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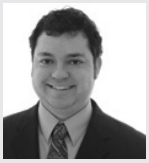
P.O. Box 66
Grand Ledge, Michigan 48837
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Editor's Notes

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

Associate Editors:
Thomas D. Isaacs
thomas.isaacs@
bowmanandbrooke.com



Matthew A. Brooks
mbrooks@smithbrink.com

Katharine Gostek
katharine.gostek@kitch.com

Victoria L. Convertino
vconvertino@vgpclaw.com

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President's Corner

By: Joshua Richardson, *Foster Swift Collins & Smith PC*
jrichardson@fosterswift.com

Joshua K. Richardson is a shareholder in the Lansing office of Foster, Swift, Collins & Smith, P.C., where he concentrates his practice primarily on commercial litigation, employment litigation, and insurance regulatory law.

Mr. Richardson is admitted to practice law in Michigan, the U.S. District Court for the Eastern and Western Districts of Michigan and the Eastern District of Wisconsin, the U.S. Sixth Circuit Court of Appeals, and the U.S. Supreme Court. Mr. Richardson earned his B.A. from Michigan State University in 2004 and his J.D. from Indiana University School of Law - Bloomington in 2007.

Mr. Richardson is a member of the State Bar of Michigan, the American Bar Association, the Ingham County Bar Association, the Federal Bar Association, the Defense Research Institute, and is a Barrister member of the American Inns of Court. Mr. Richardson also sits on the Board of Directors for the Boys & Girls Club of Lansing, where he served as Chair of the Board in 2015 and 2016.

Many Thanks

With my time as President of the MDTC nearing its end, it seems appropriate to take a look back and recognize the hard work and accomplishments achieved throughout the year. The efforts and commitment that I have witnessed of so many talented individuals are truly remarkable. Below are just some of the many examples that are worthy of recognition.

This year, the MDTC established a much-needed Veterans Section. A very special thanks to those MDTC members who are spearheading the effort: **Edward P. Perdue** (Dickinson Wright), **Kimberlee A. Hillock** (Willingham & Cote'), **Carson J. Tucker** (Law Offices of Carson J. Tucker), **Lawrence R. Donaldson** (Plunkett Cooney), and **Thomas W. Aycock** (Smith Haughey). They are already hard at work developing direct service projects and engaging and highlighting veterans within our membership.

The Winter Meeting Committee, **Atallah (Tony) Taweel**, Co-Chair (Ottenwess, Taweel & Shenk), **Daniel Cortez**, Co-Chair (Foley Baron Metzger & Juip), **Deborah L. Brouwer** (Nemeth Law), and **Veronica Ronnie Ibrahim** (Julie A. Taylor & Associates), planned and successfully executed one of the best attended winter meetings ever held by the MDTC. The committee's ability to secure engaging speakers and to put together such an entertaining and educational conference was exceptional.

Not to be outdone, the golf committee oversaw the most successful golf outing in the history of the MDTC. This success was, no doubt, a result of the golf committee's dedication to expanding and improving upon one of the MDTC's more informal and fun events. And, for planning a day on the golf course and away from the office, they each deserve special recognition: **Terence P. Durkin**, Co-Chair (Kitch), **John Hohmeier**, Co-Chair (Scarfone & Geen), **Dale A. Robinson** (Rutledge Manion), **Michael J. Pattwell** (Clark Hill), and **Matthew Zmijewski** (Plunkett Cooney).

Another group of very talented individuals planned and implemented this year's Legal Excellence Awards at the Gem Theatre in Detroit. The event – a resounding success by all measures – was the result of countless hours of hard work and attention to detail by each member of the planning committee, **Richard W. Paul** – Chair (Dickinson Wright), **Gary S. Eller** (Smith Haughey), **John Mucha III** (Dawda Mann), and **Beth A. Wittman** (Kitch).

This year's Annual Meeting Committee, **R. Paul Vance**, Co-Chair (Cline, Cline & Griffin), **Charles J. Pike**, Co-Chair (Smith Haughey), **Matthew W. Cross** (Cummings McClorey), **Scott J. Pawlak** (Collins Einhorn), and **Connor B. Dugan** (Warner Norcross), has been hard at work planning what is sure to be an outstanding conference ("Oh, the Places You'll Go . . . in Litigation": June 21, 2019 – June 22, 2019 at Shanty Creek Resort). With specialty breakout sessions in the areas of no-fault, employment law, medical malpractice, and commercial litigation, the committee has done the impossible and put together a conference that is tailored to litigators in nearly all major practice areas.

Also worthy of recognition is the Executive Committee: Vice President, **Irene Bruce Hathaway** (Miller Canfield), Treasurer, **Terence P. Durkin** (Kitch), and Secretary, **Deborah L. Brouwer** (Nemeth Law). In addition to putting up with me, each of

these individuals has shown tremendous dedication to the MDTC through their diligence and wisdom in addressing the varied and seemingly constant inflow of information and issues that come with running a successful organization like the MDTC. Their contributions to the MDTC over the past year are immeasurable.

A very special thank you also goes to the MDTC's Executive Director, **Madelyne Lawry**, and her extraordinary team, **Valerie Sowulewski**, **Kyle Platt**, **Bear Nelson**, **Kyle Bentley**, **Matthew Hinkle**, and **Tony Rodeman**, for all of their hard work behind the scenes. The organization was, in no small part, built upon the daily efforts and attentiveness of Madelyne and her team.

Having been a part of this organization, in one way or another, for more than a decade, I know now more than ever that the MDTC is, at its core, a group of talented and driven individuals. It has been a privilege to work with and on behalf of each of those individuals this past year.

So, with my last opportunity to address you as President of the MDTC, I will simply say – **Thank You!**

With my time as President of the MDTC nearing its end, it seems appropriate to take a look back and recognize the hard work and accomplishments achieved throughout the year

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Alan Couture
ajc@runningwise.com, or

Scott Holmes
sholmes@foleymansfield.com

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Michael Cook
michael.cook@ceflawyers.com

Legalization of Marijuana: The Effects on U.S. Citizens and Immigrants

By: Ahndia Mansoori, *Kitch Drutchas Wagner Valitutti & Sherbrook*

Executive Summary

For years, U.S. citizens and Canadian citizens have traveled across the border into each respective country with ease. Since the legalization of marijuana on a federal level in Canada and state level in Michigan in 2018, many individuals believe it is acceptable to cross the U.S./Canadian border in Michigan while in the possession of marijuana. The possession of marijuana at the U.S. or Canadian border, however, is still illegal despite the recent legalization in Canada and Michigan, and such possession can have negative consequences.

Ahndia Mansoori is an associate attorney in the firm's Detroit office. She focuses her practice on immigration and customs law. Ms. Mansoori received her J.D. from University of Detroit Mercy Law School where she graduated Cum Laude and was a recipient of the 2016 Public Interest Fellowship. Ms. Mansoori had several internships including the International News Desk at C-SPAN, Michigan Immigrant Rights Center, and served as a Law Clerk at the Kitch Law Firm.

Introduction

For years, U.S. citizens and Canadian citizens have traveled across the border into each respective country with ease. Unlike citizens of the majority of the world, Canadian citizens are visa exempt and have a much easier time crossing the border into the United States. The same is true for U.S. citizens entering Canada.[1] In the November 2018 midterm elections, the State of Michigan voted to legalize recreational marijuana. One month earlier, in October of 2018, Canada officially legalized marijuana nationwide. With the ease of travel across the border for both Canadian and U.S. citizens, there is a possibility that citizens of both countries would reasonably believe that using and carrying marijuana across the border in accordance with Michigan's state and Canada's federal law will not incur any criminal penalties. However, this notion is entirely false. Marijuana possession remains illegal under U.S. federal law, which is the controlling authority.[2]

Governing Law: Michigan State Law, Canadian Federal Law, and U.S. Federal Marijuana Law

Lawyers in Michigan need to be aware of the governing law in Michigan and Canada, but they also need to understand how federal law comes into play. Michigan law now permits the personal use and possession of marijuana by individuals age 21 and up.[3] Users can carry up to 2.5 ounces of marijuana in public and can have in their possession up to 10 ounces of marijuana and up to 12 plants for personal use at home.[4] While it is now legal to carry marijuana in public, it is still illegal for individuals in Michigan to smoke marijuana in public and to drive under the influence of marijuana.

Similarly, Canada has also legalized marijuana for personal use. However, it is still illegal to take marijuana into Canada. Crossing the border into Canada with marijuana is considered a serious criminal offense, regardless of whether you are traveling to or arriving from Michigan where marijuana is also legal.[5] Although marijuana is legal in both Canada and Michigan, possession of marijuana is illegal at the border between them. Therefore, U.S. citizens and foreign nationals living in the U.S. that travel into Canada with marijuana will be charged with a criminal offense in Canada if caught with possession of marijuana at the border.

Finally, while Michigan state law and Canadian federal law now permit personal use and possession of marijuana, such possession and use is still not permitted under U.S. federal law. All border crossings are governed by and in accordance with U.S. federal law, which supersedes individual state laws.[6] Therefore, although use and possession of marijuana is legal in Michigan, it is still illegal at the U.S. border for both U.S. citizens

and immigrants. Current U.S. federal law makes the possession, manufacture, and distribution of marijuana a criminal act.[7] Therefore, although marijuana has become legal in Michigan, U.S. citizens and immigrants alike must be made aware of the consequences possessing and using marijuana has, especially at the border.

Marijuana Possession Consequences in Michigan

With the passing of the Michigan Regulation and Taxation of Marihuana Act, the consequences of marijuana possession will be relaxed for U.S. citizens and immigrants in Michigan. Since marijuana use and possession is still illegal federally, however, the question remains as to how the federal law will be applied in Michigan.

Without a doubt, marijuana enforcement will continue at the federal level, but not for "low-level offenders." Matthew Schneider and Andrew Birge, the U.S. Attorneys for the Eastern and Western Districts of Michigan, respectively, said in a statement to the Detroit Free Press that "we will not unilaterally immunize anyone from prosecution for violating federal laws simply because of the passage of Proposal One."[8] The U.S. Attorneys made it clear that they will look at various factors to determine whether to prosecute, including "the interstate trafficking of marijuana; the involvement of other illegal drugs or illegal activity; people with criminal records; the presence of firearms or violence; criminal enterprises, gangs, and cartels; the bypassing of local laws and regulations; the potential for environmental contamination, and the risks to minors."[9] If an individual is in possession of the legal amount under Michigan state law, they may not be as likely to be prosecuted by the federal government. There is no guarantee, however, given the delineated factors. Therefore, it is imperative that lawyers advise their clients based on whether they fall under the delineated factors that the U.S. Attorneys have outlined in their joint statement.

Additionally, legalization of marijuana will have little impact on the corporate sector and the inner company policies set forth by employers regarding marijuana. Proposal One explicitly stated that employers can continue to have policies and procedures in place that prohibit employees from possessing marijuana at the workplace or working under the influence of marijuana.[10]

Marijuana Possession Consequences at the Border for U.S. Citizens and Immigrants

At the U.S. border, U.S. citizens and immigrants who are found with marijuana will be charged under U.S. federal law, regardless of whether or not it is legal in the state or country they are entering from. A common misconception held by individuals crossing the border is that if you are a U.S. citizen entering the U.S. you will not be charged. However, attempting to cross the border and re-enter while in violation of U.S. federal law will unequivocally result in seizure, fines, and/or being charged under U.S. federal law. The prohibition at the border applies in all cases, even those where an individual is authorized to use medical marijuana.

The consequences of being found with marijuana, or even being connected to the marijuana industry, are much higher for foreign nationals entering the U.S. Customs and Border Protection ("CBP") has stated that foreign nationals who are found with marijuana, are determined to be using marijuana, or are found to be working within the marijuana industry will be deemed inadmissible to the U.S.[11]

CBP has released a few clarifications on the immigration implications regarding a Canadian citizen that is employed by or has invested in a legal Canadian marijuana venture and is traveling to the U.S. for a separate business or personal purpose. The new guidance provides that "a Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. however, if a traveler is found to be coming to the U.S. for a reason related to the marijuana industry, they may be deemed inadmissible."[12]

This guidance has the potential to also place any Canadian investors, owners, and shareholders who invest in a legal marijuana business in any way at risk to be found inadmissible under drug trafficking grounds when entering at the border. They are investing in the transaction of a controlled substance for profit, which could amount to drug trafficking under the Immigration and Nationality Act [INA] and the federal Controlled Substances Act.[13]

Based on this guidance, it will be very important for both U.S. and foreign national workers and investors in the legal marijuana industry to consult with U.S. legal counsel. It is important to understand that even visiting for unrelated business meetings can make them subject to investigation at the U.S. border. Even seemingly benign visits to the U.S. to address investor questions or to recruit U.S. investors in the marijuana industry could place an employee in danger of inadmissibility to the U.S. or a potential criminal conviction under federal law, regardless of whether the business being conducted would be done in the State of Michigan where marijuana is now legal.

There are several steps that employers should take to advise their employees for how to interact with CBP officers when crossing the border. First, at no point should a foreign national employee lie when crossing the border as to the nature of their entry. Lying to an officer at the border could result in fraud and misrepresentation charges. If an employee is unsure of what to say, it is best that they say nothing at all.

Second, if they use marijuana, all employees' should make sure that their cars are completely cleaned out— there should be no remnants of marijuana. This includes the smell of marijuana. Employees crossing the border should not indicate that they are involved in the marijuana industry in any way. In other words, do not advertise any affiliation to the marijuana industry by carrying paraphernalia or wearing any articles of clothing that would draw attention or suspicion.

Lastly, it is important to remember that border agents need only have a "reasonable suspicion" of criminal activity in order to conduct an advanced search on any electronic devices.[14] This is a very low bar and, with the legalization of marijuana in Canada, officers are more likely to begin inspecting phones. Therefore, it is imperative that all communications regarding involvement with the marijuana industry, including emails with meeting information, evidence of marijuana

business dealings, etc., be removed prior to crossing.

Immigration Consequences

In general, getting convicted for a crime has consequences for foreign nationals' immigration status. A marijuana conviction is no different. Even admitting that marijuana has been used in the past can make a foreign national deportable or removable under U.S. immigration law. Again, this can easily cause confusion for foreign nationals because of the belief that they are not breaking any laws in Michigan. Immigration law, however, is federal. Therefore, even the use of marijuana or involvement in any marijuana related businesses could be grounds for inadmissibility or a denial of immigration benefits.

It is imperative that criminal defense attorneys be aware of the grounds that make foreign nationals inadmissible or removable when making a plea. The Supreme Court ruled in *Padilla v Kentucky*, that criminal defense attorneys must advise clients of immigration consequences of a plea.[15] A marijuana conviction will trigger immigration consequences and concerns. Immigration consequences can include denial of admission, inability to obtain a visa, being put into removal proceedings, the inability to adjust status to a green card holder or naturalize, among others.

Inadmissibility and the Remedies

There are several grounds for inadmissibility or removability of foreign nationals as it relates to marijuana. Depending on the seriousness of the offense, a 5-year bar from entering the U.S., a 10-year bar from entering the U.S., or a permanent bar from entering the U.S. may apply. Even after the bar expires, a waiver would have to be filed and granted by CBP for readmission.

The following are possible grounds of inadmissibility for foreign nationals who are found to have used, been convicted of, or gotten involved with marijuana and the marijuana industry.

First, under the Controlled Substances ground of inadmissibility, a foreign national who is in violation of any controlled-substances law or regulation of a U.S. state or federal law is subject to being found ineligible for admission to the U.S. or ineligible to receive a U.S. immigrant or nonimmigrant visa.[16]

Another ground for inadmissibility is the Drug and Trafficking ground of inadmissibility. Any foreign national who an officer knows, or has reason to believe is or has been a trafficker of a controlled substance,[17] is subject to being found ineligible to for admission to the U.S.[18] An individual will also be considered under the trafficking ground of inadmissibility if they are considered to have acted as an aider, abettor, or assisted others in trafficking marijuana.[19] Again, while there is a discretionary nonimmigrant visa waiver that could be utilized in order to waive the inadmissibility charge for nonimmigrants, a trafficking conviction could amount to an aggravated felony,[20] which would be grounds for deportation. It is important to note that if a foreign national is involved in the marijuana industry, regardless of the legitimacy of the business, they will be found deportable or inadmissible under the trafficking ground.

Lastly for purposes of this article, a marijuana conviction can be classified as a "crime of moral turpitude" and be grounds for inadmissibility.[21] Offenses that have involved legalized marijuana use have been found to constitute crimes of moral turpitude.

Although a nonimmigrant waiver is available for these inadmissibility grounds, it is very important to remember the waivers can be difficult to obtain. The CBP Waiver Review Board has full discretion to grant or deny waiver applications and there is no appeal of the decision.[22] The only option applicants are left with is to re-apply for a waiver. There are a number of discretionary factors that the adjudicator takes into account when making its determination, including the type of offense as well as the number of offenses and how serious or recent it was, among other factors.[23] Based on the U.S. federal government's hard stance against marijuana and the current anti-immigrant policies rolled out by the Trump Administration and the Department of Homeland Security, a waiver will be difficult to obtain regardless of the situation.

