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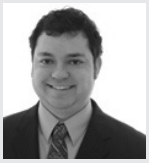

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President's Corner

By: Irene Bruce Hathaway, *Miller Canfield Paddock & Stone*
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Irene Bruce Hathaway has been an attorney with Miller Canfield since 1990 and has served as the Resident Director of the firm's largest office, in Detroit. She has a BA from the University of Michigan and a JD and from what is now known as Michigan State University School of Law, where she served as a law review editor. She concentrates her practice in catastrophic tort, commercial litigation and insurance law, with special emphasis on health care related disputes, automotive supplier disputes, fraud and on franchise litigation.

Irene is a Fellow of the State Bar Foundation, and was named a Charter Member and Senior Fellow, of the Litigation Counsel of America. She has been named yearly to the Best Lawyers in America, and in 2108 was named Lawyer of the Year Detroit, Mass Tort Litigation & Class Actions – Defendants. She has been recognized as a Michigan Super Lawyer, yearly and has been named by DBusiness to its list of Top Lawyers & Top Woman Attorneys, 2010-present. She has an av Martindale Hubble rating.

Irene is admitted to practice in Michigan and Ohio and to the United States Supreme Court as well as to federal courts throughout the country. She has been active with the MDTC since 1980 and has served on Board of Directors since 2016. She has also served on Board of Directors, Michigan State University College of Law Alumni Association, and the Transportation Club of Detroit Scholarship Committee. She is a member of the Oakland County Bar Association where she was two time chair of the Medical Legal Committee and served on the Circuit Court Committee Task Force on Rules Change and as a court Discovery Master. Irene has also served on many State Bar committees including as chair of the U.S. Courts Committee. She is a member of the Michigan Supreme Court Committee on Case Evaluation Rule Changes and has served as case evaluator in Wayne and Oakland Counties, and on the Detroit Bar Association Judicial Candidate Evaluation Panel. She was the co-Founder of the Women's Franchise Network of Southeast Michigan.

Every year the MDTC selects a "Respected Advocate" from attorneys in the plaintiff's bar. Similarly, the Michigan Association for Justice (MAJ) selects a "Respected Advocate" from the defense bar. The Respected Advocate Award is one of the most prestigious and meaningful awards a practicing Michigan civil litigator can receive. The award is given for excellence in representing clients. But another key consideration for the awards is professionalism and civility. It is the professionalism and civility component that I write about today.

I have practiced my entire career in Michigan. I am happy to report that the practice of law here has changed -- for the better-- over the 40 years of my practice. When I was a young lawyer, we were commonly referred to as "attack puppies" or "ankle biters". Rightly or not, we viewed our most important goal as proving to our superiors, and clients, that we were "tough" and "aggressive." As a young woman, especially, I, and many of my contemporaries, felt a need to prove that we would not be pushed around by older, more experienced attorneys, or by any male attorney. Awards for being civil and professional were not common.

Over the years, I came to understand that training young lawyers to be pit bulls was simply wrong. I learned that one can be a highly effective and successful advocate without aggression. In fact, I learned that aggression is often antithetical to excellent client representation. I learned that unnecessary disputes often simply led to unneeded motions, angry judges and high client bills. I also learned that the mantra "what goes around comes around" was true.

The MDTC has been instrumental in setting expectations and "spreading the word" that civility and professionalism should be a priority for all Michigan defense trial counsel. The Respected Advocate Award is one of the ways the MDTC has helped improve the practice. I believe that the days of being aggressive to prove how tough you are, thankfully, mostly behind us. While there are exceptions on both sides of the civil bar, they are fewer and fewer every day. I don't encounter any young attorneys seeking praise for being difficult to deal with. Rather, the attorneys I see now represent their clients zealously. Their work product and preparation is excellent. Indeed, overall, the **quality** of advocacy I now see from attorneys, young and old, on both sides of the bar is as high, or higher, than it has ever been. And the standards of civility and professionalism are as great as I have ever seen.

I am happy to report that the practice of law here has changed -- for the better-- over the 40 years of my practice.

That brings me back to the Respected Advocate awards, which were given out on November 8, 2019. The MAJ- chosen Respected Advocate is Cynthia Merry. The MDTC –chosen Respected Advocate is Daniel Swanson. I have been fortunate to know both Cindy and Dan almost since the day I started practice. They are universally recognized as premier attorneys who achieve excellent results for their clients, while being civil and professional at all times. They are each the kind of litigators that we should emulate. Congratulations to Cindy and Dan for these well-deserved awards! And congratulations to Michigan trial practitioners for recognizing the importance of civility and professionalism.

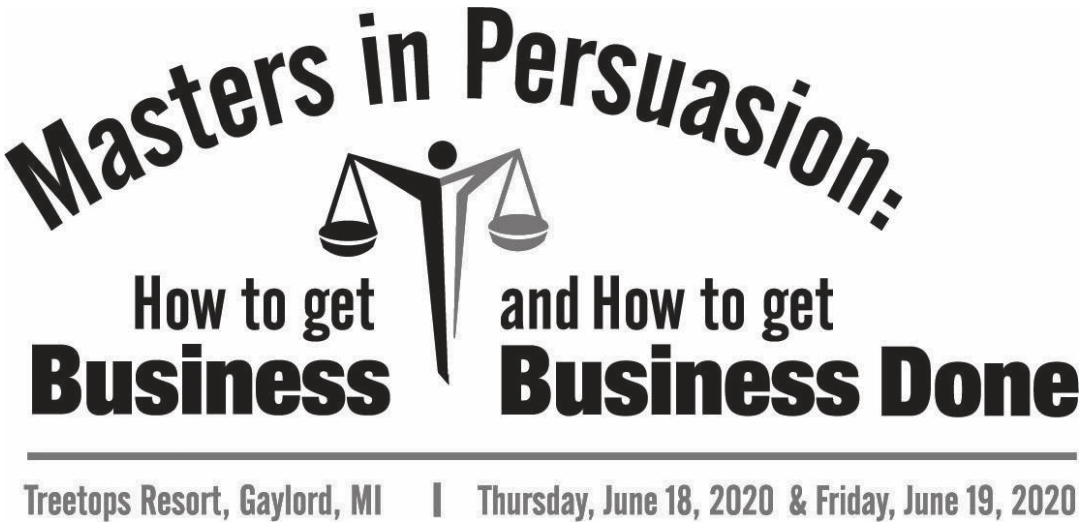
MDTC Schedule of Events

2020

February 7	Future Planning – Hotel Indigo – Traverse City
February 7	Meet & Greet Reception/ Traverse City – Mammoth Distery
February 8	Board Meeting – Hotel Indigo – Traverse City
March 19	Legal Excellence Awards – Gem - Detroit
April 30	Board Meeting – Lansing – Foster Swift
June 18-19	Annual Meeting & Conference – Treetops Resort, Gaylord
September 11	Golf Outing - Mystic Creek, Milford
October 8	Meet the Judges- Sheraton Detroit Novi
October 21-24	DRI Annual Meeting – Washington DC
November 5	MDTC Board Meeting – Sheraton Detroit Novi
November 5	Past Presidents Dinner – Sheraton Detroit Novi
November 6	Winter Conference – Sheraton Detroit Novi

2021

June 18-19	Annual Meeting & Conference – Indigo, Traverse City



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PFAS Litigation: An Overview of Cases, Claims, Defenses, Verdicts and Settlements

By: Ben Fruchey & Nick Tatro, *Foley, Baron, Metzger & Juip, PLC*

Executive Summary

An April 3, 2019 article in the Texas Lawyer asks whether Per- and polyfluoroalkyl substances (PFAS) is the new asbestos.[1] And it has been reported that there currently are more than one hundred PFAS-related lawsuits across the US, with total potential damages in the billions.[2] In the short term, Michigan may see a disproportionate share of PFAS-related litigation or PFAS environmental cleanups because the Michigan Department of Environment, Great Lakes & Energy ("EGLE," formerly DEQ) has been proactive on PFAS site identification, investigation, and cleanup. The EGLE has made it clear that sites contaminated with PFAS are a high priority.[3] Moreover, the Detroit Free Press opined that PFAS contamination is Michigan's biggest environmental crisis in 40 years.[4] So while one may question whether PFAS will be the new asbestos, there is no question that PFAS contaminated sites and PFAS-related litigation are currently a big deal in Michigan.

PFAS litigation can broadly be grouped into two types of cases based on the identity of the plaintiff: (1) cases by private individual plaintiffs who sue employers and various PFAS manufacturers for personal injury, medical monitoring, or other relief; and (2) cases brought by government or governmental agencies primarily against PFAS manufacturers for groundwater contamination. Causes of action include the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and state environmental regulation violations, products-liability and strict-liability claims, various torts including negligence, nuisance, trespass, and claims for medical monitoring. Two notable and recent high-profile settlements include a 2018 settlement by 3M with the State of Minnesota for $850 million relating to groundwater pollution and a 2017 settlement by DuPont and Chemours with approximately 3,500 residents in Ohio and West Virginia for $671 million relating to alleged pollution from a manufacturing plant.

Introduction

PFAS compounds are a relatively new concern of high importance due to a number of factors including: (1) the widespread use of fluorinated chemicals since the 1940s; (2) the low health advisory levels set the by EPA of 70 parts per trillion in November 2016 (roughly equal to 3.5 drops of water in an Olympic sized swimming pool); (3) their persistence in the environment due to the inability of natural processes to break these compounds down; and (4) the fact that they bioaccumulate and are present in most peoples' blood serum at some level.[5] According to a study released on May 5, 2019, by a Washington, D.C. based nonprofit, Environmental Working Group (EWG), and Northeastern University's Social Science Environmental Health Research Institute, approximately 19 million people in the United States are exposed to PFAS in contaminated drinking water.[6]

Ben Fruchey's practice focuses on environmental, toxic tort, mass tort and products liability litigation. He assists clients with permitting and resolving alleged regulatory violations. His litigation work includes defending individual and class action lawsuits relating to alleged nuisance odors, particulate matter and groundwater and soil contamination. He has assisted clients in their efforts to obtain environmental permits, resolve alleged permit violations, and contest denied permits under Michigan's Natural Resources and Environmental Protection Act (NREPA). Ben is a Council Member of the State Bar of Michigan's Environmental Law Section. He has been admitted *pro hac vice* in CA, ND, NY, TN, WY and VA. During law school he interned for Justice Elizabeth Weaver of the Michigan Supreme Court. He has an M.S. in geology from the University of Wyoming and worked as an oil and gas geologist and environmental consultant before attending law school.

Nick Tatro's practice focuses on environmental, toxic tort, mass tort and products liability litigation. His litigation work includes defending individual and class action lawsuits relating to alleged nuisance odors, particulate matter and groundwater and soil contamination. Nick also has extensive experience in litigation and transactional issues related to real property. He has a B.S. in History from DePaul University and received his law degree from Michigan State University College of Law.

Because of the intense focus on PFAS in Michigan by EGLE, the State is known to host a relatively high abundance of PFAS-contaminated sites compared with the rest of the nation. In a recent MLIVE article titled "Michigan has more PFAS sites than other states. There's a reason," Director of EGLE, Liesl Clark, is quoted as stating, "We've got a lot of locations that have been discovered in the state because we've been looking."[7] The map below is a compilation of PFAS sites in the US that was prepared by EWG,[8] showing the relative high abundance of PFAS sites in Michigan compared with the rest of the lower 48 states:

PFAS litigation, which already is underway, can take on a variety of forms, depending on who is exposed, the claimed route of exposure, the dose and duration of exposure, the location and timing of exposure, the specific compounds at issue and the like. A basic understanding of PFAS manufacturing timelines and their uses is helpful to understand the current and future shape of PFAS-related litigation.

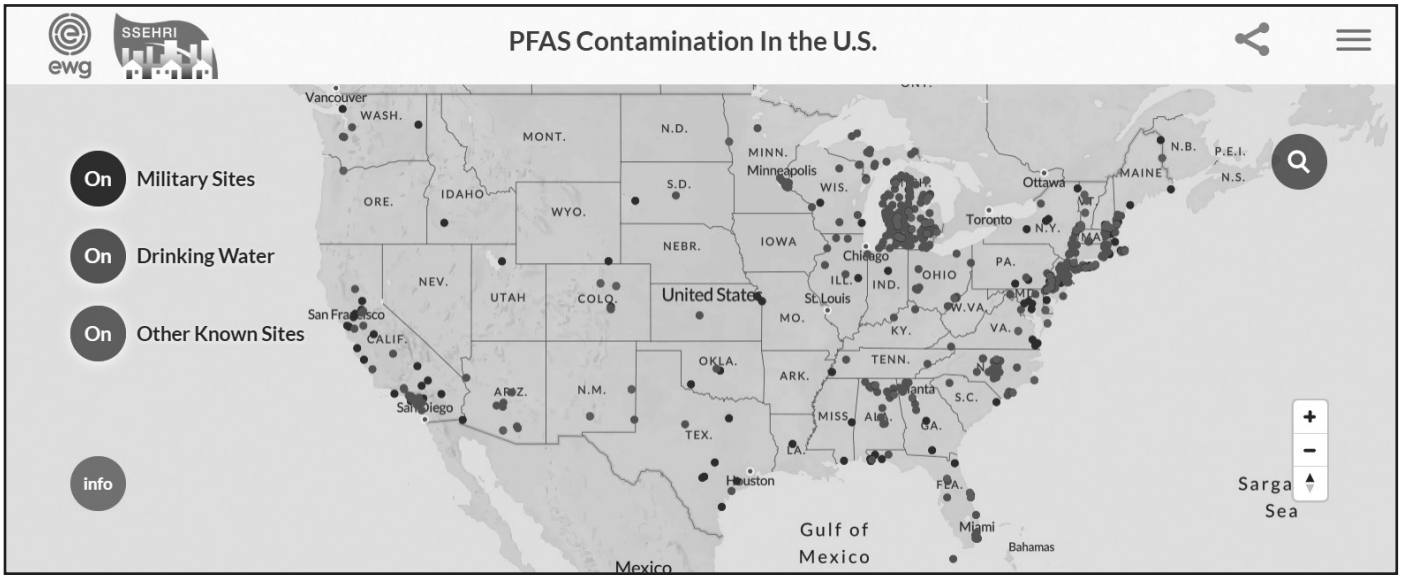
PFAS compounds were invented approximately 90 years ago and, since the 1940s, they have been used to create non-stick coatings, stain and water-resistant products, firefighting foam, and waterproof fabrics, among other products.[9] The EPA reports that PFAS can be found in food packaged in PFAS-containing materials and in commercial household products, including stain- and water-repellent fabrics, nonstick products (e.g., Teflon), polishes, waxes, paints, cleaning products, and fire-fighting foams, which are a source of groundwater contamination at airports and military bases where firefighting training occurs. The compounds also can be found in and at certain workplace environments that use PFAS as part of its operations, such as chrome plating operations. It also is found in some drinking water supplies and in many living organisms (PFAS compounds bioaccumulate in the food chain).

