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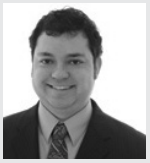

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President's Corner

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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.

"Nobody told me there'd be days like these. Strange days indeed."
--John Lennon

As I write this, most of us are still working from home, avoiding all human contact beyond our own front door. Even the most introverted of us are starting to feel a bit restless, I suspect. It's been hard on everyone. While the toll on restaurants and spas has been in the news every night, I haven't seen one main stream media story expressing worry about law firms—there's just not a lot of love for us these days.

But, in Michigan, probably more than 95% of our firms, and almost all defense firms, meet the definition of a "small businesses" and have been hit hard. There have been layoffs, salary cuts, hiring freezes, termination of summer law student programs and suspension of firm events. I have heard stories of even more extreme cost-cutting measures. It's hard.

But it seems like almost everyone I have spoken to is managing, somehow. We are fortunate since most of us can work from home, and with a little (or a lot) of tweaking, we have been able to get our support staff and administrators into the on-line world. Courts are experimenting with telephone or some internet-based attendance, in the place of in-person appearances. And, the depositions that are going forward are largely taking place on Zoom, or Go to Meeting.

The virus has forced even those of us stuck in an old-school traditional way of thinking to re-examine how we do virtually everything in our practice. Some of the changes are likely here to stay. While everyone hates telephone depositions and all the glitches and limitations that go along with them, it seems like most are impressed with Zoom. The platform allows us a clear view of the speaker, and is, in some ways, better than being there. While there are security issues yet to be worked out, and while we will be forced to plan ahead with deposition exhibits, I bet that most of us will be Zooming a lot going forward. That means no last- minute rush as a deposition ends to catch that last flight out of O'Hare; no worrying that a snow storm will prevent us from getting out of a ""Frostbite Falls"; no sitting around an airport hoping that our delayed flight gets us home in time for a big family event.

And, the remote court appearances have allowed us to avoid waiting three hours to have a 5 minute motion heard. No one will miss that, if we don't have to return to that "normal".

There will be other changes, however, that will be more painful. The more we use remote technology, the less we get to know our opponents. And the less we know people, the less likely we are to cut each other some slack on deadlines, or other basic courtesies we now take for granted. If we continue to work more from home, even our partners will become less familiar to us. While we might have argued before that the chit chat we have over coffee each morning with our co-workers is just a waste of time, or that the conversations during deposition breaks about things like how bad the Lions are this year, are pointless, we can now appreciate the value in such simple things.

So what can we do? Here is my advice, (to myself, and to anyone else who is struggling with what the future may hold): Whether things return to normal in a month, or a year, or longer, we should embrace the technology we have adapted to. But, we should not lose the human touch.

We should seek out opportunities to meet with our co-workers. We should try to take advantage of every opportunity to meet the judges and fellow attorneys.

As soon as it's safe we at the MDTC will return to a full calendar of events like "Meet the Judges", happy hours, awards events, and outings as well as continuing legal education. Please join us, even if it's just for a quick drink, or to complain about Michigan sports. Yes, a lot of it is just silly pointless chit-chat. But it's important.

Establishing Medical-Expense Damages in Michigan[1]

By: Michael J. Cook, *Collins Einhorn Farrell PC*

Executive Summary

Economic damages, particularly medical expenses, are currently driving personal injury litigation. How the value of medical expenses is determined under Michigan law is an underdeveloped issue. Michigan's appellate courts haven't addressed medical-expense evidence in light of modern medical billing and payment practices. Under two not-so-recent Michigan Supreme Court cases, the amount paid is evidence of reasonable value while a mere bill is not.

Michael J. Cook is a shareholder at Collins Einhorn Farrell PC and co-chair of its appellate-practice group. His practice focuses on appellate litigation, including post-verdict and pretrial dispositive-motion practice. Before joining Collins Einhorn, Mike was a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr. from 2007 to 2009.

Introduction

Economic damages are the new black. In particular, damages for medical expenses are "trending" and driving litigation value. But how that value is determined is an underdeveloped issue in Michigan. Is the value of medical treatment based on the bill or the amount accepted as payment? Many jurisdictions hashed out that issue several years ago (with divergent results). Michigan, though, has been largely silent.

The most recent guidance from Michigan courts came in the 1920's. Those courts gave timeless advice. And it's worth repeating: a bill that no one would pay isn't evidence of value, but the amount actually paid and accepted is evidence of reasonable value.

A quick example illustrates the point. An entrepreneurial-neighborhood child offers to shovel your driveway. You accept. When he is done, he gives you a bill for $1,000. Is his bill evidence of the reasonable value of shoveling your driveway? No, but his acceptance of your $20 counteroffer certainly is.

This simplistic example is a (hyperbolic) reflection of current medical billing and payment practices. Medical bills say one thing; the amount accepted as payment says more. And the difference between those two amounts can either cut damages in half or double them, depending on your viewpoint.

Why are medical expenses driving litigation? Because medical treatment is really, really expensive in the U.S.

It's no secret that medical costs in the United States far outpace similar, developed countries. Services and prescriptions cost double what they cost elsewhere.[2] So healthcare in the U.S. can involve big numbers, which add up quickly to become enormous numbers. And those enormous numbers can turn into "mega verdicts."

Look at two recent 9-figure verdicts. In 2018, two Michigan juries awarded over $130 million in damages.[3] The driving force behind the verdicts were economic damages for medical expenses.

Aren't damages for medical expenses just the amount on the bill? Not quite.

Here's another not-so-veiled secret: the cost of medical treatment isn't what the bill says. Whether it's private insurance, Medicaid, or good-old-fashioned cash, medical providers accept far less than the billed amount as full payment. And that difference can impact the damages claim and value of a lawsuit.

So, when it comes to determining medical-expense damages, what should juries

use—the billed amount or the paid amount? Michigan courts haven't squarely addressed that question in the context of modern medical billing practices. Like many questions, the answer is, "It depends." It's the amount paid for past damages in medical-malpractice cases.[4] Until recent legislation, it was the billed amount for automobile-negligence cases.[5] Now the no-fault act tethers "reasonable charges" for many services to the amount that Medicare would pay for them.[6] But beyond those limited circumstances, well, you have to dig for the answer.

The aim of economic damages is to compensate the plaintiff for their financial loss.

Before digging, let's start with an undeniable premise: damages include the reasonable value of the plaintiff's medical care.[7] As far as beginnings go, that one isn't bad. It tells us what the damages aren't. The damages aren't actual value. They're neither the reasonable amount billed nor the actual amount billed. And they're not necessarily the amount paid. They're something else.

Another undeniable premise helps focus the contours of "reasonable value." The purpose of damages is to compensate a loss.[8] It's not to punish the defendant.[9] And it's not to give the plaintiff a windfall.[10] So "the amount of recovery for [the losses actually suffered] is inherently limited by the amount of the loss; the party may not make a profit …."[11]

The amount accepted as payment reflects a reasonable value for the medical treatment.

So how do we determine the reasonable value of medical treatment limited to the amount of the plaintiff's loss? There's one certainty—the amount accepted as full payment is a reasonable value that doesn't exceed the plaintiff's loss. Anything above or below that amount is dubious, though possibly not off limits.

The Michigan Supreme Court's decision in *Herter v Detroit*[12] addressed the use of medical bills to show value. The plaintiff was injured in an accident and relied on his doctor's bills to establish his past medical expenses. The Supreme Court held that it was error to admit "two bills handed plaintiff by the bookkeeper of the surgeon who attended him, without evidence of the reasonable value of the service rendered."[13]

The lesson from *Herter* is that a medical bill, standing alone, isn't evidence of the reasonable value of medical treatment; it's like the neighborhood kid's $1,000 snow-shoveling bill. So what does establish reasonable value? *Herter* relied on the Supreme Court's decision in *Alt v Konkle*,[14] which explained that the amount actually paid stands on better footing.

In *Alt*, the plaintiff was injured in a car accident and relied on the amounts paid for his medical treatment to establish his past medical expenses. The defendant objected, arguing that the payment didn't show that the amount was reasonable. The trial court overruled the objection and the Supreme Court affirmed.

Alt held that "the fact that these bills and charges for services, shown to have been rendered, had been paid in full was some evidence of their reasonableness."[15] The Court approved the holding from a California case, *Dewhirst v Leopold*, which stated: "'Amounts paid for medical treatment and attention are some evidence of reasonable value thereof, and sufficient in absence of showing to contrary.'"[16]

So, under Michigan law, a medical bill alone is not evidence of the reasonable value of the plaintiff's medical expenses. But the amount accepted for medical services is, at the very least, some evidence of reasonable value.

Alt and *Herter* are not recent decisions. They've stood the test of time and their respective holdings didn't come with expiration dates. In fact, *Herter*'s rejection of the billed amount is particularly appropriate for modern medical billing. Numerous courts have recognized the reality that medical providers are very rarely paid the amount in their bills.[17]

Past versus future medical expenses.

Future medical expenses haven't been paid. They haven't even been incurred yet. So the amount accepted as payment is unknown. Likewise, there are no bills for future medical expenses. So what do we do to determine reasonable value?

The reasonable value of any particular medical service in 2032 is inherently speculative. All we have to help us with that speculation is today's reasonable value and assumptions about inflation. So nothing really changes when litigating the reasonable value of future medical expenses. A mere bill isn't evidence of anything—today or tomorrow. But the amount accepted for medical services is, at the very least, some evidence of reasonable value that can be used to project future medical expense.[18]

The collateral-source rule doesn't prohibit using evidence of the amount paid to establish reasonable value.

Lawyers get antsy about introducing evidence of how much a third party paid for an expense. The reason is the collateral-source rule. In Michigan, lawyers have to consider the common-law collateral source rule and the collateral-source statute. Neither precludes a party from using the amount paid to establish the reasonable value of a service.

The common-law collateral-source rule does not prohibit evidence of the market rate for a particular medical expense.

The common-law collateral-source rule prohibits the argument that the plaintiff has no damages because a third party compensated him.[19] When an insurer reimburses the plaintiff for the value of items destroyed in a fire, the plaintiff can still recover that value from the person who negligently caused the fire.[20] Likewise, a defendant can't use a health insurer's payment to argue that the plaintiff has no medical-expense damages.[21]

However, using an insurer's payment to show the reasonable value of the plaintiff's damages is a different matter. For example, if an insurer paid $1,000 for an MRI, the defendant can't argue that the plaintiff has no damages related to the MRI because the insurer paid it. That would violate the collateral-source rule. But a defendant can argue that the $1,000 payment establishes the reasonable value of the plaintiff's damages for the MRI. That wouldn't violate the collateral-source rule. The plaintiff's damages aren't eliminated by the $1,000 payment; they're established by it. Redacting who paid a bill and jury instructions can address concerns with jurors misunderstanding payment evidence.

But let's take a step back. Forget what someone paid for the specific plaintiff's medical care. Reasonable value is the market rate. Evidence of the rates that anyone—Medicare, Medicaid, insurers—pay is relevant. In other words, whether the plaintiff has Medicare or private insurance is beside the point, but what Medicare and insurers would pay for a given service is relevant to reasonable value and doesn't implicate the collateral-source rule.

Michigan's collateral-source statute has no bearing on the evidence offered during trial to establish the amount of damages.

The collateral-source statute[22] is Michigan's exception to the collateral-source rule. It allows a party to submit evidence of collateral-source payments to reduce the verdict. Most important here, it only applies after the verdict. It has nothing to do with evidence offered during trial.

Michigan's most significant decision on the difference between the amount billed and paid for medical treatment is *Greer v Advantage Health*,[23] which involved the collateral-source statute. It didn't address what is and isn't evidence of reasonable value during trial.

Greer held that when the jury awards the billed amount and the insurer asserts a lien for the amount paid, the statute doesn't allow trial courts to reduce the award.[24] *Greer* established that there's no back-end fix for a jury's award of damages based only on medical bills. It doesn't address the front-end issue—what is evidence of the reasonable value of healthcare treatment? *Alt* and *Herter* answer that question.

Conclusion

Michigan's appellate courts haven't addressed medical-expense evidence in light of modern medical billing and payment practices. Some might say that Michigan is behind the curve. Others might say that Michigan is well ahead of the curve with *Alt* and *Herter* on the books for nearly a century. It's a matter of perspective.

Numerous other states have tackled the issue in the last decade. Their holdings span the spectrum. Some hold that the amount paid is the ceiling. Others hold that only the billed amount is admissible. And yet others are in the middle—bills and the amount paid are evidence for the jury to consider.

Though it hasn't shut the door on billed amounts, *Alt* and *Herter* put Michigan close to treating the amount paid as the ceiling. That's where California ended up and *Alt* relied on California case law. That's also where the public policy reflected in the recent medical-malpractice and no-fault legislation seem headed. But Michigan isn't quite there for all personal-injury claims, yet.

So where is Michigan now? Or, circling back to the beginning of this article, is the value of medical treatment based on the bill or the amount accepted as payment? To answer that question, recall our snow-shoveler. Without more (like evidence that someone would actually pay it), the neighborhood kid's $1,000 bill isn't evidence of the reasonable value. That's *Herter*'s lesson.[25] When he accepts your $20 payment, you've both put a value on the service. So the payment alone is evidence of reasonable value. That's *Alt*'s lesson. Those two time-tested lessons represent the controlling law for most personal-injury cases in Michigan.

So when your neighbor's son hands you a $1,000 bill for shoveling, you're welcome to pay it, but you should probably consider what he'd accept as payment and what others are accepting as payment too. You may save a small fortune. The same holds true when litigating medical-expense damages to a jury.