Conclusion

It will be easy for U.S. citizens, Canadian citizens, and all other foreign nationals to believe that due to the legalization of marijuana they are safe from prosecution. However, it is important for all attorneys, especially criminal defense attorneys, to understand the intricacies of the federal legal consequences marijuana possession and use could have on individuals.

Endnotes

1 Although U.S. and Canadian citizens are "visa exempt" they are required to apply for work status and other types of legal status if they intend to stay long term or reside in either country. 9 FAM 201.1-2(A) (2015).

2 *21 USC § 802*

3 MCL 333.27954 (2018) ("Michigan Regulation and Taxation of Marihuana Act").

4 *Id.*

5 Press Release, Government of Canada, Canada Legalizes and Strictly Regulates Cannabis (Oct. 17, 2018), https://www.canada.ca/en/health-canada/news/2018/10/canada-legalizes-and-strictly-regulates-cannabis.html

6 *Maryland v Louisiana*, 451 US 725, 746 (1981).

7 21 USC 841—843 (2008).

8 Kathleen Gray, *Michiganders Can Still Be Arrested for Marijuana After Proposal 1*, The Detroit Free Press (Nov. 8, 2018, 1:17 PM), https://www.freep.com/story/news/marijuana/2018/11/08/marijuana-michigan-legalization/1930288002/

9 *Id.*

10 *See supra* note 2, at § 3.

11 Press Release, U.S. Customs and Border Protection, CBP Statement on Canada's Legalization of Marijuana and Crossing the Border (Oct. 9, 2018), https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border

12 *Id.*

13 *See infra* notes 16, 17.

14 CBP Directive No. 3340-049A (January 4, 2018).

15 *Padilla v Kentucky*, 559 US 356 (2010).

16 INA § 212(a)(2)(A)(i)(II) (1952); 8 USC §1182(a)(2)(A)(i)(II) (1952).

17 "Controlled substance" is defined in Section 102 of the Controlled Substances Act (21 USC § 802).

18 INA § 212(a)(2)(C); 8 USC §1182(a)(2)(C).

19 *Id.*

20 INA § 101(a)(43)(B), 8 USC §1102(a)(43)(B)

21 INA § 212(a)(2)(A)(i)(I); 8 USC §1182(a)(1)(A)(iv).

22 USCIS Policy Manual, Volume 9, Part A, Chapter 5.

23 *Id.*

Making Sure That Your Employment Agreements Mean What They Say: Recent Roadblocks for Mandatory Arbitration Provisions and Shortened Limitations Periods

By: Deborah Brouwer and Elaine Dalrymple, *Nemeth Law, P.C*

Executive Summary

Over the last few decades, arbitration agreements for employment disputes have become quite popular. Although arbitration clauses have received widespread judicial and legislative acceptance in employment agreements, two recent Michigan Court of Appeals decisions may signal a change in attitude. Both cases offer lessons to employers regarding the care needed when crafting such policies.

Deborah Brouwer, an attorney since 1980, Ms. Brouwer practices exclusively in labor and employment law, with particular experience in the defense of lawsuits against employers, including claims of race, age, religion, national origin, gender and disability discrimination, harassment and retaliation, as well as FLSA, FMLA and non-competition suits. She also provides harassment training and conducts discrimination and harassment investigations for employers. She has extensive experience in appearing before administrative agencies, including the EEOC, MDCR, MIOSHA, OSHA and the NLRB. She also appears frequently before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals.

Elaine Dalrymple is a second year law student at Wayne State University Law School. She received her undergraduate degree in Political Science Pre-Law at Michigan State University in 2015, and was on the Dean's List for all four years. At Wayne Law she is a member of the Journal of Business Law, Business and Community Law Clinic, and Transactional Law Competition. She has been a law clerk at Nemeth Law since May 2018.

After years of having employment-related disputes decided by unpredictable juries, in the last several decades employers went on the offense, requiring, among other measures, mandatory arbitration of disputes and shortened statutes of limitations. Generally, both approaches have been viewed favorably by the courts, although two recent Michigan Court of Appeals decisions may signal a change in attitude. Both cases offer lessons to employers regarding the care needed when crafting such policies..

Mandatory Arbitration Clauses

Mandatory arbitration of employment-related claims have long been enforced by Michigan state and federal courts, as long as the employee is not required to waive any claims or remedies, and as long as the arbitration process itself is fair.[1] As a result, numerous employers include arbitration provisions in employee applications, handbooks, or as stand-alone agreements. Enthusiasm for such provisions may be waning, however. In response to the "Me Too" movement, companies such as Airbnb, eBay, Uber, Microsoft, and Lyft voluntarily carved out exceptions to their mandatory arbitration agreements for sexual-harassment claims.[2] Additionally, states are beginning to limit the mandatory arbitration of sexual-harassment claims.[3] While the Michigan Legislature does not appear poised to enact any such law, the Michigan Court of Appeals recently questioned whether a claim of sexual assault in the workplace qualified as an "employment-related dispute," taking the claim outside the scope of the employer's arbitration agreement.

Is sexual assault a form of sexual harassment?

In *Lichon v Morse* and *Smits v Morse*, two former employees of the law firm owned by prominent personal-injury attorney Michael Morse filed separate lawsuits (represented by one of Morse's competitors, Geoffrey Fieger) alleging various sexual-harassment claims. Samantha Lichon claimed that Morse had touched her in a sexual manner

> Strong public policy considerations led to the Court's conclusion that "no individual should be forced to arbitrate his or her claims of sexual assault."

and made unwanted sexual comments to her during work hours while she was a receptionist at the firm.[4] Lichon said that she complained to the Human Resources department, but no action was taken and the sexual assault and harassment continued. She was later terminated for poor performance.[5] The second suit was filed by Jordan Smits, a paralegal, who alleged that Morse grabbed her breasts from behind at a company Christmas party in front of two other attorneys.[6] Smits said she immediately removed his hands and reported the incident to Human Resources in January 2016. When no action was taken by Human Resources or her supervisors, Smits left the firm.[7] An attorney from the firm then offered Smits two weeks' pay in exchange for signing a non-disclosure agreement but Smits declined.[8] Next, according to Smits, Morse reached out to her, warning her to "be careful" because he could make it difficult for her to find work in the legal field.[9]

Lichon and Smits sued both the Morse firm and Morse individually for workplace sexual harassment in violation of the Elliot-Larsen Civil Rights Act (ELCRA),[10] negligent and intentional infliction of emotional distress, negligence, gross negligence, and wanton and willful misconduct. Each woman also alleged sexual assault and battery against Morse individually.[11]

In both cases, the defendants (represented by Deborah Gordon, making the cases a virtual Who's Who of Michigan trial lawyers) asked for the cases to be dismissed because the plaintiffs had signed valid and enforceable arbitration agreements.[12] The agreements signed by Lichon and Smits were the same, providing that arbitration would apply "to all concerns… over the application or interpretation of the Firm's Policies and Procedures **relative to your employment**, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws."[13] The agreement specified that it included "any claim against another employee of the Firm for violation of the Firm's Policies, discriminatory conduct or other state or federal employment or labor laws."[14] Each trial court granted the defendants' summary disposition motion, sending the disputes to arbitration.

The plaintiffs appealed to the Michigan Court of Appeals, which consolidated the cases. In March 2019, the court reversed the summary-disposition rulings. In reaching that decision, a 2-1 majority viewed the issue as whether sexual assault of an employee at the hands of a superior is conduct related to employment, and thus covered by the arbitration agreement. The majority answered this question in the negative. The Court noted that even though the assaults may not have occurred but for the plaintiffs' employment, this was not a sufficient nexus between the alleged assaults and the arbitration agreement: "To be clear, Lichon's and Smits' claims of sexual assault are unrelated to their employment. . . Furthermore, under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm."[15] Strong public policy considerations led to the Court's conclusion that "no individual should be forced to arbitrate his or her claims of sexual assault."[16] "The effect of allowing defendants to enforce the [arbitration agreement] under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law."[17]

The majority did note that its ruling was narrow, based on the specific facts of the case, in which the person alleged to have committed assault was, in essence, the employer. According to the Court, Michael Morse and the Morse firm were essentially the same; as the sole shareholder of the Morse firm, Morse was solely legally responsible for the actions of the firm.[18] If the alleged wrongdoer had been a fellow employee, the arbitration agreement may have been enforceable, because the argument would have been that the firm's failure to discipline the co-worker for the wrongful act would have provided the nexus to the employment relationship that the majority found missing in these plaintiffs' claims against Morse himself.[19]

The dissenting judge disagreed with the majority's framing of the issue, instead viewing the issue as one of contract interpretation: whether the employees' claims fell within the scope of the arbitration agreement.[20] Because the parties had agreed to arbitrate "any claim against another employee of the Firm for violation of the Firm's policies, discriminatory conduct or violation of other state or federal employment of labor laws," and the conduct alleged by the plaintiffs, if true, was discriminatory, and violated the Firm's policies and employment laws, the parties were bound by the arbitration agreement.[21] According to the dissent, under ELCRA, "discrimination because of sex includes sexual harassment," because the ELCRA defines sexual harassment as "verbal or physical conduct or communication of a sexual nature" which "has the purpose or effect of substantially interfering with an individual's employment…"[22] As such, "sexual assault is sexual harassment… And sexual harassment is, under the ELCRA, discrimination because of sex."[23] Therefore, the plaintiffs' claims were those of discriminatory conduct against another employee, which fell within the scope of the agreement and were thus subject to arbitration.[24]

In a footnote, the dissenting judge also observed the development of "an interesting, yet potentially problematic, national trend" in which courts typically consider "sexual harassment" to be related to employment, while "sexual assault" is considered not to be related employment, even when the actual conduct is the same.[25]

While it is not yet entirely clear the effect this case will have on the future of arbitration of sexual-assault claims in Michigan, employers may want to revisit their arbitration agreements to make it entirely clear what those agreements are intended to cover – although in these cases, the employer's intent seemed not to matter.

Enforceability of Shortened Limitations Periods

The importance of a carefully drafted policy – this time one purporting to shorten the time period in which an employee could bring suit – was also the issue in another recent Court of Appeals decision. Because that provision was deemed to be part of the company's employee handbook, which stated that it was not a binding agreement, the court refused to enforce the shortened limitations period.

Many employers use handbooks to describe the company's policies regarding work rules, dress codes, benefits, attendance, and discipline, among other matters. It is important, however, that the manual not be construed as a contract, because the employer then might be bound to follow, for example, progressive discipline, or be barred from unilaterally changing its rules or benefits.[26] To prevent this, handbooks usually contain language expressly stating that the handbook is not a contract, and can be changed by the employer at any time.[27]

In *Mohamed v Brenner Oil Company*,[28] during his new hire orientation, the plaintiff was given his company handbook for review (which repeatedly stated that it was not a contract), and asked to sign a "Receipt and Acknowledgement Form."[29] The last paragraph of the acknowledgement form provided that claims against the company had to be brought within 180-days of the complained-of event.[30] In January 2017, the plaintiff was discharged, but waited until September 2017 to file a discrimination lawsuit. Arguing that the suit was untimely, the employer sought summary disposition. Consistent with well-established law upholding such provisions,[31] the trial court dismissed the suit as untimely.

The Court of Appeals disagreed, concluding that the 180-day limitations period was not binding because it was, in essence, part of the company's Handbook, which stated that it "should not be construed as an enforceable or binding contract and that defendant may modify the policies in the Handbook at any time with or without prior notice."[32] This language meant that the employer did not intend to be bound by any provision in the Handbook, including the 180-day limitations period.

Addressing the argument that the acknowledgement form was not part of the Handbook, the court noted that the form was listed in the Handbook's table of contents, was marked as "Page 85" and contained the same footer as the rest of the Handbook.[33] Even more importantly, the form included the same disclaimer as the Handbook, stating that "its policies are subject to change at the sole discretion of defendant, that [n]o contract of employment has been expressed or implied and that, if defendant changes the Handbook in any way, it may require an additional signature from its employees."[34] Thus, the court held that the defendant intended the form to be part of the Handbook, which it also intended not to be binding. As such, it could not be enforced.[35]

The *Morse* and *Mohamed* cases serve as important reminders to employers to review employee handbooks, policies and forms, to ensure that each accomplishes its intended goals. Handbooks are not typically meant to be contracts; arbitration provisions, confidentiality agreements, non-competition clauses, and shortened limitations periods are meant to be binding and enforceable. The right language can make all the difference.

In response to the "Me Too" movement, companies such as Airbnb, eBay, Uber, Microsoft, and Lyft voluntarily carved out exceptions to their mandatory arbitration agreements for sexual-harassment claims.

Endnotes

1 *Rembert v Ryan's Family Steakhouses*, 235 Mich App 118; 596 NW2d 208 (1999).

2 *See* Emily Birnbaum, *Google employees join lawmakers pushing bills to end forced arbitration*, The Hill (Feb. 28, 2019), https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration.

3 *See* Md Code Ann, Lab & Empl § 3-715 (prohibiting any waiver of an employee's right to a claim of sexual harassment in Maryland); NY CPLR 7515 (prohibiting any clause which requires mandatory arbitration for claims of sexual harassment in New York). California is also considering adopting a similar law, while Vermont has attempted to do so, but failed.

4 *Lichon v Morse*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2019 (Docket Nos. 339972, 340513, 341082); 2019 WL 1217579.

5 *Id.*

6 *Id.* at *3.

7 *Id.*

8 *Id.*

9 *Id.*

10 MCL 37.2202

11 *Lichon, supra*, at *3.

12 *Id.* at *3-4

13 *Id.* at *2 (emphasis added).

14 *Id.*

15 *Id.* at *8.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at *12.

21 *Id.*

22 *Id.* at *12-13, quoting MCL 37.2103(i).

23 *Id.* at *13.

24 *Id.*

25 *Id.* n.1.

26 *See Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).

27 *See Heurtebise v Reliable Bus Computers*, 452 Mich 405; 550 NW2d 243 (1996).

28 *Mohamed v Brenner Oil Co*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2019 (Docket No. 341899); 2019 WL 845852.

29 *Id.* at *1.

30 *Id.*

31 E.g., *Clark v Daimler Chrysler*, 268 Mich App 138; 706 NW2d 471 (2005).

32 *Id.*

33 *Id.* at *3

34 *Id.* (internal quotation marks omitted).

35 *Id.*

To Dream or not to Dream: The Bane of a Mandatory Existence

By: John Hohmeier

Executive Summary

The cost of auto insurance in metro Detroit is one of the highest in the country. The reason for this is that Michigan's no-fault system, as it currently stands, provides avenues for the system to be used and abused. One of the biggest problems with the current no-fault system is that lay-owned medical facilities incorporate for the sole purpose of "treating" auto-accident victims and charge insurance carriers a large sum of money for services that may or may not have been provided. This issue must be considered in evaluating possible solutions to the high cost of automobile insurance.

John C. W. Hohmeier joined Scarfone & Geen, P.C. in 2012 to litigate first- and third-party no-fault cases. He was both trial and appellate counsel in *Dawoud v State Farm Mut Auto Ins*, where the Court of Appeals issued a published opinion further limiting and clarifying the derivative nature of medical provider's rights in the no-fault arena.

Mr. Hohmeier is also a Chair for the Insurance Law Section of the Michigan Defense Trial Counsel. While still in school at Thomas M. Cooley Law School, his commentary on the interaction of emotion and brain chemistry with a person's ability to recall veridical memories was published in the Thomas M. Cooley Law Review.

If we dreamed the same thing every night, it would affect us as much as the objects we see every day. And if an artisan was sure of dreaming for twelve hours every night that he was king, I believe he would be almost as happy as a king who dreamed for twelve hours every night that he was an artisan.

- ***Blaise Pascal***

Let Your Imagination Take Control for a Moment

Imagine yourself, but not really yourself…Imagine you but not you at all. Imagine someone like you but not you. Imagine someone…someone who you think you could be, maybe someone you could have been…maybe someone you once knew and liked. Imagine someone you could have been but never became. Imagine someone like you… but not you at all.

Imagine that you live in a world like this one but not really this one. Imagine a world that you are familiar with – whether by story, by fable, or imagination – but a world that you have never lived in nonetheless can picture yourself living in it. Imagine a world that you could see yourself living in but have never lived in. Imagine a world like this world…but not this world at all.

If you can, imagine that you own a car. You own a car that is just like the one you may own now but not like that one at all. Imagine, if you must, that this car reminds you of a car that you may own or used to own or a car that you wished to have owned at some point. Imagine a car that you would have owned, maybe even did own…but a car you have never owned at all.

Also imagine that you have to purchase insurance for this car. Not the kind of insurance that you may have actually purchased. Insurance that you have never purchased, but it may actually resemble insurance that you either have had or could have had at one point. Imagine purchasing insurance that is similar to your current insurance…but insurance that is not like it at all.

Now imagine that you just simply cannot afford this insurance. Imagine a person like you – but not you – living in a world like this world – but not this world – driving a car like your car – but not your car – who has to purchase insurance like the insurance you have – but not the insurance you have – but you cannot afford it.