In 2009, the EPA published provisional health advisories for PFOA (Perfluorooctanoic acid) and PFOS (Perfluorooctanesulfonic acid) based on the evidence available at that time. The science has evolved since 2009 and as a result, the EPA replaced the 2009 provisional advisories in 2016 with lifetime health advisories. The lifetime health advisory set by the EPA in 2016 at 70 parts per trillion was developed to provide Americans, including the most sensitive populations, with a margin of protection from a lifetime of exposure to PFOA and PFOS from drinking water.[10] According to the CDC, most people in the United States have one or more specific PFAS compound(s) in their blood, especially PFOS and PFOA.[11] Although more research is needed, the Agency for Toxic Substances and Disease Registry states that some studies in people have been reported to show that certain PFAS may affect growth, learning, and behavior of infants and older children; lower a woman's chance of getting pregnant; interfere with the body's natural hormones; increase cholesterol levels; affect the immune system; and increase the risk of cancer.[12]

On March 26, 2019, Governor Whitmer ordered the EGLE to begin the regulatory process for establishing drinking water standards for PFAS in Michigan.[13] The draft rules are expected to be developed by October 1, 2019, and adopted in the spring of 2020.[14] A science advisory workgroup has been empaneled to review existing and proposed health-based drinking water standards and the goal is to establish Maximum Contaminant Levels, or MCLs, for PFAS that public water purveyors will be required to follow under the Safe Drinking Water Act.[15]

A review of published Court of Appeals opinions reveals that the following are counts asserted against defendants in PFAS litigated matters:

1) CERCLA and state environmental regulation violations;
2) Products liability including failure to warn and design defect,
3) Strict liability (unreasonably dangerous activity);
4) Torts including negligence, nuisance,



trespass, battery, spousal derivative claims / loss of consortium, fraud / misrepresentation, negligent / intentional / reckless infliction of emotional distress, unjust enrichment, fraudulent concealment and conversion; and

5) Claims for medical monitoring.

Private Plaintiff and Municipal Litigation

PFAS litigation can be broadly grouped into two types of cases based on the identity of the plaintiff.

The first involves claims by private individual plaintiffs who sue employers, PFAS manufacturers and downstream manufacturers who used PFAS as part of their product, such as manufacturers of firefighting foam, teflon or, more locally, shoes. Some of these cases are being brought as purported class action lawsuits or are combined in Multi-District Litigation (MDL), while others involve one or more plaintiffs in their individual capacity. Claims in these cases range from allegations of personal injury resulting from exposure to claims involving no present injury but requests for medical monitoring. An example of private plaintiff litigation is outlined in the section discussing *Leach, et al v Du Pont de Nemours* detailed below.

The second category are cases involving government or governmental agencies primarily against PFAS manufacturers and secondary manufactures for injuries to natural resources or one or more water supplies. An example is the *Minnesota v 3M* case discussed above. Plaintiffs in these cases can include states, cities and environmental quality or natural resource authorities. A more detailed overview of each of these types of cases, using recent litigated matters as a guide, is presented below.

Type I - Private Plaintiff Litigation: *Leach* Litigation and Post *Leach* Litigation (*Leach* Class Plaintiffs)

Leach et al v Dupont

In 2001, a class action lawsuit against DuPont brought on behalf of persons in the Parkersburg regional area alleged that DuPont had contaminated the drinking water supply near to its Washington Works plant. DuPont had been using PFOA in its manufacturing process for products such as Teflon. The plaintiffs asserted claims for trespass, battery, nuisance, negligence, fraud, and violation of the West Virginia Consumer Protection Act. The plaintiffs sought relief in the form of abatement, compensatory damages, punitive damages, and medical monitoring.

Class certification was granted and included all people within six named water districts, or users of certain specified private water wells, whose drinking water was contaminated with ammonium perfluoroctoanoate (aka "C-8"), and its acidic anion, PFOA, attributable to releases from DuPont's Washington Works plant. This was estimated to include nearly 80,000 people.[16] To qualify as a member of the class, a person must have been drinking contaminated water[17] for at least one year before December 4, 2004, from one of six named water districts or specified private drinking water wells contaminated with C-8. The water districts alleged to be affected were: (1) Little Hocking, Ohio; (2) Lubeck Public Service District, West Virginia; (3) City of Belpre, Ohio; (4) Tuppers Plains, Ohio; (5) Mason County Public Service District, West Virginia; and (6) Village of Pomeroy, Ohio. In November 2004, the parties reached a settlement which preserved the individual plaintiffs' personal-injury claims for a future date to allow for both blood testing of said plaintiffs and for the commission of a science advisory panel to study the effects of C-8 on the human body and to make recommendations of "probable links" of C-8 exposure and certain diseases. Additionally, as part of the settlement, DuPont agreed to design and implement water treatment technology to be used to treat the affected water districts and reduce the presence of C-8 in the local water supply.

The science advisory panel commissioned by the *Leach* class settlement was made up of three independent and credentialed epidemiologists who had not acted as experts for either party or consulted with either party prior to the settlement. In 2011, the science advisory panel, by then known as the "C8 Science Panel," began to issue its "probable link" reports.[18] Pursuant to these reports, the following human conditions were deemed to have a probable link to C-8 exposure: testicular cancer**,** thyroid disease**,** kidney cancer**,** ulcerative colitis, pregnancy related hypertension, and high cholesterol. It was not long after these findings were released that individual lawsuits were pursued by people whose claims were held in abatement by the settlement agreement until their blood was tested and the C-8 science panel released its findings.

In October 2015, a jury verdict in the first of 3,554 individual C-8 cases to be tried was reached. In that lawsuit, plaintiff Bartlett sued DuPont claiming to have kidney cancer as a result of ingesting contaminated water. DuPont had argued that plaintiff Bartlett's cancer was due to her obesity and, alternatively, that they were unaware of any danger to the public posed by C-8 at the time of contamination; however, the jury awarded the plaintiff in *Bartlett v E.I. DuPont De Nemours Co.*, 2:13-cv-170 (Southern District of Ohio) a total of $1.6 million dollars in compensation for kidney cancer that the jury deemed was related to her exposure to C-8.[19] The jury, however, did not award punitive damages. Shortly thereafter, punitive damages were awarded in the matters brought by individual C-8 plaintiffs Kenneth Vigneron and David Freeman.[20] Following these verdicts, DuPont, (and its spinoff Chemours, Inc.) agreed to pay $670 million to settle the remaining C-8 class claims (3,554 claims were filed).

The success of the C-8 litigants also has spurred similar litigation, with similar success, in Hoosick Falls, New York, surrounding the use of PFAS chemicals by local manufacturers St. Gobain Performance Plastics, Honeywell and others. [21] In addition to ground-water contamination, the Hoosick Falls cases also allege direct inhalation of PFAS compounds by residents nearby the alleged offending manufacturing plants.[22]

Hardwick v 3M et al, 2:18-cv-1185 (Southern District of Ohio) was filed on October 4, 2018, and is a class action suit brought on behalf of everyone in the United States who has PFAS in their blood. In that case, the plaintiffs are seeking further scientific study by an independent panel of scientists (like the C-8 Panel), as well as damages. [23] The complaint alleges that fluorinated compounds beyond PFOA and PFOS caused injury or risk of injury, including PFHxS, PFNA, PFBS, PFHxA, PFHpA, PFUnA, PFDoA, and GenX.[24] A motion to dismiss based in part on standing and failure to state a claim is currently pending in the matter.

[T]hat a medical-monitoring claim based on fear of future injury, without any evidence of a current personal injury, fails to state a claim upon which relief can be granted.

Zimmerman v 3M, Wolverine Worldwide and Waste Management

Michigan has a PFAS class action currently pending in the United States District Court for the Western District of Michigan. *Zimmerman v 3M et al.* 1:17-cv-01062 was filed in December 2017, alleging twelve separate tort and equitable claims. In *Zimmerman*, the plaintiffs are alleging that Wolverine Worldwide had been using a product containing PFAS to waterproof its shoes and disposed of waste containing PFAS at 75 sites in Kent County, Michigan. The defendants responded to the complaint with a motion to dismiss alleging lack of jurisdiction under the Class Action Fairness Act "local controversy" exception.[25] The defendants' motion was unsuccessful. The complaint remains unanswered, as the matter was temporarily stayed due to motions brought by a defendant in the lawsuit, and others, pursuant to 28 USC 1407, requesting to combine 84 matters spread out over ten states into a multi-district litigation. In its opinion issued on December 7, 2018, the Judicial Panel on Multi-District Litigation declined to include the *Zimmerman* matter, among others, in the resulting multi-district litigation ("MDL") now pending before the District of South Carolina as further explained below.[26]

Multi-District Litigation - AFFF (Aqueous Film-Forming Foam) Products Liability Litigation

While the MDL panel declined to include *Zimmerman* and other matters not involving AFFF, the MDL panel ruled that 75 PFAS cases across seven states be consolidated for discovery purposes and were assigned the District of South Carolina. [27] The cases all center around the use of PFAS chemicals in the manufacturing of firefighting foams, and their discharge into water supplies, mostly involving airports or air force training facilities. The plaintiffs allege PFAS compounds, contained in the foam discharged while fighting fires or in training exercises, seeped into the local water supply either through the soil or through direct exposure to groundwater. The plaintiffs include homeowners and their families whose drinking water is alleged to be contaminated.

One of the larger matters now consolidated into this MDL is *Bell v 3M et al.* 1:16-cv-02352 in the District of Colorado. The *Bell* class action lawsuit asserted negligence, defective products – failure to warn, defective product – design defect, nuisance and unjust enrichment. The plaintiffs are seeking damages for medical monitoring and personal injuries to class members. The defendants have asserted over seventy affirmative defenses, including non-liability for alleged contamination below state action levels, lack of standing due to the plaintiffs' lack of ownership interest in the affected water supplies, lack of scientific proof that the medical injuries alleged in the complaint were caused by PFAS, and lack of proof that the plaintiffs' property was physically damaged by PFAS.

Split of Authority Regarding Medical-Monitoring Claims

In the *Bell* matter, the defendants brought a motion for summary disposition that, *inter alia*, alleged that Colorado does not recognize claims for medical monitoring.[28] In ruling on the motion, US District Judge R. Brooke Jackson identified a split in jurisdictions over whether medical monitoring as a cause of action or a form of relief is allowed. The judge noted that cases saying no to medical-monitoring claims came from jurisdictions such as the Western District of Texas, Mississippi, North Dakota, Oregon, Nebraska, North Carolina, the Northern District of Georgia, Michigan, Kentucky, Alabama, the Northern District of Ohio, and Connecticut. Judge Jackson listed cases approving existence of medical-monitoring claims in Arizona, California, Florida, Maryland, Massachusetts, New Jersey, Pennsylvania, Utah, West Virginia, Washington DC, Indiana, Illinois, the Northern District of Ohio, and Colorado.[29]

The Michigan case that Judge Jackson referred to is *Henry v Dow Chemical* in which the Court held that a medical-monitoring claim based on fear of future injury, without any evidence of a current personal injury, fails to state a claim upon which relief can be granted.[30]

Type II - Federal, State and Municipal Litigation: *Minnesota v 3M*

In January 2011, the State of Minnesota filed a complaint against 3M Corporation alleging PFAS contamination of several sites throughout the state.[31] Minnesota alleged that 3M disposed of wastewater containing PFAS directly into soil and groundwater, which seeped into local water supplies contaminating over 100 square miles of groundwater.[32] Minnesota further alleged 3M released wastewater into streams with direct connections to the Mississippi River.[33] Minnesota alleged damages pursuant to its state equivalent of CERCLA (known as "MERLA"), under its Water Pollution Control Act, trespass, nuisance and negligence. Minnesota sought recovery for damages to the state's natural resources and destruction of its drinking water supply.[34] On February 20, 2018, the parties entered into a settlement agreement that called for 3M to pay $850

million.[35] The money from the settlement will be used, in part, to treat the affected waterways and improve the quality of the affected drinking water.[36] Other similar actions are now pending in the Northern District of Alabama,[37] and the District of Minnesota.[38]

Conclusion

As outlined at the beginning, while it remains to be seen whether PFAS will become the new asbestos, the prevalence of pending litigation and the sudden interest in PFAS by state and federal regulators almost assures continued clean-ups, regulatory enforcement actions and litigation for years to come.

Endnotes

1 https://www.law.com/texaslawyer/2019/04/03/is-pfas-is-the-new-asbestos/?slreturn=20190430120744
2 https://www.circleofblue.org/2018/world/as-pfas-lawsuits-proliferate-legal-tactics-emerge/
3 https://www.michigan.gov/egle/0,9429,7-135--490376--,00.html
4 https://www.freep.com/in-depth/news/local/michigan/2019/04/25/pfas-contamination-michigan-crisis/3365301002/
5 The CDC reports that "Most people in the United States have one or more specific PFAS in their blood, especially PFOS and PFOA." https://www.atsdr.cdc.gov/pfas/pfas-blood-testing.html
6 https://www.ewg.org/release/mapping-pfas-contamination-crisis-new-data-show-610-sites-43-states
7 https://www.mlive.com/news/2019/08/michigan-has-more-pfas-sites-than-other-states-theres-a-reason.html
8 Interactive Map available at https://www.ewg.org/interactive-maps/2019_pfas_contamination/map/.
9 https://www.epa.gov/pfas/basic-information-pfas
10 https://www.epa.gov/sites/production/files/201605/documents/drinkingwaterhealthadvisories_pfoa_pfos_5_19_16.final_.1.pdf
11 https://www.atsdr.cdc.gov/pfas/pfas-blood-testing.html
12 https://www.atsdr.cdc.gov/pfas/docs/Talking_to_Doctor.pdf
13 https://www.mlive.com/news/2019/03/michigan-will-draft-pfas-standards-for-public-drinking-water.html
14 https://www.michigan.gov/egle/0,9429,7-135-3308_3323-494996--,00.html
15 https://www.michigan.gov/egle/0,9429,7-135-3308_3323-494996--,00.html
16 *See* Leach Class Action Settlement Agreement, at § 2.1.4, which can be accessed at https://www.hpcbd.com/dupont/Settlement-Agreement.pdf.
17 Which according to the Class Action Settlement Agreement in the case, meant "containing a quantifiable (greater than or equal to .05ppb) amount of C-8.
18 http://www.c8sciencepanel.org/prob_link.html
19 https://www.alternet.org/2016/01/dupont-duplicity-chemical-giant-hid-cancer-causing-properties-teflon/
20 https://www.delawareonline.com/story/money/2016/12/21/jury-orders-dupont-pay-2m-c8-case/95710838/
21 *See e.g.*, *Andrick v St Gobain Performance Plastics, et al*, 1:17-CV-1058 (NDNY).
22 *Id.*
23 https://www.documentcloud.org/documents/4956490-Hardwick-Complaint.html
24 https://www.martindale.com/legal-news/article_goldberg-segalla-llp_2511670.htm
25 https://www.courtlistener.com/docket/6379848/zimmerman-v-the-3m-company/
26 *In re Aqueous Film-Forming Foams Prods Liab Litig*, 357 F Supp 3d 1391, 1396 (2018).
27 *Id.*
28 *Bell v 3M Co*, 344 F Supp 3d 1207 (D Colo, 2018).
29 *Id.* at 1223.
30 *Henry v Dow Chem Co*, 484 Mich 483, 498-504; 772 NW2d 301 (2009).
31 *See generally* Complaint filed in *Minnesota v 3M Company*, 27-CV-10-28862, accessed at http://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CV-10-28862/Complaint-011811.pdf.
32 *Id.*
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35 https://www.pca.state.mn.us/sites/default/files/c-pfc2-11f.pdf.
36 *Id.*
37 *West morgan-East Lawrence Water and Sewer Authority, et al v 3M Co, et al*, 5:15-01750.
38 *City of Lake Elmo v 3M Co*, 0:16-02557.