Endnotes

1 A version of this article was originally published in two parts by Michigan Lawyers Weekly (March 10 & 24, 2020)

2 For example, in 2014, the average cost of an MRI was $1,119 in the United States, $788 in the United Kingdom, and $215 in Australia. Peterson-Kaiser, Health System Tracker <https://www.healthsystemtracker.org/chart-collection/how-do-healthcare-prices-and-use-in-the-u-s-compare-to-other-countries/#item-the-average-price-of-an-mri-in-the-u-s-is-significantly-higher-than-in-comparable-countries_2018> (accessed July 12, 2019).

3 Hall, Jury awards family $130M in medical malpractice case against Beaumont, Detroit Free Press (Sept. 25, 2018), available at https://www.freep.com/story/news/local/michigan/oakland/2018/09/25/beaumont-hospital-royal-oak-medical-malpractice/1423035002/. Donnelly, 17-year-old girl wins $135M lawsuit in malpractice case, The Detroit News (July 2, 2018), available at https://www.detroitnews.com/story/news/local/detroit-city/2018/07/02/17-year-old-girl-wins-135-million-lawsuit-malpractice-case/753275002/

4 MCL 600.1482.

5 MCL 500.3107(1)(a); MCL 500.3157; *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 383; 554 NW2d 49 (1996).

6 2019 PA 21.

7 M Civ JI 50.05, cmt, citing *Herter v Detroit,* 245 Mich 425; 222 NW 774 (1929).

8 *Rafferty v Markovitz*, 461 Mich 265, 270–271; 602 NW2d 367 (1999).

9 *Rafferty*, 461 Mich at 270–271; *McAuley v Gen Motors Corp*, 457 Mich 513, 519-520; 578 NW2d 282 (1998)

10 *Lawrence* C *Young, Inc v Servair, Inc,* 33 Mich App 643, 645; 190 NW2d 316 (1971).

11 *McAuley*, 457 Mich at 520.

12 *Herter v Detroit,* 245 Mich 425; 222 NW 774 (1929).

13 *Herter*, 245 Mich at 428.

14 *Alt v Konkle*, 237 Mich 264; 211 NW 661 (1927).

15 *Alt*, 237 Mich at 270.

16 *Alt*, 237 Mich at 270, quoting *Dewhirst v Leopold*, 194 Cal 424; 229 P 30 (1924).

17 See, e.g., *Aetna Life Ins Co v Huntingdon Valley Surgery Ctr,* 129 F Supp 3d 160, 174 (ED Penn, 2015) (billed "rates are not 'actual charges' that providers intend to collect in

full from insurers and members") reversed in part on other grounds, 703 Fed Appx 126 (CA 3, 2017); *Howell v Hamilton Meats & Provisions, Inc*, 52 Cal 4th 541, 564; 257 P3d 1130 (2011; *Nassau Anesthesia Assocs PC v Chin*, 924 NYS2d 252, 254 (NY Dist Ct, 2011); *Temple Univ Hosp, Inc v Healthcare Mgmt Alternatives, Inc,* 832 A2d 501, 510 (Pa Super Ct, 2003).

18 See *Corenbaum v Lampkin,* 215 Cal App 4th 1308, 1330-31; 156 Cal Rptr 3d 347 (2013).

19 *Tebo v Havlik*, 418 Mich 350, 366; 343 NW2d 181 (1984) ("The common-law collateral source rule provides that the recovery of damages from a tortfeasor is not reduced by the plaintiff's receipt of money in compensation for his injuries from other sources.").

20 *Perrott v Shearer*, 17 Mich 48 (1868); *Hagen v Chicago, D & CGTJR Co*, 86 Mich 615; 49 NW 509 (1891); *Peter v Chocago & WM Ry Co*, 121 Mich 324; 80 NW 295 (1899).

21 *Tebo*, 418 Mich at 366-368 (explaining that a plaintiff could recover economic damages in a dramshop action despite receiving no-fault benefits covering the same damages).

22 MCL 600.6303.

23 *Greer v Advantage Health*, 305 Mich App 192; 852 NW2d 198 (2014).

24 *Greer*, 305 Mich App at 212-213. The analysis is complex. The court agreed that the "insurance discount"—the difference between the bill and the payment—is a collateral-source payment. *Id.* at 210-211. Normally, that would reduce the judgment. But there's an exception when the payment is from an entity who exercised its right to a lien. Since the healthcare insurer asserted a lien, the exception applied. *Id.* at 212.

25 *Herter*, 245 Mich at 428.

Tribal Sovereign Immunity, Its Origins and Development How Does That Affect My Practice?[1]

By: Michael L. Rausch, Evan T. Thompson, Jana M. Simmons

Executive Summary

There are over 500 federally recognized Indian tribes in the United States, many of which are located in the Midwest. It is not uncommon for otherwise typical personal-injury litigation to arise out of incidents occurring on tribal land or involving a tribal member or employee. As an insurance-defense litigator, it is helpful to understand the concepts of tribal sovereignty and tribal sovereign immunity in the event a case involves tribal law.

Introduction

Imagine sitting at your desk, and you get one of the following calls from an adjuster you deal with regularly:

1. "Linda, an explosion occurred at a residence on the reservation. Our insured is the contractor who installed the water heater. The insured is being sued in Tribal Court along with the Tribal Housing Authority and others. We need you to defend."
2. "Tony, an employee from the Tribal Casino located outside the reservation was driving a company vehicle and was involved in a motor-vehicle accident with our insured trucker. We have paid our insured trucker's property damage and property losses and would like to subrogate against the at-fault Indian driver and Casino. Can you assist?"
3. "Barb, our insured contractor did some work on the tribal council building reservation and is now being sued for negligence after a beam fell during construction injuring local workers. The workers have sued the tribe as the owner and our contractor in Tribal Court. We need you to defend our insured."
4. "Mike, we have a product-liability case involving a tire failure on a motor vehicle owned by the tribe and driven by a member Indian on the local reservation that ended up in a wrongful-death suit from the family. They sued the vehicle and tire manufacturers and the tribe for its failure to maintain the vehicle. We insure the tire manufacturer. We need you to defend our insured."

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What do all of these scenarios have in common that you, as an insurance-defense litigator, should know? Tribal sovereignty and tribal sovereign immunity. Over the course of the next year or so, the Native Nations Law Task Force of the Defense Research Institute (DRI) will be providing a series of articles involving legal issues encountered throughout tribal and federal courts in civil (and perhaps criminal) cases. We start here with the basics—what is tribal sovereignty and what is tribal sovereign immunity; what are its origins, and what is its status today?

Today, sovereign immunity, as a fundamental aspect of tribal sovereignty, continues to be asserted, denied, debated, and changed by ongoing case law.

But first, did you know there are 573 federally recognized Indian tribes in the United States and over 600 First Nations in Canada?[2] There are 326 reservations in the United States and more than 3,100 Indian reserves in Canada.[3] Additionally, issues related to federal recognition are not static. On December 20, 2019, Congress gave federal recognition to the Little Shell Tribe of Chippewa Indians of Montana, making it the 574th federally recognized Indian tribe in the United States.[4] Given the number and diverse locations of reservations and the above scenarios, you can see why issues related to sovereign immunity are important.[5]

As you may know, sovereign immunity stems from the English common law. As attorney William Wood stated in his law review article:

> The origins of the common law sovereign immunity doctrine are two-fold. On the one hand, English common law dating back to at least the Fourteenth century recognized the King's immunity from suit in his courts. As this monarchical immunity doctrine evolved, the notion of foreign sovereign immunity--the concept that a sovereign should enjoy protections in other nations' courts similar to those it receives at home-- began to develop…

By the time the United States was founded, sovereign immunity was, in the oft-quoted words of Alexander Hamilton, seen as something "inherent in the nature of sovereignty" that was recognized by the "general sense, and the general practice of mankind." The states that formed the new republic understood both themselves and their newly-formed national government to have sovereign immunity. Foreign nations, of course, were already in the group of entities recognized as having immunity.[6]

The History of Indian Tribes as Sovereign Nations

During the time of the American colonies, the nations that sent explorers to the "new world," entered into treaties with the native nations thereby treating them as foreign sovereigns—a sovereign equal to themselves. When the United States adopted its Constitution in 1788,[7] the Constitution continued to recognize the Indian tribes as sovereign nations by allowing the President to enter into treaties with the Indians and by regulating commerce "with foreign Nations, and among the several states, and with the Indian Tribes."[8] Thereafter, the federal government exercised its constitutional authority by making contacts with Indians a subject of federal control.[9] Notably, the federal government at that time did not attempt to regulate the conduct of Indians among themselves—that was left entirely to the tribes.

In 1823, the United States Supreme Court recognized the Indians as having a legal right to the lands they occupied to the exclusion of third parties.[10] It noted that such occupancy could only be extinguished either "by purchase or by conquest."[11] In 1831, the Court recognized the Cherokee Nation as "a distinct political society separated from others, capable of managing its own affairs and governing itself…."[12] The Court, however, did not recognize Indian tribes as "foreign states" but rather as "domestic dependent nations" whose relationship resembled that of ward to his guardian. This resulted in the doctrinal basis for the protection of the tribes by the federal government—a mix of sovereignty and guardianship, two concepts which, to civil practitioners, should be mutually exclusive.

The following year, in 1832, the Court decided the case of *Worcester v Georgia*, 31 US (6 Pet) 515 (1832). In that case, the Court reversed the convictions of missionaries who had been arrested by Georgian authorities for violating a Georgia law requiring non-Indians residing in Cherokee territory to obtain a license from the state governor. They appealed their convictions. The Court reversed the convictions after reviewing the history of Indian relations, the treaties with the Cherokees, and the Trade and Intercourse Acts. The Court found the several Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive." In other words, the Georgia law had no authority over the Cherokee nation—i.e. the Indian nations were sovereign. Thus, states had no jurisdiction over Indians or Indian nations—that remained a subject of federal control.

The United States Supreme Court has since continued to recognize Indian tribes as separate sovereigns whose sovereignty pre-existed the U.S. Constitution. Such sovereignty, however, continues to be limited by federal control.

Later, in 1885, Congress passed the Major Crimes Act authorizing the federal government to prosecute murder and other serious crimes committed by an Indian in Indian country in federal court.[13] Although the US constitutional framers originally limited congressional authority

to drafting treaties and regulating commerce with the Indians, congressional authority expanded in the first 100 years of the United States according to the guardianship doctrine espoused in 1831, thereby providing Congress with authority to alter the sovereignty of the Indian nations. Congress also expanded its control over Indian lands by passing the General Allotment Act of 1887. This act authorized the President to allot portions of reservation land to individual Indians for purposes of encouraging husbandry.[14] However, benign its intended purposes, this act resulted in millions of Indian-held lands being transferred to non-Indians. What remained in Indian holdings became highly fractionated, rendering the land unusable.[15]

The Indian Reorganization Act of 1934 changed federal policy related to allotment but continued to recognize congressional authority over Indian nations. It authorized tribes to organize and adopt constitutions subject to the approval of the Secretary of the Interior.[16]

The United States Supreme Court has since continued to recognize Indian tribes as separate sovereigns whose sovereignty pre-existed the U.S. Constitution.[17] Such sovereignty, however, continues to be limited by federal control. Indeed, the Supreme Court has stated that Congress "has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." [18]

Sovereign Immunity

Today, sovereign immunity, as a fundamental aspect of tribal sovereignty, continues to be asserted, denied, debated, and changed by ongoing case law. The Supreme Court stated in 1940 that absent the sovereign's consent, the attempted exercise of judicial power is void.[19] Courts have subsequently asserted that the courts have no discretion about whether to apply the doctrine of sovereign immunity, for it "involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy … the application of which is within the discretion of the Court." [20]

Presently, federal courts recognize that a sovereign can assert immunity "at any time during judicial proceedings." [21] Further, the defense of lack of subject matter jurisdiction cannot be waived.[22] Nevertheless, the Ninth Circuit has limited the application of the sovereign immunity defense and impliedly expanded federal control by holding that courts should entertain a sovereign immunity defense only so long as the defendant provides "fair warning ... before the parties and the Court have invested substantial resources in the case." [23]

During the time of the American colonies, the nations that sent explorers to the "new world," entered into treaties with the native nations thereby treating them as foreign sovereigns—a sovereign equal to themselves

These premises of federal Indian law demonstrate that tension continues to exist between tribal sovereign immunity and federal control over Indians and Indian tribes. Sovereign immunity, however, continues to be applied to divest courts of their subject matter jurisdiction, thereby preserving tribal sovereignty and the protections that come along with it.[24]

Procedurally, the issue of tribal sovereign immunity, which is quasi-jurisdictional, is handled by the courts in the same manner as its other subject matter jurisdiction jurisprudence. For example, because sovereign immunity is a preliminary jurisdictional issue, a court is required to resolve any factual disputes on the merits when it decides a motion raising the same and is not bound by allegations of the complaint.[25] When a district court is presented with a challenge to its subject matter jurisdiction, "'[n]o presumptive truthfulness attaches to [a] plaintiff's allegations.'" [26] In resolving a motion to dismiss based on sovereign immunity, "[a] district court may 'hear evidence regarding jurisdiction' and 'resolv[e] factual disputes where necessary.'" [27] Thus, as it presently stands, a court's failure to follow these procedural rules would deprive a tribe of a fundamental aspect of its sovereignty and its most basic due process rights.