Now Imagine Your Own Reality

For some people, they do not have to imagine this scenario because they live it every day – almost everyone reading this, for example. A significant number of people who

own vehicles and live in the metro-Detroit area of Michigan just simply cannot afford to purchase car insurance for whatever reason. Why is that? Why does a place dubbed the "Motor City" have insurance rates that are astronomically and (for some) unaffordably higher than the rest of the country?

While the answer to this question may change from person to person depending on what his or her background is, there is one clear-cut suggestion as to why auto-insurance rates in the metro-Detroit area are two, three, four, five, even ten times more expensive as insurance rates in other areas of the country: Michigan's current no-fault system. Even people aspiring to office in this great state are using it as a running board. Unfortunately, it is not that simple.

Even Communism is Perfect on Paper

To be clear, the idea of no-fault Insurance is a pretty good concept. Professors Robert Keeton and Jeffrey O'Connell studied auto-accident reparations in the 1960s and determined the third-party tort system did not work.[1] It was determined that a first-party system was preferred which did not consider fault and where allowable expenses related to an automobile accident could be paid as they were incurred. The efforts of Keeton and O'Connell led to the development of the Uniform Motor Vehicle Accident Reparations Act (UMVARA).

The 86-page UMVARA, as well as its comments,[2] was the prototype for the Michigan no-fault act. In fact, on numerous occasions Michigan courts have cited to the UMVARA in analyzing Michigan no-fault issues. Repeatedly, the Michigan Supreme Court has emphasized that the UMVARA was the model for the Michigan no-fault act over 40 years ago.[3] But even Communism looked good on paper before it was put into practice.

These days, Professors Keeton and O'Connel would be rolling over in their graves if they were to witness the abuse and outright fraud that is taking place under the system they spent so many years researching and trying to push through. What is one thing they probably did not think about when they were formulating their darling? People's greedy desires. Wherever there is a system, there are people committed to abusing it.

There is endless lore within the realm of Michigan no-fault that anyone in the trenches has either heard or experienced that would make the average consumer's head spin off its axis. $160,000 in physical therapy bills for 18 months of treatment where the "injured person" testified he would sleep there for a couple hours each time? Check. Over 20 MRIs within a year at $5,000 a pop performed on someone who is known for staging accidents? Check.

Hundreds, if not thousands, of unassuming and innocent people a year unlawfully solicited within hours of a legitimate accident and then sent to half-a-dozen known barnacles that have no professional obligations or ethical ties to the community, and who were incorporated for the sole purpose of bilking the multi-million-dollar no-fault industry? Check. Check. Check. The list of abuses can go on and on and on. So what is the solution?

The Hard Sell: New Thoughts Born From Old Ideas

The problems are loud on both sides of the aisle: the excessive and unreasonable treatment on one side, and the big bad insurance company who does not want to pay for it all on the other. Solutions, on the other hand, come across as theoretical pipe dreams that may look good on paper or make a good sound bite, but crumble under the thumb of the human desire to always want more. Anyone reading this article who thinks "what is this guy talking about?" just has to take a minute and get off their high horse or descend from their ivory tower of ignorance.

I have not been a no-fault attorney for that long – seven years give or take – and I have only been on the defense side of the aisle for six of those years. In the last two or three years, however, I have investigated and defended at least a dozen "paper claims." What is a paper claim you may ask? It is where someone steals your insurance information from your car or wallet and then calls your insurance company claiming that he or she was in an accident.[4]

The person then gets a claim number from the insurance carrier and then he or she go to any of the known barnacles, give it the claim number, tell it they were in an accident, tell it they are injured, and then receive anywhere from three to four different prescription medications (which is really all they want),[5] provide a urine sample that is sent to more than one lab for testing, and get prescribed physical therapy, MRIs, and probably injections or surgery.

Sounds ridiculous right? It is. But that does not change the fact that it happens all the time. As ridiculous as it sounds, it happens all the time because by the time the insurance company figures out what is going on – usually by talking to its insured – the person(s) who staged the accident has already gotten the drugs they need to either consume or sell on the street. And sure: they will even go to physical therapy facilities that are willing to pay them for the claim number so that the facility can bill the insurance company. Yes, this is a thing.

In any event, the most recent attempt to curb the excess and fraud occurring within Michigan's no-fault system is the executive order of Governor Rick Snyder that is touted as creating a "new" anti-fraud authority to crack down on abuses in the auto-insurance industry among other things. Governor Snyder indicates that "Fraud in the system drives up the cost of insurance for all Michiganders, and we need to do everything we can to eradicate it."[6]

This sounds exactly like something Michigan has needed for years, but is the order actually geared towards "eradicating" fraud? Not really. Aside from the deliberate staging of auto accidents and false police reports, the biggest problem in this author's eyes is lay-owned medical facilities incorporated for the sole purpose of "treating" auto-accident victims and charging insurance carriers a ridiculous amount of money for the services that they may or may not provide.

What is altogether frustrating and disappointing is the fact this executive order makes no reference to either Michigan's Public Health Code or the Business Corporation Act. In this author's mind, the failure to mention these two key acts is indicative of only one thing: a complete misunderstanding as to what is happening on the ground level and what is actually driving up the cost of auto insurance in Michigan.

This Breeding Ground Has Gone Sour

About a decade ago, in *Miller v Allstate*,[8] the Supreme Court ostensibly indicated that no person or entity other than the Attorney General can challenge the corporate make up of any particular entity – a big mistake, to be honest.[9] Now not even insurance companies, who are being billed millions of dollars a year by improperly formed corporations (and presumably passing the expense on to the consumer), can challenge the legality of an arguably illegitimate corporation.

That being said, in *Miller*, PT Works, Inc., a physical therapy facility, had incorporated under the Business Corporation Act, MCL 450.1101 *et seq*., instead of the separate Professional Service Corporation Act, ("PSCA"), MCL 450.221 *et seq*. Allstate Insurance Company contended that the services were not lawfully provided because PT Works did not incorporate under the proper statute.

The question in *Miller v Allstate* was whether PT Works was required to organize under the PSCA.[10] That being said, the issue was never decided because the Supreme Court ruled that Allstate Insurance Company could not challenge whether the corporation was lawfully "organized." The opinion stops short because the Supreme Court did not even discuss "lawfully rendered" in the context of MCL 500.3157 – which is the go-to statute now.[11]

Since the *Miller* decision, every single attorney representing medical providers – and the vast majority of courts – have used the *Miller* decision to argue or decide that insurance carriers cannot contest the legality of the services provided by a medical provider when it comes to no-fault cases. Which is absurd…but to compound this obvious problem, three years later in *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*,[12] the Court of Appeals interpreted MCL 500.3112 to allow providers to sue, which opened up an express lane for medical providers to flood the courts.[13]

Without going into pain-staking detail, the Court in *Lakeland* took the phrase "to or for the benefit of" from MCL 500.3112 and interpreted that phrase to support its decision that medical providers were "claimants."[14] The *Lakeland* Court did not expressly state that providers could independently sue no-fault carriers, but virtually every trial court in the state soon bought into the argument that it did.

Is it a wonder that after the *Miller* and *Lakeland* decisions were released, a significant – nay, a crippling – number of lay-owned medical facilities were incorporated in Michigan and began billing and then suing no-fault carriers? No, it isn't a coincidence. And anyone who thinks that it is has had their head stuck in the sand …It is not a coincidence people.

No Political Brush Can Paint This Problem Pretty

With Detroit Mayor Mike Duggan, who has been pushing for a system where motorists can choose insurance plans with less medical coverage (a plan that was rejected by the House several times now), is actually suing the state to try and force legislative action. Clearly, the costs of no-fault is a hot-button issue that needs to be addressed even if some public figures may be just using it as a platform to garner support.[15]

So where does that leave everyday people who are required to purchase no-fault coverage? It leaves us in the unenviable position of recognizing that the vast majority of us pay a ridiculous amount of our disposable income into a system that is being utilized as a pipeline to line the pockets of a few (attorneys included) at the expense of the many. We cannot change the desires of others on any practical level. And maybe that is the problem. As such, it's feast or famine out here.

It may be ironic…it may just be that people don't care. Either way, aside from all the political divisiveness and choosing of sides, anyone who owns a car or a truck or a van can agree that the cost of insurance in Michigan is ridiculous. Detroit has by far the highest insurance rates in the country and it does not make any sense…does it? So at this point, you no longer have to pretend or imagine that you are someone who you are not, you do not have to imagine a world like yours but not yours…because you are living it here in Michigan.

A Conclusion You Do Not Have To Imagine

Imagination is a very tricky concept, isn't it? How do you know that you are imagining something? How do you know that you are not the person who you imagined is not like you but could be you? You are, in fact, the person that could be you…you are living in the world that you could have lived in…and you do own that car that you thought you could have owned but you do not own it. Whatever is in your mind exists now in the real world whether you believe it or not.

In its purest form, and looking back at the opening quote to this article, someone smarter than both me and you once said that if we are conscious 12 hours a day, slept the other 12 hours while dreaming of the same thing, that we could not distinguish between dream and reality. I believe this. But most of us do not sleep 12 hours a day. Most of us do not always dream about the same thing. Some of us do not even dream at all.

The crushing reality of the current plight of Michigan no-fault consumers is that there is no quick fix to the problem everyone experiences when they pay their insurance premium every month. And no matter how much you sleep, or how much you dream, or how much you wish that this problem would just fix itself, it is not going away. Everyone knows that it is a problem – especially those using it as a platform for relevance. But while recognizing the problem is great, nobody seems to offer any workable solutions.

Don't get me wrong: the new executive order by our Governor is an obvious step in the right direction because it recognizes and brings attention to a very real problem that affects millions of people. But while the order obviously recognizes this far-reaching problem, it does not really offer

any workable solutions. So is it a wonder why the real problems continue with their schemes? Is it a wonder why we let these problems chase us back to our dreams?

Endnotes

1 There were long delays before cases were resolved and the resolution was always a lump-sum payment.

2 SA complete copy of the November 1, 1972 UMVARA is available upon request.

3 *Grange Ins Co of Michigan v Lawrence*, 494 Mich 475; 835 NW2d 363 (2013).

4 There is never just one person involved. Inevitably the person orchestrating the claim puts four to five people in the car and one of them is usually listed as the named insured. But every single time I have seen this, the named insured is more than willing to testify under oath that neither he nor she were ever involved in an accident, and their vehicle has absolutely no damage on it either.

5 Rumor has it they then consume the drugs and share it with their friends, or they turn around and sell the drugs on the streets.

6 https://www.detroitnews.com/story/news/local/michigan/2018/09/11/snyder-authority-auto-insurance-fraud/1270718002.

7 Any Stephen King fan knows this reference.

8 481 Mich 601; 751 NW2d 463 (2008).

9 Who better to keep corporations in check than the Michigan consumer for sure, but certainly insurance carriers who pay out millions of dollars a year in indemnity should be able to question and challenge on this issue.

10 *Miller v Allstate Ins Co*, 275 Mich App 649, 655; 739 NW2d 675 (2007). The Court of Appeals had already ruled that the professional corporation statutes applied to physical therapists, so PT Works was improperly incorporated…anyways.

11 Contact the author for examples and arguments to utilize.

12 250 Mich App 35; 645 NW2d 59 (2002).

13 This has obviously been remedied recently by the Supreme Court's decision in *Covenant v State Farm*, but I digress…..

14 For example, the *Lakeland* Court looked at the word "claimant" in isolation (at MCL 500.3148, only) and said "claimant" was not defined. As a result – because a provider was making a claim, it was a claimant? Brilliant.

15 The Federal court push will be addressed in subsequent articles.

Appellate Practice Report

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

Splitting Time in the Michigan Court of Appeals

The Michigan Court Rules are clear about timeframes for oral argument at the Court of Appeals. When both sides preserve oral argument, then "the time allowed for argument is 30 minutes for each side."[1] If only one side preserves oral argument, then that party gets 15 minutes.[2]

Clear enough. But a glance at the Court's schedule for an average 10 a.m. call proves that there's no way for each side to get 30 minutes—not unless someone comes equipped with a souped-up DeLorean and a flux capacitor. The Court typically schedules at least five cases for the 10:00 a.m. call, which ends at 11:00 a.m. There's no way to give each side of each case a full 30 minutes. Just reading the docket sheet confirms that the Court expects your argument to be significantly shorter than 30 minutes.

If you don't get that from the docket sheet, you'll figure it out during your first argument. The presiding judge typically begins the session by reminding the audience of lawyers that the Court has read the briefs and doesn't want advocates to repeat those arguments. Nor is the Court interested in arguments outside the briefs; you're supposed to preserve your arguments through briefing. You're supposed to focus on what matters most.

Once you start arguing, you'll often get clues—some subtle, some not—that the Court wants you to move on. A typical case is over in ten to fifteen minutes—and that includes the appellant's argument, the appellee's argument, and rebuttal.

These time pressures are often a good thing. They force advocates to zero in on their core points—to get to the heart of the appeal without telling the Court what it already knows.

But what happens when you have more than one party on a side? Do you each get a half hour?

In a word, no. Each *side* gets a half-hour maximum, not each *party*. When there are multiple appellees, for example, the appellees have to figure out how to use their collective half-hour. Typically, that requires a phone call or two before oral argument to come up with a plan. And the first appellee to the podium should begin by announcing the plan and explaining who's at counsel's table.

As a general rule, the fewer attorneys arguing, the better.[3] Avoid giving everyone a turn at the podium and, instead, pick an attorney to argue on behalf of all the appellees or appellants. That way, you'll avoid wasting the Court's time shuffling between the podium and the counsel's table. You'll also have a better shot at engaging the Court. You're not there to give every attorney a chance to speak his or her piece; you're there to educate the Court and answer questions. Pick the person best qualified to do that.

This rule against dividing argument is a time-honored bit of appellate wisdom. The United States Supreme Court even codified this principles in its local rules: "Divided argument is not favored."[4] And many courts have adopted express rules discouraging parties from splitting oral argument.[5]

Another important note for planning an oral argument with multiple appellees: If the Court schedules consolidated cases for oral argument, the Court will typically treat the two cases as one for purposes of oral-argument timing. That is, you'll get a half-hour maximum per side, and probably a lot less. If the two cases have the same party

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 is a past chair of the State Bar of Michigan's Appellate Practice Section. 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 e-mail address is Trent.Collier@CEFLawyers.com.

as appellant, the appellant will argue both cases, the appellee will respond for both cases, and then the appellant can present a combined rebuttal.

Whatever the case, planning ahead is a good idea. The Court of Appeals has a helpful staff of clerks in each district. They're happy to answer non-substantive questions and clarify the procedure for oral argument. Working these details out in advance can help you focus on substance when game day arrives.

You're not there to give every attorney a chance to speak his or her piece; you're there to educate the Court and answer questions. Pick the person best qualified to do that.

Can a Consent Judgment or Stipulated Order of Dismissal Be Appealed?

Sometimes a trial court ruling on a particular claim will end the case as a practical matter, even if there are other claims remaining. That can make it tempting to reach a consent judgment or stipulated order of dismissal on those remaining claims in order to pave the way for an appeal from the key trial court rulings. Although consent judgments and stipulated orders of dismissal are generally not appealable, both Michigan and federal courts recognize certain exceptions.

Michigan Courts

It is well established that the Michigan Court of Appeals has jurisdiction "only over appeals filed by an 'aggrieved party.'" *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), citing MCR 7.203(A) ("The court has jurisdiction of an appeal of right filed by an aggrieved party..."), overruled in part on other grounds by *Cam Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 557; 640 NW2d 256 (2002). Thus, a party ordinarily cannot appeal either from a consent judgment or a stipulated order of dismissal. *Cam Constr*, 465 Mich at 556 ("[O]ne may not appeal from a consent judgment, order or decree."); *Begin v Michigan Bell Telephone Co*, 284 Mich App 581, 585; 773 NW2d 271 (2009) ("A party that waives an objection to a rule of practice or to evidence, stipulates to facts, or confesses judgment, generally cannot later claim the right to appellate review of those matters.").

There is, however, a recognized exception for consent judgments and stipulated orders of dismissal that expressly preserve the parties' right to appeal. As the Michigan Supreme Court observed in *Travelers Ins v Nouri*, 456 Mich 937; 575 NW2d 561 (1998), "the Court of Appeals has previously recognized that an appeal of right is available from a consent judgment in which a party has reserved the right to appeal a trial court ruling." Thus, the Supreme Court in *Travelers* reversed the Court of Appeals' dismissal of the defendant's claim of appeal because although the parties agreed to entry of a consent judgment against the defendants that accepted the plaintiffs' factual allegations as true, the judgment reserved the defendants' right to appeal the trial court's denial of their motion for summary disposition. *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 278; 597 NW2d 235 (1999).

Also instructive is one of the cases that the Supreme Court cited in *Travelers*—*Smith v City of Westland*, 158 Mich App 132; 404 NW2d 214 (1986). In *Smith*, the plaintiff brought several claims against the City of Westland arising out of the plaintiff's decedent's suicide while being detained in the city's jail. The plaintiff alleged various state law claims, along with a federal civil rights claim under 42 USC 1983. After the civil rights claim was dismissed on summary disposition, the parties reached a consent judgment that "settled all outstanding claims against all defendants" and "specifically preserved plaintiff's right to appeal from the [order dismissing the plaintiff's civil rights claim]." *Id.* at 134.