An Interview with the New Leader of Michigan's Auto Fraud Unit – Keisha Glenn

By: John Hohmeier, *Scarfone & Geen, P.C.*

Executive Summary

Say it loud, say it clear: this is a new column for the Michigan Defense Quarterly and the Quarterly intends on making it a regular part of every edition. The views conveyed in the column do not reflect the beliefs of the Michigan Defense Trial Counsel (MDTC); rather, they reflect the view of the author entirely. As a member of the MDTC Board of Directors, I am honored to pen the first editorial. That being said, anyone who reads the Quarterly, or knows me, also knows that I defend insurance companies and am defense-oriented. With that in mind, I, as well as the MDTC, want to make it clear that we encourage anyone and everyone to submit an editorial for publication, regardless of what side of the 'v' you are on. Potential authors should be aware that the MDTC reserves the rights to edit any submitted editorial for content, and holds exclusive veto power to either publish or not publish any submission. That being said: the MDTC has not vetoed me yet, so I'll give it a shot.

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.

THE MICHIGAN DEFENSE QUARTERLY'S OP-ED(ISH) COLUMN

So, many months ago I mentioned the newly formed auto fraud unit put together by our new Attorney General, Dana Nessel. Given the current plight of the no-fault system and (in this author's mind) the unchecked past abuse of fraud and unlawful conduct, I will admit that I was skeptical. When Ms. Nessel appointed Keisha Glenn as the new leader of the unit, however, my skepticism about the lack of impact the unit may have on cracking down on fraud became secondary.

As the author of this article, I must disclose that I worked with Ms. Glenn for many years – sharing ideas on how to detect, confront, and defend against fraudulent no-fault claims. For years, Ms. Glenn and I achieved many successes and obtained unheard-of dismissals of fraudulent and unlawful claims by way of summary disposition motions, trials, and appeals if necessary. I thought that a natural corollary of that would be to conduct an interview of Keisha Glenn.

Keisha, give the people a bit of history about yourself in case they do not know (or want to act like they don't know).

A major priority for Attorney General Nessel is to address the massive fraud that plagues the no-fault insurance system. She has committed her time and the office's resources in creating this unit. I was very honored when then Attorney-General elect Dana Nessel chose me to join her administration in her newly created Auto Insurance Fraud Unit.

I am a graduate of Spring Arbor University and University of Detroit Mercy Law School. I am a mother of two adult sons and proud nana of a five-year-old grandson. My professional background includes over 9 years of criminal prosecution under Kym Worthy. I have handled felonies ranging from armed robbery to sexual assault, including murder. I also have over six years of first- and third-party insurance defense experience. My practice heavily involved special investigative unit matters, which included detecting and defending against fraudulent claims.

So, Keisha, tell us what your role is as head of the auto-fraud unit?

The Attorney General has entrusted me with the responsibility of building the unit from the ground up. I have sought input from different aspects of the auto insurance industry, including both the defense and plaintiff bar. I am establishing networks with plaintiff and defense organizations, as well as local law enforcement agencies and professional SIU organizations.

Part of the process will be educating these entities about the existence of the unit because historically, these types of crimes and wrongful acts were never prosecuted. Our Attorney General has made this a priority within her administration and has provided the resources for this unit to function. Our office is forming a task force with other government agencies to provide avenues for information and resource sharing and coordinated investigations.

What are some of your initial goals as you become familiar with the position?

The Attorney General and I have agreed that the initial goals for the unit will be to create awareness of the unit, perform community outreach, prosecute fraud where it is occurring, and generate measurable results in doing so.

In your mind, what is the biggest problem facing the auto-insurance industry?

The Michigan no-fault insurance industry has been targeted by outside entities who look to abuse the comprehensive benefits Michigan citizens enjoy under the no-fault system. There is a clear pattern of economically disadvantaged individuals being targeted by unscrupulous providers who then provide unnecessary and/or excessive treatment that risks the safety and well-being of the individuals. Some of these individuals are led to believe their primary doctors cannot treat injuries from auto accidents or they must go to an "accident specialist." Solicitation is a problem, and there are clearly deceptive practices by people and entities who reach out to auto-accident victims pretending to be representatives of insurance companies; these people then steer treatment to the unscrupulous providers.

Where do you see yourself focusing most of your time?

The no-fault unit's resources will be focused on investigating complaints, and on holding those accountable who would take advantage of the no-fault system for personal gain.

People want to know (mostly the plaintiff bar): are you going to be fair to both sides, i.e. are you going to hold insurance companies accountable as well?

The role of an assistant attorney general is to seek justice. To that end, complaints involving no-fault insurance fraud will be thoroughly investigated. Prosecutions will be commenced against anyone, individuals or companies, who use the no-fault system to commit fraud.

What do you think about the fact that, technically, nobody is required to report any fraudulent insurance acts to the Attorney General's office?

I do believe that a compulsory reporting statute would be helpful, but there are other avenues of obtaining reports of fraud. Michigan residents are overwhelmingly honest, and I do believe that complaints of fraud will be reported by citizens as well as non-law-enforcement investigation agencies such as the National Insurance Crime Bureau.

Do you think it is fair that nobody other than the AG's office can contest the corporate designation of any given business/medical provider?

I encourage insurance companies to report concerns about the corporate designation of any given business/medical provider to the Attorney General, so that the Attorney General can consider challenging the improperly formed medical providers as providing unlawful treatment. Improperly formed medical entities, particularly the lay-owned medical providers billing tens, if not hundreds of thousands, of dollars, avoid oversight by the proper regulatory agencies. This lack of oversight impacts the quality of the services as well as the conduct of the entities as far as pricing, recordkeeping, and services.

Is there anything you would like the readers to know that I was too narrowly focused to ask?

Separately and through partnerships, the no-fault unit of the Attorney General's office will make efforts to educate the community through concerted outreach efforts to help individuals recognize potential fraud, so they are knowledgeable in recognizing it and helpful in reporting it to the fraud unit.

***

Time will tell whether the newly realized and re-purposed fraud unit will pay dividends and restore faith in Michigan consumers. Rest assured, the time has never been better for such a unit to have someone like Keisha at the helm. While clearly cognizant of the unit's end game, Keisha has seen human nature at its worst: she has seen people victimized in her time at the prosecutor's office and she has seen the rampant abuse of no-fault system in her time as a defense attorney.

In conclusion, and at least for me, Keisha's words are encouraging to say the least. While my skepticism of the past has been perpetuated by constant denials of both my and my colleagues' motions for summary disposition by multiple courts – disappointment which may only be paralleled by the frustration of Michigan no-fault consumers – I find encouragement in Keisha's directive and established goals.

Nobody who knows Keisha can say anything other than she is relentless in her pursuit of what she believes to be

right, and also in her prosecution of what she believes is wrong. In my mind, and given her response to the specific question of whether she is going to be "fair" in her pursuit of justice, she is perfect for her new role.

I am fairly confident that the vast majority of people will join me in congratulating Keisha Glenn on her new appointment, wish her nothing but the best in pursuit of her new role as the leader of the anti-fraud unit, and hope that she perseveres and accomplishes the goals that she has set forth above in her very candid answers to this interview. In the timeless words of Calvin Coolidge:

> Nothing in this world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men [and women] with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the official policy, view, opinion, or position of the MDTC.

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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Effect of Denials of Leave to Appeal "For Lack of Merit"

For some time now, a subject of discussion among appellate practitioners has been the effect of orders from the Michigan Court of Appeals denying applications for leave to appeal "for lack of merit in the grounds presented," and the extent to whether they are (or should be) controlling in a subsequent appeal under the law of the case doctrine. Until recently, the issue hadn't been fully addressed in a published opinion. But that has now changed with the Court of Appeals' decision in *Pioneer State Mut Ins Co v Michalek*, ___ Mich App ___; ___ NW2d ___; 2019 WL 4891871 (2019).

An Historical Perspective

As a general rule, the denial of an application for leave to appeal does not amount to a decision on the merits, and thus isn't the law of the case. See *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328-329; 57 NW2d 901 (1953) ("The denial of an application for leave to appeal is ordinarily an act of judicial discretion equivalent to the denial of certiorari. It is held that the denial of the writ of certiorari is not equivalent of an affirmation of the decree sought to be reviewed.") (citations and internal quotations omitted).

But over the years, the Court of Appeals has, fairly consistently, applied the law of the case doctrine to orders denying applications for leave to appeal "for lack of merit in the grounds presented," including in appeals from interlocutory orders. See, e.g., *Sidhu v Farmers Ins Exchange*, unpublished opinion per curiam of the Court of Appeals, issued Sept 11, 2008; 2008 WL 4180347, *1 (Docket No. 277472) (declining to address issue regarding timeliness of action by insurer to recover mistakenly paid no-fault benefits because the Court had previously denied leave to appeal from the trial court's partial grant of summary disposition against the insurer).

The Court has done so despite there being at least some question as to whether such a practice is consistent with the court rules. In relevant part, MCR 7.205(E)(2) provides that the Court of Appeals may "grant or deny [an] application; enter a final decision; [or] grant other relief." It is not clear whether this language really allows for an order that "denies" an application but yet purports simultaneously to decide the merits of the arguments presented. In addition, MCR 7.215(E)(1) provides that "[a]n order denying leave to appeal is not deemed to dispose of an appeal."

Yet some Court of Appeals panels have concluded that orders denying leave "for lack of merit" are not only authorized by the court rules, but that they provide a sufficient expression of "an opinion on the merits of the case" such that the law of the case doctrine should apply. See, e.g., *Contineri v Clark*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2003; 2003 WL 21771236, *2 (Docket No. 237739) ("Despite case law holding that orders denying leave to appeal do not express an opinion on the merits of the case, Michigan courts have not held that this case law applies to orders denying leave to appeal 'for lack of merit.'").

The *Pioneer* Decision

In *Pioneer*, the Court of Appeals took the issue head on. The defendants in *Pioneer* had failed to timely appeal a final judgment in the plaintiff's favor, and so were required to file a delayed application for leave to appeal. The Court of Appeals denied the application "for lack of merit on the grounds presented." Thereafter, the trial court

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awarded attorney fees to the plaintiff. As part of their appeal from the attorney fee order, the defendants also sought to challenge the underlying judgment.

In rejecting the defendants' challenge to the judgment, the Court of Appeals found two problems. **First**, the Court held that it lacked jurisdiction because appeals as of right from postjudgment orders awarding attorney fees are limited to the attorney fee issue. MCR 7.202(6)(a)(*iv*). **Second**, the Court concluded that even if it had jurisdiction, the law of the case doctrine would preclude review of the underlying judgment.

The Court began by recognizing its options in "exercising the discretion afforded it when reviewing an application for leave to appeal." *Pioneer*, 2019 WL 4891871, *2. "[I]t can grant the application and hear the case on the merits, deny the application, enter peremptory relief, or take any other action deemed appropriate." *Id.*, citing MCR 7.215(E)(2). The Court then explained that when it denies an application for leave to appeal for lack of merit in the grounds presented, "the order means what it says—it is on the merits of the case." *Id.* Thus, even if the Court had jurisdiction to consider the defendants' merits challenge to the underlying judgment, "we would not address those issues under the law of the case doctrine." *Id.*

The Court did, however, distinguish between the defendants' challenge to what was a **final** order, and an interlocutory application for leave to appeal from a nonfinal order. *Id.* The Court noted that in the latter case, "the Court generally does not express an opinion on the merits." *Id.* In a footnote, the Court went on to explain how it "typically" handles applications for leave to appeal from interlocutory orders:

> If a panel decides to deny an application challenging an interlocutory nonfinal order, it typically uses language indicating that the application was denied because the Court was not persuaded that immediate appellate review was necessary. There is no merits language in those denial orders because no merits determination was made; instead, the panel has simply determined appellate intervention was not necessary at the time. As a result, parties are still free to challenge these interlocutory orders when appealing the final order. [*Id.* at *2, n 6.]

While this may be the Court's usual practice, there are plenty of unpublished opinions (like the previously-mentioned *Sidhu* and *Contineri* decisions, to name a couple) in which law of the case effect was given to denials of leave to appeal from interlocutory nonfinal orders because the denials were "for lack of merit in the grounds presented." Thus, it seems that parties would be well-advised to take heed of the following word of caution from the concurring opinion in *Hoye v DMC/WSU*, unpublished opinion per curiam of the Court of Appeals, issued Jan 28, 2010; 2010 WL 334833, at *6 n 3 (Docket No. 285780) (Gleicher, J., concurring), in which the law of the case doctrine was applied to an order denying leave, "for lack of merit," from an application challenging an interlocutory order:

> The well-advised litigant seeking interlocutory review should think carefully before invoking this Court's jurisdiction by leave, since a request for appellate consideration before final judgment may result in only a one-sentence decision, forever foreclosing the right a future opportunity to full, or even memorandum-style, legal analysis.

As a general rule, the denial of an application for leave to appeal does not amount to a decision on the merits, and thus isn't the law of the case.

The New Science of Brief Writing

Everyone has their own biases about legal writing. Write short sentences. Write shorter briefs. Use contractions (or do not use contractions). Put all of your citations in footnotes—or don't put anything in footnotes. More em dashes and more parentheticals but no string citations. Write informally—but, no, wait, not **that** informally.

Although we're usually happy to coast along with our biases, some legal academics have started to test the received wisdom about legal writing with statistical analyses. This empirical research suggests that much of the conventional wisdom is on target—though there are some surprises, too. Here's a brief dive into recent research on three critical issues for brief-writing.