One of the seminal cases involving tribal sovereign immunity is *Santa Clara Pueblo v Martinez*, 436 US 49, 55; 98 S Ct 1670 (1978). In that case, a female member of the Santa Clara Pueblo Tribe brought an action for declaratory relief against enforcement of a tribal ordinance that denied membership to children of female members who married outside the tribe. At the same time, however, the ordinance recognized membership for children of male members who married outside the tribe. The plaintiff filed her case in federal district court. Although she prevailed in the district court and the Tenth Circuit Court of Appeals, the Supreme Court began its analysis by stating that:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government…. Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations."… They have the power to make their substantive law in internal matters … and to enforce that law in their forums….
>
> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.[28]

The Court went on to state that:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers…. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without

> congressional authorization," the "Indian Nations are exempt from Suit."… It is settled that a waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'"[29]

The Court reversed the lower court decisions and held that the suit against the tribe was barred by its sovereign immunity.[30] In 2009, it was held that tribal sovereign immunity applies in federal, state, and tribal courts.[31]

So, what is the effect of tribal sovereign immunity? The Court has answered that question: "The entitlement is an immunity from suit rather than a mere defense to liability."[32] In other words, it precludes all discovery on the substance of the claim in addition to any further proceedings unrelated to resolving the threshold issue of a tribe's sovereign immunity.

Clearly, tribal sovereign immunity is always subject to the plenary control of Congress—otherwise, its application in the scenarios at the beginning of this article has immediate implications for the insurance defense practitioner. Here are possible repercussions of sovereign immunity in these scenarios:

1. Absent a waiver, the Housing Authority cannot be sued and its liability insurance cannot be accessed, thereby exposing the insured to much greater liability.[33]
2. The casino, as a tribal entity, is likely immune from suit. The employee, in his individual capacity, may be your only option for recovery.
3. Since the Indian owner is the tribe itself, the insured may not be able to apportion liability to the tribe. If this involved a private tribal entity or individual as owner, however, sovereign immunity protections would not apply.
4. The tribe has sovereign immunity and is not subject to suit by the member Indian, thereby exposing the manufacturer to possibly greater risk.

The DRI's Native Nations Law Taskforce intends to follow up this article with additional articles that affect the defense of Native Nations and their organizations. We look forward to sharing this with you.

Endnotes

1 A version of this article was originally published in For the Defense (March 2020).

2 National Congress of American Indians, http://www.ncai.org/about-tribes; https://en.wikipedia.org/wiki/Indigenous_peoples_in_Canada.

3 https://en.wikipedia.org/wiki/Indian_reservation and https://en.wikipedia.org/wiki/Indian_reserve.

4 https://www.cnn.com/2019/12/18/politics/montana-little-shell-tribe-recognition-trnd/index.html.

5 This article focuses on United States Federal Indian law and does not discuss Canadian Aboriginal policies or Canadian Aboriginal law. Note the difference in terminology between the United States and Canada: "Indian law" versus "Aboriginal law," respectively. Additionally, of note is that in Canada, the term "Aboriginal" is generally used instead of "Indian."

6 https://www.cnn.com/2019/12/18/politics/montana-little-shell-tribe-recognition-trnd/index.html.

7 The Constitutional Convention passed the Constitution in 1787. It was adopted on June 21, 1788, when New Hampshire became the ninth state to ratify the Constitution. https://constitutioncenter.org/blog/the-day-the-constitution-was-adopted.

8 Art. I, § 8, cl. 3 and Art II, § 2, cl. 2.

9 See e.g. The Trade and Intercourse Acts, 1 Stat.137 (1790); 2 Stat. 139 (1802); 4 Stat. 729 (1834).

10 *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823).

11 *Id.*

12 *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831).

13 23 Stat 385 (1885) now codified at 18 USC 1153 *et seq*.

14 25 Stat 388.

15 Indian Land Tenure Foundation (ILTF); https://iltf.org/land-issues/history/.

16 25 USC 461

17 *Santa Clara Pueblo v Martinez*, 436 US 49, 56; 98 S Ct 1670, 1675-1676 (1978).

18 *Id.*

19 *United States v US Fidelity & Guaranty Co*, 309 US 506, 514; 60 S Ct 653, 657; 84 L Ed 894 (1940).

20 *People of State of Cal ex rel California Dept of Fish and Game v Quechan Tribe of Indians*, 595 F2d 1153, 1155 (CA 9, 1979).

21 *In re Jackson*, 184 F3d 1046, 1048 (CA 9, 1999).

22 *Augustine v United States*, 704 F2d 1074, 1077 (CA 9, 1983).

23 *Hill v Blind Industries and Services of Maryland*, 179 F3d 754, 758 (CA 9, 1999).

24 *Quechan Tribe of Indians*, 595 F2d at 1155. *Robinson v United States*, 586 F3d 683, 685 (CA 9, 2009) (citing *Augustine v United States,* 704 F.2d 1074, 1077 (CA 9, 1983)).

25 *Mortensen v First Fed Sav & Loan Ass'n, 549 F2d 884, 891 (CA 3,1977); see Osborn v United States*, 918 F2d 724, 728-29 (CA 8, 1990).

26 *Robinson v United States*, 586 F3d 683, 685 (CA 9, 2009) (citing *Augustine v United States,* 704 F.2d 1074, 1077 (CA 9, 1983)).

27 *Robinson,* 586 F3d at 685 (citing *Augustine*, 704 F2d at 1077).

28 *Santa Clara Pueblo v Martinez*, 436 US 49, 55-56; 98 S Ct 1670, 1675-1676 (1978).

29 *Id.* at 58.

30 *Id.* at 59.

31 *Ingrassia v Chicken Ranch Bingo and Casino*, 676 F Supp 2d 953, 957 (ED Cal, 2009).

32 *Mitchell v Forsyth*, 472 US 511, 525; 105 S Ct 2806 (1985).

33 A waiver of sovereign immunity presupposes the sovereignty of the tribe in the first place. When the tribe waives its immunity, it allows a party to sue the tribe as specified in the waiver, similar to the Federal Tort Claims Act or any statutory waiver contained in the codes of the various states which allow private parties to sue the sovereign.

The Op-Ed(ish) Column

By: Brandon Ayers and John Hohmeier

This is a new column for the Michigan Defense Quarterly. We intend to make it a regular feature in each issue. It's an open forum, available for opinion pieces, storytelling, and even entertaining law-related fiction. Any views and opinions expressed here are those of the author and do not necessarily reflect the official policy, view, opinion, or position of the MDTC.

Brandon Ayers joined Scarfone & Geen, P.C. in July 2019. Since joining the firm, Mr. Ayers has focused his practice in the areas of first and third party no-fault litigation.

Mr. Ayers graduated from Eastern Kentucky University with a Bachelors of Arts in Sociology & Political Science. He went onto obtain his Juris Doctorate, graduating Cum Laude, from Western Michigan University-Cooley Law School in 2019.

During law school, Mr. Ayers completed an internship with the Honorable Linda V. Parker of the Eastern District of Michigan. Also, Mr. Ayers competed in the National Moot Court Competition where he was awarded "Best Oralist" in the region and his team was awarded the Best Brief in the region, before advancing to the National Moot Court Championship in New York City. Mr. Ayers lives in Midtown Detroit and loves being involved in his community.

John 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 Milking Stool: Three Legs of Justice

Everything we do in public policy prevents us from doing something else.
To govern is to choose.
–Richard Lamm

There is a troubling but fleeting trend in the no-fault world: medical providers who blow the one-year-back rule[1] or have their claims dismissed for fraud, are actually suing the patient and trying to couch the allegations in terms of contract (express or implied) and quantum meruit.[2] While unscrupulous enough, there is little doubt that both Michigan jurisprudence and public policy serve to protect the average Michigan consumer. Here is why.

The best way to understand this issue is to understand the progression of provider litigation in general. Let's say the medical provider began treating the person injured in an accident in 2015. In 2015, everyone knew that it was a no-fault claim: The provider knew, the injured person knew, the lawyers knew, and the insurance carrier knew. Then in May 2017, the Michigan Supreme Court released its opinion in *Covenant v State Farm* and changed the entire landscape of no-fault law.

Now after May 2017, every provider treating no-fault patients had to get assignments from those patients to sue the insurer.[3] There was about a two to three month gap between the May 2017 decision and new lawsuits, because the providers were scrambling to get assignments from the injured person or just completely manufacturing them in order to either amend their complaints or file new suits. If a provider could not get in touch with the injured person in time and obtain an assignment, it would lose the entire claim because those claims would be barred by MCL 500.3145.

So instead of suing an insurance carrier, some providers sued their patients for the same claim they had previously submitted to the no-fault carrier. Certainly an argument can be made that the providers' only reason was to leverage a settlement with the insurance company. But any insurance-defense lawyer should realize this: in no world would Michigan law and Michigan public policy provide more protections for the multi-billion dollar insurance industry than it does for Michigan no-fault consumers.

Like a milking stool, the argument rests on three legs:

(1) Because the provider's claim is for treatment related to injuries sustained in an automobile accident, the No-Fault Act applies and the one-year-back rule bars the claim.

(2) There is no express contract between the provider and the patient because there is no mutual assent on essential terms, i.e. the cost of the treatment, so the No-Fault Act controls and bars the claim.[4]

(3) Even if there is an implied contract between the provider and the patient (which there usually is given the relationship between the provider and the patient), the contract violates Michigan Public Policy, i.e. the No-Fault Act, and the contract cannot be enforced.

The No-Fault Act controls every claim stemming from injuries related to an auto accident. Period. While there is an argument that you can couch it in contract (whether express or implied), there is no court that is going to go that route for a number of reasons. For one, Supreme Court decisions like *Muci v State Farm* (and others) have made it very clear that any no-fault issue (medical benefits from a car accident) is governed by the No-Fault Act. But let's look at a specific situation recently appealed from district court to circuit court.

Provider X began treating patient zero and routinely submitted the bills to the no-fault carrier because that's what they do. The carrier stopped paying about a year into treatment and denied the claim, but the provider kept treating. Next thing you know, the provider (or its attorney) blew the one-year-back rule, so they sued the patient. The carrier obviously has a duty to defend and indemnify so we stepped in and went to work.

Everybody in the entire process – from beginning to end – knew that this began as a no-fault claim and was pushed as a no-fault claim the entire time, until September 2018. For nearly three years this was handled within the no-fault context, so it seemed rather obvious that the No- Fault Act applied. Because the No-Fault Act applies, the one-year-back rule also served to bar provider X's claim against patient zero – so we argued.

Now, there was no express contract between provider X and patient zero because there was no mutual assent on essential terms, i.e. the charges or the cost of treatment – there never is. We took depositions and both the biller and owner kept patient zero in the dark about what the running balance was, and there was no mention at all of any pricing within the contract the provider claimed it had. Because there is no mutual assent on the essential terms, the contract fails – so we argued.

We anticipated that the provider would argue that there was a meeting of the minds on all essential terms of the contract except cost or charges, so the contract can be reformed to or supplemented to say a "reasonable charge." Well: if that is the case, then MCL 500.3107 and MCL 500.3157 of the No-Fault Act are implicated and we are back within the no-fault context, which means that the one-year-back rule would still bar the claim.

Next, we argued that even if there is an implied contract between the provider and the patient (there probably is) that would allow the provider six years to sue the patient, the contract would violate Michigan public policy. It is hornbook law – whether we use the Restatements of Contracts or the Supreme Court's own words – that if a contract, or a provision of a contract violates the law or public policy, then it is unenforceable.

This now brings us full circle, back to the beginning: in multiple decisions, the Michigan Supreme Court has repeatedly held that the No-Fault Act is a comprehensive statutory scheme that reflects the public policy of Michigan when it comes to handling the claims of someone who has been injured in an accident. Is it reasonable for the provider to argue that Michigan public policy favors the provider suing the patient when its claim is otherwise barred by the one-year-back rule?

The answer is no. While this is probably a fleeting trend stemming from the providers' outrage over the *Covenant* decision in 2017, it is possible that one of you or several of you will encounter this (or already have). If you do, don't pay. Give those barnacles a taste of the long-knuckle and whack 'em off the no-fault boat. Then take the insured out for a couple of pints of IPA and get them to tell you about all the solicitation calls they received after the accident – a topic for another article.

Endnotes

1 MCL 500.3145.

2 Given the new no-fault amendments, MCL 500.3112 now makes MCL 500.3143 nugatory because medical providers no longer need an assignment from the injured person to sue the insurance carrier.

3 Of course, not anymore with the absurd new amendment to MCL 500.3112, but I digress.

4 While these authors admit that they are not the most experienced litigators out there, never have they ever found themselves in the situation where the doctor or the physical therapy clinic or the MRI company or whoever actually informed the injured person as to what the charges for the treatment would be and/or that the injured person would be personally responsible for the treatment if the insurance carrier did not pay. Ever. And the reasons for this are obvious: if you were told that your 45-minute physical therapy session was going to cost you anywhere from $300-$900 per visit, would you ever go back?

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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"Last Pending Claim" Language in Trial-Court Orders: It's a (Potential) Trap[1]

The Michigan Court Rules provide that every "judgment" must state whether it's the case's final order:

> Each judgment must state, immediately preceding the judge's signature, whether it resolves the last pending claim and closes the case. Such a statement must also appear on any order that disposes of the last pending claim and closes the case. [MCR 2.602(A)(3)]

Although this language can help advocates track a case's progress, it can be a trap, too. The inclusion or omission of this language is not relevant to whether the judgment is final for appellate purposes. Consequently, attorneys who rely on this language to determine what is and is not appealable by right may waive a client's appellate rights.

Generally, a party may file an appeal of right from the first order that resolves all claims. See MCR 7.202(6)(a)(i). Other orders can trigger appeals of right, but the final judgment is often the key order. The "last pending claim" language of MCR 2.602(A)(3) seems, at first blush, to mark when an order is final under this rule.