A more recent example of preserving appellate rights in a stipulated order is *Pugh v Zefi*, 294 Mich App 393; 812 NW2d 789 (2011). There, the parties reached an agreement to arbitrate their dispute over the defendant insurer's refusal to pay underinsured motorist benefits. As a result, the trial court dismissed the case. However, the order of dismissal specifically reserved the insurer's right to appeal the trial court's prior denial of its motion for summary disposition on the coverage issue. See also *Vanderveens Importing Co v Keramische Industrie M deWit*, 199 Mich App 359, 360; 500 NW2d 779 (1993) (appeal from consent judgment that preserved the defendant's right to appeal the trial court's rulings "concerning jurisdiction and the question of whether or not the matter should have been tried in the Netherlands").

Federal Courts

A recent opinion from the Sixth Circuit Court of Appeals illustrates the similar approach followed in the federal courts—at least in the Sixth Circuit. In *Innovation Ventures, LLC v Custom Nutrition Labs, LLC*, 912 F3d 316 (CA 6, 2018), the parties entered into a stipulated judgment awarding nominal damages to a beverage manufacturer for a competitor's alleged breach of a noncompete agreement, and dismissing one of the counts of the plaintiff's complaint with prejudice. The judgment provided, however, that it was "Approved as to Form Only and Preserving All Rights of Appeal," in part so that the plaintiff could appeal a summary judgment ruling that left it "without any theory of actual damages to present to the jury, leaving only the theory of nominal damages." *Id.* at 326 (internal quotation marks omitted).

In concluding that it had appellate jurisdiction, the Sixth Circuit began by acknowledging the "long-standing rule that a party may not appeal a judgment to which it consented." *Id.* at 327. However, the court explained, "[t]here is an important exception" to that rule: "[A]n appeal is permissible when 'solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint.'" *Id.*, quoting *Raceway Props, Inc v Emprise Corp*, 613 F2d 656, 657 (CA 6, 1980). Finding a "*Raceway* dismissal" to be appropriate in the case before it, the *Innovation Ventures* court noted: (1) the plaintiff's remaining claim was dismissed with prejudice; (2) plaintiffs are permitted to appeal awards of nominal damages and are not required to pursue theories of recovery that they do not wish to pursue; (3) the stipulated judgment did not reserve the parties' right to litigate any of the issues it purported to resolve; (4) the plaintiff's intention to appeal was "known to the court and opposing parties." *Id.* at

331-332 (citation and internal quotation marks omitted).

Conclusion

While parties should of course proceed with caution any time they consider entering into a consent judgment or stipulated order of dismissal, there is ample support for parties' ability to save time and money litigating peripheral claims or issues when it would be more efficient to simply reach an agreement on them while preserving the most important issues for immediate appeal.

Endnotes

1 MCR 7.214(A)

2 *Id*.

3 § 13:12.*Special problems in multi-party and multi-lawyer cases*, Federal Appeals Jurisdiction and Practice § 13:12 (2018 ed) ("In a case involving multiple parties on the same side, the first goal should be to have one lawyer present any joint arguments on behalf of all those parties"). .

4 SCOTUS L.R. 28.4.

5 See 16AA Fed Prac & Proc Juris § 3980.1 (4th ed, 2018) (citing rules from various federal courts that discourage dividing argument).

Schedule of Events

2019

June 21	Board Meeting – Shanty Creek, Bellaire
June 21-22	Annual Meeting & Conference – Shanty Creek, Bellaire
September 13	Golf Outing – Mystic Creek, Milford
September 24-26	SBM Annual Meeting – Suburban Collection Showplace, Novi
October 16-19	DRI Annual Meeting – New Orleans
October 24	Defense Network – South Eastern Michigan – TBA
November 7	MDTC Board Meeting – Sheraton Detroit Novi
November 7	Past Presidents Dinner – Sheraton Detroit Novi
November 8	Winter Conference – Sheraton Detroit Novi

2020

February 7	Future Planning – Hotel Indigo – Traverse City
February 7	Meet & Greet Reception/ Traverse City - TBA
February 8	Board Meeting – Hotel Indigo – Traverse City
March 12	Legal Excellence Awards – Gem
June 18-19	Annual Meeting & Conference – Treetops Resort, Gaylord
September 11	Golf Outing – Mystic Creek, Milford
October 1	Meet The Judges – TBA
October 21-24	DRI Annual Meeting – Washington DC
November 5	MDTC Board Meeting – TBA
November 5	Past Presidents Dinner – TBA
November 6	Winter Conference – TBA

Legal Malpractice Update

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell, P.C.*[1]
michael.sullivan@ceflawyers.com; david.anderson@ceflawyers.com

Malpractice Claims Against Experts & The Witness-Immunity Doctrine

Voutsaras v Bender, ___ Mich App ___; ___ NW2d ___ (2019) (Docket No. 340714); 2019 WL 97183.

Facts:

An attorney and his law firm were retained by a husband and wife's attorneys to provide litigation support and expert testimony in a lawsuit arising out of the foreclosure of a commercial mortgage and note. Unfortunately for the husband and wife, those foreclosure proceedings came to an end when the trial court granted summary disposition in the opposing party's favor. After the wife passed away, her estate filed a malpractice claim against the attorney and firm that were retained to provide litigation support and expert testimony, alleging that they "breached their duty to the estate by failing to properly investigate the facts required to formulate their opinions, failing to understand the applicable standards, and failing to provide a competent professional opinion." But the trial court granted summary disposition in the attorney and firm's favor, reasoning that Michigan's witness-immunity doctrine, which immunizes witnesses from liability for the consequences of their testimony, barred the estate's malpractice claim.

Ruling:

On appeal, the estate argued that the trial court's application of the witness-immunity doctrine was simply too broad. And the Court of Appeals agreed. It held that "licensed professionals owe the same duty to the party for whom they testify as they would to any client, and witness immunity is not a defense against professional malpractice." In reaching that decision, the Court recognized that the case presented an issue of first impression in Michigan. Turning to decisions from the United States Supreme Court and seven other states' appellate courts, the Court concluded that attorneys retained to provide expert support and testimony cannot be "absolutely immunized from professional malpractice claims where they already owed a duty of professional care, merely because part of their retention included the provision of expert testimony." This, the Court explained, would extend the witness-immunity doctrine too far.

The Court was very careful, though, to make clear that its decision applied only to cases in which the expert's testimony was allegedly incompetent, *not* to cases in which the expert's testimony was simply unfavorable. The Court explained that, "to the extent [the estate] may assert that the [attorney] gave testimony that was *unfavorable* to [the estate], such assertions unambiguously run afoul of the witness immunity doctrine in Michigan." However, the Court continued, "whether witness immunity protects the [attorney] from giving *professionally incompetent* testimony, which might or might not be favorable, was clearly not a matter considered" in previous cases.

The Court also limited its decision to resolving the issue of "whether defendants are immune from liability" *only*. The Court expressly declined to address the attorney and firm's argument that the estate failed to establish the existence of a legal duty. The Court presumed, for the sake of argument, that the attorney and firm breached their professional duty to the estate. But the Court ultimately left the duty and breach issues for the trial court to resolve.

Practice Note:

Although *Voutsaras v Bender* resolves an issue of first impression in Michigan, the decision itself is quite narrow: attorneys—and, most likely, other licensed professionals—whose conduct may fall below the requisite standard of care aren't immune from liability for malpractice simply because their services included or might include expert testimony.

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 e-mail addresses are Michael.Sullivan@ceflawyers.com and David.Anderson@ceflawyers.com.

Endnotes

1 The authors would like to thank Peter Tomasek for his work on this article.

MDTC Legislative Report

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

Michigan's One Hundredth Legislature began its work in January with many new faces. In this new session, the Republicans have maintained control of both houses with less commanding majorities than they enjoyed before, and they must now be mindful that their efforts will be scrutinized for approval by a new Democratic Governor – a circumstance which will necessarily require an increased level of bipartisan cooperation if anything is to be accomplished in the next two years.

There have been no major disagreements so far, apart from the Legislature's recent disapproval of Governor Whitmer's Executive Order reorganizing the Department of Environmental Quality, and there are points of agreement that should provide a starting point for constructive discussions, although there are a great many details left to be resolved. There is general agreement, for example, that something must be done to fix the infernal roads, and that our citizens must be given some relief from the steep cost of no-fault auto insurance. Whether these problems can be solved and how they might be addressed remain to be seen. The long-standing reluctance to raise additional revenue by new taxes remains, and the widely differing opinions that have thwarted past efforts at no-fault reform are still in play.

In her first State of the State Address, Governor Whitmer said that she will not be willing to accept band-aid fixes and half-measures as solutions for serious problems. There are many, I am sure, who wish her the best of luck with that, but there will surely be conflicting assignments of blame for any failures, and it seems unlikely that our new Governor will be willing to shut down the state government if the Legislature will not legislate as she decrees. Like it or not, there will need to be some bipartisan discussion and compromise. Governor Whitmer has also pledged to veto any legislation designed to thwart the People's constitutional right to challenge legislation by referendum. She **does** have the ability to enforce that promise, and thus, it is unlikely that we will see any further attempts to shield legislation from referendum by inclusion of nominal appropriations inserted for that purpose in the next four years.

Public Acts of 2018

As I mentioned in my last report, dissatisfaction with the impending shift of executive power set the stage for a very active and contentious lame-duck session in the last month of 2018. A staggering number of enrolled bills was sent to Governor Snyder for him to review during his last week in office. Most of these were approved, while a few were vetoed. When the dust had finally settled, there were a total of 690 Public Acts of 2018 – 256 more than when I completed my last report on December 21st. Many of the new public acts approved in the last week of 2018 were inconsequential. Those that may be of interest include:

2018 PA 608 – House Bill 6595 (Lower - R) has amended the Michigan Election Law to create new, more restrictive procedural requirements governing voter initiatives proposing voter-led laws, constitutional amendments, and referendum of legislation. Most notably, this act now provides that no more than 15% of the petition signatures used to determine the sufficiency of support for an initiative petition may be provided by voters in any single congressional election district. The legislation will also establish a new limited procedure and timeframe for reviewing determinations of the Board of State Canvassers with respect to the sufficiency or insufficiency of a petition. Under this new provision, a party aggrieved by the board's determination will be required to seek review in the Supreme Court within 7 business days after the date of the board's declaration, but not less than 60 days prior to the election in which the proposal would be submitted.

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.

Like it or not, there will need to be some bipartisan discussion and compromise.

This legislation has been criticized as an impermissible attempt to limit the People's constitutionally reserved right to pursue voter initiatives proposing amendment of the Constitution, adoption of initiated laws, and referendum of legislation. The new restrictions pertaining to the collection of petition signatures are particularly problematic considering the abundant case law from our Supreme Court holding that the Legislature may not impose statutory restrictions that curtail or unduly burden the free exercise of the People's constitutional right to pursue voter-initiated proposals. Thus, it may be expected that our appellate courts may soon be called upon to judge the validity of this legislation in relation to future ballot proposals.

2018 PA 603 – House Bill 1238 (Kowall - R) has effected numerous amendments of the Michigan Election Law to establish new procedures for implementation of the constitutional amendments recently adopted by the voters' approval of the "Promote the Vote" Proposal 18-3. These include, most notably, a new requirement that persons registering to vote within 14 days before an election must do so and provide proof of residency at the office of the clerk of the city or township where they reside.

2018 PA 602 – House Bill 4205 (Cole - R) has amended the Administrative Procedures Act to provide, subject to limited exceptions specified therein, that a state agency may not promulgate an administrative rule that is more stringent than applicable federal standards unless adoption of a more stringent state standard has been specifically authorized by statute, or the director of the agency has determined that there is a clear and convincing need to exceed the applicable federal standard. When a proposal to adopt a more stringent state administrative rule is made, the proposal must now include a statement and explanation of the specific facts and circumstances that establish the clear and convincing need for adoption of the more stringent standard.

2018 PA 488 – House Bill 4779 (Kosowski - D) has amended the Legislative Council Act to add a new Chapter 1A, entitled "Uniform Electronic Legal Material." This new Chapter identifies the official publishers of specified state legal materials and establishes new procedures for publication of those materials in electronic or printed form; designation of the electronically stored or printed state legal materials as official; preserving and ensuring the integrity of electronically maintained state legal materials; authentication of those electronically maintained materials; and ensuring that those electronically maintained materials will be made available for use by members of the public.

This legislation identifies the Legislative Service Bureau as the official publisher of the state Constitution, Public Acts of the Legislature, and the Michigan Compiled Laws. The Office of Performance and Transformation (formerly the Office of Regulatory Reform) is designated as the official publisher of administrative rules promulgated under the Administrative Procedures Act. State "legal material' will also include any "materials related to and created by state courts" as provided for in cooperative agreements regarding the authentication, preservation, and publication of those materials made by the Legislative Council Administrator and the State Court Administrative Office.

Legal material in an electronic record authenticated as official under the new provisions will be presumed to be an accurate copy of the material. Corresponding amendments have been made to 1970 PA 193, providing for "the compilation of the general laws of this state and the compilation and revision of state administrative rules . . ." **by 2018 PA 655 – House Bill 4780 (Kesto - R)**. Each of these acts provides that a party contesting the accuracy or authentication of a record or compilation designated as official will have the burden of proving the alleged inaccuracy or lack of authenticity by a preponderance of the evidence.

2018 PA 457 – House Bill 5017 (Lucido - R) has amended the Penal Code to add a new Section MCL 750.411x, providing new criminal penalties for cyberbullying.

Governor Snyder also made use of his veto pen to disapprove a substantial number of bills during the last week of the year. The vetoed bills included two initiatives discussed in my last report:

House Bill 6553 (VerHeulen – R), which proposed an amendment of 1846 RS 2 – "Of the Legislature" – to add a new Section MCL 4.83a, which would have provided statutory authority for the Legislature, and each house of the Legislature, to intervene in any action commenced in any state court, whenever the Legislature, or either house thereof, deemed such intervention necessary in order to protect any right or interest of the legislative body because a party to the action had challenged the constitutionality of a state statute, the validity of legislation, or any action of the Legislature. Had it been approved, this legislation would have allowed intervention at any stage of the proceedings, and the legislative intervenor would have had the same right to prosecute an appeal, apply for rehearing, or take any other action that could be taken by the parties to the litigation. This bill, proposed to guarantee the Legislature a voice in any litigation challenging legislative enactments that our new Governor and Attorney General might bring or decline to defend, was among the initiatives which were loudly criticized as impermissible efforts to limit the authority and powers of the new administration.

Senate Bill 100 (Casperson – R) and **Senate Bill 101 (Robertson – R)**, which would have amend the Revised Judicature Act and the Administrative Procedures Act to expand the circumstances in which fees and costs must be awarded to a prevailing party other than the state in civil actions brought by or against the state, and a prevailing party other than a state agency in contested cases.

New Initiatives

As of this writing on March 6th, there are no Public Acts of 2019, but there are a few initiatives of interest in the works. These include:

House Bill 4001 (Wentworth - R) and **House Bill 4002 (LaGrand - D)**, which propose amendments of the Public Health Code to establish new procedures governing forfeiture of property involved in violations of that act. These include, most notably, new requirements that a

criminal conviction be obtained before forfeiture can be pursued in most cases. These bills were passed by the House on February 28th and have now been referred to the Senate Committee on Judiciary and Public Safety. Similar amendments have been proposed by S**enate Bill 2 (Lucido – R)**, which was passed by the Senate on February 13th and subsequently reported by the House Judiciary Committee without amendment on February 26th.

A bipartisan package of House Bills – **House Bills 4007 through 4016** – has proposed amendments to the Freedom of Information Act and a corresponding amendment of the Legislative Council Act to authorize and provide new procedures for disclosure of records of the Legislature, and to remove the existing exceptions which have excluded the offices of the Governor and Lieutenant Governor from the act's disclosure requirements. As introduced, these bills are very similar to legislation that was introduced in the last two legislative sessions but failed to garner the support required for final passage. A bipartisan interest remains, however, and thus, it appears that this legislation may finally gain the required traction in this new session.

New bills proposing no-fault auto insurance reform have also been introduced in the House and the Senate. A number of these have renewed proposals for changes suggested without success in prior legislative sessions. These proposed amendments, designed to reduce the cost of no-fault auto insurance, have again included provisions allowing insureds to choose between alternative levels of personal protection insurance (PIP) benefits; requiring adjustment of the premiums charged to members of the Michigan Catastrophic Claims Association to reflect the election of the reduced maximum for PIP benefits; limiting the amount of reimbursements that may be paid as PIP benefits for treatments, training, products, services or accommodations for accidental injuries in accordance with the limitations provided by the administrative rules for workers-compensation benefits; and creating a new Michigan Automobile Insurance Fraud Authority to provide support to law enforcement and prosecuting authorities to combat auto-insurance fraud.

