rather, it references "the insurer of the owner or registrant of the vehicle occupied" or "the insurer of the operator of the vehicle occupied." The fact that there may (or may not) be insurance on the actual vehicle is irrelevant under the statutory language. See *Farmers Ins Exch v Farm Bureau Gen'l Ins Co*, 272 Mich App 106; 724 NW2d 485 (2006) (interpreting similar language in MCL 500.3114(5)); *Jeffrey v Titan Ins Co*, 252 Mich App 330; 652 NW2d 469 (2002) (interpreting similar language in MCL 500.3115(1)). Simply put, the issue is whether or not Jim and Mary's policy insures Johnny as the "owner," "registrant," or "operator" of his own motor vehicle that he was operating at the time of the occurrence.

For many years, practitioners simply assumed that because the vehicle itself was insured, no-fault coverage had to flow from that insurer. However, recent case law has amply demonstrated that despite the fact that premiums may have been paid for such coverage, an insurance company will not be liable to pay Johnny's no-fault benefits because the policy issued to Jim and Mary simply did not insure the "owner," "registrant," or "operator" of the motor vehicle – Johnny himself.

The recent Michigan Court of Appeals' decision in *Stone v Auto-Owners Ins Co*, 307 Mich App 169; 858 NW2d 765 (2014), amply illustrates this point. In *Stone*, Plaintiff sought survivor's loss benefits as the widower of Stephanie Stone, who was killed in a motor-vehicle accident while driving a 2002 Ford Taurus, which she owned and registered. Neither Stephanie nor her husband obtained an insurance policy on the vehicle. However, Stephanie's parents added Stephanie's Taurus to their existing no-fault policy with Auto-Owners Insurance Company. Stephanie and her husband had also been listed as drivers under the family's auto policy with Auto-Owners. At the time of the accident, Stephanie and her husband were not living with her parents. The trial court ruled that because the insurer had accepted a premium for the coverage and undoubtedly insured the automobile at the time of the accident, the parents' insurer, Auto-Owners Insurance Company, was responsible for paying the benefits.

The Court of Appeals ruled otherwise. First, the Court of Appeals observed that there was no coverage under the general priority provision of MCL 500.3114(1), because:

> There is no dispute that, at the time of the accident, Stephanie was neither married to nor living with John or Linda [her parents], and the policy at issue only names 'John and Linda Stone' as the 'insured.' As this Court has held, the 'person named in the policy' under MCL 500.3114(1) is synonymous with the 'named insured,' and persons designated merely as drivers under a policy (such as plaintiff and Stephanie) are

The Court of Appeals again held that simply being designated as a "driver" or "principal operator" on a policy does not elevate that individual to the status of a "named insured," again relying on its earlier decision in *Stone*..

> neither named insureds nor persons named in the policy [citing *Transamerica, supra* and *Dairyland, supra*]. Accordingly, plaintiff is not entitled to nofault benefits under MCL 500.3114(1).

As for coverage under MCL 500.3114(4), the court acknowledged that the issue of whether or not Auto-Owners could be deemed the insurer of the "owner," "registrant," or "operator" of the motor vehicle depended upon the actual policy language. See *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007); *Amerisure Ins Co v Coleman*, 274 Mich App 432; 733 NW2d 93 (2007). After examining the language of the insurance policy at issue, the Court of Appeals noted that there was nothing in the Auto-Owners' policy that would designate plaintiff or Stephanie Stone as a contractual insured. Despite the fact that Auto-Owners Insurance Company clearly insured the vehicle being operated by Stephanie Stone at the time of her death, because Auto-Owners did not insure the "owner," "registrant," or "operator" of the vehicle, it was not obligated to afford no-fault benefits to Stephanie Stone's dependents.

A similar result was reached by the Court of Appeals in *Barnes v Farmers Ins Exch*, 308 Mich App 1; 862 NW2d 681 (2014). In *Barnes*, plaintiff and her mother owned a 2004 Chevy Cavalier. The plaintiff's mother allowed her insurance policy with Allstate Insurance Company to lapse because she could no longer drive the vehicle. However, the plaintiff's mother asked a church friend, Huling, to insure her vehicle through his policy with State Farm. The plaintiff was driving the vehicle when she was involved in a motor-vehicle accident. She initially sought benefits from Huling's insurer, State Farm, and sued State Farm when it denied her claim. The plaintiff also filed a claim with the Michigan Assigned Claims Facility, which assigned Farmers Insurance Exchange to handle her claim. State Farm filed a motion for summary disposition on the basis that the plaintiff could not recover benefits because the plaintiff was not a named insured nor a relative of the named insured (Huling) domiciled in his household. State Farm also argued that, because Huling was not an "owner" of the Chevy Cavalier owned by the plaintiff and her mother, State Farm was not obligated to afford benefits under MCL 500.3114(4), either. The trial court granted summary disposition in favor of State Farm. Farmers Insurance Exchange, as assignee of the Michigan Assigned Claims Facility, then filed its own motion for summary disposition, arguing that, as the "owner" of the Chevy Cavalier, the plaintiff was disqualified from recovering benefits because she, as the "owner" of the vehicle, failed to insure it. The lower court granted summary disposition in favor of Farmers Insurance Exchange and plaintiff appealed.