But finality for appellate purposes does not depend on the inclusion or omission of the "last pending claim" language. The Court of Appeals made this point in *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc,* 292 Mich App 51; 807 NW2d 354 (2011). There, the trial court's order stated that it was final, even though it left several claims open. The appellants filed a claim of appeal, treating the order as a final order for appellate purposes. Before addressing the merits, the Court of Appeals explained that an order's finality depends on the Michigan Court Rules, not the trial court's erroneous insertion of "last pending claims" language. *Id.* at 61. Consequently, the order did not give rise to an appeal of right. (Fortunately, the Court of Appeals exercised its discretion to treat the claim of appeal as an application and granted it.)

Why would the Michigan Court Rules require courts to insert "last pending claim" language if that language has no legal effect? Staff comments to the 1998 amendments to MCR 2.602 indicate that the Michigan Supreme Court added this requirement at the suggestion of the Michigan Judges Association "to facilitate docket management." MCR 2.602, Staff Comment to 1998 Amendment. So this language is not about determining finality for appellate purposes. It's about informing circuit-court clerks when to close a case.

Advocates who confuse "last pending claim" language with a determination of finality can lose appellate rights. For example, suppose you receive an order in the opposing party's favor on all counts. The opposing party's sanctions motion is still pending, which prompts the court to add language stating that the order is not final and does not close the case. Because that order "disposes of all the claims and adjudicates the rights and liabilities of all the parties[,]" it is a final order under MCL 7.202(6)(a)(i). Instead of filing a timely claim of appeal, however, you rely on the "last pending claim" language and wait for an order on the sanctions motion before filing a claim of appeal. Then you receive a sanctions order stating that it **is** a final order that **does** close the case. If this sanctions order arrives more than 21 days after entry of the judgment on the merits, then you have waited too long to file a claim of appeal on the merits.

You can still appeal the sanctions order under MCR 7.202(6)(a)(iv), but you've lost your right to file a claim of appeal from the **merits** judgment. Even if you still have time to file a delayed application, you're likely to have an unhappy client.

The lesson, therefore, is to assess finality based on MCR 7.202(6) and governing caselaw rather than the inclusion or omission of "final order" language.

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When is a Court's Decision Really "Final" for Purposes of Appeal?

As a general matter, appellate jurisdiction in both the Michigan Court of Appeals and the federal appellate courts stems from entry of a "final" decision. See MCR 7.203(A)(1) ("The court has jurisdiction of an appeal of right filed by an aggrieved party from . . . (1) A final judgment or final order . . . ."); 28 USC 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."). But determining whether a decision is actually "final" for purposes of appeal is not always an easy task.

Michigan rules

With certain limited exceptions, the Michigan Court Rules define the "final" decision in a case as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). Seems straightforward enough, but what does it mean to "dispose" of the claims in a case and "adjudicate" the parties' rights and liabilities? Do findings of fact and conclusions of law count? What if they contain the words "order" or "judgment" at the end? In short, it depends.

While a final judgment or order does not have to take any particular form, it has been said that "[t]o be final, that is, binding and determinative of litigation, a judgment must do more than indicate the judge's opinion as to the outcome of an action and must be 'rendered.'" 7A Michigan Pleading and Practice (2d ed), § 53:7. As explained in 3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2602.2:

> [A] distinction exists between the court's decision or opinion and the judgment entered thereon. An opinion announces the court's decision and its reasons therefor, but the further entry of a judgment is required to carry the decision into legal effect.

So, for example, a written opinion using language that is "prospective only" is not sufficient—i.e., a "judgment . . . will enter." *LeTarte v Malotke*, 32 Mich App 289, 290, 292; 188 NW2d 673 (1971). See also *Heck v Bailey*, 204 Mich 54, 55; 169 NW 940 (1918) (finding statement that the defendant was "entitled to a divorce" was not sufficient to constitute a rendered judgment); *Hibbard v Hibbard*, 27 Mich App 112, 113; 183 NW2d 358 (1970) (no final judgment where the court's opinion stated, "[a] judgment may be entered in accordance with the foregoing opinion").

On the other hand, the Michigan Court of Appeals in *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212; 625 NW2d 93 (2000), found the following language to be sufficient to constitute the trial court's "judgment":

> Judgment **should** be entered for plaintiff against defendant, Don Jones, Inc. in the amount of $57,000.
>
> IT IS SO ORDERED. [*Id.* at 220 n 4 (emphasis added by the court).]

The dissent considered this language as indicating the trial court's *future* intent to enter a judgment, but the majority disagreed:

> While the document was not entitled a "judgment," it functioned, for all intents and purposes, as a judgment. Indeed, "judgment" is defined as "[a] court's final determination of the rights and obligations of the parties in a case." See Black's Law Dictionary (7th ed), p 846. There is no requirement that this determination be contained in a document entitled a "judgment." Such a requirement would elevate form over substance. Here, the trial court did indeed intend the original "opinion and order" to function as the "final determination of the rights and obligations of the parties." [*Id.*]

What about the requirement under MCR 2.602(A)(3) that an order or judgment certify whether it resolves the last pending claim and closes the case? As we discuss more fully in our companion article, "'Last Pending Claim' Language in Trial-Court Orders: It's a (Potential) Trap," that can sometimes be helpful, but it isn't determinative. See *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011) (holding that an order leaving certain claims intact wasn't final, regardless of the trial court's statement to the contrary). Thus, the question in every case is whether the judgment, order, or opinion at issue intends to end the litigation, or whether it leaves open the possibility that some other action needs to be taken.

Federal rules

The federal rules make it easier to determine when a decision is final. With limited exceptions for orders disposing of certain post-judgment motions, Rule 58 provides that every judgment "must be set out in a separate document." FR Civ P 58(a). The purpose of this requirement is to help avoid uncertainty "'as to the date on which a judgment is entered,' and thus when the time for an appeal begins to run." *United States v $525,695.24, Seized from JPMorgan Chase Bank Investment Account #xxxxxxxx*, 869 F3d 429, 435 (CA 6, 2017) (citation omitted). Rule 54 provides additional guidance by stating that "[a] judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings." FR Civ P 54(a).

As a result, neither a court's findings of fact and conclusions of law after a bench trial (or evidentiary hearing) nor a written opinion granting a motion to dismiss or for summary judgment will start the time to appeal (or to file post-judgment motions). Instead, a separate document stating the court's "judgment" must be entered that is (1) "self-contained and separate from the opinion," (2) "note[s] the relief granted," and (3) "omit[s] (or at least substantially omit[s]) the trial court's reasons for disposing of the claims." *LeBoon v Lancaster Jewish Community Ctr Ass'n*, 503 F3d 217, 224 (CA 3, 2007). If a separate document is **not** entered as required by Rule 58(a), then judgment is automatically entered after 150 days. FR Civ P 4(a)(7)(A)(ii).

Conclusion

More often than not, the finality of a court's decision will not be difficult to assess. But care should be taken to ensure that it is, in fact, final.

Endnotes

1 Paraphrasing Ackbar, Gial, *Return of the Jedi* (1983).

Legal Malpractice Update

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***Voutsaras v Attorney Defendants*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2020 (Docket No. 345493); 2020 WL 908495**

Facts:

The plaintiff (a financial planner) and the defendant (an estate-planning attorney) worked together on matters for mutual clients for several years. In 2012, the plaintiff and his wife, Diana, met with the defendant to discuss estate planning for the plaintiff's wife. Diana had been diagnosed with terminal cancer. The defendant drafted an irrevocable life insurance trust (ILIT) naming the plaintiff as the trustee. But Diana never signed that first draft of the ILIT.

Instead, Diana later contacted the defendant and met with him several times to discuss her estate planning. The plaintiff wasn't a part of those discussions. Because of those conversations, the defendant drafted another ILIT, which named Diana's daughter as the trustee. Diana executed the new ILIT. She passed away, and her daughter, as trustee, submitted life insurance claims that paid out over $3 million to the ILIT.

The plaintiff filed suit against the defendant, alleging legal malpractice, breach of fiduciary duty, and silent fraud. The plaintiff contended that the defendant concocted a secret plan to divert the life insurance policies from the plaintiff, which the plaintiff believed were to be paid out to him to pay off creditors. The trial court granted summary disposition in favor of the defendant, holding that the plaintiff's legal-malpractice claim subsumed the fraud and breach-of-fiduciary duty claims. The court also held that the legal-malpractice claim was time-barred under the two-year statute of limitations. The plaintiff appealed.

Ruling:

The Court of Appeals agreed with the trial court. Courts look past labels and view the complaint as a whole to determine the "gravamen" of the action. Although the same set of facts **may** give rise to separate causes of action, when a plaintiff alleges negligent legal representation, the claim is one of legal malpractice, only.

The Court of Appeals determined that plaintiff's breach-of-fiduciary duty claim was duplicative of his legal-malpractice claim. Breach-of-fiduciary duty claims require a more culpable state of mind than what is needed to sustain a professional-negligence claim. Yet plaintiff alleged that the defendant owed him a fiduciary duty and breached that duty on the same facts as his malpractice claim. Because plaintiff didn't allege the defendant breached a duty **outside** the alleged attorney-client relationship, his claim sounded in malpractice.

The Court of Appeals held that the same was true as to plaintiff's silent fraud claim. Fraud is distinct from malpractice, and a claim can be made out when there was a suppression of material facts and a duty to disclose those facts. But, like plaintiff's breach-of-fiduciary duty claim, the only duty plaintiff alleged arose out of the purported attorney-client relationship. Looking through the labels placed on plaintiff's claim, the Court of Appeals agreed with the trial court that the plaintiff's malpractice claim subsumed the fraud claim.

Because the plaintiff filed his claim more than two years after the last date of professional services rendered (here, when Diana executed the ILIT), the Court of Appeals upheld dismissal of the lawsuit under the two-year statute of limitations governing legal-malpractice claims. The six-month discovery rule didn't save the plaintiff's claim either.

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Practice Note:

Former clients may seek to sidestep the two-year statute of limitations applicable to legal-malpractice claims by alleging other torts, like breach of fiduciary duty, which have longer limitations periods and don't necessarily require expert testimony. Even though the existence of an attorney-client relationship doesn't automatically preclude a breach-of-fiduciary duty claim, a plaintiff must prove conduct involving a more culpable state of mind to sustain separate and distinct tort claims.

AES Management, Inc v Attorney-Defendants, unpublished per curiam opinion of the Court of Appeals, issued February 6, 2020 (Docket No. 346160); 2020 WL 598373

Facts:

Plaintiff AES Management, Inc. contracts with business clients to provide human resource services. AES manages affiliate entities that perform the same or similar functions as AES. In 2005, Michigan's Unemployment Insurance Agency (UIA) determined that AES owed $1.8 million in unpaid unemployment taxes. The UIA claimed that AES created the affiliate entities in order to take advantage of lower unemployment tax rates (a practice called "payrolling") and made material misrepresentations to the UIA. Because of the latter charge, the UIA determined that AES was subject to statutory damages under the Michigan Employment Security Act, totaling $10 million.

An Administrative Law Judge reversed the UIA's determination that AES engaged in fraud or payrolling. The UIA appealed the ALJ's decision to the Michigan Compensation Appellate Commission (MCAC), which agreed that AES didn't commit fraud, but found that AES engaged in payrolling. So, the MCAC reinstated AES's $1.8 unemployment tax liability.

AES retained the defendants to represent it in the unemployment taxes matter in 2014. The defendants appealed the MCAC's decision to the Macomb County Circuit Court. The circuit court affirmed the MCAC's decision, but the defendants didn't report that development to their client for nine months. At that point, AES was unable to obtain a discretionary appeal to the Court of Appeals. The defendants filed a delayed application for leave to appeal to the Court of Appeals, which was denied. AES then sued the defendants for legal malpractice.

In response, the defendants filed a motion for summary disposition under MCR 2.116(C)(8) arguing that AES failed to state a claim because it didn't plead that the issues AES would have raised on appeal were of sufficient public importance or that the circuit court's errors were so readily apparent that the Court of Appeals would have granted leave. The trial court granted summary disposition in favor of the defendants. AES appealed.

Ruling:

The Court of Appeals reversed the trial court's decision, holding that AES properly pleaded its legal-malpractice claim. The elements of a legal-malpractice action are 1) an attorney-client relationship, 2) negligence in the legal representation of the plaintiff, 3) that the negligence was a proximate cause of an injury, and 4) the fact and extent of the injury alleged. Here, AES alleged an attorney-client relationship in the underlying proceedings. AES alleged that the defendants were negligent in various ways, including failing to take action to monitor the status of the appeal, failing to inform AES of critical developments that caused AES to be unable to obtain a discretionary appeal to the Court of Appeals, and failing to file a timely application for leave to appeal the circuit court's decision. And AES alleged that *but for* the defendants' malpractice, it would have successfully appealed the circuit court's decision and avoided the tax liability. Consequently, the Court of Appeals held that the trial court erred in granting summary disposition under MCR 2.116(C)(8).

Even though the defendants sought summary disposition under MCR 2.116(C)(8), they asserted that AES couldn't prove causation. Citing a footnote in *Charles Reinhart Co v Winiemko*, 444 Mich 579 (1994), the defendants argued that to sustain its legal-malpractice claim, AES must show that an appellate court would have 1) had jurisdiction to hear the appeal, 2) would have granted review when the review is discretionary, and 3) that the trial court's judgment would have been modified on review.

The Court of Appeals rejected that proposed standard, holding whether AES could **prove** the elements of its claim isn't a proper ground for granting a (C)(8) motion. **Even if** the defendants brought a motion under MCR 2.116(C)(10), the Court of Appeals held that it still would have been error to grant the motion. That's because the standard set forth in the footnote in *Charles Reinhart Co* is dicta that applies only to Michigan's Supreme Court. On the other hand, the Court of Appeals "grants leave more freely and more broadly" than the Supreme Court. To establish that the Court of Appeals would have granted a timely filed application for leave to appeal, a plaintiff need only establish that its issues and claims of error merit review. Here, AES could make that showing.