There is genuine interest in providing relief from the cost of no-fault automobile insurance on both sides of the aisle, and thus, there is optimism that some form of no-fault insurance reform may indeed be accomplished in this new session. A new Select Committee on Reducing Car Insurance Rates has been established in the House to study these issues and report appropriate legislation. That Committee has been considering input from interested parties but has not yet reported any bills. It is likely that any bills advanced for consideration by the full House or Senate will be modified in the process, so I will reserve a more complete description of content for future reports. It will suffice for now to note that the issue is being discussed with a heightened sense of purpose because the citizens of Michigan have made it clear that they are expecting some concrete results.

Although our hope for bipartisan cooperation springs eternal, we proceed with the realistic expectation that our hope may be disappointed in this age of political polarization. The sense of outrage over the events of the last lame-duck session, which many have characterized as an abuse of the legislative process, was very real and strongly felt, and this appears to have been the impetus for the introduction of three House Joint Resolutions proposing constitutional amendments apparently designed and intended to address the "lame duck problem."

House Joint Resolution C (Howell – R) proposes to amend Const 1963, art 4, § 13 to require that the regular session of the Legislature be finally adjourned (adjourned "without day") before the first Monday in November, *i.e.*, before the General Election, in an even numbered year. **House Joint Resolution E (Howell – R)** proposes an amendment of Const 1963, art 4, § 26 to provide that: "A bill introduced during a session held after the November election in an even numbered year shall not become law without the approval of two-thirds of the members elected to and serving in each House." **House Joint Resolution D (Sabo – D)** proposes an amendment of the same section, but the new language would go a step farther to require a two-thirds vote in each house for passage of any bill **considered** during a session held after the November election in an even numbered year.

Although these joint resolutions were introduced with bipartisan support, it is reasonable to predict that none of them will receive the two-thirds support required to put them on the ballot. But the sense of outrage over the events of the last lame-duck session was sufficiently strong that the memory could linger through November of next year, and thus, it is quite possible that one or more of these changes may be proposed for inclusion on the general election ballot by a voter-initiated petition.

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.

There is general agreement, for example, that something must be done to fix the infernal roads, and that our citizens must be given some relief from the steep cost of no-fault auto insurance.

Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
dbroaddus@secrestwardle.com

Yu v Farm Bureau Gen Ins Co of Michigan, __ Mich __; 919 NW2d 399 (Mich, 2018).

The appeal arose out of a water-loss claim under a homeowners' policy. The insurer denied the claim on the grounds "(1) that plaintiffs did not reside in the premises at the time of loss and it was not a 'residence premises' as required by the policy, (2) that the house had been vacant for more than 60 consecutive days, and (3) that the home had been unoccupied for more than 6 consecutive months." *Yu v Farm Bureau Gen Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued April 11, 2017 (Docket No. 331570), at 2; 2017 WL 1337481. The trial court granted summary disposition to the insurer on this basis. *Id*. at 1. But the Court of Appeals reversed, 2-1, finding that the insurer was "estopped from denying coverage" because it apparently knew, about 10 months before the loss, that the property had been unoccupied, yet renewed the policy just a few weeks before the loss. Also, the insurer cancelled the policy after the loss, but retained "a pro rata share of the premium … for the time period in which the loss occurred." *Id*. at 2-3. The Michigan Supreme Court, however, rejected this reasoning.

In a one-page November 21, 2018 Memorandum Order, the Supreme Court reversed and held that "equitable estoppel did not bar the defendant from denying coverage for the December 2013 water leak in the plaintiffs' Portage house." 919 NW2d at 399. The Supreme Court further explained: "[t]he plaintiffs by their own admission never told the defendant they had moved out of the Portage house when they put that house up for sale in 2013." *Id*. They also told the defendant that they "were moving" in February 2013 rather than that they "had moved," and they never asked for a seasonal policy for a non-primary residence. The Court further explained that the insurer "relied on those misrepresentations and omissions to conclude the plaintiffs still resided in the Portage house when it renewed the homeowner's policy on the house in November 2013." *Id*. For these reasons, the Court found that the insureds had "unclean hands," such that they could not invoke equity.

The Court of Appeals therefore erred by holding that Farm Bureau was equitably estopped from denying coverage "under the facts of this case." The Supreme Court remanded the case to the Court of Appeals "for consideration of the remaining issue raised by the parties but not addressed" in the April 11, 2017 opinion.

Practice Note:

The precedential effect of these kinds of Supreme Court orders is debatable. See *People v Crall*, 444 Mich 463, 464, n 8; 510 NW2d 182 (1993). However, the Court's reference to "the facts of this case" – coupled with the fact that the Court did not issue a full opinion – suggests that the Court intended to make a case-specific, "error correction" ruling.

But property-insurance practitioners may still want to keep an eye on *Yu*. As noted above, the Supreme Court remanded the case to the Court of Appeals "for consideration of the remaining issue raised by the parties but not addressed" in the Court of Appeals' opinion. That "remaining issue" apparently relates to the definition of "residence premises" under the Farm Bureau policy. The Court of Appeals majority noted that "in the absence of a valid estoppel argument, our decision in *Vushaj v Farm Bureau General Ins Co of Michigan*, 284 Mich App 513; 773 NW2d 758 (2009), is somewhat persuasive in favor of defendant." *Yu*, unpub op at 2. "But, by the same token, our decision in *McNeel v Farm Bureau Gen Ins Co of Michigan*, 289 Mich App 76; 795 NW2d 205 (2010), would seem to favor plaintiffs," at least on the issue of "vacant" and "unoccupied." *Yu*, unpub op at 2. Look for an opinion addressing that argument in the next few months.

Drew W. Broaddus is a partner at Secrest Wardle's Grand Rapids office and chair of the firm's Appellate and Insurance Coverage practice groups. He has been named to Super Lawyers Magazine's list of Rising Stars for 2012–2017. He has received an AV Preeminent® Peer Review Rating by Martindale-Hubbell and is a member of the State Bar's Appellate Practice Section Council. He can be reached at dbroaddus@secrestwardle.com.

***Yee v Memberselect Ins Co v Guzman*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2019 (Docket No. 341218); 2019 WL 320551.**

Here, the plaintiffs challenged Memberselect's denial of their homeowners' insurance claim. Like *Yu v Farm Bureau*, this case also presented an issue about whether the insureds maintained the insured property as their "residence premises."

The plaintiffs insured a house in Milford that was water damaged. They inherited the house and lived there continually until May 2012, when they began staying with their daughter in Novi. *Yee*, unpub op at 2. There was testimony that the plaintiffs "stayed in a room at their daughter's house every night since May 2012." *Id*. During the summer, the plaintiffs typically visited the Milford house at least once a week, but they did not visit much during the winter. In April 2015, township authorities notified the plaintiffs about a possible leak at the Milford house after a neighbor had contacted the township. *Id*. at 2.

At that time, "water leaks were found throughout the building, resulting in widespread flooding including into light fixtures and other electrical devices." *Id*. The causes of the leaks were "frozen and burst pipes and/or fittings." *Id*. It was also suggested that corrosion of the pipes before the major event could have also caused minor leaks. *Id*. Leaking pipes were found "inside interior walls, sink cabinets and the basement/garage ceilings." *Id*. An engineer retained by Memberselect determined "that a temporary power outage could have caused the furnaces to shut down simultaneously and long enough to cause the frozen pipes," as the electric utility statements indicated a generally steady use of electricity throughout early 2015. *Yee*, unpub op at 2.

The plaintiffs promptly filed a claim, which Memberselect denied because the insured home was not the "residence premises" as required under the policy, "plaintiffs did not notify MIC of the change in occupancy, they failed to maintain heat in the home, and they substantially increased the potential for a loss when they moved to their daughter's house." *Id*. at 2. The plaintiffs then filed suit and, after a few months of discovery, Memberselect moved for summary disposition "under MCR 2.116(C)(10), claiming that there was no genuine issue of material fact concerning whether the insured home was plaintiffs' residence premises, that plaintiffs failed to notify MIC of the change in occupancy, or that plaintiffs failed to timely file a statement of Proof of Loss." *Id*. at 2.

Despite several adjournments over a six-month period, the plaintiffs never filed a response to Memberselect's motion. *Id*. at 2-3. The trial court finally held a hearing on October 5, 2017, almost seven months after Memberselect filed the motion, and the plaintiffs' counsel failed to appear. *Id*. at 3. At that hearing the trial court granted Memberselect's motion. *Id*. The plaintiffs filed a motion for reconsideration, explaining that their counsel "accidentally missed the October 5, 2017 motion hearing." *Id*. The plaintiffs also sought reconsideration "because the dismissal was a severe and extreme sanction and plaintiffs should have an opportunity to conduct the depositions of Memberselect's insurance agents." *Id*. The trial court denied the motion for reconsideration.

On appeal, the plaintiffs attempted to frame the dismissal as an unduly harsh "sanction" for their attorney's failure to appear at the October 5, 2017 hearing. *Yee*, unpub op at 4. The panel rejected this characterization of the record, noting that the trial court dismissed the case under MCR 2.116(C)(10), not as a "sanction." "In light of plaintiffs' failure to file any responsive briefing or to appear at the motion hearing, the trial court was not obligated to scour the record to search for a basis to deny summary disposition." *Id*. at 4. "With this in mind, the trial court expressly ruled that '[b]ased upon [the] pleadings, I am going to grant summary disposition.'" *Id*.

Turing to the substance of Memberselect's MCR 2.116(C)(10) arguments, the panel noted that Memberselect's homeowners' policy covered the "insured premises," which includes the "residence premises." *Id*. at 5. The policy defined a "residence premises" as "the one, two, three or four-family dwelling, other structures and grounds" where the insured "reside[s] and which is shown on the declaration certificate." *Id*. So the policy required that the insured reside at the property in question. *Id*. Citing *McGrath v Allstate Ins Co*, 290 Mich App 434, 443; 802 NW2d 619 (2010), the panel noted that the term "reside" in this context "requires that the insured actually live at the property." *Yee*, unpub op at 5. The panel further noted that the risk to insuring property is "affected by the presence of the insured in the dwelling and the associated activities stemming from this presence." *Id*., quoting *McGrath*, 290 Mich App at 444. "Unoccupied or vacant homes, with no resident present to oversee security or maintenance, are at greater risk for break-ins, vandalism, fire, and water damage…." *Yee*, unpub op at 5, quoting *McGrath*, 290 Mich App at 444.

In this case, the plaintiffs had not resided on the property for about three years prior to the water damage event in April 2015. *Yee*, unpub op at 5. They admitted that they had spent every night at their daughter's home since 2012, and they did not regularly visit the property during the winter months. *Id*. While they expressed an intention to one day return, the mere intent to live at the property in the future was not enough to meet the definition of "reside" under the policy. *Id*., quoting *McGrath*, 290 Mich App at 443.

The panel further noted that summary disposition was proper based on the plaintiffs' failure to "timely file the statement of Proof of Loss." *Yee,* unpub op at 5. Memberselect supported this argument with an affidavit from its insurance adjuster, which indicated that she had never received a timely Proof of Loss. *Id*. Moreover, the Proof of Loss that plaintiffs eventually submitted "did not include any information as to the value of the property loss, and plaintiffs inaccurately stated that they were residing at the property when the loss occurred." *Id*. "On this record, this Court cannot conclude that the trial court plainly erred when it granted summary disposition." *Id.*

Practice Note: Because it is questionable to what extent the plaintiffs preserved their arguments – having only opposed summary disposition on reconsideration, *Yee*, unpub op at 3-4 – this opinion is probably more notable for its discussion of MCR 2.116(C)(10) standards than for its treatment of the "residence premises" issue.

***Memberselect Ins Co v Guzman*, unpublished opinion per curiam of the Court of Appeals, issued December 4,**

2018 (Docket No. 338162).

Like *Yee*, this case also involved a homeowners' policy issued by Memberselect, but this time the issue was liability coverage. Memberselect filed this declaratory judgment action, arguing that it had no duty to defend or indemnify its insured, McComb, for a personal-injury suit filed by Guzman. McComb ran a small window cleaning business and "occasionally contracted with" Guzman "to assist him." *Guzman*, unpub op at 1. Guzman was injured in the course of that work. *Id*. McComb tendered his defense to Memberselect, his homeowners' insurer. *Id*. The insurer sought to avoid coverage based on a "land motor vehicle" exclusion – arguing that the incident arose out of McComb's use of a land motor vehicle – and also on the basis of a "business pursuits" exclusion. *Id*. at 2. The panel agreed with the insurer that the "business pursuits" exclusion foreclosed liability coverage. *Id*. at 4-5.

On the day of the injury, Guzman had been helping McComb with cleaning windows. *Guzman*, unpub op at 1. Afterward, Guzman and McComb went to eat lunch at McComb's home. *Id*. A customer had asked McComb to mow one of her properties, and Guzman agreed to help McComb. *Id*. To perform this work, McComb and Guzman tried to load McComb's self-propelled push lawnmower into the back of McComb's pickup truck. *Id*. At the time, the tailgate on McComb's pickup truck could not be opened, so the two of them had to lift the mower over the tailgate. *Id*. During this process, the two placed the mower so it was resting on the tailgate, to allow Guzman to move some ladders that were still in the bed of the truck. *Id*. McComb slid the mower forward so its rear wheels would "hang" on the tailgate, but the wheels travelled over the tailgate and dropped straight down into the bed of the truck. *Id*. The dropping of the mower caused a part of the mower to strike Guzman in the head. *Id*. at 1-2. The two nonetheless proceeded to the customer's property where Guzman helped mow the grass. *Id*. at 2. But five days after the incident, Guzman went to the hospital complaining of increasing pain in his head. After the hospital visit, Guzman started treating with a neurologist. *Id*.

Guzman sued McComb, alleging that McComb's negligence caused his injuries. *Guzman*, unpub op at 1. With McComb's auto-insurance policy having lapsed, McComb sought defense and indemnity for the Guzman suit from under his Memberselect homeowners' policy. In the resulting declaratory-judgment action, the trial court denied Memberselect's motion for summary disposition, but the Court of Appeals reversed.

The homeowners' policy that Memberselect issued to McComb contained the following liability exclusions: "1. bodily injury or property damage arising out of an insured person's ownership, maintenance, use or negligent entrustment of … a land motor vehicle which is owned, operated or used by … an insured person…," or "3. bodily injury or property damage arising out of business pursuits of an insured person." *Guzman*, unpub op at 3-4. The panel found that the "business pursuits" exclusion was dispositive, and "[b]ecause either exclusion would independently preclude coverage," there was no reason to "address the land-motor-vehicle exclusion." *Guzman*, unpub op at 4.

In determining whether McComb was engaged in a "business pursuit" at the time of Guzman's injury, the panel noted that the policy did not define that term, but it did define "business" as "any full or part-time trade, profession or occupation." *Id*. The panel cited *State Mut Cyclone Ins Co v Abbott*, 52 Mich App 103, 108; 216 NW2d 606 (1974), for the proposition that an activity constitutes a "business pursuit" if it is performed with continuity and for profit. *Guzman*, unpub op at 4. Continuity requires either a "customary engagement or a stated occupation." *Id*. An activity is conducted for profit if it is performed "as a means of livelihood, gainful employment, [a] means of earning a living," or to procure "subsistence or profit." *Id*. "Commercial transactions or engagements" also satisfy the profit element. *Id*.

McComb testified that he was in the business of cleaning windows through his company. *Guzman*, unpub op at 4. He estimated that he cleaned windows approximately four days a week. But he also testified that he earned income performing "property preservation" in which he maintained and repaired properties. *Id*. Velloney, who managed numerous properties, contacted him to perform repair and maintenance work as needed. She told him how much she would pay for a job, and McComb would text her or send her a written bill after completing the job. On the day of the incident, Guzman agreed to help McComb mow the lawn at one of Velloney's properties. *Id*. Guzman was injured when they loaded the lawnmower into McComb's pickup truck to transport it to the property. McComb testified that he continued to perform property preservation work for Velloney for up to a year after the incident. Based upon this testimony, the panel found "no doubt that McComb performed the property preservation work with the motive of making a profit." *Id*. Moreover, the work was "continuous" because it was "customary" for Velloney to contact McComb when his services were needed. *Id*. "[T]he fact that McComb primarily considered himself to be a window washer" was "not particularly relevant." *Id*. The panel found no question of fact that "McComb's property preservation work was profit motivated and the activity had a sufficient amount of continuity" to trigger "the business-pursuits exclusion …." *Guzman*, unpub op at 5.

In so holding, the panel distinguished *Randolph v Ackerson*, 108 Mich App 746, 747-749; 310 NW2d 865 (1981), a case where the defendant had purchased a barn, razed it, and moved the resulting wood onto his own property. After responding to the defendant's advertisement, the plaintiff purchased some of the barn wood. The plaintiff was injured while he and the defendant were loading the wood onto the plaintiff's truck. *Id*. The *Randolph* panel held that the business-pursuits exclusion did not apply because, although the activity was undoubtedly profit motivated, it was a single incident and, therefore, did not constitute "continuous" activity. *Id*. at 748-749. But the *Randolph* panel emphasized that the defendant had never engaged in the razing of barns for wood as a profit-making activity either before the incident in question or at any time thereafter. See *Guzman*, unpub op at 5. In contrast, McComb "*did not* engage in his property preservation activity on only a single occasion." *Id*. (emphasis added). "Rather, there was evidence that McComb had done this type of work for Velloney many times before the incident and continued to do so for 'up to a year' afterward." *Guzman*, unpub op at 5.