The Court of Appeals affirmed the lower court's ruling and, in doing so, distinguished its earlier decision in *Iqbal v Bristol West Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008). The court limited its holding in *Iqbal* to those situations where one owner of the vehicle insures it. Here, none of the "owners" of the vehicle insured the Chevy Cavalier. Therefore, plaintiff was disqualified from recovering benefits under MCL 500.3113(b), even though, once again, there was no doubt that the vehicle itself was insured by State Farm.

Two unpublished Court of Appeals' decisions, which were both decided on July 16, 2015, reached similar results. In *Culbert v Starr Indemnity & Liability Co*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2015 (Docket No. 320784); 2015 WL 4374139, three individuals, Mosby, Culbert and Williams were involved in a motor vehicle accident while Mosby was driving a 2007 Chrysler PT Cruiser. The vehicle was insured by Starr Indemnity under a policy that had been purchased by Mosby's boyfriend, Fudge. However, only Fudge was listed as a named insured on the policy. Both Mosby and Fudge were listed as drivers in the insurance application. In the application, Fudge had falsely represented that he owned all of the vehicles listed in the application, even though he was not the owner of the PT Cruiser involved in the accident. Mosby and the other occupants filed a claim for no-fault benefits against Starr Indemnity Company, which was denied.

Plaintiffs argued that they were entitled to benefits from Starr Indemnity pursuant to MCL 500.3114(1). Mosby specifically argued that she should be deemed a "named insured" under the policy, because she was listed as a "driver" under the policy. The Court of Appeals rejected this argument, noting that the terms "named insured" and "other drivers" are not synonymous, relying on *Stone*. Only Fudge was the named insured. Because none of the occupants were related to Fudge, they were not entitled to claim benefits under this section.

Again, the lesson here is that red flags must be raised whenever one is dealing with an injury arising out of the use of a motor vehicle that one owns, but is insured by someone else.

The three injured plaintiffs then argued that they were entitled to benefits under MCL 500.3114(4), noting that Starr Indemnity Company was the insurer of the owner or registrant of the motor vehicle they were occupying at the time of the accident. The Court of Appeals undertook an exhaustive, step-by-step analysis of the applicable policy language, and noted that none of the occupants qualified as an "insured" under the policy. The Court of Appeals likewise noted that the PT Cruiser was not even considered "Your Covered Auto," as that term was used in the policy, because its named insured, Fudge, was not required to insure the vehicle since he simply did not own it. The court likewise concluded that Starr Indemnity was not obligated to pay uninsured motorist benefits, either. Accordingly, the Court of Appeals reversed the Circuit Court's decision to the contrary and remanded the matter back to the Circuit Court for entry of judgment in favor of the insurer.

Hoskins v Miller, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2015 (Docket No. 320150); 2015 WL 4374121, again graphically illustrates the problems with insuring vehicles that the named insured does not own. In *Hoskins*, the plaintiff's parents had purchased a 2003 Ford Focus for their daughter's use. The plaintiff's father was the titled owner of the Focus and the plaintiff's parents obtained insurance on the Focus through Home-Owners Insurance Company. Although the plaintiff was not named as an insured, she was designated as a principal operator of the Ford Focus.

The plaintiff moved out of her parents' home and reimbursed her father for the loan that he had taken out to pay for the car. Her father subsequently transferred title to the plaintiff on April 18, 2011. The plaintiff did not obtain an insurance policy of her own to cover the vehicle, but her parents continued to insure the vehicle under their policy. In January 2012, the plaintiff was injured while driving the Ford Focus. The defendant denied coverage for this loss and the plaintiff filed suit. The Circuit Court determined that there were genuine issues of material fact as to whether the plaintiff was entitled to recover no-fault benefits, thereby denying the insurer's motion for summary disposition. The insurer then filed an application for leave to appeal with the Michigan Court of Appeals, which was granted.

On appeal, the Court of Appeals again held that simply being designated as a "driver" or "principal operator" on a policy does not elevate that individual to the status of a "named insured," again relying on its earlier decision in *Stone*. Furthermore, the court observed that Plaintiff was not a "relative … domiciled in the same household" as her parents, at the time of the accident. Therefore, she was not eligible for benefits under MCL 500.3114(1).

Similarly, the Court of Appeals rejected the plaintiff's argument that she was entitled to benefits under MCL 500.3114(4). As previously noted, this statute provides that occupants of a motor vehicle shall secure payment of no-fault benefits from, "[t]he insurer of the owner or registrant of the vehicle occupied." Under the terms of the policy, her parents were simply not the owner or registrant of the involved vehicle – she was.