Practice Note:

A motion for summary disposition under MCR 2.116(C)(8) tests the sufficiency of the claim **by the pleadings alone**. Whether a plaintiff can prove the elements of their claim is an evidentiary issue, not a pleading requirement.

Moreover, in its role as an "error-correcting" court, the Court of Appeals has more flexibility to grant or deny an application for leave to appeal than the criteria applicable to the Supreme Court's consideration of whether to grant a petition for leave to appeal.

1 The authors would like to thank Jim Hunter for his work on this article.

Medical Malpractice Update

By: Daniel J. Ferris and F. Broc Gullett

***Taylor v University Physician Group*: Michigan Court of Appeals Allows Expert Testimony that Conflicts with Eyewitness Testimony**

Introduction

The Michigan Court of Appeals recently issued an opinion in *Estate of Taylor by Taylor v University Physician Group*, 329 Mich App 268; 2019 WL 3366607 (2019), that could significantly change the standard for admitting expert opinion testimony, particularly in medical-malpractice actions. Judge Elizabeth L. Gleicher wrote the majority opinion in *Taylor*, which has been marked for publication. Judge Gleicher was joined by Judge Cynthia Diane Stephens in affirming the trial court's order denying defendants' motion for summary disposition. Judge Colleen A. O'Brien explained in her dissenting opinion that she would have granted defendants' motion. The defendants have filed an application for leave to appeal to the Michigan Supreme Court that is currently pending, but, for now, the core takeaway from *Taylor* is that an expert's opinion may be admissible even when it conflicts with facts in the medical record established by eyewitness testimony.

To briefly summarize, *Taylor* was a medical-malpractice/wrongful-death action arising from a colonoscopy performed on plaintiff's decedent, Effie Taylor. During the colonoscopy, defendant Dr. Manuel Sklar biopsied lesions in Ms. Taylor's colon that he thought were arteriovenous malformations ("AVMs"). Three days later, Ms. Taylor, presented with rectal bleeding, and Dr. Veslave Stecevic, a subsequent treater, inspected the colon to find the source of the bleeding. When the bleeding could not be stopped, Ms. Taylor underwent emergency surgery to remove her colon. Ms. Taylor was a Jehovah's Witness who refused blood transfusions, and died from blood loss.

Dr. Stecevic testified that the bleeding originated at the site of a ruptured diverticulum—not from the site of the biopsies taken by Dr. Sklar—and that her bleeding and death were therefore wholly incidental to the biopsies. Contrary to Dr. Stecevic's eyewitness testimony, plaintiff's expert witness, Dr. Todd Eisner, testified that the biopsies caused the bleeding that led to Ms. Taylor's death.

The core issue in *Taylor* was the application of the rule set forth in *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 287 (1999)—namely, that an expert's opinion is objectionable when his "testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." Defendants argued that, under *Badalamenti*, Dr. Eisner's testimony was inadmissible because it was inconsistent with Dr. Stecevic's factual observations, and there was no basis for the inconsistency other than disparaging Dr. Stecevic's powers of observation. The Court of Appeals disagreed, distinguishing *Badalamenti* by emphasizing that the evidence in *Badalamenti* with which the expert's opinion conflicted was based on objective measurements obtained by machines, rather than conflicting with eyewitness observations, as in *Taylor*.

The Rule from *Badalamenti*

According to Michigan Rule of Evidence 703, an expert's opinion testimony must be based on factual evidence in the record. MRE 703 provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

Daniel J. Ferris is a member of Kerr Russell in Detroit. Dan feels privileged to be called upon to assist companies and individuals across a range of industries and with a wide variety of issues. In particular, Dan represents physicians in medical malpractice cases and currently serves a Co-Chair of the Professional Liability & Health Care Section of Michigan Defense Trial Counsel. He has been recognized by Super Lawyers as a "Rising Star" (a distinction earned by no more than 2.5% of Michigan lawyers) from 2016-2019. Dan was also elected into the Fellows of the American Bar Foundation (a distinction limited to 1% of Michigan attorneys) and the Michigan State Bar Foundation Fellows Program (a distinction limited to 5% of Michigan attorneys).

F. Broc Gullett is an associate attorney at Kerr Russell in Detroit. Broc maintains a general litigation practice, with experience in the areas of construction, medical malpractice, auto no-fault, and complex business litigation.

It is well established that this rule precludes expert testimony based on assumptions that conflict with the facts in the record. See *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 498-499 (1992); *Thornhill v City of Detroit*, 142 Mich App 656, 658 (1985); *Skinner v Square D Co*, 445 Mich 153, 172 n 14 (1994). Arising from this line of cases, *Badalamenti* has become the seminal case related to the admissibility of expert testimony when conflicts occur between the expert's testimony and facts established in the record.

In *Badalamenti*, plaintiff's theory of liability depended on evidence showing that defendants failed to diagnose and properly treat plaintiff for cardiogenic shock. At trial, defendants presented evidence of hemodynamic measurements obtained by technical devices: the patient's wedge pressure, cardiac index, and systolic blood pressure—all of which tended to negate the possibility that plaintiff suffered from cardiogenic shock. Additionally, Dr. John Cieszkowski testified that he performed an echocardiogram on plaintiff—a procedure requiring the doctor to observe and interpret images on a screen—and found that the wall function of plaintiff's heart was nearly normal, ruling out a diagnosis of cardiogenic shock. *Badalamenti*, 237 Mich App at 287-288. Contrary to Dr. Cieszkowski's first-hand testimony, the plaintiff's expert, Dr. Daniel Wohlgelernter, opined that the "plaintiff's left ventricle heart wall function was significantly damaged on March 16, which he agreed was the pertinent time frame and the definitive component for a diagnosis of cardiogenic shock." *Id.* at 288. Dr. Wohlgelernter conceded that if Dr. Cieszkowski's March 16 echocardiogram had shown relatively normal heart wall motion, he would agree that plaintiff could not have suffered from cardiogenic shock. Still, he went on to explain that he nonetheless believed plaintiff suffered cardiogenic shock because he was skeptical about the findings of the echocardiogram performed by Dr. Cieszkowski.

After a jury verdict in plaintiff's favor, the *Badalamenti* court held that defendants were entitled to JNOV because there was no basis for Dr. Wohlgelernter's expert opinion, as it conflicted with the facts established in the record. In particular, the court explained that Dr. Wohlgelernter had no reasonable basis in evidence to support his opinion that plaintiff's left ventricular heart wall function was significantly damaged on March 16, because he based his opinion on his skepticism and disparagement of Dr. Cieszkowski's findings, rather than any evidence in the record. The holding in *Badalamenti* seemed to create a relatively clear rule for determining the admissibility of expert opinion testimony that is inexplicably inconsistent with a witness' first-hand observations: it is not admissible.

The *Taylor* Ruling

The Court of Appeals' decision in *Taylor*, while purportedly distinguishing *Badalamenti*, significantly constricts the standard articulated in that case. In *Taylor*, the court explained that Dr. Sklar noted in his operative report that a segment of Ms. Taylor's ascending colon "had an appearance of multiple small blood vessels suggestive for an extensive AVM malformation" and that "[b]iopsies were taken." *Taylor* at *1. Furthermore, at his deposition, Dr. Sklar confirmed that he biopsied "a vascular lesion[,]" and his records did not support that he biopsied a diverticulum or that there was any diverticular bleeding. *Id.*

Three days after Dr. Sklar took the biopsies, Ms. Taylor presented with rectal bleeding. Because an angiogram failed to locate the source of the bleeding, Dr. Stecevic performed a colonoscopy to determine the cause. Dr. Stecevic testified that he found no AVMs in Ms. Taylor's colon but observed that Ms. Taylor was bleeding from a diverticulum in her intestinal wall, rather than from the site of Dr. Sklar's biopsies. He further stated in his deposition that the fact "[t]hat Taylor was bleeding from a diverticulum three days after undergoing biopsies of her colon was 'simply a coincidence[.]'" *Id.* at *2. Dr. Stecevic recorded in Ms. Taylor's medical record that he injected epinephrine into what he thought was a bleeding diverticulum and that this staunched the hemorrhage, but did not completely stop the bleeding.

Plaintiff's expert, Dr. Eisner, opined that he thought Ms. Taylor's bleeding came from the site of the biopsies rather than the diverticulum, in part because she had been on the blood thinner, Plavix, leading up to the procedure. He explained that diverticular bleeding is very rare, and he provided reasons suggesting that Dr. Stecevic was mistaken in his observation that the bleeding was coming from a spontaneously ruptured diverticulum. Dr. Eisner explained that when there is much blood in the colon, it can pool in the diverticular pockets and then come out of the pockets, taking on the appearance of diverticular bleeding. He also noted that "it would be an unusual coincidence for her to have a bleeding diverticulum after what the gastroenterologist thought was an AVM, was biopsied when she took Plavix, and then she started to bleed after that." *Id.* at *5.

Curiously, the majority in *Taylor* pitted Dr. Sklar's testimony against that of Dr. Stecevic and focused on whether there were AVMs in Ms. Taylor's colon, rather than on whether Ms. Taylor was bleeding from the location of the biopsies before the second colonoscopy. The court emphasized that Dr. Sklar's operative report, along with his subsequent testimony, supported that he biopsied AVMs in Ms. Taylor's colon and was therefore inconsistent with Dr. Stecevic's opinion that no AVMs were biopsied. Citing the United States Supreme Court's opinion in *Tolan v Cotton*, 572 US 650; 134 S Ct 1861 (2014), the court explained that "summary judgment is inappropriate where witnesses to an event provide starkly different descriptions of what they saw, heard, or perceived." *Taylor* at *3. Thus, the court emphasized that Dr. Sklar's testimony conflicted with Dr. Stecevic's statement as it pertained to whether Ms. Taylor's colon had any AVMs that were biopsied. Based on this conflict, the court found it proper to allow Dr. Eisner to infer from Dr. Sklar's testimony that AVMs were biopsied and to assume further that the biopsy sites bled three days later (before the second colonoscopy) even though Dr. Stecevic specifically testified that the biopsy sites were not the source of the bleeding that caused Ms. Taylor's death.

The *Taylor* majority acknowledged defendants' argument—specifically that the standard from *Badalamenti* rendered Dr. Eisner's expert testimony about the source of Ms. Taylor's bleeding

inadmissible because the statement was inconsistent with Dr. Stecevic's eyewitness account. However, the court thought that defendants' reliance on *Badalamenti* was misplaced due to what it perceived to be a key distinction. That is, in *Badalamenti*, the evidence related to whether the "plaintiff had cardiogenic shock included *objective* hemodynamic measurements obtained by technical devices: the patient's wedge pressure, cardiac index, and systolic blood pressure[,]" as well as an echocardiogram—a procedure that includes a physician's interpretation of images on a screen—and the objective measurements did not support that the plaintiff was in cardiogenic shock. *Id.* at *5 (emphasis in original). According to the *Taylor* court, the testimony of plaintiff's expert in *Badalamenti* was inadmissible because the expert conceded that the measurements were "contrary to a diagnosis of cardiogenic shock" but maintained that the plaintiff had cardiogenic shock, supporting his belief merely by expressing "skepticism" of the results of the echocardiogram. *Id.*

The *Taylor* court emphasized the importance in *Badalamenti* that the evidence "rested largely on objective measurements obtained by machines rather than eyewitness observations." *Id.* The court then explained that "[u]nlike the hemodynamic measurements that figured prominently in *Badalamenti*, the evidence supporting that Ms. Taylor's bleed came from a diverticulum rather than a biopsied AVM is purely subjective—Dr. Stecevic's interpretation of what he saw." *Id.* The court added that Dr. Sklar's eyewitness testimony provided the facts underpinning Dr. Eisner's statement. Therefore, the court explained, Dr. Eisner's evidence was consistent with the facts in the record and not grounded in "mere speculation or baseless disdain for a contrary conclusion." *Id.* The court went on to affirm the circuit court's decision to deny defendants' motion for summary disposition.

Judge O'Brien's Dissenting Opinion in *Taylor*

Judge Colleen O'Brien wrote a salient dissenting opinion in which she focused on what she perceived to be the core issue: whether the evidence that the biopsy sites were bleeding, if any, was adequate to support Dr. Eisner's expert opinion that the biopsy sites were, in fact, bleeding. Judge O'Brien explained that Dr. Stecevic washed and looked for an active bleed at the sites where Dr. Sklar biopsied but could not find any bleeding. She further explained that Dr. Stecevic even took pictures of the areas where he searched, showing that the blood was washed away, so he had a clear view. Based on these facts, in Judge O'Brien's opinion, Dr. Stecevic's testimony established that as of the time of Ms. Taylor's second colonoscopy, she was not bleeding from the areas biopsied by Dr. Sklar. It followed, then, that if Ms. Taylor was not bleeding from the biopsy sites at the time of the second colonoscopy, plaintiff could not establish that Dr. Sklar's biopsies caused Ms. Taylor's death, entitling the defendants to summary disposition.