1. **Judges prefer simple writing, but have mixed opinions on how informal legal writing should get.** Most legal-writing experts today will tell you to write simply: short sentences, short words, clear transitions. There's some empirical support for this view. Sean Flammer sent surveys to federal and state judges to gauge their preference for "plain English" writing.[1] He found that most judges preferred simpler writing.[2] Another study concluded that judges "found the plain English briefs more convincing and thought that legal briefs came from less prestigious firms and ineffective appellate advocates."[3] Flammer's results didn't vary from trial to appellate courts or from federal to state courts.[4] Nor was a judge's age a factor in how much they liked simple legal writing over more formal legal writing.[5] So the empirical research here confirms the conventional wisdom. Simpler writing is better. Things got a little more complicated when judges considered informal writing. Many judges—especially older, rural judges—thought that some briefs were too informal.[6] Contractions can get divisive.
2. **Better writing—measured according to plain-language metrics—may contribute to better results.** Judges may prefer simpler writing but does it matter? Does better writing translate to better results? To address this question, Adam Feldman analyzed brief quality and outcomes at the United States Supreme Court.[7] He concluded that there is a correlation between high-quality briefs and favorable outcomes: "The likelihood of winning a case increases by approximately 20% by moving from the low end of the brief quality spectrum to the high end."[8] Similarly, Feldman and Shaun Spencer's 2018 analysis of summary-judgment briefing found a similar

connection between readability and positive outcomes.[9] That said, the conclusion isn't universal. Lance Long and William F. Christensen's 2011 study found no statistically significant correlation between readability and case outcomes in a sample of 882 state and federal cases.[10]

3. **There's no correlation in general between brief length and success—although the picture may be more complicated for appellants.** What about brief length? We all know that judges are busy and that many judges express a preference for shorter briefs. Does writing a longer brief hurt your arguments? The answer seems to be "no." Steven Morrison's recent study of cases in the Eighth Circuit Court of Appeals found that longer briefs were not less successful than their more succinct companions.[11] An earlier study from Gregory Sisk and Michael Heise complicates this picture.[12] Sisk and Heise found that longer *appellant* briefs fared better—up to about 14,000 words.[13] Briefs between 10,000 and 14,000 words did better than average. Sisk and Heise cautioned, however, that no one should take their research as an excuse to pad an appellant brief with excess words and issues.[14] Their takeaway was that "the kind of civil cases in which reversal is most warranted may also be of the sufficiently complicated variety to justify a more extended treatment in the appellant's brief."[15]

This very brief review of recent research suggests that conventional wisdom does pretty well at tracking what works. Judges often tell us that they prefer simpler writing and that appears to correlate with positive outcomes. There's no magic size for a successful brief but, as the Sisk and Heise research indicates, cases that warrant reversal often require lengthier briefing.

If that overview confirms your brief-writing preferences, there are some surprises in store, too. For example, one study determined that attorneys who have been disciplined have a 50% higher rate of "careless errors" in briefing—that is, errors in grammar, spelling, and usage.[16] In other words, there seems to be a correlation between sloppiness in minor things like grammar and sloppiness in major things like professional ethics. Too many typos in a brief may serve the same function as brown M&Ms in Van Halen's dressing room—a sign that there are bigger problems afoot.[17]

So stay tuned to the emerging empirical research on appellate briefing, even if it confirms your biases so far. You may find some surprises.

Endnotes

1 Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English,* 16 Legal Writing: J Legal Writing Inst 183, 186 (2010).

2 *Id.*

3 Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them,* 6 J. Ass'n Legal Writing Directors, 1, 5-6 (2009). See also *John Campbell, Writing That Wins: An Empirical Study of Appellate Briefs,* Colo Law 85,87 (2017).

4 Flammer, *supra* at 186.

5 *Id.*

6 *Id.* at 211.

7 Adam Feldman, *Counting on Quality: The Effects of Merits Brief Quality on Supreme Court Decisions,* 94 Denv L Rev 43, 63 (2016).

8 *Id.* at 63.

9 Pam Keller, *Some Science Supporting Style,* J. Kan. BA 16, 17 (2019) (citing Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 Legal Writing 61, 61 (2018)).

10 Lance N. Long, William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?* 12 J App Prac & Process 145, 145–46 (2011).

11 Steven R. Morrison, *Testing—and mostly Rejecting—the Folk Wisdom of the Effective Appellate Brief,* Champion 57, 57-58 (2019).

12 Gregory C. Sisk and Michael Heise, *"Too Many Notes"? An Empirical Study of Advocacy in Federal Appellate Procedure,* 12 Journal of Empirical Legal Studies 578 (2015), available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2564&context=facpub (last visited October 19, 2019).

13 *Id.* at 597.

14 *Id.* at 600.

15 *Id.* at 597.

16 Keller, *supra,* at 17.

17 Steve Jones, *No Brown M&Ms: What Van Halen's Insane Contract Clause Teaches Entrepreneurs,* Entrepreneur, March 24, 2014 (available at: https://www.entrepreneur.com/article/232420).

Legal Malpractice Update

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell, P.C.*[1]
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***Spitzer v Lawyer-Defendant*, unpublished per curiam opinion of the Court of Appeals, issued Oct. 24, 2017 (Docket No. 333158); 2017 WL 4798651**

Facts:

Lawyer-defendant represented plaintiff in his divorce. Plaintiff agreed to a settlement with his former wife. Plaintiff testified on the record during the settlement hearing that he had consulted with counsel, that it was in his best interest to settle, and that he entered into the settlement voluntarily, intelligently, and knowingly.

But plaintiff had a change of heart before the court could enter the consent judgment. He hired new counsel and filed a motion to set aside the settlement, claiming that his attorney and his former wife's attorney had coerced him into settling the divorce.

The trial court in the divorce matter denied the motion to set aside the settlement. The court concluded that defendant did not coerce plaintiff into settling. Defendant's advice related to plaintiff's handling of certain trust funds had nothing to do with the decision to settle the divorce matter.

Plaintiff appealed, and the Court of Appeals affirmed. The Court didn't reach the issue of whether defendant coerced plaintiff into settling because it concluded that there was no evidence that the wife's attorney participated in any coercion. But the Court **did** hold that plaintiff's testimony was "knowingly and voluntarily made."

Following the loss of his appeal in the divorce case, plaintiff filed a legal-malpractice action against defendant. Once again, plaintiff argued that defendant had coerced him into settling the divorce matter. Defendant moved for summary disposition, arguing that the malpractice claim was barred by collateral estoppel. Defendant argued that the trial court in the divorce case already rejected plaintiff's claim that defendant had coerced him into settling.

For his part, plaintiff argued that the issue whether defendant coerced him into settling was not a fact "essential to the judgment" in the divorce case. The trial court disagreed and granted defendant's motion for summary disposition on collateral estoppel grounds.

On appeal, plaintiff argued that the issue whether defendant coerced him into settling the divorce case was not litigated or essential to the judgment in the divorce case. He argued that the Court of Appeals affirmed the denial of his motion to set aside the divorce settlement in the underlying matter **only** because it found that the wife's attorney did not participate in the coercion.

The trial court in the divorce matter denied the motion to set aside the settlement. The court concluded that defendant did not coerce plaintiff into settling.

Ruling:

The Court of Appeals affirmed summary disposition on the basis that plaintiff's legal-malpractice claim was barred by collateral estoppel.

The Court explained that the trial court in the divorce action made an express finding of fact that defendant did not coerce plaintiff into settling the divorce. The trial court's conclusion was not disturbed on appeal because the Court of Appeals didn't make any finding in the divorce case regarding whether defendant had coerced plaintiff into

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settling. Instead, the Court of Appeals had affirmed the trial court's conclusion that plaintiff had knowingly and voluntarily entered into the settlement. The Court further held that the coercion issue was an essential fact to the underlying divorce case.

Finally, the Court held that the trial court's ruling in the divorce case that defendant did not coerce plaintiff into the settlement remained "part of the trial court's valid and final judgment in the divorce proceeding." Therefore, the Court of Appeals affirmed the trial court's order granting defendant summary disposition with regard to plaintiff's legal malpractice claim.

Practice Note:

Michigan law recognizes that the doctrine of collateral estoppel applies to legal-malpractice claims and prohibits legal-malpractice plaintiffs from re-litigating issues that were already decided in the attorney's favor in the underlying case.

Endnotes

1 The authors would like to thank Mary Aretha for her work on this article.

MICHIGAN DEFENSE QUARTERLY

Publication Schedule

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

MDTC Legislative Report

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The Legislature has returned to its regular fall schedule after its summer break. There were only a handful of sessions in July and August, many of which were limited to introduction and referral of bills. With the beginning of the new fiscal year looming, most of the legislative activity was focused upon completion of next year's budget before October 1st. The difficult question of how to pay for fixing the state's steadily deteriorating roads and bridges continued to be the major sticking point throughout the summer months and into the first week of September. That discussion has been continuing for the last several years with little progress, but Governor Whitmer has forcefully insisted that this must change, and thus, she has also been adamant in her insistence that she would not approve a budget that does not include sufficient funding to do the job properly. The Republican legislative leaders would like to fix the roads as well, but have been guided by their constituents of both parties who would also like better roads but don't wish to pay the hefty cost.

All of this has led to a display of brinksmanship as a refusal to make the necessary compromises raised the specter of a government shutdown in October. In the first week of September with little time remaining, the Republican legislative leaders tested the Governor's resolve by declaring that they would pass the budget with or without a final plan for fixing the roads and discuss that issue later if necessary. Discussions continued over the weekend and I was greeted one morning with news that the Governor had agreed to resolve the road funding issue later in exchange for the Republicans' pledge to pursue the further negotiations promptly and in good faith. I will wait to see how that goes with the hope that I will not be writing about road funding in next October's report.

Public Acts of 2019

As of this writing, there are 47 Public Acts of 2019 – 25 more than there were when I last reported in June. The few which may be of interest include:

2019 PA 43 – House Bill 4225 (Kahle – R) and 2019 PA 42 – Senate Bill 128 (Hertel - D), which have amended the Public Health Code to facilitate expeditious treatment of pain for hospice patients by exempting them from the requirement that a "bona-fide prescriber – patient relationship" be established before a prescriber can prescribe controlled substances listed under schedules 2 though 5.

2019 PA 40 – House Bill 4296 (Filler – R), which has amended the Revised Judicature Act, MCL 600.1993, to extend the sunset for collection of e-filing fees from February 28, 2021 to February 28, 2031.

2019 PA 39 – House Bill 4367 (Sheppard – R) has created a new act to be known as the "administration of opioid antagonists act," which will expand the authority of government agencies to obtain supplies of opioid antagonists – naloxone hydrochloride and similar agents approved for administration for treatment of opioid overdoses – and authorize the possession and use of those medications by their properly trained employees, agents and volunteers for emergency treatment of opioid overdoses. The new act, which will take effect on September 24, 2019, will also provide immunity from criminal and civil liability for government agencies and their employees, agents and volunteers who possess or administer an opioid antagonist in good faith.

2019 PA 32 – Senate Bill 129 (Schmidt - R), which has amended § 5 of the unmanned aircraft systems act, MCL 259.305, to allow political subdivisions that prohibit the use of non-emergency motor vehicles to enact and enforce ordinances or regulations that prohibit the use of unmanned aircraft in a manner that interferes with the safe use of horses in commercial activities. This amendatory act, which took

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effect on June 25, 2019, does not use the term "drone" or name Mackinac Island as its primary beneficiary, but the enrolled analysis reflects the underlying intent to allow the regulation of drones, and the irresponsible use thereof, on the island.

New Business

New initiatives of interest include the following:

House Bill 4810 (Robinson - D), which would amend the Code of Criminal Procedure to add a new Section MCL 760.21b. This new provision would prohibit all use of facial recognition technology by law enforcement officials for purposes of law enforcement for a period of five years and require exclusion of all evidence obtained by the use of such technology. This bill was introduced on July 10, 2019 and referred to the House Judiciary Committee.

Senate Bill 462 (Ananich – D), which would amend the Code of Criminal Procedure, MCL 767.24, to extend the statute of limitations for criminal charges of misconduct or willful neglect of duty by public officers from six to ten years after the date of commission of the offense. This bill was introduced on August 28, 2019 and referred to the Senate Committee on Judiciary and Public Safety. The same amendment has also been proposed by **House Bill 4834 (Cherry – D),** introduced and referred to the House Judiciary Committee on the same date.

There were only a handful of sessions in July and August, many of which were limited to introduction and referral of bills.

Senate Bill 457 (Irwin – D), which again proposes an amendment of the Revised Judicature Act, MCL 600.2946, to eliminate the statutory immunity for product-liability claims involving drugs which have been approved by the U.S. Food and Drug Administration. This bill was introduced on August 28, 2019 and referred to the Senate Committee on Judiciary and Public Safety.

House Bill 4372 (Glenn – R) and **House Bill 4373 (Rendon – R),** which would amend the Public Health Code to require permanent revocation of a health care provider's license upon conviction of an offense involving sexual penetration made under the pretext of medical treatment. These bills were passed by the House on September 4, 2019.

Senate Joint Resolution J (Nesbitt – R), which would amend Const 1963, art 6, § 23 to require advice and consent of the Senate for Gubernatorial appointments of Supreme Court Justices if approved by a vote of the people in the next general election. This Joint Resolution was introduced on August 20, 2019 and referred to the Senate Committee on Advice and Consent.

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.

Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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***Farm Bureau Ins Co v TNT Equipment and Employers Mut Cas Co,* __ Mich App __; __ NW2d __ (2019) (Docket No. 343307).**

This is an unusual subrogation action that arose out of a fire at a storage facility. The plaintiffs – Farm Bureau, Pioneer Mutual, and Hastings – all insured farm equipment that was stored at TNT's facility and was damaged in the fire. Plaintiffs paid their insured's claims and then sought reimbursement from TNT's insurer, Employers Mutual, directly. The claim was unusual in that – at least by the time it got to the Court of Appeals[1] – the plaintiffs' claim was not based on the alleged negligence of TNT but rather on the theory that the plaintiffs' insureds had a direct right to recovery under TNT's policy with Employers Mutual. The trial court found that they did, but the Court of Appeals unanimously reversed in a published opinion. The panel rejected the plaintiffs' arguments that they were additional insureds or third-party beneficiaries of TNT's insurance contract with Employers Mutual. The opinion serves as a reminder that industry-specific concepts should not distract us from the fact that an insurance policy is, ultimately, a contract between two parties.

At the time of the fire, TNT was insured by Employers Mutual under a "Commercial Inland Marine" policy. *TNT Equipment,* __ Mich App at __; slip op at 2. The plaintiffs sought reimbursement from Employers Mutual for the amounts they had paid to their insureds for the damaged farm equipment, contending that the plaintiffs' insureds were entitled to coverage under Employers Mutual's policy with TNT, and that the plaintiffs were therefore entitled, as subrogees, to payment from Employers Mutual. *Id.* Employers Mutual denied the claims on the grounds that TNT had exercised an option under the policy directing Employers "to pay for their [TNT's] customer's deductibles and verifiable uninsured losses only." *Id.* Employers Mutual took the position that "because TNT had opted out of any other coverage, it was not obligated to pay any other amounts for damages to the farm equipment belonging to" the plaintiffs' insureds. *Id.*

The Court of Appeals first considered whether the plaintiffs were "first-party insureds" under Employers Mutual's policy. *Id.* at __; slip op at 3. The panel found that, under general contract principles, they were not: "In this case, TNT purchased from Employers a policy of commercial inland marine insurance." *Id.* at __; slip op at 4. "The parties do not dispute that plaintiffs' insureds were not parties to the policy between TNT and Employers, and that plaintiffs' insureds are not named insureds under that policy." *Id.* "There further is no dispute that the policy does not expressly grant anyone other than the named insured enforcement rights." *Id.*

The panel similarly determined that the plaintiffs were not additional insureds under Employers Mutual's policy: "An 'additional insured' is defined generally as someone who is covered by an insurance policy but who is not the primary insured. An additional insured may, or may not, be specifically named in the policy. … Plaintiffs in this case do not contend that the policy here designated plaintiffs' insureds as 'additional insureds' under the policy, and point to no published Michigan authority supporting their position that they qualify as additional insureds absent a provision in the policy designating them as such." *TNT Equipment,* __ Mich App at __; slip op at 4 (citations omitted).