The court likewise rejected the plaintiff's arguments that the policy should be reformed, because there was no indication that the Auto-Owners Insurance policy at issue violated public policy or contravened the legislative intent of the No-Fault Act. The court also rejected the plaintiff's arguments that she should be entitled to benefits because she was an "innocent third-party" to the insurance transactions between her parents and Auto-Owners Insurance Company.

Again, the lesson here is that red flags must be raised whenever one is dealing with an injury arising out of the use of a motor vehicle that one owns, but is insured by someone else. Courts are taking a much closer look at these cases and almost invariably are concluding that no coverage is warranted, even though the vehicle itself is undoubtedly insured by the insurer. This author anticipates that more and more insurers will re-write their policy language to eliminate any possibility of a broad contractual insured.

What is the "life lesson" from these cases? Simply put, never, ever insure a vehicle that you do not own under a "family auto policy." Remember that, under no-fault, we are not just insuring vehicles – we are insuring people.

By: Kyle Platt
kyle@sharedresources.us

Technology Corner: Speak Write

The beauty of technology is that it usually simplifies a person's life or a task in their life. For instance, writing. We have gone from all handwritten documents, to the typewriter, and now to the computer. I want to be clear: I am not diminishing handwriting. It is a true art, but many people, including myself, have almost illegible penmanship. The computer has allowed us to make clear documents with the ease of sending them to anyone in the world. But what if you cannot type? We all know someone who is a one-finger, hunt-and-peck typist. I even have a computer-science professor who is extremely slow at typing. He blames it on his high school because the boys took machine shop, while the girls took typing class. If you are one of those people or simply just don't have the time to type a document, I recommend looking into Speak Write.

Speak Write is a company that will take almost any form of communication and turn it into a document for you. This includes voice recordings, pictures, phone calls, faxes and even cassette tapes. They accept submission of content through their mobile app, website, email and also the mail. The average turnaround on a document is 3 hours from when you send it, unless, of course, it was sent by mail. They are open 24 hours a day to make sure that information sent at any time will be back to you within a few hours.

It is a very interesting idea that is pretty simple. Speak Write has a large staff of employees who receive the content and start typing. When I learned that other people type the documents for you, I was a bit skeptical because a lot of documentation can consist of sensitive information that needs to be handled carefully. After looking further into the company, I found out that the typists are based in the United States and go through many security protocols upon employment, like background checks, employee screening, and confidentiality policies to ensure your data remains private. All data sent and received over the Internet is also encrypted for security purposes.

Speak Write specifically markets to the legal field. With legal transcripts needing to be typed often, Speak Write believes that it can be a great benefit to law firms. Workload commonly varies throughout the year. Whether it is a busy or slow time of year, their pay-as-you-go system enables a scalable workforce for typed documentation. Speak Write commonly transcribes memos, legal pleadings, legal proceedings, deposition summaries, legal and appellate briefs, and much more.

For legal transcripts to be transcribed it costs 1.5 cents per word. They do offer a free 10-page trial. I suggest giving the mobile app a try on a phone call, voice recording, or a picture of something you would like in document form. All of these tasks can be accomplished through a few clicks on a smart phone while out and about on a busy day. Technology continues to grow and, in the process, it should continue to ease our lives. Through the technology they are providing, Speak Write may be able to optimize your workday.

Kyle Platt is a business major at Central Michigan University. He currently works at Shared Resources as an information technology intern under Madelyne Lawry, the executive director of MDTC.

Supreme Court

By: Emory D. Moore, Jr., *Foster Swift Collins & Smith PC*
emoore@fosterswift.com

Supreme Court Update

An Employee Who Reports a Future Violation of Law is Not Protected by the Whistleblower Protection Act

On February 1, 2016, the Michigan Supreme Court held that reporting a planned future violation of law is not an activity protected by Michigan's Whistleblower Protection Act ("WPA"). *Pace v Edel-Harrelson*, __ Mich __; __ NW2d __ (2016); 2016 WL 416787 (Supreme Court No. 151374).

Facts: The plaintiff was an employee of a non-profit agency that received state grant money for use in aiding domestic violence victims and homeless individuals. The plaintiff claimed that a co-worker indicated to her that the co-worker was going to use grant money to purchase the co-worker's daughter a stove. The plaintiff immediately reported the co-worker's plan to a supervisor, who promised to take care of the situation. A few weeks later, after the supervisor failed to take action, the plaintiff reported the co-worker's plan directly to the agency's Executive Director. A few weeks later, the plaintiff's employment was terminated for harassing and intimidating behavior towards a co-worker. The plaintiff filed suit, alleging her employment was terminated in violation of the WPA, because she reported the co-worker's planned unlawful use of grant money.