Judge O'Brien further explained why she thought to allow Dr. Eisner's testimony violated the rule from *Badalamenti*. Despite Dr. Stecevic's clear testimony to the contrary, Dr. Eisner testified that he believed the biopsy sites continued to bleed. Dr. Eisner testified that he thought Dr. Sklar and/or Dr. Stecevic were mistaken—stating that he did not believe Dr. Sklar and/or Dr. Stecevic "'truly knew where [they] were' in the colon during the colonoscopies because 'there is not a road map in there, so sometimes we don't know exactly where we are. Sometimes it's an estimate.'" *Taylor* at *9 (O'Brien, J., dissenting). Thus, Judge O'Brien explained, "Dr. Eisner opined that one or both of the doctors were mistaken about where they were in the colon." Then, quoting *Badalamenti*, Judge O'Brien tied it all together, explaining that "an expert's opinion—here, Dr. Eisner's—is inadmissible if it 'is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony *other than by disparaging the witness' power of observation*.'" *Id.* (emphasis in original).

Effect of *Taylor* Moving Forward

As it stands, the *Taylor* majority's conclusion that experts can disregard eyewitness observations significantly narrows the well-established rule from *Badalamenti*. This new rule is likely to have a significant impact on the defense of physicians in medical-malpractice litigation. In particular, before *Taylor*, all entries in a patient's medical record—whether derived from a health care provider's observations or an objective test using a machine—were entitled to equal respect. Now, as a result of *Taylor*, subjective observations of health care providers are denigrated such that an expert witness can disregard them. Indeed, under this standard, an expert can offer an opinion diametrically opposed to the healthcare provider's observation, so long as the expert can attach her inferences to some other evidence in the record.

If it stands, this new rule will allow a plaintiff and his or her expert to disregard aspects of the medical record that are inconsistent with the plaintiff's theory of liability. Indeed, it opens up many more opportunities for creative liability theories by plaintiffs' experts in medical-malpractice cases because the experts are not constrained by first-hand observations noted in the medical record. With the defendants' application to the Michigan Supreme Court pending, it remains to be seen whether the rule from *Taylor* will become the new norm.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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While reporting on this ordinary Wednesday after Super Tuesday, I know that two things are certain – first, that spring is finally on its way, and second, that the "silly season" leading up to the November election will also be upon us soon. I was reminded of these truths on a sunny afternoon last week when my concentration was disrupted by a joyful and boisterous noise coming from the front lawn of the state Capitol across the street. Looking out, I saw a large wading pool on the pavement by the front steps with an adjoining platform from which a bipartisan parade of legislators, legislative staff and political junkies, many of them clad in colorful and outrageous costumes, were launching themselves into the chilly water and then lingering just long enough to take a bow before retreating to the warmth inside. The purpose of this relatively new spectacle – the "Legislative Polar Plunge" – was charitable, and the mood jovial. I realized, of course, that this friendly feeling of bipartisan détente will soon be replaced by the polarized animosity that we may all expect to see in this Presidential election year, but for that short time, it was a beautiful thing to see.

Our Legislature will take its spring break in the first week of April and then continue in session before adjourning for the summer recess sometime in June. As is customary in the first few months of any year, much of the Legislature's attention to date has been focused upon crafting the budget for the next fiscal year, which will begin on October 1st. The Governor and the legislative leadership have expressed a mutual desire to complete this process before the summer recess while working together to avoid the mistakes that led to last year's budget debacle. A few other initiatives have been addressed, some of which are deserving of passing reference, but it is unlikely that anything of great substance will be accomplished in the remainder of this year. The Senators are not up for election this year, but all of the seats in the House of Representatives for the next session will be filled in the November election, so the eligible incumbent Representatives and all who aspire to fill an open House seat will be vigorously campaigning. And when our Legislators are on the campaign trail, there isn't a lot that gets done in Lansing.

Public Acts of 2019

There are now 178 Public Acts of 2019 – 32 more than when I last reported in December.

They include several new acts **(2019 PA Nos. 148 – 153** and **157-159)** created by the enactment of a package of bills that were passed in December but had not yet received the Governor's approval before my last report. As I mentioned briefly in that report, the changes proposed by that legislation and now approved will provide a substantial overhaul of the State's gaming laws. Although too numerous to discuss in detail here, the proposed changes have amended the Michigan Gaming Control and Revenue Act and other existing gaming laws, and created new acts, to authorize, regulate and raise tax revenue from internet gaming, sports betting, fantasy sporting contests, and wagering on live and simulcast horse racing events. New penalties have also been provided for violations of the new provisions, with corresponding amendments of the Penal Code and Code of Criminal Procedure.

Another package of new acts **(2019 PA Nos. 171 – 176)** has amended several sections of the Penal Code to add "cryptocurrency" and "distributed ledger technology" to the statutory definitions of several criminal offenses, including crimes against animals, credit card offenses, racketeering, obtaining money or other things of value by false pretenses, embezzlement, forgery, and counterfeiting, and money laundering.

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

The few other new Public Acts of 2019 that may be of interest include:

2019 PA 161 – House Bill 5176 (Hernandez – R) which, according to last year's budget compromise, imposes new procedural limitations upon the State Administrative Board's authority to make administrative inter-transfers of funds within appropriations for particular executive departments, boards, commissions, officers or institutions in the future.

2019 PA 170 – Senate Bill 110 (Lucido – R), which has amended the Estates and Protected Individuals Code, MCL 700.5306, to provide that a court may appoint a limited guardian to supervise access to an incapacitated individual if it finds, by clear and convincing evidence, that: 1) the individual is incapacitated; 2) that a person having the care and custody of that individual has denied another person access to that individual; and 3) that the incapacitated individual desires contact with the other person or that contact with the other person is in the incapacitated individual's best interest.

Public Acts of 2020

As of this writing, there are 56 Public Acts of 2020. The few which may be of interest to our members include:

2020 PA 33 – House Bill 5124 (Byrd – D), which has amended several sections of the General Property Tax Act to provide new options to enable homeowners to avoid loss of their homes by foreclosure for unpaid property taxes.

2020 PA Nos. 36-38 – House Bills 4468 (Johnson – R); 4444 (Johnson – R) and **4445 (Iden – R),** which have amended provisions of the Freedom of Information Act to facilitate the publication and disclosure of public documents by the use of electronic media. The amendatory acts would allow state agencies to make required publications of public documents in electronic format; allow public bodies to respond to requests for production of documents electronically, at the request of the party seeking disclosure; and allow for the production of requested documents on any form of non-paper physical media.

2020 PA 42 – House Bill 5117 (Bolden – D) and **2020 PA 44 – Senate Bill 68 (Wojno D)** have amended Chapter 64 of the Revised Judicature Act, MCL 600.6431 and 600.6452, to provide that the notice requirements and limitation periods of those provisions will not apply to claims against the state for compensation under the wrongful imprisonment compensation act.

2020 PA 43 – House Bill 5118 (Calley – R) completes the package by its amendment of the wrongful imprisonment compensation act extending the time for filing of claims under the act by persons released from custody before March 29, 2017, to allow the filing of such claims within 18 months after the effective date of this amendatory legislation.

Old Business and New Initiatives

New legislation of interest includes the following:

House Bill 5421 (Filler – R), which would amend the Penal Code, MCL 750.539c, to provide that its prohibition against the use of devices for eavesdropping on private conversations would not apply to the use of such devices for purposes of security monitoring of a residence or other structure on residential property if the monitoring is conducted in conformity with MCL 750.539d. That provision allows security monitoring in a residence if the monitoring is conducted by or at the direction of the owner or principal occupant of the residence and is not conducted for any "lewd or lascivious purpose." The House passed this bill on March 3rd and now awaits consideration by the Senate Committee on Judiciary and Public Safety.

Senate Bill 686 (Barrett – R), which would create a single-section act providing new whistleblower-type protection for classified civil service employees of state departments and agencies and nonpartisan legislative staff for communications with a legislator or a legislator's staff. The new section prohibits disciplinary action by a state department or agency or a member or office of the Legislature for such communications unless the law prohibits the specific communication at issue, and the disciplinary action is taken following authority otherwise provided by law. The Senate passed the bill and referred it to the House Committee on Oversight on February 26th.

Senate Bill 790 (Runestad – R) proposes an amendment of the Revised Judicature Act to add a new section MCL 600.1429. The new section would allow public access to video recordings of public court proceedings following the stated procedures and requirements while emphasizing that video recordings made available according to this new section would not be considered an official record of court proceedings. This bill was introduced and referred to the Senate Committee on Judiciary and Public Safety on February 11, 2020, but has not been scheduled for hearing as of this writing.

The Legislature as Litigator

Finally, it is appropriate to make note of the efforts that the Legislature has made during this session to defend the actions of the prior legislature in judicial proceedings. Those actions taken during the lame-duck session of 2018 were discussed in my prior report providing the details of that exciting and divisive session.

The first of these judicial proceedings involved the present Legislature's request to the Supreme Court to issue an advisory opinion on the constitutionality of 2018 PA Nos. 368 and 369 – a request made hoping that the Court would settle an intense debate whether those acts had been validly enacted using the "adopt and amend" strategy employed to do so. As some will recall, the stage for this dispute was set in September of 2018 when the Legislature passed legislation to raise the minimum wage and require employers to provide paid sick leave, which had been proposed by voter initiatives supported by enough petition signatures. (2018, PA Nos. 337 and 338) This action was taken by the Republican majority to prevent the submission of those questions to the voters with the intent to repeal or modify the newly-created provisions in the lame-duck session when it would be possible to do so by a simple majority vote instead of the generally unattainable three-quarters vote required to repeal or amend an initiated law approved by the voters at the polls.

Following that plan, bills were promptly introduced on the Thursday after the general election to scale back the voter-

initiated reforms enacted in September. Those bills, which became 2018 PA Nos. 368 and 369, were quickly passed over strenuously-voiced objections, and subsequently approved by Governor Snyder on December 13th after a period of speculation as to whether he would aid this unapologetic effort to thwart the people's reserved right to propose initiated laws.

Separate requests for an advisory opinion on the constitutionality of those amendatory acts were filed by the Senate and the House of Representatives on February 13, 2019, before their effective date. On April 3, 2019, the Supreme Court requested additional briefing and heard oral arguments addressing both sides of the issue in July. On December 18, 2019, the Court issued its decision denying the requested advisory opinion in a peremptory order, with lengthy concurring and dissenting opinions, stating that the requests for advisory opinions were denied "because we are not persuaded that granting the requests would be an appropriate exercise of the Court's jurisdiction." *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 and 369,* ___ Mich ___; 936 NW2d 241 (2019)

Justice Clement's concurring opinion stated her finding that the Court lacked jurisdiction to grant the requested advisory opinions after the effective date of the legislation – an opinion which was also shared by Chief Justice McCormack. Justice Cavanagh's concurring opinion stated her belief that Justice Clement's view of the Court's jurisdiction was "compelling" but ultimately concluded that this was not an appropriate occasion for the Court to exercise its discretion to issue an advisory opinion. Justice Bernstein concurred with Justice Cavanagh. Justices Viviano and Zahra dissented, expressing their opinion that the Court did have jurisdiction to grant the requests for issuance of an advisory opinion and that it should have granted the request in this case. None of the opinions addressed the critical constitutional questions presented, and thus, the validity of this legislation remains unresolved, to be decided in future litigation.

The Legislature has also weighed in on litigation addressing the constitutionality of 2018 PA 608, enacted during the lame-duck session of 2018. As some may recall, PA 608 was created by the enactment of legislation, prompted by dissatisfaction with the success of voter initiatives in the 2018 general election, which proposed amendments of the Michigan Election Law to create new more restrictive procedural requirements governing voter initiatives proposing initiated laws and constitutional amendments. Most notably, the act provided that no more than 15% of the petition signatures used to determine the sufficiency of support for an initiative petition could be provided by voters in any single congressional election district – a restrictive requirement finding no support in the governing constitutional language. Other new provisions required that initiative petitions include a checkbox to identify petition circulators as volunteers or paid circulators and required paid circulators to file an affidavit identifying themselves as such before circulating petitions for voter signatures.

This legislation has been widely criticized as an impermissible attempt to limit the People's constitutionally reserved right to pursue voter initiatives proposing amendment of the Constitution, adoption of initiated laws, and referendum of enacted legislation. The new restrictions on the collection of petition signatures were particularly problematic in light of the abundant case law from our Supreme Court holding that the Legislature may not impose statutory restrictions that curtail or unduly burden the free exercise of the People's constitutional right to pursue voter-initiated proposals. Thus, it came as no surprise that the constitutionality of this amendatory legislation was subsequently challenged in an action for declaratory judgment filed in the Court of Claims on behalf of the League of Women Voters and other interested parties. The Attorney General has agreed that the challenged portions of the legislation are unconstitutional and has, therefore, declined to defend it. The Senate and House of Representatives, desiring to uphold the law enacted by the prior legislature, has sought to intervene for that purpose.

On January 27, 2020, the Michigan Court of Appeals issued its published decision addressing the constitutional challenges to 2018 PA 608 in *League of Women Voters v Secretary of State,* ___ Mich App ___; ___ NW2d ___; (2020). In a majority Opinion written by Judge Deborah Servitto and joined by Judge Michael Gadola, the Court affirmed the decision of Court of Claims Judge Cynthia Stephens holding that the new 15% limitation on petition signatures collected from any single congressional district and the new requirement that petitions include a checkbox identifying the circulator as a paid or volunteer circulator are unconstitutional and therefore cannot be enforced.

The Court of Appeals also agreed with the League of Women Voters and the Secretary of State that the new requirement for paid circulators to file an affidavit identifying themselves as paid circulators before circulating petitions is also unconstitutional and therefore cannot be enforced, reversing Judge Stephens' decision to the contrary. And like Judge Stephens, the Court of Appeals majority found that the Michigan Senate and House of Representatives lacked standing to pursue their claim for declaratory relief but received their briefs and considered their arguments in support of the legislation, nonetheless. Judge Mark Boonstra wrote a separate opinion concurring in part and dissenting in part. He disagreed with the majority's holding that the Legislature lacked standing to present its claims and its conclusion that the new checkbox requirement was unconstitutional but agreed that the new 15% signature limitation and the affidavit requirement were unconstitutional and could not be enforced.