Municipal Law Report

By Lisa A. Anderson, *Rosati Schultz Joppich & Amtsbuechler, PC*

The Fourth Amendment Allows Warrantless Inspections Of Dangerous Properties If Certain Pre-Inspection Procedures Are Followed.

James Benjamin, as Trustee of the Rebekah C. Benjamin Trust v Stemple, ___F3d ___; 2019 WL 545129 (CA6, Feb. 12, 2019) (Docket No. 18-1736) (recommended for full text publication).

Facts:

Like many municipalities, the City of Saginaw maintains a registry of unoccupied properties in order to ensure that vacant properties are safe, secured, and well-maintained. The City of Saginaw established an unoccupied properties registry for that reason under the authority of its Unsupervised Properties Ordinance. Under the Ordinance, owners of unoccupied properties must register their property with the City and provide the City with the name and contact information of the owner and others who will be responsible for maintaining the vacant property. The City also requires submission of a property-maintenance plan. Out-of-state property owners are required to identify a local agent who will maintain the property. The Unsupervised Properties Ordinance and unoccupied properties registry helps prevent and eliminate blight and nuisance conditions that negatively impact the value of surrounding properties.

In addition to providing basic contact information and a maintenance plan, owners registering unoccupied properties are required to authorize the City to enter and board their property and take any action necessary to secure property that has become dangerous as defined by the City's Dangerous Building Ordinance. Plaintiff James Benjamin, trustee for a trust that owns unoccupied properties in the City, refused to sign the unoccupied properties registration form to authorize the City to enter his property and secure the premises if they became dangerous. Benjamin objected that the registration form required him to waive his Fourth Amendment right to be free from warrantless searches.

Benjamin filed suit against the City Clerk and Chief Building Inspector on behalf of the trust and a potential class of vacant property owners after the trust received citations for failing to comply with the Unsupervised Properties Ordinance. The complaint alleged that the City's registration process violates the doctrine of unconstitutional conditions by requiring property owners to waive their Fourth Amendment rights and consent to a warrantless search of their property. Trustees for the Jones Family Trust, a second trust owning unoccupied property in the City, intervened in the case.

The district court granted a motion to dismiss in favor of the City Clerk and Building Inspector and denied preliminary-injunction motions filed by the trusts. The court concluded that the language of the registration form requiring property owners to consent to the City entering the property if the property becomes dangerous does not impose an unconstitutional condition. An unconstitutional condition occurs when the government coerces a person into giving up their constitutional rights. The court explained that the City's Unsupervised Properties Ordinance and unoccupied properties registration only allows the City entry to property that has previously been found to be dangerous under the City's Dangerous Buildings Ordinance. The Dangerous Buildings Ordinance requires a formal administrative proceeding before a building is found to be dangerous. That proceeding provides due process protections by requiring written notice to the owner, a public hearing, and a written decision made by an impartial decisionmaker. The decision is then subject to appeal. The court concluded that the

Lisa A. Anderson is a shareholder in the Farmington Hills office of Rosati Schultz Joppich & Amtsbuechler, PC where she specializes in municipal law. She concentrates her practice primarily on zoning and land use law, constitutional and civil rights litigation, general municipal law, and appellate practice. She also provides general counsel services to government clients on a wide range of municipal issues. She can be reached at landerson@rsjalaw.com or at (248) 489-4100.

requirement on the registration form that property owners consent to the City's entry on their property involves post-hearing remediation efforts only and does not impose an unconstitutional condition or require a waiver of constitutional rights.[1] The property owners appealed the rulings.

Ruling:

The Sixth Circuit Court of Appeals affirmed the district court judgment. The Court explained that what looked like a complex unconstitutional conditions claim was really a straightforward Fourth Amendment claim. The Fourth Amendment protects a person's right to be secure in his person, home, papers, and effects, against unreasonable searches and seizures. Subject to certain exceptions, a warrantless search of a home or business is presumptively unreasonable. Administrative searches conducted to assure compliance with building codes, including codes designed to prevent buildings from becoming dangerous to others, fall within an exception to the warrant requirement.[2] In order to fit within the administrative search exception to the warrant requirement, the government must give the property owner an opportunity to obtain a precompliance review of the search request before a neutral decisionmaker. In other words, the administrative process must provide the property owner the opportunity to challenge a warrantless search request before the owner is sanctioned for refusing entry.[3]

The Court found that the City's registration form did not constitute a waiver of Fourth Amendment rights because property owners do not have a Fourth Amendment right to resist a warrantless search of a building that has been found to be dangerous in a formal administrative proceeding. The Court noted that the City's Dangerous Building proceeding provides a number of safeguards to ensure the fairness of the process, including the right to notice and an opportunity to be heard, to introduce evidence, examine witnesses, have legal representation, and file an appeal. The Court concluded that the City's process satisfies the Fourth Amendment's requirement of a precompliance review before a neutral decisionmaker.

Practice Note:

A warrant is not required for an inspection of property that has been found to be dangerous through a formal administrative hearing process where the property owner is given an opportunity to challenge the government's findings before a neutral adjudicator. Whether a warrant is necessary will depend upon whether the required procedures provide for a precompliance review that will satisfy the Fourth Amendment.

> The complaint alleged that the City's registration process violates the doctrine of unconstitutional conditions by requiring property owners to waive their Fourth Amendment rights and consent to a warrantless search of their property.

An Order Of Demolition Does Not Have To Provide The Property Owner With An Opportunity To Repair A Structure That Is Not Capable Of Reasonable Repair.

Bailey & Biddle LLC v City of St. Joseph, unpublished per curiam opinion of the Court of Appeals, issued February 12, 2019 (Docket No. 340989); 2019 WL 573090 (Mich Ct App Feb. 12, 2019).

Facts:

Plaintiff Bailey & Biddle LLC ("Bailey") owns an unoccupied, single-family home in the City of St. Joseph. The home was built around 1900 and had fallen into a state of disrepair. Beginning in 2013, the City began notifying Bailey of several code violations on the exterior of the home, including a defective roof. Bailey was given more than a year to replace the roof and repair the home but failed to do so. In 2015, the City again notified Bailey of the need to make repairs. Bailey pulled a permit but never completed the repairs. In 2017, the City revoked Bailey's permit and obtained an administrative search warrant to search the interior of the home. The inspection revealed severe water damage, widespread mold infestation, and extensive structural damage, including a collapsed ceiling and structural supports that were so water logged they were incapable of supporting their loads.

Due to the extensive damage to the home, the City determined that the home was beyond reasonable repair and ordered Bailey to demolish and remove the structure. Bailey appealed the decision to the City's Property Maintenance Board of Appeals (PMBOA), which held a hearing on the claim. At the hearing, the City presented evidence that the costs required to make the home habitable were approximately $122,000. The value of the home was estimated between $40,000 and $50,000. Bailey attended the hearing with its attorney and presented evidence to show that repair costs were 50% to 75% of what was estimated by the City. Bailey also argued that it could do much of the work itself for less than the City's estimate. After hearing and considering the evidence, the PMBOA affirmed the demolition order. Bailey appealed the PMBOA's decision to circuit court, which affirmed the PMBOA, finding that there was overwhelming evidence to affirm the demolition order. Bailey filed an appeal from the circuit court order.

Ruling:

The Court of Appeals affirmed the circuit court judgment upholding the demolition order. Bailey argued on appeal that the City violated its due process rights by failing to provide an opportunity to repair the structure. The Court disagreed, noting instead that Bailey was given a full hearing before the PMBOA at which it was represented by counsel and presented evidence for individualized fact finding. The Court ruled that there is no fundamental constitutional right to repair a structure that is unfit for human occupancy. The Court further found that any private right to repair must yield to the City's higher interest in protecting the safety of its citizens.

The Court reviewed the 2003 International Property Maintenance Code (IPMC) §110.1 and found that demolition may be ordered under three circumstances. First, demolition and removal of a structure is required when the structure is unsafe for human occupancy and repair is unreasonable.

> The Court ruled that there is no fundamental constitutional right to repair a structure that is unfit for human occupancy. The Court further found that any private right to repair must yield to the City's higher interest in protecting the safety of its citizens.

Second, if the structure is capable of being made safe by repairs, the code official must give the owner the option to repair the structure or demolish and remove it. Third, if construction has ceased for more than two years, the code official must order the owner to demolish and remove the structure. The Court found that §110.1 of the 2003 IPMC requires that property owners be given an opportunity to repair only if the structure is capable of reasonable repair. Since the evidence supported the conclusion that the building was not capable of reasonable repair, the Court ruled that the PMBOA and the circuit court did not err by affirming the demolition order.

Practice Note:

Under the 2003 IPMC, property owners do not have to be provided an opportunity to repair a dangerous structure that is so deteriorated that it is not capable of reasonable repair. Evidence showing the cost of the repairs needed to make the building habitable in comparison to the total value of the building in habitable condition may help establish if repair is reasonable.

Endnotes

1 *James Benjamin, as Trustee of the Rebekah C. Benjamin Trust, v Stemple*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 21, 2018 (Case No. 18-cv-10849), pp. 5-11; 2018 WL 3069286, at *3-8 (E.D. Mich. June 21, 2018).

2 *James Benjamin, as Trustee of the Rebekah C. Benjamin Trust v Stemple*, ___F3d ___; 2019 WL 545129 (CA 6, Feb. 12, 2019) (Docket No. 18-1736) (recommended for full text publication), citing *City of Los Angeles v Patel*, 135 S Ct 2443, 2452 (2015).

3 *Id.*, citing *Liberty Coins, LLC v Goodman*, 880 F3d 274, 280 (CA 6, 2018).

Medical Malpractice Report

By Daniel J. Ferris and Derek R. Boyd, *Kerr, Russell and Weber, PLC*

Derek R. Boyd's practice focuses on commercial litigation, while providing support for the defense of medical malpractice actions, as well. Prior to joining Kerr Russell, Derek represented physicians and hospitals in a wide variety of both medical malpractice and general negligence matters. He also worked for a "Big Three" automaker in its transfer pricing counsel group, helping establish and execute global tax strategy for its subsidiaries and ensuring compliance with statutory guidelines.

He graduated from Wayne State University Law School where he was Associate Editor of *The Wayne Law Review* and National Team Member of the Wayne State Moot Court Team, as well as a litigation supervisor and Board member of the Detroit Free Legal Aid Clinic.

Daniel J. Ferris feels privileged to be called upon to assist companies and individuals across a range of industries and with a wide variety of issues. Daniel handles matters involving class action, commercial disputes, corporate law, employment law, insurance, licensing, litigation, products liability, and professional liability defense, and has particular experience in non-compete and sales representative contracts.

Dan has been recognized by Super Lawyers as a "Rising Star," was elected into the The Fellows of the American Bar Foundation and the The Michigan State Bar Foundation Fellows Program. He is passionate about education, is a lifelong learner, and works hard to stay at the leading-edge of knowledge, training, and tactics in the legal profession to provide clients with the best client service, work product, and results possible. In addition to his undergraduate and law degrees from the University of Michigan, he completed a trial advocacy program at the Northwestern University School of Law. Dan has served as an instructor at the University of Michigan and is an editor of Michigan Law of Damages and Other Remedies, a treatise published by the Institute of Continuing Legal Education.

He is also a Fellow of the Oakland County Bar Foundation and supports homeless youth as a member of the Covenant House Michigan Young Professionals Society. He additionally volunteers with Kerr Russell's Giving Back program, represents nonprofit corporations, and represents clients on a pro bono basis.

Can My Client Sue My Expert? Michigan Court of Appeals Addresses Witness Immunity Doctrine

Expert witnesses play a pivotal role in any medical-malpractice action. A party's litigation strategy—and, indeed, the filing of a lawsuit in the first place—often depend in significant respect on the opinion of an expert physician or other practitioner. Expert witnesses are considered to owe a duty to the court in giving their testimony and, pursuant to the witness-immunity doctrine, are shielded from claims arising from their testimony.[1] This doctrine provides that witnesses "are wholly immune from liability for the consequences of their testimony or related evaluations."[2] The doctrine has been held to shield witnesses from claims brought by adverse parties[3] and also from claims brought by the parties that retain them.[4] Indeed, the witness-immunity doctrine offers such broad protection to witnesses that even false or malicious testimony has been held not to abrogate the privilege and give rise to a claim.[5]

The scope of this protection in Michigan has recently been called into question, however, by the decision of the Court of Appeals in *Estate of Voutsaras v Bender*.[6] The issue in *Voutsaras* related to attorney expert witnesses who were retained in conjunction with an underlying lawsuit.[7] Following an unfavorable grant of summary disposition in the underlying action, the *Voutsaras* plaintiffs brought suit against their attorneys of record and their attorney experts.[8] The plaintiffs claimed that the experts failed to properly investigate the facts required to formulate their opinions, failed to understand the applicable standards, and failed to provide a competent professional opinion.[9] The expert witness defendants moved for summary disposition, relying on the witness-immunity doctrine. The trial court, noting that the witness-immunity doctrine is to be "broadly construed," found that a party's own expert witnesses are shielded by witness immunity and cannot be sued by their client for professional malpractice, regardless of any duty they owe the client.[10]

Noting that the potential ability to sue one's own expert witness presented an issue of first impression in Michigan, the Court of Appeals looked not only at how the witness-immunity doctrine had been applied in Michigan[11], but also to decisions from other jurisdictions. Although the circumstances in *Voutsaras* dealt specifically with attorney experts, the survey undertaken by the court touched on cases involving professionals in a wide variety of fields including accounting,[12] engineering,[13] bio-mechanics and kinesiology,[14] business valuation,[15] medical billing,[16] and accident investigation.[17] The courts in these cases held that the witness-immunity doctrine did not shield the experts where the claims were not focused on the content of the experts' testimony, but were instead focused on the allegedly negligent provision of services. Thus, allowing the plaintiffs' claims to proceed was not thought to undermine the purpose of the witness-immunity doctrine, which is to encourage witnesses to testify freely at trial without fear of liability.

In line with these cases, the *Voutsaras* court held that, to the extent the plaintiff's claims rested on the defendants having provided damaging testimony or evidence, the defendants were protected by the witness-immunity doctrine.[18] However, the court declined to extend witness immunity to the "negligent performance of professional services."[19] The court found that a claim of professional malpractice was not precluded "merely because the professional was expected to provide expert testimony."[20]

The court stated at one point: "[w]e hold that licensed professionals owe the same duty to the party for whom they testify as they would to any client."[21] However, the court declined to rule on the issue of whether the defendants in that case owed a legal duty to the plaintiff.[22] The court explained that it was not satisfied that the trial court

> Expert witnesses are considered to owe a duty to the court in giving their testimony and, pursuant to the witness-immunity doctrine, are shielded from claims arising from their testimony. This doctrine provides that witnesses "are wholly immune from liability for the consequences of their testimony or related evaluations."

record included facts necessary to resolve the issue and left it for the trial court to determine whether the defendants owed or breached a legal duty.[23] Thus, the *Voutsaras* court did not specifically determine which particular claims against the defendants were actionable but, rather, ruled that the defendants were not "absolutely immunized."[24]

Whether the *Voutsaras* decision could be applied to allow suit against a medical-malpractice expert is an important issue to consider. Notably, none of the cases cited by the *Voutsaras* court involved a healthcare professional testifying in a medical-malpractice action. It could certainly be argued that *Voutsaras* should be restricted to the context of a claim against an attorney expert.

To that end, the circumstances of a claim against an attorney expert are in important respects different from a claim against a healthcare expert. An attorney expert's duty to the client is difficult to distinguish from the duty owed by that party's attorney of record, given the similarity of the role each plays. That is, both are opining on the application of the law. It may thus seem sensible that both the expert and the attorney of record could be sued for legal malpractice.

The role of a medical-malpractice expert in opining on the standard of care applicable to a given profession is inherently different than the role that a provider serves when providing care for patients. Thus, an argument can be made that a medical-malpractice expert is not practicing medicine while serving as an expert, and, therefore, the standard of care does not encompass the expert work. The fact that *Voutsaras* did not rule upon the specific duties owed by the experts in that case could be thought to leave room for an argument of this nature.