The WPA provides, in relevant part, that "An employer shall not discharge, threaten, or otherwise discriminate against an employee … because the employee, … reports or is about to report, …, a violation or a suspected violation of a law …."

The defendant moved for summary disposition, arguing that the plaintiff did not engage in an activity protected by the WPA because the plaintiff's report of a **plan** to violate a law did not constitute report of an **actual** violation or suspected violation of a law. The trial court agreed and granted summary disposition in favor of the defendant.

The Court of Appeals reversed, finding that the Legislature did not intend to require an employee to report an **actual** violation of a law. The court stated that where an employee has a good faith and reasonable belief that a violation of a law is being actively planned, reporting that belief is a protected activity under the WPA.

Ruling: The Michigan Supreme Court reversed the Court of Appeals. The Court agreed with the Court of Appeals that an employee does not need to report an **actual** violation of law, as the WPA explicitly includes "a suspected violation of a law" in its protections. The Court, however, disagreed with the Court of Appeals' statement that where an employee has a good-faith and reasonable belief that a violation of a law is being actively planned, reporting that belief is a protected activity under the WPA. The Court reasoned that "'a violation or suspected violation' refers to an existing violation" not a future violation that may or may not occur. The Court therefore held that "because plaintiff reported a suspected future violation of a law, not a suspected existing violation, the plaintiff did not engage in a "protected activity."

In response to the argument that the plaintiff believed that she was reporting a violation that had already occurred when she reported to the Executive Director, the Court explained that even where an employee believes at the time of reporting that a violation had already occurred, if the employee does not express that belief and

Emory D. Moore, Jr. is an associate in the Lansing and Farmington Hills offices of Foster, Swift, Collins & Smith PC. A member of the General Litigation Practice Group, Emory focuses primarily on labor and employment matters, commercial litigation, and insurance defense. He can be reached at emoore@fosterswift.com or (517) 371-8123.

The Court reasoned that "'a violation or suspected violation' refers to an existing violation" not a future violation that may or may not occur.

merely reports a possible future violation, as the plaintiff did, the employee has not engaged in conduct protected by the WPA.

The Court held that the WPA does not apply and remanded to the Court of Appeals to determine the merits of a public-policy claim that was previously preempted by the application of the WPA.

Practice Note: WPA claims are subject to a mere 90-day statute of limitations. Since the Court ruled that the WPA was inapplicable, this case has been remanded to the Court of Appeals for a determination of the merits of a claim that the termination violated public policy. Public-policy claims are subject to a much longer statute of limitations, so the Supreme Court's decision might actually have a negative effect for employers by providing employees who report future violations of law with a significantly longer period of limitations. It is possible, however, that the Legislature will take notice of this decision and clarify whether the WPA applies in this situation.

Parties Cannot Cite Unpublished Opinions When Published Authority Exists, and Must Explain Any Citation to an Unpublished Opinion

On March 23, 2016, the Michigan Supreme Court amended MCR 7.215(C) by adding the following language: "Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented." The Staff Comment, which is not authoritative, provides that "[a]n unpublished opinion may be cited, for example, if there is no published authority on a given legal proposition or if it is necessary to demonstrate a conflict in interpretation of the law." Before this amendment, MCR 7.215 allowed citation to unpublished opinions, but merely explained that such opinions are not binding precedent, and required the party citing the opinion to provide a copy to the court and opposing parties.

MCR 2.119 and MCR 7.212 were amended to provide that motions and briefs must comply with the provisions of MCR 7.215(C). The new rule becomes effective May 1, 2016.

Practice Note: Unpublished opinions are not binding precedent, but can undoubtedly be highly persuasive. Some attorneys practicing in areas that are nearly devoid of published opinions rely on unpublished opinions on a daily basis. Some practitioners rely on unpublished opinions only when presented with a unique set of facts for which only an unpublished opinion provides an analogy. Unpublished opinions clearly serve an important purpose for many attorneys – and while this amendment does not unconditionally preclude the use of unpublished opinions as persuasive authority, it significantly restricts and discourages their use. If counsel, nonetheless, feels justified in citing an unpublished opinion, this amendment requires counsel to explain the reason for such citation.

By: Vanessa F. McCamant, *Aardema Whitelaw, PLLC*, and Emory Moore, *Foster, Swift, Collins & Smith, P.C.*
vmccamant@aardemawhitelaw.com, emoore@fosterswift.com

Medical Malpractice Report

An Expert's Standard of Care Opinion in Med-Mal Cases is Inadmissible When Based Solely on that Expert's Personal Beliefs

On February 8, 2016, the Michigan Supreme Court held that a trial court did not abuse its discretion when it ruled that an expert's standard-of-care opinion in a medical-malpractice case was not reliable because it was based solely on the expert's personal experience and belief. *Elher v Misra*, __ Mich __; __ NW2d __ (2016); 2016 WL 483425 (Supreme Court No. 150824).