On February 3rd, the Senate and House of Representatives applied for leave to appeal the decision of the Court of Appeals to the Michigan Supreme Court. On February 14th, the Supreme Court issued an order scheduling oral argument on their application for March 11th.

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

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***City of Bad Axe v Pamar Enterprises, Inc,* unpublished per curiam opinion of the Court of Appeals, issued January, 14, 2020 (Docket No. 345810); 2020 WL 230010**

Defendant Pamar Enterprises, Inc. was the winning bidder for a contract with the Michigan Department of Transportation ("MDOT") to reconstruct highway M-53 and perform sewer work located in the City of Bad Axe ("City"). The MDOT proposal advised that the successful bidder was responsible for securing insurance in accordance with its specifications, including that the policy had to provide coverage for the City and others. Pamar secured a general commercial liability policy through Secura Supreme Insurance Company. After Pamar began work, a large "rain event" caused rainwater to flow into the sanitary system in the project area. *Pamar,* unpub op at 1. This caused damage to the property of multiple city residents, who filed suit against Pamar and the City. The City requested that Secura provide a defense, but Secura refused on the grounds that the residents "sought to hold plaintiff city responsible for its own acts of negligence regarding its maintenance of the sewer system." *Id.* at 2. The City then filed this declaratory judgment action, seeking to compel Secura "to provide a defense and indemnity as well as reimbursement of expended attorney fees." *Id.*

The trial court granted the City's motion for summary disposition, finding that Secura was required to provide a defense and ordered payment of attorney fees. The Court of Appeals affirmed. The panel began its analysis by looking at the contract between MDOT and Pamar which, when read alongside the policy Secura issued to Pamar, clearly made the City an insured. Most relevant was an endorsement[1] providing:

> A. Additional Insured When Required By Written Construction Contract
>
> 1. Operations Performed For An Additional Insured
>
> WHO IS AN INSURED is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in a written contract or written agreement prior to a loss, that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:
>
> a. Your acts or omissions; or
>
> b. The acts or omissions of those acting on your behalf;
>
> In the performance of your ongoing operations for an additional insured.

The panel found that this language made it "apparent that defendant Pamar obtained a general commercial policy of insurance through defendant Secura because it was a requirement of its contractual agreement with MDOT to be awarded the bid for the reconstruction of M-53 located in plaintiff city." *Pamar,* unpub op at 5. "Although the policy contained an 'additional insured' endorsement, the plain language of the 'additional insured' provision modified the 'WHO IS AN INSURED' language of the policy," eliminating any distinction "between an insured and an additional insured…." *Id.*

The panel then addressed "whether the underlying complaint raises a theory of liability against an insured that falls within the policy coverage." *Id.* After taking a close look at the underlying complaint allegations,[2] the panel held that it did. The panel found it "apparent from the allegations by the city residents in the underlying amended complaint that they claimed defendant Pamar's alteration to the sewage system during construction caused the rain event to overwhelm the system and damage

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to their property." *Pamar,* unpub op at 7. "Irrespective of the fact that a separate and distinct claim was raised against [the City], the allegations in the amended complaint attribute their damages to the actions of defendant Pamar in its construction work by its alterations to the area." *Id.* "In light of defendant Pamar's claim that [the City's] sewage system was deficiently maintained, the city residents' amended complaint included allegations that [the City's] maintenance of the system was the cause or a contributing cause." *Id.*

Put another way, the "allegations in the complaint first attribute the city residents property damage to defendant Pamar's negligence and, after defendant Pamar placed the blame on plaintiffs, the city residents amended their complaint to continue to allege that defendant Pamar was responsible or that both defendant Pamar and plaintiffs were responsible." *Id.* at 8. The alternative allegations of independent negligence by the City "did not alter the fact that the underlying lawsuit arguably falls within the terms of the policy because it contests defendant's actions and involvement in causing the property damage." *Id.*

***Messenger v Atain Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided December 26, 2019 (Docket No. 344690); 2019 WL 7206066**

Construction site accidents often result in complex coverage disputes due to the interplay between policies issued to property owners, general contractors, subcontractors. The Court of Appeals' recent opinion in *Messenger* illustrates this. *Messenger* deals with liability coverage for a fatal workplace accident. Coverage turned on an exclusion in the Atain policy for "bodily injury" suffered by an "employee, subcontractor, or employee of any subcontractor … of any insured or any person performing work or services for any insured arising out of and in the course of employment by or service to any insured for which any insured may be held liable as an employer or in any other capacity.…" *Messenger,* unpub op at 2. The Court of Appeals held that the exclusion applied and Atain owed no coverage.

Messenger, an employee of NBI Construction Services ("NBI"), was killed in a construction accident that occurred on the premises of Piedmont Concrete. NBI was a subcontractor for Mains Construction, the general contractor. Messenger's estate filed suit against Piedmont Concrete, Mains Construction, and NBI. Mains Construction was insured by Atain, but Atain denied Mains Construction's tender, asserting that there was no coverage. Piedmont Concrete settled with the estate and NBI was dismissed pursuant to the exclusive remedy provision of the Worker's Compensation Act. Mains Concrete reached an agreement with the estate whereby Mains Concrete would be released from liability in exchange for an assignment of its rights under the Atain policy. The estate then litigated the coverage issue against Atain directly.

The trial court granted Atain's motion for summary disposition, finding that although the policy contained an "Employees, Subcontractors, Independent Contractors, Temporary Workers, or Volunteers" endorsement, that endorsement had an exclusion that applied here. Specifically, the endorsement provided that there was no liability coverage for:

"Bodily injury" to an "employee", subcontractor, employee of any subcontractor, "independent contractor", employee of any independent contractor", "temporary worker", "leased worker", "volunteer worker" of any insured or any person performing work or services for any insured arising out of and in the course of employment by or service to any insured for which any insured may be held liable as an employer or in any other capacity.… *Messenger,* unpub op at 2 (emphasis added).

The Court of Appeals affirmed, finding "that this exclusion precludes any obligation by defendant to indemnify Mains for this claim." *Id.* There was no dispute that Messenger was an employee of NBI at the time of the accident, that NBI was a subcontractor of the insured, Mains, and that Messenger was therefore providing a "service" to Mains. See *id.*

The panel rejected the estate's argument that discovery was necessary in order to determine the intended scope of the exclusion. *Id.* at 3. The estate also argued that the policy's "Stop Gap Employers Liability" endorsement created an ambiguity. That endorsement provided: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury by accident' … to your 'employee' to which this insurance applies." *Id.* The panel found no ambiguity because "the scope of this endorsement is limited" to "bodily injury by accident" occurring in the "coverage territory" – Canada. *Id.* "The accident did not occur in Canada and, therefore, the stop-gap provision does not apply in this case." *Id.*

The estate also argued that an ambiguity was created by the Atain policy's "Independent Contractors Liability Insurance" endorsement. *Messenger,* unpub op at 3. Again, the panel rejected this argument, finding that the estate's argument ignored "two important points. First, the policy clearly states that there is no altering of coverage. And, second, that the consequence of a failure to comply results in the employees of the subcontractor being treated as employees of the insured for purposes of calculating the premium due under the policy." *Id.* at 3-4.

The estate advanced a fourth argument – "that the more reasonable interpretation of the policy is to conclude that the employee exclusion only applies to employees of subcontractors where those employees are deemed to be de facto employees of the insured under worker's compensation law." *Id.* at 4. But the panel saw "no meaningful argument why that is the more reasonable conclusion," as the plain language of the policy did not support it. *Id.*

At bottom, Atain's policy simply said that it would not provide liability coverage for persons injured while doing work for Atain's insured, either directly as Main's employees or through independent contractors. So the case ultimately turned on the established proposition that – although exclusionary clauses "are strictly construed in favor of the insured" – "clear and specific exclusions will be enforced as written so that the insurance company is not held liable for a risk it did not assume." *Auto Owners Ins Co v Seils*, 310 Mich App 132, 146-147; 871 NW2d 530 (2015).

***Andreson v Progressive Michigan Ins Co,* unpublished opinion per curiam of the Court of Appeals, decided December 19, 2019 (Docket No. 345864); 2019 WL 6977115**

Although I usually don't discuss automobile cases here – leaving them form the No-Fault Report – *Andreson* warrants some attention because it addresses an unusual kind of "bad faith" claim. The decision also discusses the proper computation of 12% penalty interest the Uniform Trade Practices Act ("UTPA"), MCL 500.2006(4).

The Andresons, husband and wife, were injured in a motor-vehicle accident and sued for various benefits, including a claim against Progressive for underinsured motorist ("UIM") benefits. That case proceeded to trial and through an appeal[3]; relevant here is the fact that the Andresons were awarded $128,660.67 in attorney fees under the offer of judgment rule, MCR 2.405(D). *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76; 910 NW2d 691 (2017). The Andresons filed a second suit against Progressive (this appeal), alleged that Progressive defended the UIM suit in bad faith. In this suit, the Andresons also sought 12% penalty interest under the UTPA.

Both sides moved for summary disposition; the trial court awarded the Andresons 12% penalty interest on the UIM verdict, but denied their request for 12% penalty interest on their award of offer of judgment sanctions. *Andreson*, unpub op at 2.The trial court also dismissed the Plaintiffs' bad-faith claim as "not supported by the record." *Id.* Plaintiffs appealed.

The Court of Appeals affirmed both holdings. As to penalty interest, the panel noted that § 2006(4) provides: if "benefits are not paid on a timely basis, the benefits paid bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or a person directly entitled to benefits under the insured's insurance contract." *Andreson*, unpub op at 3. "By its explicit language, 12% interest is payable on the insurance 'benefits' only." *Id.* The panel found that "offer of judgment sanctions are not a 'benefit' to which [Plaintiffs] are entitled under their insurance contract with" Progressive. *Id.* Defining a "benefit" as "a payment or service provided for under an … insurance policy," the Court of Appeals found that "a sanction provided for in the Michigan Court Rules for an offer of judgment is not a 'benefit paid' (i.e., a service or payment provided for under the insurance policy) as set forth in or contemplated by" § 2006(4). *Andreson*, unpub op at 3-4.

The panel then considered Plaintiffs' bad-faith claim. The gist of this theory was "that an insurer has a contractual obligation to act in good faith and when it, as here, refuses to make or delays in making a no-fault payment, there exists a rebuttable presumption that the action is unreasonable (i.e., in bad faith)." *Id.* at 4. "According to plaintiffs, two of defendant's actions evidence bad faith on its part: (1) its violation of the UTPA, and (2) its failure to pay underinsured motorist benefits until 2 ½ years after the jury verdict in plaintiffs' favor, and five months after this Court affirmed the trial court." *Id.* at 5. The panel found no precedential or record support for these theories.

The panel cited *Kewin v Massachusetts Mut Life Ins Co,* 409 Mich 401, 420; 295 NW2d 50 (1980) for general rule that absent an "allegation and proof of tortious conduct existing independent of the breach, exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract." *Andreson*, unpub op at 5. Plaintiffs here did not allege tortious conduct independent of Progressive's breach of the insurance contract. And although Michigan does recognize "an insured's claim against its insurer for bad faith in refusing to settle," such a claim has been recognized "only in situations where the claimant's insurer is defending an action and refuses/neglects to settle on behalf of the claimant." *Id.* at 5. In other words, "bad faith" typically only refers to liability coverage, not a first-party claim by an insured. *Id.*

Assuming without deciding that a "bad faith" claim of this nature **could** be viable, the panel went on to reject the claim on its merits. *Id.* at 6-7. "[W]here a dispute exists as to the nature and extent of a plaintiff's injuries, particularly when based on medical records, a refusal to accept an offer of settlement rather than proceed to jury trial does not constitute bad faith." *Id.* at 6.

Andreson illustrates that "bad faith" claims are extremely limited under Michigan law. "Unreasonable" delays in payment are primarily addressed through § 2006(4), not through separate, quasi-tort claims against the insurer. But as *Andreson* underscores, the penalty interest assessed under that provision is only applied to "benefits" under the policy, and not costs or fees imposed under a Court Rule.

***Allstate Ins Co v Stack*, __ F Supp 3d __ ; 2019 WL 6894228 (ED Mich, December 18, 2019).**

Here, Judge Arthur Tarnow – applying Michigan law in diversity – held that Allstate could not rely upon a business exclusion in its Personal Umbrella Policy ("PUP") to avoid liability coverage for a fatal motor-vehicle accident.

Allstate's insured, Michael Stack, was a sales executive for Penguin Toilets. Penguin Toilets sold toilets with an overflow drainage system. The toilets were manufactured in China, shipped to a warehouse in Taylor, Michigan, and then from there shipped wholesale to various buyers. Stack was the Senior Vice President of Sales and Distribution and his job was to coordinate the shipments coming in from China with the purchase orders coming in from buyers. He was not an employee, however, but instead paid himself as a partner. His brother, Patrick Stack, was his supervisor and the company's managing member.

Allstate's insured would drive about 45 minutes from his home to the warehouse in Taylor a couple of times a week. He was making such a trip on the morning of the accident to deliver "some paperwork." But it was unclear **why** he was making this trip, as Patrick Stack testified that the documents did not need to be hand delivered and could have been e-mailed to Taylor.