Finally, after a lengthy analysis the panel also determined that the plaintiffs were not third-party beneficiaries of the policy. *Id.* at __; slip op at 9. Focusing on the "form and meaning" of the policy, the panel found that "the policy issued by Employers to TNT contains no promise by Employers to directly benefit plaintiffs' insureds within the meaning of MCL 600.1405." *Id.* The Court of Appeals emphasized that "the

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inquiry here is not whether there was coverage under the policy for the damage to the property of plaintiffs' insureds; the question of coverage is a separate inquiry that a court need not reach unless it is determined that a claimant, in fact, has a right to seek enforcement of the policy." *Id.,* citing *Shay v Aldrich,* 487 Mich 648, 665-667; 790 NW2d 629 (2010). "Rather the inquiry here is whether plaintiffs' insureds are members of a class (being either insureds or third-party beneficiaries), that empower them to seek to enforce the policy. In this case, the clear and unambiguous language of the policy does not evidence an intent of the parties to directly benefit plaintiffs' insureds." *TNT Equipment,* __ Mich App at __; slip op at 9. Here, TNT and Employers Mutual entered into a contract for the purpose of insuring **TNT**, should **TNT** be found liable for payment of damages to the property of others that was under its care, custody, or control. *Id.* Whether "coverage under the policy would be triggered if TNT were found liable for damage to the property of plaintiffs' insureds" was "not before" the panel. *Id.* Rather, the plaintiffs sought to "enforce the policy and trigger coverage under the policy between TNT and Employers regardless of whether TNT is liable and regardless of whether TNT wants the coverage." *Id.* The panel held that the plaintiffs had no "right to enforce the contract between TNT and Employers." *Id*.

***Home-Owners Ins Co v Perkins*, __ Mich App __; __ NW2d __ (2019) (Docket No. 344926).**

"At issue in this fire damage case is the proper interpretation of MCL 500.2833(1)(q) and its impact on the viability of each party's claim." *Perkins,* __ Mich App at __; slip op at 1. MCL 500.2833(1)(q) states that fire-insurance policies contain a provision stating:

> That an action under the policy may be commenced only after compliance with the policy requirements. An action must be commenced within 1 year after the loss or within the time period specified in the policy, whichever is longer. The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability. *Perkins,* __ Mich App at __; slip op at 2.

In an attempt to comply with this provision, Perkins' policy from Home-Owners contained the following clause:

> We may not be sued unless there is full compliance with all terms and conditions of this policy. Suit must be brought within one year after loss or damage occurs. The time for commencing a suit is tolled from the time you notify us of the loss or damage until we formally deny liability for the claim. *Id.* at __; slip op at 3.

On March 4, 2015, fire substantially destroyed Perkins' home and personal possessions. *Id.* at __; slip op at 1. She immediately notified Home-Owners of her loss and later submitted a proof of loss based on her best guess of the age and purchase price of the items she could recall being in her house. *Id.* On August 28, 2015, Home-Owners wrote a letter formally denying Perkins' claim on the grounds that "she had committed arson, misrepresented facts in her claim of loss, and failed to comply with other provisions in the fire insurance policy." *Id.* at __; slip op at 1-2. Home-Owners sent the letter via certified mail to Perkin' attorney at the time; although the attorney signed for it, Perkins later denied receiving it. *Id.* at __; slip op at 2.

On October 5, 2016, Home-Owners sued Perkins, alleging that Perkins breached the insurance contract by submitting a claim that was "knowingly inaccurate and grossly exaggerated," by failing to comply with certain terms of the contract, and by concealing material facts and circumstances surrounding her loss "as part of an effort to fraudulently induce" the insurer to pay her claim. *Id.* at __; slip op at 2. Home-Owners sought damages from Perkins because Home-Owners had paid $56,700 to the mortgagee of Perkins' house. *Id.* On February 6, 2017, Perkins filed a counterclaim for breach of the insurance policy and wrongful denial of her claim. *Id.*

Home-Owners argued that the counterclaim was untimely under the aforementioned policy language, because Perkins did not file suit under the policy until more than a year after the loss. *Perkins,* __ Mich App at __; slip op at 3. The insured claimed that Home-Owners waived this defense by filing its own suit more than a year after the loss. *Id.* Home-Owners responded that the statute and policy language "applied only to the insured." *Id.* After some procedural wrangling, the trial court ruled that § 2833(1)(q) "applies to actions by both insurers and insureds," so the trial court dismissed both suits. *Id.* at __; slip op at 4. Both sides appealed.

The panel found that as "a matter of first impression," the one year limitations period contained in § 2833(1)(q) "applies to all actions under the policy including those by insurers…." *Id.* at __; slip op at 4-5. The panel explained its interpretation of the statute in some detail but ultimately, the holding was based on a plain reading of the provision. While the "suit against us" provision **in the policy** set forth a one-year limitations period applicable only to actions brought by the insured, the panel found that this was "contrary to the mandate set forth in" § 2833(1)(q) and therefore, the "suit against us" provision was "absolutely void." *Perkins,* __ Mich App at __; slip op at 7. So the statue controlled and under the statute, both suits were untimely. *Id.*

Notwithstanding this holding, Perkins maintained that her counterclaim should have survived summary disposition because of her waiver argument. The panel rejected this argument, finding that when Home-Owners filed suit, "it was not disavowing any clause in the contractual agreement it had with [Perkins] and thereby inviting [Perkins] to do the same." *Id.* at __; slip op at 9. Again, the policy language only applied to suits by the insured, not the insurer. Although that provision was void under the statute, it was still relevant to determining whether Home-Owners' filing of a suit represented "an intentional and voluntary relinquishment of a known right." *Id.* at __; slip op at 8.

***Yu v Farm Bureau Gen Ins Co of Michigan (On Remand),* unpublished opinion per curiam of the Court of Appeals, issued May 21, 2019 (Docket No. 331570); 2019 WL 2194538 ("*Yu III*").**

In an earlier report, I discussed the Supreme Court's memorandum order in this case, *Yu v Farm Bureau Gen Ins Co of Michigan,*, 503 Mich 907; 919 NW2d 399 (2018) ("*Yu II*"), which arose out of a water loss claim under a homeowners' policy. There, the Court held that "equitable estoppel did not bar the defendant from denying coverage for the December 2013 water leak in the plaintiffs' Portage house." *Id.* The 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' prior opinion.[2] The Court of Appeals recently issued its opinion on remand, holding that there was no coverage because the loss did not occur at the "residence premises" as defined in the policy. *Yu III,* unpub op at 1. With "the argument of equitable estoppel no longer being available to plaintiffs" per the Supreme Court's holding, the panel therefore held that Farm Bureau was entitled to summary disposition. *Id*. at 4.

The appeal arose out of Farm Bureau's denial 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 I,* unpub op at 2. The trial court granted summary disposition to the insurer on this basis. *Id.* at 1. But the Court of Appeals initially 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." *Yu I,* unpub op at 2-3. But as noted above, the Supreme Court rejected this reasoning and remanded to the Court of Appeals for consideration of the "residence premises" issue.

On remand, the panel noted that the policy at issue "provided for coverage for a dwelling on" the "residence premises," which the policy defined as "[a.] the one family dwelling, other structures, and grounds; [b.] a two, three, or four family dwelling (where you reside in at least one of the family units), other structures, and grounds; or [c.] that part of any other building" where the insured "reside[s] and which is shown in the Declarations of this policy." *Yu III,* unpub op at 1-2. The terms "dwelling" and "reside" were undefined in the policy, but the panel found that "this case is controlled by our opinion in *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619 (2010)." *Yu III,* unpub op at 2. The *McGrath* panel "agreed with the insurer that 'where you reside' required that the insured live at the premises when the loss occurred." *Yu III,* unpub op at 3. The panel then applied *McGrath* to the facts of this case and held, *Id.* at 4:

> Plaintiffs do claim to have visited the Portage property somewhat more frequently than was the case in *McGrath,* perhaps once a month or so. But we do not find this to be a sufficient basis to distinguish this case from *McGrath.* Even accepting all of plaintiffs' claims, they resided in the Lansing area for over three years before the loss at issue here. That is, to use *McGrath's* terminology, the apartment in Okemos and later the home in East Lansing had become their "home base" and the location to which they "regularly returned." More importantly, that no longer describes the Portage home. Accordingly, … the trial court did not err in granting summary disposition in favor of defendant.

***Krolczyk v Citizens Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued April 4, 2019 (Docket No. 341016); 2019 WL 1494491.**

Here, the plaintiffs filed a first-party property loss claim for missing or stolen jewelry. Citizens denied the claim on the grounds that the plaintiffs had previously filed for bankruptcy and allegedly underreported the value of the jewelry. Citizens argued that because the plaintiffs were granted a bankruptcy discharge at least partly on the basis of that representation, the plaintiffs were judicially estopped from recovering. The trial court and the Court of Appeals disagreed.

Between 1995 and 2002, the plaintiffs purchased four pieces of jewelry, which were collectively appraised at $44,600. *Krolczyk,* unpub op at 1. In July of 2015, the plaintiffs purchased a homeowner's insurance policy from Citizens. *Id.* For an additional $825 premium, Citizens individually scheduled each piece of jewelry at the appraised values. *Id.* at 2. Shortly after returning from a vacation in March of 2016, the plaintiffs discovered the four pieces of jewelry missing. *Id.* On April 15, 2016, the plaintiffs filed a claim with Citizens for the "loss or theft" of the jewelry. *Id.* Citizens investigated the claim, and learned that the plaintiffs had filed for bankruptcy in June 2009, and the plaintiffs' bankruptcy schedules listed the jewelry at a combined value of only $1,000. *Id.* Although the plaintiffs were subject to a creditors' examination during the bankruptcy proceeding, no one inquired further about the jewelry. *Id.* In July of 2009, the bankruptcy court granted the plaintiffs a discharge. *Id.*

Citizens took the plaintiffs' examinations under oath as part of its investigation, and "Plaintiffs admitted that they had no precise explanation for telling the bankruptcy court their jewelry was worth $1,000 when they had appraisals for higher values, although Virginia Krolczyk noted that they relied on advice from their bankruptcy lawyer." *Id.* Citizens continued to deny the claim based on "the bankruptcy discrepancy," and the plaintiffs filed suit. *Id.*

The parties filed cross motions for summary disposition, with Citizens claiming "that the

doctrine of judicial estoppel prevented plaintiffs from claiming that the jewelry was worth" over $40,000 "after having taken the position in the bankruptcy court that it was only worth $1,000…." *Krolczyk,* unpub op at 2. Citizens "also asserted that the bankruptcy deprived plaintiffs of an insurable interest in the jewelry." *Id.* The plaintiffs responded that the discrepancy was explainable as a mistake or inadvertence instead of an intentional attempt to mislead the judicial system. *Id.* The plaintiffs also argued that if Citizens was correct about the import of

the bankruptcy proceeding, the plaintiffs "creditors and the bankruptcy trustee are the aggrieved parties," not Citizens. *Id.* at 2-3.

Although the trial court "initially expressed concern about the magnitude of the discrepancy," it also expressed concern that Citizens was "opportunistically trying to avoid its obligations by relying on the long-closed bankruptcy." *Id.* at 3. The trial court held that the plaintiffs' conduct in the bankruptcy could be explained by mistake or inadvertence. *Id.* The trial court therefore denied Citizen's motion and granted the plaintiffs' motion as to Citizen's liability. *Id.*

Citizens appealed, and the Court of Appeals affirmed in a 2-1 decision. The majority (Judges Colleen O'Brien and Amy Ronayne Krause) acknowledged that the value the plaintiffs placed on the jewelry in the bankruptcy – which the bankruptcy court apparently accepted – was "directly contrary to the current claim that it is worth over $40,000." *Krolczyk,* unpub op at 5. However, the panel was not persuaded that the plaintiffs' earlier $1,000 valuation "had any practical consequences." *Id.* While Citizens maintained "that the $1,000 valuation enabled plaintiffs to get a discharge of their debts with no liquidation of assets," the record did not support this. *Id.* In the 2009 bankruptcy proceeding, "[n]either the trustee nor the creditor's lawyer inquired into the jewelry…." *Id.* Also, Citizens "made many attempts to notify the bankruptcy trustee of the potential $40,000 in understated assets, and the bankruptcy trustee was uninterested in pursuing the issue." *Id.* "The level of disinterest shown by the trustee and creditor, both during the bankruptcy proceedings and after" led the majority to believe "that the jewelry was of minimal importance." *Id.* The majority further noted "the lack of any conceivable harm whatsoever to Citizens, which charged plaintiffs for insuring the jewelry as appraised and in no way relied on anything that happened in the bankruptcy proceeding…." *Id.*

Zack v Westfield Ins Co, **unpublished opinion per curiam of the Court of Appeals, issued June 11, 2019 (Docket No. 343732).**

This claim arose out of the alleged mishandling of a corpse by a funeral home, insured by Westfield. The funeral home was supposed to cremate the deceased and bury his ashes, but the funeral home instead buried an empty urn and the deceased's ashes were later found in a box. The trial court and the Court of Appeals found that there was no liability coverage because there was no injury during the policy period. The alleged mishandling occurred sometime between mid-February and mid-April 2015 but was not discovered until January 2016. Westfield insured the funeral home through most of 2015 but cancelled the funeral home's policy effective December 19, 2015 "due to nonpayment." *Zack,* unpub op at 2.