Facts: A surgeon performing a laparoscopic gallbladder removal misidentified the common bile duct as the cystic duct and clipped it, necessitating surgical repair. The patient filed a medical-malpractice action in Oakland County Circuit Court against the surgeon and the hospital.

In addition to standard medical-malpractice claims, the plaintiff asserted that negligence could be inferred from the clipping of the common bile duct under the doctrine of *res ipsa loquitur*. The plaintiff's sole standard-of-care expert was Paul Priebe, MD, a board-certified general surgeon and associate professor of surgery at Case Western Reserve University. Dr. Priebe testified at deposition that, when the common bile duct is clipped during the performance of a laparoscopic gallbladder removal, it is virtually always a breach of the standard of care. Dr. Priebe was unable to cite any peer-reviewed medical literature, identify individuals within the scientific community with the same opinion, or provide any other supporting authority for his opinion. In fact, he testified that he was not aware of any general-surgery colleague at Case Western Reserve, his employer, who agreed with him that, absent extensive scarring or inflammation, it is always a breach of the standard of care to injure the common bile duct during a laparoscopic cholecystectomy.

The defendants moved for summary disposition under MCR 2.116(C)(10), arguing that pursuant to MCL 600.2955 and MRE 702, Dr. Priebe's testimony was scientifically unreliable and therefore inadmissible. In support of its argument, the defense provided affidavits from several experts and peer-reviewed publications providing that clipping a patient's common bile duct during a laparoscopic gallbladder removal is a recognized complication attributable to misperception because of the limits of human perception while utilizing laparoscopic 2-dimensional technology, as opposed to the lack of care or skill. The defendants also submitted affidavits from two surgeons within the Case Western Reserve system (Dr. Priebe's employer) who specifically disagreed with Dr. Priebe's assertion. The trial court granted summary disposition in favor of the defendants, relying on: "[1] the absence of scientific testing and replication, [2] the lack of evidence that Priebe's opinion and its basis were subjected to peer-reviewed publication, and [3] plaintiff's failure to demonstrate the degree to which Priebe's opinion and its basis were generally accepted in the relevant expert community."

In a published split opinion, the Court of Appeals reversed the trial court, finding that the trial court incorrectly applied MRE 702 and abused its discretion in finding that Dr. Priebe's testimony was inadmissible. The Court of Appeals stated that the

Emory D. Moore, Jr. is an associate in the Lansing and Farmington Hills offices of Foster, Swift, Collins & Smith PC. A member of the General Litigation Practice Group, Emory focuses primarily on labor and employment matters, commercial litigation, and insurance defense. He can be reached at emoore@fosterswift.com or (517) 371-8123.

Vanessa McCamant is a partner at Aardema Whitelaw PLLC in Grand Rapids. Her concentration is on the defense of medical malpractice claims. She graduated from DePaul University College of Law in Chicago in 2004.

The Court further explained that "[w]hile peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered Priebe's opinion unreliable and inadmissible under MRE 702."

issue was "outside the realm of scientific methodology," and therefore neither MRE 702 nor MCL 600.2955 made Dr. Priebe's testimony inadmissible. Specifically, the court stated that the three guideposts relied upon by the trial court were irrelevant to the facts of this case. The court found that the "testing and replication" guidepost is inapplicable to standard of care opinions since it is difficult to discern how such an opinion can ever be tested or replicated. The court found that the "peer-reviewed publication" guidepost should not have been relied upon because there was no evidence that the standard-of-care issue had ever been "analyzed, investigated or studied in peer-reviewed articles." Finally, the court found that the lack of evidence of the "general acceptance" guidepost for Dr. Priebe's opinion was irrelevant because standard-of-care "calls for a value judgment derived largely from an expert's education, training, and experience, not a scientific pronouncement." The reliability of such an opinion depends on "whether the expert's qualifications create a foundation adequate to support the expert's statement of the standard of care."

Ruling: The Michigan Supreme Court reversed the Court of Appeals, finding that Dr. Priebe's opinion was not sufficiently reliable. The Court reiterated that determining whether an expert's opinion should be admitted involves a two-tier analysis. First, the proponent must establish that the expert is **qualified** under MCL 600.2169 by virtue of his or her experience. Second, the proponent must establish that the specific opinions offered are sufficiently **reliable** under the principles articulated in MRE 702 and MCL 600.2955. The Court agreed with the Court of Appeals that not all factors in MCL 600.2955 are relevant in every case, and that the "testing and replication" factor was inapplicable to an opinion like the one at issue. Nonetheless, the trial court did not abuse its discretion in finding Dr. Priebe's testimony to be unreliable and therefore inadmissible. The Court of Appeals' conclusion that the issue had not been subjected to peer review was incorrect, as revealed by medical literature submitted by the defendants. Additionally, the degree to which Dr. Priebe's opinion was generally accepted was a relevant factor. The Court of Appeals misinterpreted this factor as requiring the opinion to be generally accepted, whereas the factor merely allows the court to consider the degree to which it is generally accepted. There was no evidence presented to substantiate that Dr. Priebe's opinion was generally accepted. Overall, "Plaintiff failed to provide any support for Dr. Priebe's opinion that would demonstrate that it had some basis in fact and that it was the result of reliable principles or methods." The Court further explained that "[w]hile peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered Priebe's opinion unreliable and inadmissible under MRE 702." The Court confirmed its holding in *Edry v Adelman*, 486 Mich 634, 642; 786 NW2d 567 (2010)—"Under MRE 702, it is generally not sufficient to simply point [solely] to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." It should also be noted that, at all levels, the Courts agreed that the doctrine of *res ipsa loquitur* was inapplicable.