However, in other respects, the conceptual underpinning of *Voutsaras* may arguably apply to a medical-malpractice expert. Specifically, the decision supports that an expert's duty with regard to the contents of his or her testimony in a judicial proceeding is distinct from any duty the expert may have to provide litigation support services when developing the basis or substance of that testimony. As such, the protections that safeguard an expert's ability to comply with his or her testimonial duty may not extend to the expert's actions in reaching those conclusions. A medical-malpractice expert may therefore arguably be negligent in performing the duties he or she has assumed when agreeing to provide litigation support services, even if the expert is protected for the subsequent act of testifying. Indeed, as quoted above, the *Voutsaras* court used broad language in summarizing its holding and spoke in terms of "licensed professionals" generally.[25]

A simple example of negligence committed by a medical-malpractice expert would be a physician who promises to sign an affidavit of meritorious defense by the due date but then inexplicably fails to do so. Although seemingly not a breach of the standard of care, the negligence committed in this example may, consistent with *Voutsaras*, qualify as a breach of a duty "owed by one rendering professional services."[26]

Research has not revealed any decisions from Michigan or other jurisdictions where a party pursued a claim against its own healthcare professional expert for acts or omissions in providing pretrial litigation support services in a medical malpractice action. As such, there appears to be a distinct lack of precedent in this regard. Of the cases cited by the *Voutsaras* court, the examples presented by the Ph.D. biomechanics expert and Ph.D. kinesiologist in *Pollock, supra*, are arguably similar to medical experts. Other cases involving expert physicians are of interest but do not address the question at hand.[27]

It is important to recognize that, even if claims against a medical-malpractice expert are viable, they would often be difficult to prove. Not only does the aggrieved client have to prove that the expert breached his or her duty, but the client must also prove causation and damages. That typically means that the client plaintiff must prove that the expert's negligence actually affected the outcome of a case. To recover against the expert, the client plaintiff must typically prevail in a "trial-within-a-trial." Given the many factors that contribute to the overall outcome of a case, it may be quite difficult to prove that the expert was responsible for the undesirable outcome.

It is also important to recognize that the Court of Appeals' decision in *Voutsaras* may not be the final word in that case. The attorney expert defendants have filed an application for leave to appeal to the Michigan Supreme Court. If the Supreme Court grants leave, it could reverse the Court of Appeals and make a stronger statement in favor of witness immunity.

With that in mind, it is noteworthy that courts of other states have extended the witness immunity doctrine to protect expert witnesses from any liability to the party retaining the expert. In *Bruce v Byrne Stevens & Assocs Eng'rs, Inc*,[28] the Washington Supreme Court considered the witness-immunity doctrine in the context of an engineering expert retained to calculate the costs of corrective work. Based on the testimony of the expert, the *Bruce* plaintiff obtained a verdict awarding damages only to later discover that the actual costs of the corrective work were twice the amount estimated by the expert.[29] A plurality of the court found that the witness-immunity doctrine extended "not only to [the expert's] testimony, but also to acts and communications which occur in connection with the preparation of that testimony."[30]

The Michigan Supreme Court may yet take the opportunity to weigh in on this issue and could elect to follow Washington's approach. So long as the Court of Appeals decision in *Voutsaras* remains binding precedent, however, experts in all fields, including healthcare, should be mindful that, while what they say on the stand is subject to strong protection, the work they perform before that point could arguably be the subject of a claim.

Endnotes

1 *Maiden v Rozwood,* 461 Mich 109, 133-34; 597 NW2d 817 (1999).

2 *Id.* at 134 (citations omitted).

3 *Id.* at 133-134.

4 *See Briscoe v LaHue*, 460 US 325; 103 S Ct 1108; 75 L Ed 2d 96 (1983).

5 *Maiden*, 461 Mich at 134.

6 __ Mich App __; __ NW2d __ (2019) (Docket No. 340714).

7 *Id.*, slip op at 2.

8 *Id.*

9 *Id.*

10 *Id.,* slip op at 3.

11 Particularly in *Maiden*, 461 Mich 109.

12 *Mattco Forge, Inc v Arthur Young & Co*, 5 Cal App 4th 392; 6 Cal Rptr 2d 781 (1992) (holding that a litigation support expert was not protected from liability for alleged professional malpractice, negligence, and breach of contract during pretrial discovery); *LLMD of Mich, Inc v Jackson-Cross Co*, 559 PA 297; 740 A2d 186 (1999) (holding that expert was not immunized from his negligence in formulating an opinion where a key calculation error was revealed during cross examination at trial).

13 *Murphy v AA Mathews*, *Div Of CRS Group Engineers*, Inc, 841 SW2d 671 (Mo, 1992) (holding that witness immunity did not protect an expert from liability for negligence in providing litigation support services).

14 *Pollock v Panjabi*, 47 Conn Supp 179; 781 A2d 518 (2000) (holding that witness immunity did not prevent a party from pursuing a claim against biomechanics expert and kinesiologist he had hired, after pretrial vior dire of the expert, the trial court ruled that the expert's opinion was not credible and not admissible at trial).

15 *Boyes-Bogie v Horvitz*, 14 Mass L Rptr 208 (Mass Super, 2001) (holding that witness immunity did not preclude action against business valuation expert for negligence in valuation of a marital asset).

16 *Marrogi v Howard*, 805 So 2d 1118, 1131 (La, 2002) (holding that witness immunity did not bar claim against medical-billing expert relating to failure to provide "competent litigation support services," where expert allegedly admitted to making numerous mathematical and coding errors and terminated his own deposition after it had begun).

17 *Hoskins v Metzger*, 102 So 3d 752, 753 (Fla App, 2012) (holding that the trial court erroneously dismissed an action where the clients alleged their expert had failed to wear appropriate clothing when testifying at trial, was unfamiliar with critical aspects of the "scientific method of investigation," and could not support his theory under cross-examination).

18 *Voutsaras*, slip op at 5.

19 *Id*. slip op at 8.

20 *Id.*

21 *Id.*, slip op at 2.

22 *Id.*, slip op at 3.

23 *Id.*

24 *Id.*, slip op at 5.

25 *Id.*, slip op at 2.

26 *Id.*, slip op at 3.

27 See, e.g., *Kahn v Burman*, 673 FSupp 210 (ED Mich, 1987) (mem), *aff'd*, 878 F2d 1436 (CA 6, 1989) (holding that plaintiff's expert in medical-malpractice suit was immune from suit by defendant relating to statements in report); *Panitz v Behrend*, 429 Pa Super 273; 632 A2d 562 (1993) (holding that physician expert testifying regarding chemical exposure was immune from suit by party presenting her where testimony was not as anticipated by client); *James v Brown*, 637 SW2d 914 (Texas, 1982) (holding that treating psychiatrists were shielded from defamation claim for testifying as to diagnoses in commitment proceeding but were not immune from other claims such as medical malpractice for misdiagnosis); *Cruz v Angelides*, 574 So2d 278 (Fla 3d DCA, 1991) (holding that witness immunity protected treating physician from suit by patient where physician expressed medical opinion favorable to a defendant physician in an underlying medical-malpractice suit brought by the patient); *Bernstein v Alameda Etc Med Assn*, 139 CalApp2d 241, 245–246; 293 P2d 862 (1956) (holding that physician expert was entitled to protection of privilege such that statements made an expert report submitted in conjunction with industrial accident proceeding could not support his expulsion from local medical association notwithstanding their disparaging nature).

28 776 P2d 666, 667 (Wash, 1989).

29 *Id.*

30 *Id.* at 673; see also *Harrison v Roitman,* 131 Nev Adv Op 92; 362 P3d 1138, 1143-44 (2015) (following *Bruce*).

Research has not revealed any decisions from Michigan or other jurisdictions where a party pursued a claim against its own healthcare professional expert for acts or omissions in providing pretrial litigation support services in a medical malpractice action.

No-Fault Report

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

Recent Developments Regarding Rescission and Effect on "Innocent Third Parties"

Readers will recall that, in the October 2018 edition of the Michigan Defense Quarterly, the author discussed the ramifications of the recent Michigan Supreme Court decision in *Bazzi v Sentinel Ins Co*, 502 Mich 390, 919 NW2d 20 (2018). To recap, the Michigan Supreme Court held that the so-called "Innocent Third Party Doctrine" was abrogated by its earlier decision in *Titan Ins Co v Hyten*, 491 Mich 547, 817 NW2d 562 (2012). In fact, the Supreme Court went on to note that there was no basis for distinguishing between non-mandatory benefits, in the form of residual bodily injury liability policy limits that were in excess of $20,000 per person/$40,000 per accident (*Hyten*) and statutorily-mandated PIP benefits (*Bazzi*) – there was no automatic entitlement of benefits for the "innocent third party." At the same time, however, the Supreme Court ruled that the insurer was not automatically entitled to rescind coverage as to an "innocent third party." Instead, the trial court would need to "balance the equities" between the defrauded insurer and the "innocent third party." Other than a few abstract principles involving equity jurisprudence, the Supreme Court in *Bazzi* provided very little guidance to the reviewing court as to how those abstract equity principles were to be applied.

One of the cases that had been pending before the Michigan Supreme Court was *Farm Bureau Gen'l Ins Co of Michigan v ACE American Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2017 (Docket No. 329585); 2017 WL 242750. In that case, Farm Bureau insured one Mark Rueckert and his daughter under a personal auto policy. Mr. Rueckert's wife, Robynn, was never disclosed to Farm Bureau, even though she regularly drove Mark's vehicle. At the time Mr. Rueckert applied for insurance with Farm Bureau, his wife's driver's license was suspended, due to prior convictions for operating a vehicle while intoxicated. In fact, she had been ticketed a week before the application for insurance was completed by Mr. Rueckert for driving Mr. Rueckert's uninsured motor vehicle without a valid driver's license. Robynn Rueckert was subsequently injured in a motor vehicle-pedestrian accident where the owner of the motor vehicle was insured with defendant ACE American Insurance Company. Even though Robynn Rueckert was not involved in the fraudulent insurance transaction, and even though the accident itself had nothing to do with the fraudulent statements made by Mr. Rueckert in the insurance application, the Court of Appeals ruled that Farm Bureau was permitted to rescind the policy, which would leave ACE American Insurance Company as the next highest order of priority for payment of the no-fault benefits incurred by the injured claimant, Robynn Rueckert.

Following the Michigan Supreme Court's decision in *Bazzi*, the Supreme Court vacated only that portion of the Court of Appeals' opinion which held that Farm Bureau was automatically entitled to rescission as a matter of law, with regard to the "innocent third party," Robynn Rueckert. The matter was remanded back to the Kent County Circuit Court "to determine whether rescission is available as an equitable remedy as between Farm Bureau and Robynn Rueckert." Given this ruling, Chief Justice Markman prepared a concurring opinion, in which he attempted to provide the lower courts with some guidance regarding the criteria to be applied when considering rescission *vis-à-vis* "innocent third parties." Chief Justice Markman's concurring opinion is interesting as he discusses a number of points that might be missed by the casual reader of the *Hyten* and *Bazzi* opinions.

First, Chief Justice Markman made it clear that an insurer may invoke all three types of fraud in support of an attempt to rescind coverage based upon a misrepresentation

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 e-mail address is rsangster@sangster-law.com.

in an insurance application – fraudulent misrepresentation (the type of fraud that was at issue in *Bazzi*), innocent misrepresentation (the type of fraud at issue *Farm Bureau*), and silent fraud. This is an important point, as a rescinding insurer need not demonstrate that the misrepresentation was **knowingly made by the insured**. Even an innocent misrepresentation, or a failure to disclose what one was under a duty to disclose, will support rescission of an insurance policy.

Turning next to the guidelines to be considered by the reviewing court, Justice Markman emphasized that the court cannot base its decision "solely upon the subjective determinations and the unconstrained exercises of discretion of the trial judge," as what we would have there would be "the rule of judges," not the "rule of law." Instead, as stated by Chief Justice Markman:

> There must, in other words, be an applicable legal rule, and that is no less true in matters of equity than in any other realm in which the 'judicial power' of our Michigan constitution is exercised. Such rules, such standards, not only guide the trial court, but they also guide the parties in comprehending their rights and responsibilities and in marshalling their arguments, and the appellate courts in meaningfully reviewing the trial court's judgments. See Warda v City Council of City of Flushing, 472 Mich 326, 339-340 (2005) ("Absent a comprehensible standard, judicial review cannot be undertaken in pursuit of the rule of law, but only in pursuit of the personal preferences of individual judges. The latter pursuit falls outside the 'judicial power' in Michigan.").

With this in mind, Chief Justice Markman observed that because the insurer bears the burden of establishing that rescission is warranted, in cases where neither party is more or less "innocent" than the other, the insurer will have failed to satisfy its burden of proof and rescission would not be warranted with respect to the innocent third party. As a result, in considering whether one party is more or less "innocent" than the other, Chief Justice Markman enunciated five factors that should be considered by the trial court. These factors will be discussed below.

Factor #1 – "The Extent to Which the Insurer, in fact, Investigated or Could have Investigated the Subject Matter of the Fraud Before the Innocent Third Party was Injured, which may have Led to a Determination by the Insurer that the Insurance Policy had been Procured on a Fraudulent Basis"

In *Titan Ins Co v Hyten*, the Supreme Court abrogated the so-called "easily ascertainable rule," which had its roots in the Court of Appeals' decision in *State Farm v Kurylowicz*, 67 Mich App 568, 242 NW2d 530 (1976). *Kurylowicz* and its progeny had held that where a misrepresentation in an insurance application was "easily ascertainable," the insurer was estopped from rescinding the policy. In *Hyten*, the Supreme Court held that an insurer was entitled to rely upon the honesty of its insured, and there was no need to independently verify any of the representations made in the application for insurance. Given this statement, though, Chief Justice Markman (who wrote the opinion in *Titan Ins Co v Hyten*) seems to be saying that, if an insurance company elects not to verify the information in the insurance application, it does so at its own risk vis-à-vis innocent third parties.

Factor #2 – The Specific Relationship between the Innocent Third Party and the Fraudulent Insured

In this regard, Chief Justice Markman suggests that, if the innocent third party "possessed some knowledge of the fraud," equity might weigh in favor of the rescission. For example, a parent tells their 20-year-old son that, due to the increased cost of insuring them under the household policy, they are not telling their insurance agent about the youthful driver's presence in the household, and the youthful driver agrees to this arrangement. In that case, the "innocent third party" may not be "innocent" at all, since he or she is actually complicit in the fraud.

Factor #3 – The Precise Nature of the Innocent Third Party's Conduct in the Injury-Causing Event

In this regard, Justice Markman references the Supreme Court's decision in *Andreae v Wolgin*, 257 Mich 572 (1932), in which the Supreme Court noted, "an estoppel resting wholly on equity cannot be used to shift a loss from one careless person to another when the loss could not have happened without the earlier negligence of Plaintiff, and the later negligence of Defendant at most only contributed to the result." The problem with this factor in the case involving rescission of a no-fault insurance contract is the fact that we are dealing with, after all, the **No-Fault** Act. Perhaps the most fundamental tenant of the No-Fault Act is found in MCL 500.3105(2), which provides that benefits are due without regard to fault! It appears to be rather problematic to suggest that an insurance company might be able to rescind coverage where the accident is solely the fault of the "innocent third party," but not where the "innocent third party" is not at fault.

Factor #4 – Whether the Innocent Third Party Possesses an Alternative Avenue for Recovery Absent Enforcement of the Insurance Policy

During oral argument in *Bazzi*, Justice Bernstein posited the following scenario. Justice Bernstein is a passenger in Justice McCormick's motor vehicle, and he is injured in a motor vehicle accident. Because Justice Bernstein does not have a policy of his own, Justice McCormick's insurer picks up his benefits and pays for three or four years as the insurer of the owner of the motor vehicle occupied by Justice Bernstein under MCL 500.3114(4). Suddenly, Justice McCormick's insurer decides to rescind coverage, based upon a fraudulent misrepresentation in the application for insurance. Justice McCormick's insurer rescinds coverage and suddenly Justice Bernstein is left without no-fault insurance benefits, because he failed to put any other insurer, or the Michigan Assigned Claims Plan, on notice of a potential claim for no-fault benefits within one year, as required by MCL 500.3145(1).

There was apparently some concern in the *Bazzi* case over the timing of Sentinel Insurance Company's decision to rescind coverage. If that indeed was the case, perhaps a better outcome would have been for the Supreme Court to simply hold that an insurer has a right to automatically rescind coverage, even as to an "innocent third party," so long as any rescission action is taken within one

Chief Justice Markman observed that because the insurer bears the burden of establishing that rescission is warranted, in cases where neither party is more or less "innocent" than the other, the insurer will have failed to satisfy its burden of proof and rescission would not be warranted with respect to the innocent third party

year of the accident and the "innocent third party" is advised, in writing, of the alternative sources of recovery, including the name and address of any lower priority insurer or the Michigan Assigned Claims Plan itself. Such a holding would have been far easier for a court to apply, and would certainly have lessened any delays that may come about, with regard to the processing of no-fault claims, given the uncertainties and delays inherent in having a circuit court "balance the equities" and determine whether or not the insurer can rescind even as to the "innocent third parties."

Assuming that a rescission action is undertaken within one year from the date of loss, there should always be a lower priority insurer, or the Michigan Assigned Claims Plan, to step in and pick up the benefits. However, there may be a problem where the "innocent third party" is also a statutory or constructive "owner" of the motor vehicle owned by the defrauding insured. In those cases, the "innocent third party" may be precluded from recovering benefits from the Michigan Assigned Claims Plan pursuant to MCL 500.3113(b) and MCL 500.3173.

Finally, Chief Justice Markman makes reference to "health insurance" as an alternative source of recovery. While health insurance does indeed cover medical expenses, coverage is certainly not as broad as the benefits provided under the No-Fault Act. Simply put, there is no substitute for no-fault insurance benefits.