The Westfield policy – using fairly standard commercial general liability language – stated that liability coverage applied to bodily injury or property damage **only** if it was caused by an occurrence that took place in the coverage territory **and** the bodily injury or property damage "occurs during the policy period…." *Zack,* unpub op at 5. This general liability coverage was modified by a Funeral Directors Professional Liability endorsement. *Id.* at 4. There was no dispute that an "occurrence" – defined in the endorsement to include "any act or omission arising out of the rendering or failure to render professional services as a funeral director" – took place in 2015 when the insurance policy was in effect. *Id.* at 5. There was likewise no dispute that the plaintiffs suffered an injury as a result of that occurrence. *Id.* The panel noted that, although the endorsement expanded coverage to "other injury" and "other injury arising out of the rendering of or failure to render professional services in connection with the insured's business as a funeral director," the endorsement did not alter the requirement that the injury or damage occur during the policy period. *Id.*

The underlying plaintiffs asserted, in their complaint against Westfield's insured, that the funeral home's director was arrested on January 9, 2016, and that while he was in jail, one of his employees found the box purportedly containing their son's ashes. *Zack,* unpub op at 5. The underlying plaintiffs further alleged that on March 18, 2016, their son's grave was exhumed and it was confirmed that the urn that was intended to hold his ashes was empty. *Id.* Plaintiffs asserted that as a result of the funeral home's negligence, they suffered "severe mental and emotional pain and suffering, physical pain and suffering, denial of social pleasure, embarrassment, humiliation, mortification, and medical expenses." *Id.* The panel held that because "plaintiffs did not learn that their son's ashes were not, in fact, buried until after the policy coverage had ended, they did not suffer their emotional, mental and physical injuries resulting from that negligent act until after the policy had terminated." *Id.*

The *Zack* opinion illustrates the difference between "claims made" and "occurrence based" coverages. "An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect…." *St. Paul Fire & Marine Ins Co v Barry,* 438 US 531, 535; 98 S Ct 2923 (1978). Put another way, "[a]n 'occurrence policy' is a policy in which the coverage is effective if the negligent act or omitted act occurs within the policy period, regardless of the date of discovery." *State Farm Fire & Cas Co v McGowan,* 421 F3d 433, 436 (6th Cir 2005). Under such policies, "coverage of property damage caused by an occurrence as defined in the policy is limited to damage occurring during the policy period." *Id.* at 438. "Claims-made and occurrence-based insurance policies insure different risks." *Med Protective Co v Kim,* 507 F3d 1076, 1082 (7th Cir 2007). "In the occurrence policy, the risk is the occurrence itself," but in "the claims made policy, the risk insured is the claim brought by a third party against the insured." *Id.* Had this been a "claims made" policy, the lack of coverage would have been obvious since the underlying plaintiffs did not learn of the alleged "occurrence" until months after the policy period.

Endnotes

1 The Court of Appeals' opinion refers to allegations of negligence against TNT, but TNT was dismissed from the suit and no party challenged that on appeal. *TNT Equipment,* __ Mich App at __; slip op at 2 n 2.

2 *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) ("*Yu I*").

Municipal Law Report

By Lisa A. Anderson and Matthew J. Zalewski, *Rosati Schultz Joppich & Amtsbuechler, PC*
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Qualified Immunity: The Right Allegedly Violated By A Public Official Must Be Defined At A High Level Of Specificity.

City of Escondido v Emmons, 139 S Ct 500 (2019).

The United States Supreme Court, in a per curiam opinion issued on January 7, 2019 in *City of Escondido v Emmons,* 139 S Ct 500 (2019), reiterated that the right allegedly violated by a public official in a case brought under 42 USC 1983 must be defined at a high level of specificity before a court can determine if the right was clearly established under a qualified-immunity analysis. Qualified immunity shields public officials from personal liability for federal statutory or constitutional violations if their conduct does not violate clearly established rights of which a reasonable person would have known.[1]

A right is clearly established when the contours of the right are so obvious that a reasonable official would have known that his conduct violated the right at the time it occurred.[2] Existing precedent must be so clear that it places the statutory or constitutional question "beyond debate" so that **every** reasonable official would have understood that what he was doing violated that right.[3] In *City of Escondido*, the Supreme Court held that the right allegedly violated by a public official must be defined at a high level of specificity to be clearly established, especially in excessive force cases.

Facts

The Escondido police received a 911 call from Maggie Emmons, who reported a domestic violence dispute at the apartment she shared with her husband, her two children, and her roommate, Ms. Douglas. The police responded and arrested Ms. Emmons's husband. A few weeks later, the police received another 911 call about a domestic disturbance at the Emmons' address. Officer Craig and Sergeant Toth were among the officers who responded to the call. Officer Craig knocked on the door of the Emmonses' apartment. When no one answered, he spoke to Ms. Emmons through an open window in her apartment and overheard a man tell her to back away from the window. A few minutes later, a man later identified as Ms. Emmons's father opened the apartment door and stepped outside. When Mr. Emmons tried to brush past the police officers, Officer Craig took him to the ground and handcuffed him.

Mr. Emmons sued the officers for excessive force under 42 USC 1983. Based on the evidence, the district court concluded that only Officer Craig was involved in the excessive force claim and granted summary judgment to Sergeant Toth. The district court also granted summary judgment to Officer Craig on the ground that the law did not clearly establish that the officer could not take down an arrestee in these circumstances. The court reasoned that the domestic dispute escalated when the officers were unable to enter the apartment to do a welfare check, and observed that the officers did not know if Mr. Emmons was armed and dangerous or had injured the individuals in the apartment.

On appeal, the Ninth Circuit Court of Appeals reversed and remanded the case for trial on the excessive force claims against Officer Craig and Sergeant Toth. The Ninth Circuit's entire relevant analysis of the qualified-immunity question consisted of finding that "the right to be free from excessive force" was clearly established at the time of the events in question. The United States Supreme Court granted certiorari and reversed the Ninth Circuit.

Ruling

The Supreme Court held that the Ninth Circuit contravened settled principles of law when it failed to define the right that was allegedly violated at a high level of specificity.

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Defining the right in broad terms as the "right to be free from excessive force" was not specific enough to defeat qualified immunity. The Supreme Court explained that the Ninth Circuit should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Ninth Circuit made no effort to explain how case law prohibited Officer Craig's actions, and denied the officers the protection of qualified immunity based only on the conclusion that the "right to be free of excessive force" was clearly established.

The Supreme Court held that the Ninth Circuit's analysis was "far too general," reiterating that it has "repeatedly told courts … not to define clearly established law at a high degree of generality," particularly in excessive force cases.[4] Holding public officials personally liable for damages for constitutional violations based on the violation of general legal rights "avoids the crucial question whether the official acted reasonably in the particular circumstances he faced."[5] The Court explained:

> Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." While this does not require a case directly on point, it does require a plaintiff to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment.[6]

In the context of a Fourth Amendment excessive force claim, "a body of relevant case law is usually necessary to clearly establish the answer."[7]

Practice Note

Qualified immunity is a defense not just against liability but against suit itself and against the costs and burdens of litigation. To achieve the greatest benefit from the qualified immunity protections, the entitlement to immunity should be determined at the earliest stages of the litigation.[8] Where possible, consideration should be given to whether discovery should be limited in the beginning stages of the case and tailored to specifically address the qualified-immunity question.[9]

Legislative Immunity Applies To Local Legislators, Not To Legislative Bodies.

Adam Community Center v City of Troy, 381 F Supp 3d 887 (ED Mich, 2019).

Facts

Plaintiff, a religious nonprofit organization, filed suit against the City of Troy, the Troy City Council, the Troy Planning Commission, the Troy Zoning Board of Appeals ("ZBA"), and the individual members of the ZBA, alleging that the ZBA's denial of a variance request violated plaintiff's state and federal constitutional rights and the Religious Land Use and Institutionalized Person Act ("RLUIPA"). Defendants filed a motion to dismiss the complaint as their first responsive pleading. The motion to dismiss argued in part that the City Council, Planning Commission, and individual ZBA members were entitled to legislative immunity from the claims.[10]

Ruling

The court observed that individual legislators are entitled to absolute immunity for the actions they take in their legislative capacity, but legislative bodies such as the City Council and Planning Commission are not. Local legislators have long enjoyed immunity from liability for their legislative actions.[11] The concept of legislative immunity is rooted in the principle that "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by fear of personal liability."[12] This concept rests on the theory that "[a]ny restriction on a legislator's freedom undermines the public good by interfering with the rights of the people to representation in the democratic process."[13]

Courts have long recognized that the policy reasons underlying legislative immunity carry special weight for local legislators, where the threat of civil liability may overshadow the benefits derived from public service.[14] The policies underlying legislative immunity may not have the same application to municipal entities. The district court concluded that municipal entities do not enjoy the protection of legislative immunity that covers individual council and board members. Additionally, the court opined that the individual members of the ZBA were not entitled to legislative immunity with respect to their decision to deny the plaintiff's variance request, since the court found that the denial of a variance application is an administrative, not legislative, activity.

Practice Note

Courts apply a two-part test in determining whether an activity is legislative and thus entitled to legislative immunity. First, a court will consider whether the activity was an "integral step in the legislative process." Next, the court will consider whether the activity was legislative in substance, that is whether it bore the hallmarks of traditional legislation, including a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides. The party invoking legislative immunity carries the burden of demonstrating that immunity exists.

Endnotes

1 *Reichle v Howards*, 566 US 658, 664 (2012).
2 *Anderson v Creighton*, 483 US 635, 640 (1987).
3 *Reichle,* 566 US at 664; *District of Columbia v Wesby*, 138 S Ct 577, 589-90 (2018).
4 *City of Escondido,* 139 S Ct at 503.
5 *Wesby*, 138 S Ct at 590.
6 *City of Escondido,* 139 S Ct at 504.
7 *Id.*
8 *Anderson,* 483 US at 646 n6.
9 *Id.*
10 An analysis of the other claims in the case is beyond the scope of this update.
11 *Saboury v City of Lansing*, 366 F Supp 3d 928 (CA 6, 2017), citing *Bogan v Scott-Harris*, 523 US 44, 48-49 (1998).
12 *Bogan,* 523 US at 52.
13 *Saboury*, 366 F Supp 3d at 933.
14 *Id.*

No-Fault Report

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NO-FAULT REFORM – THE END OF AN ERA UNINTENDED CONSEQUENCES

Warning – the opinions expressed herein are solely those of the author, and do not necessarily represent the opinions of the MDTC, the MAJ, the State Bar of Michigan, the defense bar, the plaintiff's bar, the neighborhood bar, the insurance industry, the medical industry, the auto industry, the Republican party, the Democratic party, the Libertarian party, or those attending your Halloween party!

In our past articles, the author has attempted to highlight what could best be described as "holes" in the recently passed no-fault reform amendments, SB 1 and HB 4397, now 2019 PA 21 and 22, respectively. Given that some of the provisions have already taken effect, and claims are being filed, it is becoming more apparent that the Legislature needs to revisit this area, once again, in order to correct some of the glaring inequities that have become apparent since June 11, 2019, when these bills became law. The following article is designed to highlight some of those areas that require immediate attention, in the opinion of the author, before further damage is done to the no-fault system.

PART I – WHEN IS A CHOICE NOT A CHOICE!

In the earlier articles, the author described the situation that would be faced by motorcyclists after July 1, 2020, when the PIP choice provisions begin to phase in with policies issued or renewed after that date. Because the priority provisions have not changed, the motorcyclist is now at the mercy of whatever PIP coverage limits may have been obtained by the owner of the motor vehicle involved in the accident. However, the problem extends beyond motorcyclists, and includes occupants of vehicles operated in the business of transporting passengers, and employees and their family members who are occupying employer-furnished vehicles. Let us examine these situations in further detail.

Part A – Motorcyclists

As noted above, the priority provision for motorcyclists involved in an accident with a motor vehicle, MCL 500.3114(5)(a) remains unchanged. A motorcyclist injured in a motor-vehicle accident will first turn to the insurer of the owner of the motor vehicle involved in the accident for payment of his no-fault benefits. Next in line is the insurer of the operator of the motor vehicle involved in the accident. Third in line, of course, is the motor-vehicle insurer for the operator of the motorcycle.

Given the inherent risks of operating a motorcycle, the motorcyclist is more apt to sustain serious injuries if he or she is involved in an accident with a motor vehicle. The author, for one, will be obtaining lifetime, unlimited PIP coverage, which I would expect would cover me whether I am driving a car, riding a bicycle, walking across the street, or riding one of my motorcycles.

However, if the owner of the motor vehicle involved in the accident is a Medicaid recipient with $50,000 worth of PIP coverage, the motorcyclist will be bound by the coverage level chosen by the owner of the motor vehicle, and would not have access to the lifetime, unlimited coverage available under his own motor-vehicle policy, as the law is presently drafted. Even if the owner or registrant of the motor vehicle has opted to purchase $250,000 worth of coverage, the motorcyclist may be stuck at that level of coverage, even if the motorcyclist has opted for lifetime, unlimited benefits on his motor-vehicle insurance policy.

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Part B – Vehicles For Hire

When the No-Fault Act was originally drafted, occupants of motor vehicles operated in the business of transporting passengers always received their benefits from the insurer of the motor vehicle they were occupying. Since then, the Legislature has carved out a number of exceptions, for passengers (but not operators) of certain vehicles, including government-sponsored transportation vehicles, school buses, charter buses, taxi cabs, and transportation network company vehicles, so that the passenger's own motor-vehicle insurance policy (or that of a spouse or a domiciled relative) will pay first. However, passengers in other types of vehicles operated in the business of transporting passengers, such as ambulances, limousines, party buses, non-emergency medical transportation vehicles, and airport shuttles receive their PIP benefits from the insurer of the vehicle they are occupying. Drivers of all vehicles being operated in the business of transporting passengers likewise receive their benefits from the insurer of the vehicle itself. See MCL 500.3114(2). Again, the no-fault amendments did not change these priority provisions.

Adoption of this "bright line" order was obviously an attempt to restore some stability to the priority system, but the legality and even the constitutionality of DIFS Order 19-048 is being challenged by the Michigan Automobile Insurance Placement Facility (MAIPF), which administers the MACP.

Like the prudent motorcyclist referenced above, assume that a person secures a policy providing for lifetime, unlimited no-fault benefits, for the protection of himself and his family. His daughter, a senior in high school, rents a party bus with some friends to go to the prom. On the way to the prom, the party bus is involved in a serious auto accident, and the daughter is catastrophically injured. The owner of the party bus, though, has only opted to purchase PIP coverage in the amount of $250,000. Those limits are quickly exhausted, yet under the way the new law is set up, the injured daughter cannot access her father's lifetime, unlimited PIP coverage. She is bound by whatever PIP coverage limits were chosen by the owner of the vehicle being operated in the business of transporting passengers.

Along these same lines, imagine that a person is employed driving a SMART bus in the metro-Detroit area. The SMART bus system decides to opt for $250,000 in PIP coverage limits. The bus driver, though, is seriously injured in a motor-vehicle accident, and even though the bus driver may have opted for lifetime, unlimited coverage on her own vehicle, the current law has no mechanism for her to access that coverage because her household insurer is simply a lower priority insurer.

Part C – Employer-Furnished Vehicles

Imagine that you work for a company that still provides company cars to their employees. However, the owner of the company opts to purchase $250,000 in PIP coverage. Pursuant to MCL 500.3114(3), the insurer of the employer-furnished vehicle occupies the highest order of priority for payment of the no-fault benefits at issue. Even if the employee has opted to purchase lifetime, unlimited benefits on his own motor vehicle, he has no way of accessing that coverage because his motor-vehicle insurer is a lower priority insurer.