Practice Note: The Court of Appeals' decision neglected to support the trial court's role as evidentiary gatekeeper, responsible for ensuring that only reliable expert testimony is admitted. The Supreme Court, however, restored the objectives of MRE 702 and MCL 600.2955 in overruling the Court of Appeals, reestablishing the trial court's gatekeeper function in performing a mandatory two-tier analysis of an expert's qualifications and opinion testimony and excluding unreliable evidence.

The arsenal of evidence the defense presented, which contradicted the opinions of Dr. Priebe, was critical here. If it had simply been a battle of the experts' experience, the outcome may have been different. Therefore, while supporting literature is not always "necessary or sufficient," it certainly helped the defense in this case. The defense experts' contrary opinions on the issue, while helpful, were likely not as compelling as the extra step the defense took in obtaining affidavits from Dr. Priebe's own colleagues contradicting his opinions. In mounting a challenge like this, the defense may wish to look into obtaining similar affidavits from plaintiff's expert's colleagues, reviewing historical testimony from the expert's colleagues to see if contrary testimony has been offered on the topic, and reviewing literature authored by the expert or expert's colleagues that contradicts the opinion being offered.

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When the people who are teaching, operating, or practicing under the same roof as plaintiff's expert disagree with him or her, that would seemingly be powerful evidence.

Other things that would be helpful in waging an argument to exclude such expert testimony include: (1) determining whether the expert will acknowledge that the complication at issue is known and recognized among their peers; (2) determining whether the expert is familiar with the frequency with which the complication occurs; (3) determining whether the expert has encountered the complication and with what frequency; (4) determining whether the expert's colleagues have encountered the complication; and (5) determining whether the expert has ever testified on the other side of the issue and, if so, how the circumstances were different. The defense should remain mindful that this decision applies to all proponents of expert testimony. Therefore, it is important to know what other than "experience" forms the basis and provides support for your own experts' opinions as well.

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

Amicus Report

The Michigan Supreme Court has ordered oral argument on whether to grant Westfield Insurance Company's application for leave to appeal in *Spectrum Health Hosps v Westfield Ins Co*, and has invited the Michigan Defense Trial Counsel to submit an amicus brief on the issues to be addressed.[1] The issues as posed by the Supreme Court are: (1) whether *Miller v Auto-Owners Ins Co*, 411 Mich 633; 309 NW2d 544 (1981), remains a viable precedent in light of *Frazier v Allstate Ins Co*, 490 Mich 381; 809 NW2d 126 (2011), and *LeFevers v State Farm Mut Auto Ins Co*, 493 Mich 960; 828 NW2d 678 (2013); and (2) if so, whether *Miller* should be overruled.

Summary of the Case:

Mr. Norman was changing a tire on his parents' Chevy Blazer, which was insured through Westfield. The jack became dislodged, and the vehicle fell on Mr. Norman's hand, pinching his fingers between the axle and the wheel rim. Mr. Norman sought treatment at Spectrum. Westfield denied the claim because MCL 500.3106(1) provides that no-fault benefits are not payable for "accidental bodily injury arising out of the … maintenance … of a parked vehicle as a motor vehicle," and none of the three statutory exceptions to MCL 500.3106(1) were applicable.

Both the district court and the circuit court considered themselves bound to follow *Miller* which held that all maintenance injuries were compensable under MCL 500.3105(1),[2] without regard to MCL 500.3106(1).[3] The Court of Appeals denied leave to appeal.

Paul A. McDonald, with Magdich Law, has agreed to write the amicus brief on behalf of the Michigan Defense Trial Counsel.

Mr. McDonald is a partner at Magdich Law, where he has been practicing since 2011. His practice primarily focuses on first and third-party no-fault litigation, with an emphasis on SIU/fraud related matters. Before becoming an attorney, he worked for five years as an adjuster for a large automobile insurance carrier. He is admitted to practice in the State of Michigan, U.S. District Court for the Eastern District of Michigan, and U.S. Court of Appeals for the Sixth Circuit.