Factor #5 – Whether Enforcement of the Insurance Policy Would Merely Relieve the Fraudulent Insured of What Would Otherwise be the Insured's Personal Liability to the Innocent Third Party

In other words, rescission may be favored if the no-fault insurer is exposed to a potential tort claim against its insured, arising out of an automobile accident. Imagine the following scenario. The defrauding insured is involved in a single vehicle accident, in which his passenger, an "innocent third party" is seriously injured. The accident is solely the fault of the defrauding insured. Upon receiving notice of the loss, the insurer conducts an investigation and determines that a fraudulent misrepresentation was made in connection with the application for insurance, and the insurer rescinds. Because the "innocent third party" does not have insurance of his own in his household, he turns to the insurer of the owner of the vehicle he was occupying, who would be the defrauding insured! If the insurance company rescinds, then the injured passenger would resort to the Michigan Assigned Claims Plan for payment of his no-fault benefits. If the insurer is not allowed to rescind, then the insurer faces exposure not only on the claim for no-fault insurance benefits, filed by the innocent third party/passenger, but also a potential tort claim against its insured. In this regard, Chief Justice Markman clearly indicates that the insurer should be allowed to rescind coverage so that in the event of a tort claim, it is the defrauding insured who bears responsibility with regard to any tort claim arising out of the accident.

Summation

Certainly, Chief Justice Markman's observations in *Farm Bureau v ACE American Ins Co* provide some guidance to litigants and circuit courts. However, in this writer's opinion, it is still no substitute for a "bright line" rule as to when an insurer can or cannot rescind coverage. As noted above, this author respectfully suggests that either the "Innocent Third Party Rule" be reinstated, so that an insurer is never permitted to rescind coverage in cases involving "innocent third parties" or, in the alternative, a no-fault insurer can rescind coverage automatically, even as to an "innocent third party," so long as (1) the rescission takes place within one year from the date of accident, (2) the "innocent third party" is given notice of possible lower priority insurers or the Michigan Assigned Claims Plan, together with the necessary contact information, and (3) the "innocent third party" is given ample opportunity to place either the lower priority insurer or the Michigan Assigned Claims Plan on notice of a possible claim for no-fault benefits. Despite Chief Justice Markman's laudable intentions to articulate some standards to be applied by the lower courts when considering this issue, the author fears that the lower courts will continue to struggle with "balancing the equities" and will often reach different conclusions on similar fact patterns, depending on the predilections of the reviewing judge.

Court Rules Report

By: Sandra Lake, *Hall Matson PLC*
slake@hallmatson.law

PROPOSED AMENDMENTS

2018-19 – Modifications to the Rules Concerning Civil Discovery

Rule affected: Numerous

Issued: November 28, 2018

Comment Period: March 1, 2019

The proposal would make sweeping changing to the rules concerning discovery. The new rules would require mandatory discovery disclosure (similar to federal court), implement a presumptive limit on interrogatories (20 in most cases, including subparts, but 35 in domestic-relations proceedings), limit a deposition to 7 hours, and require the parties to confer and submit a discovery plan. Initial disclosures would include, for example, a statement of the factual basis of the party's claims or defenses; the legal theories of the claims or defenses, including citation to relevant legal authorities; the names of persons with discoverable information; a copy of tangible evidence in possession of a party; the location of tangible evidence not in the possession of a party; a computation of each category of damages; a copy or opportunity to inspect pertinent portions of insurance policies; and anticipated subject areas of expert testimony. Special disclosures would be required in no-fault cases, such as providing a copy of the first-party claim file and a privilege log for documents not disclosed in a first-party case. In general, these disclosures will need to be made by a plaintiff within 14 days of receipt of an answer or by defendant within 28 days of filing the answer. Further, a party is not excused from making disclosures simply because the party has not fully investigated the case or because an opposing party's disclosures are inadequate

2018-25 – Incorporate Cases Argued on Application into the Supreme Court Rules

Rule affected: 7.312

Issued: February 13, 2019

Comment Period: June 1, 2019

The proposed amendment would incorporate into the Supreme Court rules the procedure to be followed for cases being argued on the application. According to the Staff Comments, these rules have been previously included in orders granting argument on the application. A proposed new subrule (K) would alert parties to the fact that they should argue the merits of the case even for motions being heard on the application.

2017-17 – Modifications to Criminal Procedure Rules Concerning Restitution

Rule affected: Numerous

Issued: November 18, 2018

Comment Period: March 1, 2019

The proposed amendments would more explicitly require restitution to be ordered at the time of sentencing as required by statute, and would establish a procedure for modifying restitution amounts. Disputes as to the proper amount of restitution are resolved by the court under a preponderance of the evidence standard.

ADOPTED AMENDMENTS

2002-37/2018-20 – Uniform Procedure for Determining Indigency or Waiver of Fees

Rule affected: 2.002

Issued: December 3, 2018 (corrections issued January 23, 2019)

Effective: January 1, 2019 (corrections effective immediately)

This amendment, and subsequent corrections, clarifies and updates MCR 2.002 (regarding determination of indigence for purposes of filing fees) by establishing a more streamlined procedure to be used in an e-filing (and paper) environment, creating a threshold level of indigence (125% of the federal poverty level) and implementing a *de novo* review procedure.

Sandra Lake is a 1998 graduate of Thomas M. Cooley Law School. She is Of Counsel at Hall Matson, PLC in East Lansing, specializing in appellate practice, medical malpractice defense, insurance coverage, and general liability defense. She is also the Vice President of the Ingham County Bar Association and previously served as Chair of its Litigation Section. She may be reached atslake@hallmatson.law.

Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*[1]
Anita.comorski@tnmglaw.com

Michigan Defense Trial Counsel has continued to participate as amicus curiae in several important cases pending before the Supreme Court. MDTC's most recent contributions involve issues that have arisen following the Supreme Court's decision in *Covenant Med Center, Inc v State Farm Mutual Auto Ins Co*.[2]

The Supreme Court held in *Covenant* that the no-fault statutory scheme did not allow for healthcare providers to directly sue no-fault insurers for recovery of no-fault benefits. The Supreme Court granted oral argument on the application in the case of *W.A. Foote Memorial Hospital v Michigan Assigned Claims Plan* to determine the retroactive application of *Covenant*.[3] As detailed in a previous Amicus Report, MDTC filed an amicus brief in support of the defense position in *Foote*.

Related to the issues raised in *Foote*, the Supreme Court has now granted oral argument on the application in the case of *Jawad A Shah, MD, PC v State Farm Mutual Auto Ins Co*, directing the parties to brief "whether the anti-assignment clause in the defendant's insurance policy precludes the defendant's insured from assigning his right to recover no-fault personal protection insurance benefits to the plaintiff healthcare providers."[4] The Supreme Court also directed that *Shah* be argued in the same future session as *Foote*.

The MDTC's amicus brief in support of the defense position in *Shah* was authored by John C.W. Hohmeier and David J. Lanctot of Scarfone & Green, PC. Factually, the *Shah* case arose out of an unanswered question from *Covenant*. Specifically, while the *Covenant* Court held that healthcare provides did not have standing to bring a direct claim against insurers for no-fault benefits, the Court stated that its decision was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider."[5]

The *Shah* case was already pending in the trial court at the time *Covenant* was released. Thus, in *Shah*, the plaintiff healthcare provider obtained an assignment from the insured to allow it to continue to pursue payment for healthcare services already provided to the insured. The defendant insurer in *Shah* moved for summary disposition, relying on an anti-assignment clause in its policy with the insured. While the trial court granted the defendant insurer's motion for summary disposition based on the anti-assignment clause, the Court of Appeals reversed in a published decision.[6] The Court of Appeals found the anti-assignment clause to be an unambiguous contract provision, but nevertheless held that the clause was unenforceable as a violation of public policy, relying on pronouncements from the Supreme Court's decision in *Roger Williams Ins Co v Carrington* to the effect that "[i]t is the absolute right of every person—secured in this state by statute—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy."[7] The defendant insurer filed an application with the Supreme Court, which as noted above, has granted oral argument on the application.

As it was undisputed that the anti-assignment clause at issue in *Shah* was unambiguous, MDTC's amicus brief in *Shah* focused primarily on the issue of whether such clauses are against public policy. In arguing that they are not, MDTC submitted the public policy concerns voiced in *Roger Williams* were no longer applicable, given that the responsibility for evaluating and approving insurance policies for reasonableness rests with the Commissioner of Insurance. The anti-assignment clause in *Shah* was approved by the Commissioner.

Moreover, MDTC noted in its brief that the no-fault act itself does not prohibit anti-assignment clauses and contains no provision explicitly allowing assignment. Indeed, the no-fault act itself was, in part, intended to reduce legal costs and the

Anita Comorski is a principal in the Appellate Practice Group at Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. With over fifteen years of appellate experience, Ms. Comorski has handled numerous appellate matters, obtaining favorable results for her clients in both the State and Federal appellate courts.

burden on the court system. Allowing assignment of claims would not serve these purposes. Rather, direct claims by healthcare providers (previously allowed, prior to *Covenant*) and, now, assignment of claims has led to multiple lawsuits and an increasing burden on the court system. The anti-assignment clause actually works in harmony with and serves the intended purposes of the no-fault act. To conclude that an insured could assign benefits under a no-fault policy, regardless of the existence of an unambiguous anti-assignment clause, would essentially nullify the Supreme Court's conclusion in *Covenant* that the no-fault act does not permit direct claims by healthcare providers.

Primary briefing in *Shah* only recently concluded, with several interested organizations filing amicus briefs. Given the timing, this case and the related *Foote* matter may not be scheduled for oral argument until the Supreme Court's next term.

This update is only intended to provide a brief summary of the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC does maintain an amicus brief bank on its website accessible to its members. For a more thorough understanding of the issues addressed in these cases, members are encouraged to visit the brief bank to review the complete briefs filed on behalf of this organization.

Endnotes

1 Anita Comorski is a principal in the Appellate Practice Group at Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. With over fifteen years of appellate experience, Ms. Comorski has handled numerous appellate matters, obtaining favorable results for her clients in both the State and Federal appellate courts

2 500 Mich 191; 895 NW2d 490 (2017).

3 Michigan Supreme Court Docket No. 156622.

4 Michigan Supreme Court Docket No. 157951.

5 500 Mich at 217 n 40.

6 *Jawad A Shah, MD, PC v State Farm Mutual Auto Ins Co*, 324 Mich App 182; 920 NW2d 148 (2018).

7 43 Mich 252, 254; 5 NW2d 303 (1880).

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MDTC
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Officers

Joshua K. Richardson
President
Foster Swift Collins & Smith PC
313 S. Washington Square
Lansing, MI 48933
517-371-8303 • 517-371-8200
jrichardson@foSuiterswift.com

Irene Bruce Hathaway
Vice President
Miller Canfield Paddock & Stone, PLC
150 West Jefferson Suite 2500
Detroit, MI 48226
313- 963-6420 • 313- 496-8453
hathawayi@millercanfield.com

Terence P. Durkin
Treasurer
Kitch Drutchas Wagner Valitutti & Sherbrook
1 Woodward Ave Suite. 2400
Detroit, MI 48226
313-965-6971 • 313-965-7403
terence.durkin@kitch.com

Deborah L. Brouwer
Secretary
Nemeth Law PC
200 Talon Centre Drive Suite 200
Detroit, MI 48207-5199
313-567-5921 • 313-567-5928
dbrouwer@nemethlawpc.com

Richard Paul
Immediate Past President
Dickinson Wright PLLC
2600 W. Big Beaver Road Suite 300
Troy, MI 48084
248-433-7532 • 248-433-7274
rpaul@dickinsonwright.com

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MDTC
P.O. Box 66
Grand Ledge, MI 48837
517-627-3745 • 517-627-3950
info@mdtc.org

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Livonia MI 48152-2660
734-742-1819 • 734-521-2379
dcortez@fbmjlaw.com

Conor Dugan
Warner Norcross & Judd LLP
111 Lyon Street NW Suite 900
Grand Rapids, MI 49503
616-752-2127 • 616-222-2127
conor.dugan@wnj.com

Gary S. Eller
Smith Haughey Rice & Roegge PC
213 S. Ashley Street Suite 400
Ann Arbor, MI 48104
734-213-8000 • 734-332-0971
geller@shrr.com

Kimberlee A Hillock
Willingham & Coté PC
333 Albert Ave Suite 500
East Lansing, MI 48823
517-324-1080 • 517-351-1195
khillcok@willinghamcote.com

John C.W. Hohmeier
Scarfone & Geen, P.C.
30680 Montpelier Drive
Madison Heights, MI 48071
248-291-6184 • 248-291-6487
jhohmeier@scarfone-geen.com

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

Richard J. Joppich
Kitch Drutchas Wagner Valitutti & Sherbrook
2379 Woodlake Drive Suite 400
Okemos, MI 48864
517-381-7182 • 517-381-4427
richard.joppich@kitch.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

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

A. Tony Taweel
Ottenwess, Taweel & Schenk, PLC
535 Griswold Street Suite 850
Detroit, MI 48226
313-965-2121 • 313-965-7680
ttaweel@ottenwesslaw.com

Carson J. Tucker, JD, MSEL
Law Offices of Carson J. Tucker
117 N. First Street Suite 111
Ann Arbor, MI 48104
734-629-5870 • 734-629-5871
cjtucker@lexfori.org

R. Paul Vance
Cline Cline & Griffin PC
503 S. Saginaw Street Suite 1000
Flint, MI 48502
810-232-3141 • 810-232-1079
pvance@ccglawyers.com

MDTC LEADER CONTACT INFORMATION

Regional Chairs

Flint: Megan R. Mulder
Cline, Cline & Griffin, P.C.
503 Saginaw Street, Suite 1000
Flint, MI 48502
810.232.3141 • 810.232.1079
mmulder@ccglawyers.com

Grand Rapids: TBA

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

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

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300 Street Andrews Road Suite 302
Saginaw, MI 48638
989-790-0960
djordan@owdpc.com

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Zausmer, August & Caldwell, P.C.
32255 Northwestern Highway, Suite 225
Farmington Hills, MI 48334
248-851-4111 • 248-851-0100
NScherbarth@zacfirm.com

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

Commercial Litigation
David Hansma
Seyburn Kahn
2000 Town Center, Suite 1500
Southfield, MI 48075
248-353-76202 • 248-353-3727
dhansman@seyburn.com

Commercial Litigation
Samantha Pattwell
Dickinson Wright PLLC
215 S. Washington Square Suite 200
Lansing, MI 48933
517-487-4776 • 517-487-4700
spattwell@dickinsonwright.com

General Liability
Shaina Reed
Fraser Trebilcock Davis & Dunlap PC
124 W. Allegan St Suite 1000
Lansing MI 48933
517-482-5800 • 517-482-0887
sreed@fraserlawfirm.com

General Liability
Anthony Pignotti
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road Suite 300
Livonia, MI 48152
734-742-1800 • 734-521-2379
apignotti@fbmjlaw.com

In House Counsel
Lee Khachaturian
The Hartford Financial Services Group, Inc
5445 Corporate Drive Suite 360
Troy, MI 48098
248-822-6461 • 248-822-6470
diana.khachaturian@thehartford.com

Insurance Law
Stephen C. Madej
Scarfone & Geen PC
30680 Montpelier Dr
Madison Heights, MI 48071-1802
248-291-6184 • 248-291-6487
smadej@scarfone-geen.com

Insurance Law
Olivia Paglia
Plunkett Cooney
38505 Woodward Ave Suite 2000
Bloomfield Hills, MI 48304
248-901-4058 • 248-901-4040
opaglia@plunkettcooney.com

Labor and Employment
Nicholas Huguelet
Ogletree Deakins Nash Smoak & Stewart PLLC
34977 Woodward Ave Suite 300
Birmingham, MI 48009
248.723.6164 • 248.593.2603
nicholas.huguelet@ogletree.com

Labor and Employment
Clifford Hammond
Foster Swift Collins & Smith PC
28411 Northwestern Hwy Suite 500
Southfield, MI 48034
248-538-6324 • 248-200-0252
chammond@foSuite rswift.com

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

Municipal & Government Liability
Robyn 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
Veronica R. Ibrahim
Julie A. Taylor & Associates
20750 Civic Center Drive Suite 400
Southfield, MI 48076-4132
248-945-3838 • 855-847-1378
veronica.ibrahim.yot2@statefarm.com

Professional Liability & Health Care
Kevin 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
Daniel John Ferris
Kerr, Russell and Weber, PLC
500 Woodward Ave Suite 2500
Detroit, MI 48226
313-961-0200 • 313-961-0388
dferris@kerr-russell.com

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

Trial Practice
Hannah Treppa
Butzel Long PC
150 W Jefferson Ave Suite100
Detroit, MI 48226-4452
313-983-6966 • 313-225-7080
treppa@butzel.com

Young Lawyers
Jeremiah Fanslau
Magdich & Associates
17177 N. Laurel Park Drive Suite 401
Livonia, MI 48152
248-344-0013 • 248-344-0133
jfanslau@magdichlaw.com

Young Lawyers
Amber Girbach
Hewson & Van Hellemont PC
25900 Greenfield Road Suite 650
Oak Park, MI 48237
248-968-5200 • 248-968-5270
agirbach@vanhewpc.com

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

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Brandon Schumacher, *Foster Swift Collins and Smith PC*

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

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