Part D – Proposed Solution

HB 4812 has been introduced, which would change the order of priority for motorcyclists back to where it was before 1980. This bill would change the priority provisions so that the motorcyclist's motor vehicle insurer would occupy the highest order of priority for payment of the no-fault benefits at issue. While it would take another article to explain the "back story" behind the shift in the priority provisions that took place in 1981, it is the author's opinion that such a change would be bad public policy. HB 4812 does not address the situations where passengers in certain vehicles for hire, operators of all vehicles for hire, and occupants of employer-furnished vehicles find themselves in, when they have opted to purchase lifetime, unlimited coverage for their own automobiles, and yet are bound by whatever PIP coverage choices were made by the owners of the motor vehicles occupied or involved in the accident. These individuals may have made a choice to fully protect themselves by purchasing lifetime, unlimited benefits, but their choice means nothing in these circumstances.

The legislative fix is very simple – a law needs to be enacted to make it clear that if a person is entitled to benefits under MCL 500.3114(2), MCL 500.3114(3) or MCL 500.3114(5), and they have opted to purchase higher PIP coverage limits on their own policies under MCL 500.3114(1), then the injured person's insurer would receive a set-off for the benefits paid by the higher priority insurer, and after that higher priority coverage is exhausted, then the injured person's own personal motor vehicle insurance policy kicks in. Essentially, the person's own personal motor vehicle insurance coverage operates as excess or secondary insurance, and only kicks in after the underlying limits are exhausted. Furthermore, the amounts paid by the highest priority insurer should be applied toward the personal insurer's MCCA self-retention limit. The proposed statute should read something like this:

> If an injured person claiming benefits under MCL 500.3114(2), MCL 500.3114(3) or MCL 500.3114(5) has higher PIP coverage limits available to them, whether individually or through a spouse or relative of either domiciled in the same household pursuant to MCL 500.3114(1), then the insurer for the injured person, his or her spouse or a relative of either domiciled in the same household shall receive a credit for the amount of no-fault benefits being paid by the insurer paying pursuant to MCL 500.3114(2), MCL 500.3114(3) or MCL 500.114(5). Such insurer shall commence payment of benefits under the policy after the limits of the insurer paying under MCL 500.3114(2), MCL 500.3114(3) and MCL 500.3114(5) have been

exhausted. Any amounts paid by an insurer paying under MCL 500.3114(2), MCL 500.3114(3) and MCL 500.114(5) shall be added to any amounts paid by the injured person's insurer under MCL 500.3114(1) for purposes of reimbursement by the Michigan Catastrophic Claims Association for benefits paid in excess of the amounts set forth in MCL 500.3104.

HB 4812 does not address the situations where passengers in certain vehicles for hire, operators of all vehicles for hire, and occupants of employer-furnished vehicles find themselves in, when they have opted to purchase lifetime, unlimited coverage for their own automobiles, and yet are bound by whatever PIP coverage choices were made by the owners of the motor vehicles occupied or involved in the accident.

A few examples will clarify how this proposed amendment would work.

A motorcyclist obtains lifetime, unlimited PIP coverage on his own personal motor vehicle. While operating his motorcycle, he is involved in an accident with a motor vehicle whose owner has opted to procure $50,000 in PIP coverage. Due to the catastrophic nature of the injuries suffered by the motorcyclist, the $50,000 in PIP coverage is exhausted after 1 month. Once the coverage is exhausted, the motorcyclist's personal motor vehicle insurer commences payment of the "allowable expenses" at issue. Once the individual's personal insurer pays $530,000, thereby resulting in a total payout of $580,000 – the current MCCA self-retention limit – a motorcyclist's motor-vehicle insurer is reimbursed dollar for dollar by the MCCA.

To use another example, imagine that George works for SMART. SMART has $250,000 of PIP benefits on their vehicles. George is catastrophically injured while operating a bus. SMART's insurer pays the first $250,000. George's personal motor vehicle insurer then pays $330,000, bringing the total payout to $580,000. Any amounts paid by George's insurer above $330,000 would be reimbursed by the MCCA.

Finally, with regard to the "party bus" scenario, discussed above, if the party bus operator opted to carry $500,000 worth of PIP coverage, and the daughter is catastrophically injured, the insurer of the party bus would pay the first $500,000 in "allowable expense" coverage. The daughter's father's insurer then pays $80,000, thereby satisfying the current MCCA self-retention limit of $580,000. At that point, the MCCA will reimburse the father's personal motor vehicle insurer for the benefit payments made.

PART II – EVEN THOUGH THE INTENT OF THE LEGISLATION WAS TO PRECLUDE OUT-OF-STATE RESIDENTS FROM RECOVERING MICHIGAN NOFAULT BENEFITS, THE NEW LAW OPERATES TO DEPRIVE MICHIGAN RESIDENTS, INJURED WHILE OCCUPYING A MOTOR VEHICLE OUTSIDE THE STATE OF MICHIGAN, FROM RECOVERING NOFAULT BENEFITS.

Even a cursory glance of the no-fault amendments makes it clear that one of the intended results was to prevent out-of-state residents from recovering no-fault benefits, except under very limited circumstances. See, e.g., MCL 500.3113(c), which bars out-of-state residents from recovering Michigan no-fault benefits and MCL 500.3163, which provides that insurers admitted to do business in Michigan are no longer obligated to provide Michigan no-fault benefits to its out-of-state residents traveling in this state. See also the changes in MCL 500.3111, which govern Michigan residents involved in motor-vehicle accidents occurring outside of Michigan. **However, these changes, when coupled with the changes in priority (likewise discussed below) operate to deprive Michigan residents, who previously would have been entitled to recover no-fault benefits, from recovering no-fault benefits if they are injured in an accident occurring outside the State of Michigan.**

Take, for example, Bobby, Sue, and their three children who live in Detroit. Bobby and Sue have been living together for ten years. By all appearances, Bobby, Sue, and their three children appear to be a traditional "Ozzie & Harriet" family in everything but a marriage license! Bobby, Sue, and their three children travel to Toledo to take in a Toledo Mud Hens baseball game. While traveling in their car in Toledo, Bobby, Sue, and the three children are all seriously injured.

Under the old order of priority, all five occupants are entitled to Michigan no-fault benefits under MCL 500.3111, as Bobby is the named insured on a no-fault policy, his three children are relatives who are domiciled with him, and Sue recovers benefits because she is the occupant of a motor vehicle whose owner or registrant was insured by a Michigan no-fault policy. MCL 500.3114(4).

Under the current system, Sue is still entitled to receive no-fault benefits under MCL 500.3111, because she is a Michigan resident and is occupying a motor vehicle whose owner (Bobby) was insured under a Michigan no-fault insurance policy. However, under the current version of MCL 500.3114(4), she no longer turns to Bobby's insurer for payment of her no-fault benefits. She turns to the Michigan Assigned Claims Plan (MACP). **However, the statutory provisions governing the operation of the MACP make it clear that it does not provide coverage for accidents occurring outside the State of Michigan!** Sue is entitled to benefits but she has nowhere to go! Certainly, it could not have been the intention of the Legislature to deprive Sue of benefits that she otherwise would have been entitled to receive under the old system. Therefore, the Legislature needs to step in and amend the provisions governing the operation of the MACP to make it clear that Michigan residents, like Sue, who are entitled to benefits under MCL 500.3111 will receive their benefits from the MACP even for accidents occurring outside the State of Michigan. A proposed legislative amendment would look something like this:

A resident of this state, entitled to recover benefits under MCL 500.3111

for accidents occurring outside the State of Michigan shall receive their benefits from the Michigan Assigned Claims Plan., if they are not entitled to benefits from another insurer.

PART III – THE IMPACT OF THE PRIORITY CHANGES IN MCL 500.3114(4) AND MCL 500.3115(1)

As noted in our prior articles, the no-fault reform amendments re-wrote the priority provisions applicable to occupants and non-occupants of motor vehicles who do not have a policy of insurance available to them in their household, either individually or through a spouse or domiciled relative. Effective June 11, 2019, those individuals now turn to the Michigan Assigned Claims Plan (MACP), where their "allowable expense" benefits are now capped at $250,000. **The problem is that under the terms of the insurance policy issued to the owner of the motor vehicle occupied, these "strangers to the insurance contract" are still considered to be "insureds" under the policy.** So which controls – the new statute or the policy language?

The MACP had taken the position that it is accepting these claims, subject to a review of the policies issued to the owners of the motor vehicles involved in these accidents, in order to determine whether or not the policies would arguably provide greater coverage than was available through the MACP. If, for example, the policy contains a provision that provides that the policy provisions change automatically with any change in the Insurance Code, the MACP would accept coverage without question, because the policy provisions have obviously changed effective June 11, 2019.

On the other hand, if the policy itself makes no reference whatsoever to the Code, then the policy will be construed as providing broader coverage, and the claim will be returned to that insurer for payment.

These are extreme examples, and the author respectfully submits that very few, if any, policies have either of these policy languages. Most policies have language to the effect that the policy is "subject to the code." It is an open question as to whether or not the phrase "subject to" is a statement of limitation on coverage. Certainly, two attorneys reading this same language may come to different conclusions, as could two circuit court judges reviewing the identical policy language. **All of this chaos results because the insurers have not yet had time to get the Amendatory Rate and Policy Form Endorsements filed with the Department of Insurance and Financial Services.**

Don't think it makes a difference? Think again. Imagine a pedestrian, Brenda, who is struck by a motor vehicle while walking across the street. Brenda does not own a motor vehicle. Brenda is not married and has no relatives in her household who own a motor vehicle. Mike owns the motor vehicle that strikes Brenda. Under Mike's policy, she qualifies as an "insured" because she is involved in an accident with "your covered auto" under Mike's policy. Under the policy, she is entitled lifetime, unlimited no-fault benefits, because the accident occurred before July 1, 2020. However, under the MACP, her "allowable expense" benefits are capped at $250,000. Imagine that Brenda is catastrophically injured, and her initial hospitalization expenses alone exceed $250,000. What if Mike's insurer determines that its policy language is not clear, and decides to commence payment of Brenda's no-fault benefits? Imagine that three years from now, the MCCA reviews the policy and determines that the claim should have been referred over the MACP in the first place, and refuses to reimburse Mike's insurer. What then?

> [T]he Legislature needs to step in and amend the provisions governing the operation of the MACP to make it clear that Michigan residents, like Sue, who are entitled to benefits under MCL 500.3111 will receive their benefits from the MACP even for accidents occurring outside the State of Michigan.

Or imagine that Mike's insurer continues to pay on the claim, and after three years, the insurer has paid out $750,000. A Court of Appeals panel then interprets similar policy language and determines that the policy coverage automatically changed when the law changed, at which point the insurer sues the MACP for reimbursement. While the MACP may reimburse for the first $250,000 in "allowable expense" coverage, the insurer which, in good faith, paid benefits is now out $500,000! The NoFault Act was originally enacted to provide some certainty when it came to payment of no-fault benefits, yet under this scenario, the outcome is anything but certain.

On September 20, 2019, the Director of Insurance issued Order 19-048, which orders insurance carriers to continue handling claims under the old priority system until their Amendatory Rate and Policy Form Endorsements are filed and approved by the Department of Insurance and Financial Services (DIFS). Furthermore, DIFS will not approve the new policy forms unless they are accompanied by a premium rate reduction. Claims that may have been sent to the MACP by the originating insurer are to be sent back to the originating insurer for handling. Adoption of this "bright line" order was obviously an attempt to restore some stability to the priority system, but the legality and even the constitutionality of DIFS Order 19-048 is being challenged by the Michigan Automobile Insurance Placement Facility (MAIPF), which administers the MACP. See *MAIPF/ MACP v Department of Insurance and Financial Services*, Court of Claims Docket No. 19-000162-MM.

Proposed Legislative Fix

To short circuit the MAIPF/MACP lawsuit, and the inherent delays in straightening out the priority system, the Legislature needs to act very quickly. **The Legislature needs to make a choice – either delay the effective date of these priority changes to accidents occurring after July 1, 2020, to give insurers time to get their amendatory endorsements in order, or indicate that notwithstanding any policy provisions to the contrary, those claimants entitled to benefits under MCL 500.3114(4) and MCL 500.3115(1) automatically go to the MACP for payment of their benefits.** With regard to the first scenario, the legislative proposal should read something like this:

> The amendments to MCL 500.3114(4) and MCL 500.3115(1) apply to accidents occurring after July 1, 2020.

That way, claims that are currently being handled by the MACP, for accidents occurring after June 11, 2019, would be returned to the insurer of the owner of the motor vehicle occupied by the injured Claimant, or involved in the accident with the injured non-occupant While this is what the DIFS Order, currently being challenged, provides, there would be no question about the legality of such a law, and stability would be restored now.

Alternatively, MCL 500.3114(4) and MCL 500.3115(1) could be amended to include the following introductory clause:

Notwithstanding the provision of any insurance policy to the contrary, and without regard to the need to file new rates and policy forms as contemplated by Chapters 21 and 22 of the Code, . . .

Either way, it is imperative that some sense of certainåty be restored to the priority provisions.

PART IV- CLAIMS THAT ARE CLEARLY WITHIN THE PURVIEW OF THE MACP

On Sunday, September 22, 2019, columnist Mitch Albom published an editorial opinion in the Detroit Free Press in which he highlighted the plight of a 3-year-old girl, who was struck as a pedestrian by an uninsured motorist. Because the girl's parents did not have insurance of their own, she was eligible for no-fault benefits through the MACP. She would have been entitled to benefits through the MACP under the pre-June 11, 2019, No-Fault Act as well. However, because the loss occurred after June 11, 2019, her benefits were capped at $250,000. According to the article, her initial hospital bill at Children's Hospital of Michigan exceeded $140,000!

Two days later, Governor Whitmer directed DIFS to issue an order- DIFS Order 19-049- delaying the implementation of the $250,000 cap on MACP claims until after July 2, 2020, when the PIP choice provisions and the higher tort liability provisions begin to phase in. The DIFS order was issued with no notice to the MAIPF/MACP or, for that matter, any other interested party. The first rationale for the delay in implementation is questionable, as it pertains to the 30-day "window period" for individuals who lose their Medicare coverage or health insurance coverage, but who fail to obtain no-fault insurance within that timeframe.[1]

> She is bound by whatever PIP coverage limits were chosen by the owner of the vehicle being operated in the business of transporting passengers.

The second rationale, though, makes some sense from a public policy standpoint. The order explains that under the new system, excess "allowable expense" coverage will now be part of a claimant's tort claim, which will be easier to recover given the dramatically higher tort liability limits that will begin to be phased in after July 1, 2020. However, tortfeasors are still operating their automobiles under the pre-amendment tort liability limits. Utilizing the Mitch Albom example, it would be unfair to cap the 3-year-old girl's "allowable expense" coverage at $250,000 when she has no recourse, under the current tort system, to recover "allowable expense" damages in excess of the $250,000 cap. The press accounts indicate that the order was issued after Governor Whitmer had a closed-door meeting with advocates opposing the recent no-fault changes. All one needs to do is to lay the Mitch Albom article aside DIFS Order 19-049 and ask yourself whether the order likewise issued in response to Mitch Albom article as well.