Anyone interested in volunteering as an amicus writer for the Michigan Defense Trial Counsel should send inquiries to Amicus Committee Co-Chair, Kimberlee A. Hillock at khillock@willinghamcote.com.

Kimberlee A. Hillock is a shareholder and co-chairperson of Willingham & Coté, P.C.'s Appellate Practice Group. Before joining Willingham & Coté, P.C., Ms. Hillock worked as a research attorney and judicial clerk for the Honorable Donald S. Owens of the Michigan Court of Appeals, and as a judicial clerk for the Honorable Chief Justice Clifford W. Taylor of the Michigan Supreme Court. Since joining Willingham & Coté, P.C., in 2009, Ms. Hillock has achieved favorable appellate results for clients more than 48 times in both the Michigan Court of Appeals and the Michigan Supreme Court. She has more than 13 years of experience in appellate matters and is a member of the Michigan Supreme Court Historical Society Advocates Guild.

Endnotes

1 498 Mich 969; 873 NW2d 303 (2016) (Supreme Court Docket No. 151419).

2 MCL 500.3105(1) states: "[A]n insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

3 MCL 500.3106(1) states:

> Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> (c) the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

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September TBA	Board Meeting - Okemos
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 – Sheraton, Boston, MA
November 1	EID/Golden Gavel Award Deadline
November 10	MDTC Board Meeting – Sheraton, Novi
November 10	Judicial Award Recipient Selected
November 10	Past Presidents Dinner – Sheraton, Novi
November 11	Winter Meeting – Sheraton, Novi

2017

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January TBA	Board Meeting
March 2	Board Meeting – Detroit Golf Club
March 2	Annual Meeting – Detroit Golf Club
June 22-24	Annual Meeting – Shanty Creek, Bellaire
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November 9	MDTC Board Meeting – Sheraton, Novi
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2018

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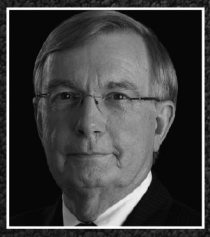

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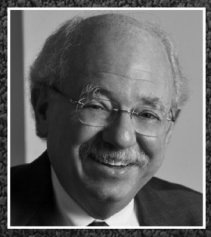

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Troy, MI 48098
248-822-6461 • 248-822-6470
Diana.Khachaturian@thehartford.com

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313-983-4419 • 248-901-9090
hballentine@plunkettcooney.com

Richard W. Paul
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2600 W. Big Beaver Road, Suite 300
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rpaul@dickinsonwright.com

Joshua K. Richardson
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Foster, Swift, Collins & Smith, P.C.
313 S. Washington Square
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517-371-8303 • 517-371-8200
jrichardson@fosterswift.com

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326 E. State Street P.O. Box 606
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231-946-2700 •231-946-0857
MIC@runningwise.com

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734-213-8000 • 734-332-0971
geller@shrr.com

Angela Emmerling Shapiro
Butzel Long PC
301 East Liberty Street, Suite 500
Ann Arbor, MI 48104
248-258-2504 • 248-258-1439
shapiro@butzel.com

Scott S. Holmes
Foley & Mansfield, PLLP
130 East Nine Mile Road
Ferndale, MI 48220
248-721-8155 • 248-721-4201
sholmes@foleymansfield.com

Randall A. Juip
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road, Suite 300
Livonia, MI 48152
734-742-1800 • 734-521-2379
rajuip@fbmjlaw.com

John Mucha, III
Dawda, Mann, Mulcahy & Sadler PLC
39533 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304
248-642-3700 • 248-642-7791
jmucha@dmms.com

Carson J. Tucker, JD, MSEL
Law Offices of Carson J. Tucker
117 N. First Street, Suite 111
Ann Arbor, MI 48104
734-218-3605 • 734-629-5871
cjtucker@lexfori.org

Robert Paul Vance
Fraser Treiblock Davis & Dunlap PC
124 W. Allegan Street, Suite 1000
Lansing, MI 48933
517-377-0843 • 517-482-0887
pvance@fraserlawfirm.com

Jenny Zavadil
Bowman and Brooke LLP
41000 Woodward Avenue, Suite 200 East
Bloomfield Hills, MI 48304
248-205-3300 • 248-205-3399
jenny.zavadil@bowmanandbrooke.com

MDTC LEADER CONTACT INFORMATION

Regional Chairs

Flint: Bennet J. Bush
Garan Lucow Miller P.C.
1111W. Long Lake Road, Suite 300
Troy, MI 48908
248-641-7600 • 248-641-0222
bbush@garanlucow.com

Grand Rapids: Charles J. Pike
Smith Haughey Rice & Roegge PC
100 Monroe Center Street NW
Grand Rapdis, MI 49503
616-458-5456 • 616-774-2461
cpike@shrr.com

Lansing: Michael J. Pattwell
Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906
517-318-3043 • 517-318-3082
mpattwell@clarkhill.com

Marquette: Jeremy S. Pickens
O'Dea Nordeen and Burink PC
122 W. Spring Street
Marquette, MI 48955
906-225-1770 • 906-225-1764
jpickens@marquettelawpc.com

Saginaw: David Carbajal
O'Neill, Wallace & Doyle P.C.
300 Street Andrews Road, Suite 302
Saginaw, MI 48638
989-790-0960 • 989-790-6902
dcarbajal@owdpc.com

Southeast Michigan: Joseph E. Richotte
Butzel Long PC
41000 Woodward Avenue
Bloomfield Hills, MI 48304
248-258-1407 • 248-258-1439
richotte@butzel.com

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

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Angela Emmerling Shapiro
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MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice:
Beth A. Wittmann
The Kitch Firm
One Woodward Ave, Suite 2400
Detroit, MI 48226
313-965-7405 • 313-965-7403
beth.wittmann@kitch.com

Appellate Practice:
Nathan Scherbarth
Jacobs & Diemer, PC
500 Griswold Street, Suite 2825
Detroit, MI 48226
313-965-1900 • 313-965-1919
nscherbarth@jacobsdiemer.com

Commerical Litigation:
Brandon C. Hubbard
Dickinson Wright PLLC
215 S. Washington Sq., Suite 200
Lansing, MI 48933
517-487-4724 • 517-487-4700
bhubbard@dickinsonwright.com

Commerical Litigation:
Brian M. Moore
Dykema Gossett PLLC
39577 Woodward Avenue, Suite 300
Bloomfield Hills, MI 48304
248-203-0772 • 248-203-0763
bmoore@dykema.com

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

Insurance Law:
Michael J. Jolet
Hewson & Van Hellemont PC
25900 Greenfield Road, Suite 650
Oak Park, MI 48237
248-968-5200 • 248-968-5270
mjolet@vanhewpc.com

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

Labor and Employment:
Deborah L. Brouwer
Nemeth Law PC
200 Talon Centre Drive, Suite 200
Detroit, MI 48207
313-567-5921 • 313-567-5928
dbrouwer@nemethlawpc.com

Labor and Employment:
Clifford L. Hammond
Nemeth Law PC
200 Talon Centre Drive, Suite 200
Detroit, MI 48207
313-567-5921 • 313-567-5928
chammond@nemethlawpc.com

General Liability:
Dale A. Robinson
Rutledge Manion Rabaut Terry & Thomas PC
333 W. Fort St., Suite 1600
Detroit, MI 48226
313-965-6100 • 313-965-6558
drobinson@rmrtt.com

General Liability:
Sarah Lynn Walburn
Secrest Wardle
2025 E Beltline SE, Suite 600
Grand Rapids, MI 49546
616-285-0143 • 616-285-0145
swalburn@secrestwardle.com

Professional Liability & Health Care:
Kevin M. Lesperance
Henn Lesperance PLC
40 Pearl Street NW, Suite 1040
Grand Rapids, MI 49503
616-551-1611 • 616-323-3658
kml@hennlesperance.com

Professional Liability & Health Care:
Vanessa F. McCamant
Aardema Whitelaw PLLC
5360 Cascade Rd SE
Grand Rapids, MI 49546
616-575-2060 • 616-575-2080
vmccamant@aardemawhitelaw.com

Municipal & Government Liability:
Robyn J. Brooks
City of Detroit Law Dept
2 Woodward Ave., Suite 500
Detroit, MI 48226
313-237-3049 • 313-224-5505
broor@detroitmi.gov

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

Young Lawyers:
Robert E. Murkowski
Miller Canfield Paddock & Stone PLC
150 W. Jefferson Ave., Suite 2500
Detroit, MI 48226
313-496-8423 • 313-496-8451
murkowski@millercanfield.com

Young Lawyers:
Trevor J. Weston, Esq.
Fedor Camargo & Weston PLC
401 S Old Woodward Ave, Suite 410
Birmingham, MI 48009-6603
248-822-7160 • 248-645-2602
tweston@fedorlaw.com

Young Lawyers:
Jeremiah Lee Fanslau
Magdich & Associates
17177 N. Laurel Park Drive, Suite 401
Livonia, MI 48152
248-344-0013 • 248-344-0033
jfanslau@magdichlaw.com

Law Practice Management:
Fred J. Fresard
Dykema Gossett PLLC
39577 Woodward Ave., Suite 300
Bloomfield Hills, MI 48304
248-203-0593 • 248-203-0763
ffresard@dykema.com

Law Practice Management:
Thaddeus E. Morgan
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 1000
Lansing, MI 48933
517-377-0877 • 517-482-0887
tmorgan@fraserlawfirm.com

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P.O. Box 66
Grand Ledge, MI 48837

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