In any event, the legality of DIFS Order 10-049 is being challenged as well in the *MAIPF/MACP v DIFS* lawsuit, reference above. Counsel for the MAIPF/MACP has also filed a motion for entry of a temporary restraining order and preliminary injunction, preventing the executive branch from delaying the implementation of the $250,000 cap on MACP claims. Again, the Legislature could step in and short circuit the MAIPF/MACP lawsuit by declaring that the $250,000 MACP cap takes effect for accidents occurring after July 1, 2020. Otherwise, practitioners will need to keep an eye on the *MAIPF/MACP v DIFS* litigation to determine whether these post June11, 2019 claims are, in fact, capped at $250,000. Again, the MAIPF/MACP is challenging the legality of both DIFS Order – 19-048 and 19-049 – and while the basis for challenging DIFS Order 19-048 is based on insurance policy considerations, DIFS Order 19-049 appears to be based solely on public policy concerns, and the author cannot help but wonder whether Governor Whitmer and her staff may be having "buyer's remorse" over these amendments.

CONCLUSIONS

These are just a few of the areas that need to be corrected by the Legislature, preferably before the end of the year. The proposed amendments to the priority provisions should be addressed immediately by the Legislature, so that the MACP can return the claims to the prior insurers (if the implementation of the priority changes is delayed until after July 1, 2020) or the MACP automatically takes those cases without getting bogged down in policy interpretation issues. If the Legislature chose to delay implementation of the $250,000 MACP cap until after July 1, 2020 at the same time, it would also short circuit the *MAIPF/MACP v DIFS* lawsuit, discussed above. The author respectfully suggests that the Legislature make a call – one way or the other – to restore some level of certainty.

There are certainly other areas that need to be addressed, and as they arise, those will be discussed in forthcoming articles. For the time being, to mis-quote Bette Davis (as many people do), "Buckle your seatbelt, it's going to be a bumpy ride."

Endnotes

1 These individuals are entitled to coverage through the MACP up to $2,000,000.

Supreme Court

By: Stephanie Romeo, *Clark Hill PLC*
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Supreme Court Clarifies Summary Disposition Standards and Highlights Distinctions Attorneys May Forget

On July 10, 2019, the Michigan Supreme Court clarified the scope and impact of MCR 2.116(C)(8) and MCR 2.116(C)(10): two deceptively similar rules allowing defendants to obtain summary disposition in Michigan state court. Motions brought under MCR 2.116(C)(8) are decided on the pleadings alone and no other evidence is considered. In contrast, a party opposing a motion brought under MCR 2.116(C)(10) may not rest on mere allegations or denials in its pleadings, but must submit evidence establishing a genuine issue of material fact for trial. Emphasizing the distinction between a claim's legal sufficiency and a claim's factual sufficiency, the Michigan Supreme Court concluded that the lack of evidence to support an allegation cannot be fatal under MCR 2.116(C)(8) and a case involving a motion filed under MCR 2.116(C)(8), but erroneously evaluated under MCR 2.116(C)(10) by a preceding lower court, must be reversed. *El-Khalil v. Oakwood Healthcare, Inc. Docket*, No. 157846, 2019 WL 3023561 (Mich. July 10, 2019).

Facts: Plaintiff Ali El-Khalil was employed by Oakwood Hospital-Dearborn (Oakwood Dearborn) as a podiatrist from 2008 until 2011. In 2011, he was granted staff privileges at various hospitals, which were renewed for one or two year periods. In August 2014, El-Khalil sued Oakwood Healthcare, Inc. (Oakwood Healthcare) and two doctors, alleging racial discrimination in violation of the Elliott-Larsen Civil Rights Act (ELCRA) based on his Arabic ethnicity, tortious interference with an advantageous business relationship, and defamation. The trial court granted defendants' summary disposition of the discrimination and tortious interference claims under MCR 2.116(C)(7) and MCR 2.116(C)(8) and El-Khalil later stipulated to dismissal of his defamation claim. After El-Khalil's claims were dismissed, the vice chief of staff at Oakwood Dearborn reviewed complaints from El-Khalil's peers ranging from February 2015 through May 2015. Due to these complaints, Oakwood Dearborn denied El-Khalil's re-employment application on June 2, 2015.

On June 24, 2015, El-Khalil filed another lawsuit alleging only breach of contract based on an alleged breach of the Medical Staff Bylaws, which were part of El-Khalil's employment agreement. On July 6, 2015, El-Khalil amended his complaint and added a claim of unlawful retaliation under ELCRA as he believed defendants unlawfully retaliated against him based on his previous lawsuit. In lieu of filing an answer, defendants moved for summary disposition under MCR 2.116(C)(7) (immunity and release) and MCR 2.116(C)(8) (failure to state a claim on which relief can be granted). The trial court granted summary disposition to defendants without specifically identifying which rule supported its decision, but concluded that "plaintiff offered no support beyond his bare assertions" that defendants retaliated against him in violation of ELCRA or that defendants' actions were contrary to the hospital's bylaws.

The Court of Appeals determined that the trial court reviewed the summary disposition motion under MCR 2.116(C)(10) and affirmed the decision under that subrule. Because the motion was filed under MCR 2.116(C)(7) and MCR 2.116(C)(8), as opposed to MCR 2.116(C)(10), the Michigan Supreme Court vacated the Court of Appeals opinion and remanded for review under the appropriate standards. On remand, the Court of Appeals once again held that summary disposition of El-Khalil's claims was appropriate, but this time claimed it was appropriate under MCR 2.116(C)(8). It found it unnecessary to address whether summary disposition of either claim was appropriate under MCR 2.116(C)(7).

Ruling: The Michigan Supreme Court reversed the judgment of the Court of Appeals, holding that when considering a motion filed under MCR 2.116(C)(8),

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a trial court must accept all factual allegations as true, deciding the motion on the pleadings **alone**. On the other hand, when a motion is filed under MCR 2.116(C)(10), a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. According to the Michigan Supreme Court, the Court of Appeals erred in granting summary disposition by simply giving an MCR 2.116(C)(8) label to what was essentially a MCR 2.116(C)(10) analysis.

The Michigan Supreme Court explained that the Court of Appeals erroneously relied on El-Khalil's failure to present evidence of a causal connection between his protected activity and the adverse employment action, as required under ELCRA to establish a prima facie case of retaliation. This inquiry went beyond the scope of appropriate review under MCR 2.116(C)(8) as this court rule requires merely an adequate allegation, rather than adequate evidence to support it. The Court of Appeals erred in examining the relative strength of the evidence offered by plaintiff and defendants to determine whether the record contains a genuine issue of material fact as this analysis is only a requirement under MCR 2.116(C)(10). Here, El-Khalil adequately pleaded causation by alleging defendant decided not to reappoint him after and because of his 2014 lawsuit.

Similarly, the Michigan Supreme Court explained that the Court of Appeals erroneously granted summary disposition on El-Khalil's breach of contract claim by basing its decision on complaints about El-Khalil's unprofessional interactions with hospital staff rather than analyzing the sufficiency of El-Khalil's allegation based on the pleadings alone. El-Khalil asserted that the denial of his privileges was in breach of the by-laws, and that assertion was legally sufficient to survive MCR 2.116(C)(8). Because the Court of Appeals conducted an analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for El-Khalil's allegations, the Michigan Supreme Court reversed the judgment of the Court of Appeals and remanded to that Court for consideration under MCR 2.116(C)(7).

Practice Pointer: As the Supreme Court explained, attorneys often breeze through the section of a brief or judicial opinion describing the appropriate legal standard at issue. Attorneys are especially likely to do this when reviewing the standards governing summary disposition, as these standards are so commonly seen and reviewed throughout an attorney's practice. This case reveals the dangers in doing so, while also providing a detailed and informative explanation of the appropriate analyses under these standards to help attorneys avoid these costly and inefficient mistakes. While the distinction between these two legal standards may seem obvious, it is easy to conflate the two given the daily stressors and intensity of the fast-paced work environment. This case also reminds us of the difficulty of prevailing on a motion filed under MCR 2.116(C)(8), given the minimal burden placed on the opposing party, generally the plaintiff. When drafting or responding to future motions for summary disposition, this case can serve as a quick and helpful guide to ensure the selection of the appropriate legal standard.

Court Rules Report

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PROPOSED AMENDMENTS

2018-25 – Supreme Court procedure for cases argued on application

Rule affected:	MCR 7.312
Issued:	February 13, 2019
Comment Period:	June 1, 2019
Public Hearing:	September 18, 2019

The amendment would incorporate into the Supreme Court rules the procedure for cases being argued on the application. (Note that these rules have been previously included in orders granting argument on the application.) A proposed new subrule (K) also alerts parties to argue the merits of the case even for cases being heard on the application.

ADOPTED AMENDMENTS

2002-37 – E-Filing exemptions

Rule affected:	MCR 1.109
Issued:	June 5, 2019
Effective:	September 1, 2019

This amendment provides a statewide process for requesting an exemption from the e-filing requirements, including a list of certain people automatically exempt and a list of factors for the court to consider when determining to exempt a person from the requirements.

2018-19 – Amendment to discovery rules

Rule affected:	Numerous
Issued:	June 19, 2019
Effective:	January 1, 2020

These comprehensive amendments to the rules concerning discovery are based on a proposal created by a special committee of the State Bar of Michigan. The rules require mandatory initial disclosures in many cases, re-define the scope of discovery, adopt a presumptive limit on interrogatories (20 in most cases), limit a deposition to 7 hours, and modify the sanctions for failure to provide discovery. The amendments also update the rules to more specifically address issues related to electronically stored information, as well as many other substantive changes.

2017-28 – Restrictions of filing protected personal identifying information

Rule affected:	MCR 1.109, MCR 8.119 and AO 1999-4
Issued:	May 22, 2019
Effective:	January 1, 2021

These amendments define and more clearly outline the procedure for redacting protected personal identifying information from documents filed with the court.

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Amicus Report

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The Supreme Court in its upcoming session will be addressing several cases involving premises-liability issues. The Court has invited Michigan Defense Trial Counsel to weigh in as amicus curie in two of these cases.

The Supreme Court has granted oral argument on the application in the case of *Smith v City of Detroit* and invited participation by MDTC.[1] The plaintiff in *Smith* alleged that he was injured while riding his bicycle on a sidewalk in the City of Detroit when he was suddenly thrown forward over the handlebars. After the fall, the plaintiff reported that he observed a couple of slabs of concrete missing from the sidewalk, with just granular material of the sub-base remaining. The plaintiff claimed he did not see the hazard because it was dark and there was insufficient street lighting in the area.

The ensuing litigation involved multiple parties, including the city, the general contractor for the sidewalk work, the subcontractor, and various other entities. Following various procedural maneuvers, only the general contractor (Rauhorn) and subcontractor (Merlo) remained. These remaining defendants sought and were granted summary disposition on the basis that the claim sounded in premises liability (rather than ordinary negligence), and the open-and-obvious doctrine barred the claim.

The plaintiff appealed only the dismissal as to the subcontractor Merlo. On appeal, in an unpublished opinion, the Court of Appeals affirmed the trial court's finding that the claim sounded in premises liability, but reversed as to the conclusion that the open-and-obvious doctrine barred the claim. The Court held that a question of fact was presented regarding whether the missing portion of the sidewalk was open and obvious under the darkened conditions encountered by the plaintiff.

The parties filed cross-applications for leave to appeal in the Supreme Court. The Court subsequently granted oral argument on the plaintiff/cross-appellant's application. In its order, the Supreme Court directed the parties to address "whether the defendant cross-appellee maintained possession and control over the sidewalk such that plaintiff's claim sounded in premises liability rather than ordinary negligence." Compare *Orel v Uni-Rak Sales Co Inc*, 454 Mich 564 (1997), and *Finazzo v Fire Equip Co*, 323 Mich App 620 (2018), with *Fraim v City Sewer of Flint*, 474 Mich 1101 (2006)."

Given the issue as stated in the Supreme Court's order, the Court apparently will be considering the extent, if any, to which a contractor or subcontractor has "possession and control" of a premises. In the absence of possession and control, a contractor or subcontractor cannot be subject to a premises-liability claim. Such a finding would impact the defenses available to a contractor or subcontractor when an individual is injured on the premises. The open-and-obvious doctrine, for example, is only available in a premises-liability claim.

The Supreme Court will also be addressing the distinction between premises-liability claims and ordinary-negligence claims in *Scola v JP Morgan Chase Bank,* and again requested participation by MDTC as amicus curiae.[2] This case arose out of injuries sustained by the minor plaintiff as he was riding in a car driven by his mother, which was involved in a head-on collision. The plaintiff's mother was driving in the city of Wayne where Michigan Avenue splits into two one-way roads, with a city block in between them. The plaintiff's mother turned in the Chase Bank parking lot from Wayne Road

[T]he Court apparently will be considering the extent, if any, to which a contractor or subcontractor has "possession and control" of a premises.

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and attempted to exit onto Michigan Avenue. The plaintiff's mother apparently did not realize Michigan Avenue was one-way in that area, turned the wrong way when exiting the parking lot and was involved in the head-on collision.

The trial court granted summary disposition in favor of the defendant bank, finding that the case sounded in premises liability, rather than ordinary negligence, and that the open-and-obvious doctrine barred the plaintiff's claim. The Court of Appeals affirmed.

The plaintiff appealed to the Supreme Court, which granted oral argument on the application, asking the parties to address "whether the Court of Appeals erred in holding that the appellant's claim sounded in premises liability rather than ordinary negligence." Based on the arguments made by the plaintiff in the Court of Appeals, this appeal will also involve, to a certain extent, consideration of whether the defendant had "possession and control" of the premises since the accident actually took place on Michigan Avenue, not in the defendant bank's parking lot. In addition, the Court will be asked to determine whether the claimed defect of a lack of warning signs at the parking lot's exit indicating that Michigan Avenue was one-way sounds in ordinary negligence or premises liability.

As of the date this report was written, both of the above cases were in the briefing stage. MDTC will provide updates on the issues once the amicus briefs are filed.

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 Supreme Court Docket No. 158300.

2 Supreme Court Docket No. 158903.

Published cases make law.

On behalf of my insurance clients, I have won 19 published decisions in the Michigan Supreme Court, and 39 published opinions in the Michigan Court of Appeals

ACIA v Hill, 431 Mich 449 (1988)
ACIA v NY Life, 440 Mich 126 (1992)
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Bosco v Bauermeister, 456 Mich 279 (1997)
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Cruz v State Farm, 466 Mich 588 (2002)
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Muci v State Farm, 478 Mich 178 (2007)
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Smith v DAIIE, 124 Mich App 514 (1983)
Smith v Motorland, 135 Mich App 33 (1984)
St. Bernard v DAIIE, 134 Mich App 178 (1984)
Williams v Payne, 131 Mich App 403 (1984)
Witt v American Family, 219 Mich App 602 (1996)
Universal Underwriters v ACIA, 256 Mich App 541 (2003)

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