Michael Stack was a recovering alcoholic, and drank that morning. "While he was en route to the Taylor warehouse, Stack also took a business call to discuss sales." *Stack*, 2019 WL 6894228 at *1. "At around 10:25 a.m., while driving on I-275, Stack crossed the median and drove his GMC Envoy into incoming traffic at around 75 m.p.h." *Id.* "He continued driving against traffic until his SUV struck an oncoming car," killing its two occupants. *Id.*

Allstate filed this declaratory judgment action, seeking a determination that it owed no coverage for this accident under its PUP, based upon the following

exclusion: "We will not cover any occurrence arising out of a business or business property." *Id*. at *2. The policy defined "business" as "any full or part-time activity of any kind: 1) Arising out of or relating to an occupation, trade, or profession of an insured person; and 2) Engaged in by an insured person for economic gain, including the use of any part of any premises for such purposes." *Id.* Although Michael Stack was not paid for his driving, Allstate argued that his drive from his residence to the Penguin Toilets warehouse arose from a business activity as defined in this exclusion. *Id*. at *3. Allstate argued that Stack "was delivering bills of lading to the warehouse, and that his driving was therefore related to his business." *Id.*

Judge Tarnow rejected Allstate's argument, finding that the "uncontested testimony of Patrick Stack makes clear that there was no need for Michael Stack to deliver the paperwork that was in his car." *Stack*, 2019 WL 6894228 at *3. Judge Tarnow agreed that a "courier whose job responsibilities entailed moving paperwork from place to place would certainly be engaged in a business venture while driving with paperwork." *Id*. However, Allstate's insured "was a corporate official … not a courier, and the facts that he carried paperwork in his car and took a business phone call prior to the accident do not transform a commute into a business activity." *Id.* "A contrary rule would transform all commutes to and from one's employment – and indeed any pre- or post-work driving that results from an insured party's job – into business activity under similarly-worded PUPs." *Id.* In Judge Tarnow's view, such "a broad exclusion could not be divined by the 'plain, ordinary and popular sense' of the language employed in the policy." *Id.*, quoting *Kingsley v American Central Life Ins Co*, 259 Mich 53, 55; 242 NW 836 (1932).

Allstate has appealed this ruling to the Sixth Circuit, Case No. 20-1061, so this is a case to keep an eye on in the coming months. Although federal courts' interpretations of Michigan law are not binding on Michigan state courts, *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 160 n 1; 809 NW2d 553 (2011), they can be viewed as persuasive authority, see *Id.* at 171.

Endnotes

1 "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails." *Besic v Citizens Ins Co of the Midwest,* 290 Mich App 19, 26; 800 NW2d 93 (2010). See also *Hawkeye-Security Ins Co v Vector Constr Co,* 185 Mich App 369, 380; 460 NW2d 329 (1990).

2 Under Michigan law, the duty to defend is determined by reference to the underlying complaint. *Northland Ins Co v Stewart Title Guar Co*, 327 F3d 448, 455 (CA 6, 2003). "Even if there are theories of liability not covered by the policy, the duty to defend includes the entire action if there are any theories of recovery that fall within the policy." *Id.*

3 In the prior case, Progressive was represented by the author on appeal.

Municipal Law Report

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Michigan's Voting Rights In The Age Of Coronavirus.

Michigan has one of the most decentralized election systems in the country. There are only eight states in the nation that administer elections at the local level, with Michigan being among the largest. The responsibility for administering Michigan's elections is divided between county and local officials. At the local level, city and township clerks are charged with the responsibility of administering all federal, state, county, city, township, and village elections.[1] Altogether, 1,699 election officials across the State - representing 83 counties, 1,240 townships, 274 cities, and 93 villages – implement and administer Michigan's election system.[2]

In 2018, voters approved a constitutional amendment making important changes to the voter registration and absentee ballot process in Michigan. Proposal 18-3 added Article II, Section 4 to the state constitution, guaranteeing several important voter rights. With the passage of the statewide ballot proposal, voters now have the right to request an absentee ballot without giving a reason.[3] Voters also have a right to register to vote up to and through Election Day, including on the day of the election.[4] Early voting is available through absentee ballot up to 45 days before an election. The local clerk must receive completed absentee ballots before the close of polls on Election Day.[5] Absentee ballots received after election polls close will not be counted.[6]

While no-reason absentee voting is now available to all registered voters, the right to vote absentee is not automatic. Once registered, voters must apply for an absentee ballot. Applications for absentee ballots are available as early as 75 days before the election and may be submitted through Election Day in person or by mail as provided by statute.[7]

On November 3rd, Michigan's new voting rights will be put to the test in a presidential election that could be significantly impacted by the threat of COVID-19. Preparations taken by the State in advance of the May 5, 2020 election could serve as a helpful guide for November. To help keep voters and election workers safe from the spread of coronavirus during the May 5th election, which was primarily limited to school bond and millage issues, Governor Whitmer issued Executive Order 2020-27 temporarily relaxing statutory requirements and ordering that the election be conducted to the greatest extent possible by mailed-in absentee ballots issued and submitted without in-person interaction.

Executive Order 2020-27 suspended strict compliance with election laws to expand the use of mail-only absentee voting.[8] Rather than wait for voters to initiate requests for absentee ballot applications, which under ordinary times is the usual procedure, Executive Order 2020-27 allowed elections officials to automatically send absentee ballot applications to all registered voters in jurisdictions where elections were held. In addition, new voter registrations were automatically treated as an absentee voter application, prompting the issuance of an absentee ballot.[9] To further facilitate absentee voting, jurisdictions were permitted to close all but one polling location in each election jurisdiction.

Given the extraordinary circumstances and the continuing threat of coronavirus, similar rules encouraging or requiring mail-in only absentee ballots during the November election could be imposed. Michigan's new no-reason absentee voting rights

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may cause a surge in absentee voting during the November election. With concerns about the spread of coronavirus still high, absentee voting during the presidential election is expected to increase exponentially. Without an effective plan and appropriate relief, the unprecedented reliance on mail-in absentee voting could strain the ability of election officials to process and count ballots promptly and handle same-day registrations.

In the midst of the COVID-19 pandemic, the United States Supreme Court and Sixth Circuit Court of Appeals have issued decisions involving absentee voter rights.

Allowing Voters To Mail Absentee Ballots After Election Day Fundamentally Altered The Nature Of The Election By Providing Voters Six Additional Days To Vote After Election Polls Closed.

Republican National Committee, et al v Democratic National Committee, et al., __ S Ct __; 2020 US LEXIS 2195 (April 6, 2020)

Facts:

In a divided opinion, the United States Supreme Court stayed a lower court ruling that permitted municipal clerks in Wisconsin to count absentee ballots **postmarked** after the April 7th Democratic primary polls closed. Wisconsin was one of the few states to allow in-person voting to proceed after the outbreak of the COVID-19 pandemic. To avoid possible health risks, a record number of voters turned to the absentee voting option to protect themselves from the risks of large crowds at voter precincts. As a result, election officials were inundated with absentee ballot requests and were unable to process all of the applications in time for the ballots to be mailed to voters and returned to election officials before the close of election polls. Wisconsin, like Michigan, requires that completed absentee ballots be received by the close of the election polls in order to be counted.

The Democratic National Committee and Democratic Party of Wisconsin filed suit and requested a preliminary injunction allowing an extension on the deadline by which elections officials had to receive completed absentee ballots. The district court granted the defendants' relief and extended the deadline for receipt of the ballots. The court ordered that absentee ballots must be received by April 13 instead of by the close of the election polls on April 7th. In addition, the district court, *sua sponte*, ruled that absentee ballots **postmarked** after the election polls closed could be counted, provided they were received by the extended April 13th deadline. The Wisconsin Legislature and Republican Party of Wisconsin intervened in the lawsuit and applied to the United States Supreme Court for a stay of the district court ruling pending appeal.

In the proceeding before the United States Supreme Court, the parties did not challenge the district court's decision to extend the deadline for municipal clerks to receive absentee ballots from April 7 to April 13. Instead, the issue before the Supreme Court was limited to whether absentee ballots **postmarked** after the election polls closed could be counted in the election if the ballots were received by the April 13th deadline extension.

> While no-reason absentee voting is now available to all registered voters, the right to vote absentee is not automatic. Once registered, voters must apply for an absentee ballot.

Ruling:

The Supreme Court ruled that counting ballots postmarked after the close of election polls allowed certain voters six additional days to cast their vote after the Election Day, which fundamentally altered the nature of the election. The fact that the district court, *sua sponte*, granted additional time to postmark absentee ballots when the plaintiffs did not ask for such relief weighed heavily in favor of a stay of the district court ruling. In granting the stay, the Supreme Court ruled that absentee ballots had to be delivered in-person by the close of the election polls on April 7th, or be mailed by April 7th and received by the clerk no later than April 13th, to be counted in the election.

Election Officials Did Not Have To Provide Absentee Ballots To Jail Detainees Arrested After The Deadline For Requesting Absentee Ballots.

Mays v LaRose, 951 F3d 751 (CA 6, 2020)

Facts:

Plaintiffs were arrested the weekend before the November election in 2018. Unable to afford bail, they sued when they realized they would be confined to jail and unable to vote in the upcoming election. The lawsuit challenged Ohio's absentee ballot regulations, asserting that Ohio provided hospital confined electors more time to file absentee ballot applications than it allowed jail detainees.

Ohio allows registered voters the opportunity to vote by absentee ballot, including voters who are detained in jail and awaiting trial. Similar to Michigan's rules, requests for an absentee ballot must be mailed and received at least three days before the election or must be made in person. As a result, individuals jailed the weekend before an election and held in custody through Election Day are not able to vote in-person or by absentee ballot. In contrast to jail detainees, Ohio voters who are hospitalized, or whose minor children are hospitalized, are allowed to apply for an absentee ballot through the day of the election.

Plaintiffs sued the Ohio Secretary of State, alleging that Ohio violated the plaintiffs' equal protection rights by treating jail detainees differently from hospitalized voters concerning their right to cast absentee ballots. Plaintiffs also alleged that the absentee ballot regulations violated their First Amendment right to vote. The district court ruled in favor of the plaintiffs, holding that Ohio was required to give pre-trial jailed detainees the same absentee ballot deadline as it gave to persons confined to a hospital. Defendants appealed.

Ruling:

The Sixth Circuit Court of Appeals reversed the district court order, ruling that Ohio had no obligation to extend

the absentee ballot deadline for jailed detainees who were unable to vote in-person because they were in jail during the election. The Court explained that Ohio's treatment of jail detainees as compared to hospitalized electors imposed a moderate burden on the plaintiffs' voting rights and required the court to apply an intermediate level of scrutiny review. Using intermediate scrutiny, the court found that the State's interests in administering the election system outweighed the burden imposed on the plaintiffs' voting rights. Evidence submitted to the court showed that counties would be overburdened and unable to accomplish essential election responsibilities if officials were required to spend limited resources processing late absentee ballot requests from jail-confined voters. Also, the court concluded that jail detainees are not similarly situated to hospitalized voters because of their confinement location. Elections staff delivering absentee ballots to jails would be required to spend limited time and resources trying to locate the elector in jail, pass through the jail's security, and verify that the voter would be present when they arrived, none of which was necessary for hospitalized electors.

In addition, the court considered the entire landscape of voting opportunities available to the plaintiffs, noting that the plaintiffs had four weeks before their arrest to vote early in-person and over ten months before their arrest to apply for an absentee ballot. The court found that the plaintiffs failed to take advantage of the voting opportunities offered by the State. The court ruled that the State's justifications for imposing the absentee ballot application deadline on jail detainees outweighed the burdens imposed on the plaintiffs' voting rights. Concerning the First Amendment claim, the Court held that Ohio's interest in orderly elections was sufficient to justify the minimal burden on the plaintiffs' right to vote.

Endnotes

1 Election Officials' Manual, Michigan Bureau of Elections, Chapter 1, p.5.
2 Michigan Municipal League, https://www.mml.org/resources/information/elections.htm.
3 1963 Const., art. II, sec. 4.; See also MCL 168.491 to MCL 168.530.
4 *Id*
5 MCL 168.764a.
6 *Id*
7 MCL 168.759
8 *Id.*
9 Executive Order 2020-27, https://www.michigan.gov/whitmer/0,9309, 7-387-90499_90705-523400 --,00.html.

No-Fault Report

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Recent Department of Insurance and Financial Services' Orders and Bulletins and How They Impact the Upcoming No-Fault Reform Amendments

As noted in my prior articles, we will soon begin seeing changes in the Michigan NoFault Act. For policies issued or renewed on or after July 2, 2020, the new PIP choice provisions will start phasing in, along with the increases in the residual bodily injury/tort liability limits. Due to the haste in which the nofault reform measures were drafted, there are countless examples of sloppy draftsmanship in both SB 1 and HB 4397, which became 2019 PA 21 and 22, respectively. Although the Legislature has promised several technical amendments, so far nothing has been introduced in the Legislature, aside from two bills which would revert the nofault motorcycle priority scheme to where it was from 1973 to 1980.

With all eyes on the state capital, it was easy to overlook the fact that the Department of Insurance and Financial Services (DIFS) has been charged with implementing many critical provisions contained within the NoFault Reform Act, including a Utilization Review Unit and an Anti-Fraud Unit. As we approach the July 2, 2020 implementation date, we need to take a look at some of the orders and bulletins issued by the Insurance Director, through the DIFS, to see how the DIFS has been working behind the scenes to give guidance to both insurance carriers and policyholders alike.

DIFS ORDERS

19-048M, Issued September 20, 2019

PA 21 and 22 were filed with the Michigan Secretary of State on June 11, 2019. The new law made significant changes to the nofault priority scheme, set forth in MCL 500.3114 and MCL 500.3115. Under the old law, so-called "strangers to the insurance contract," including occupants of motor vehicles who did not have insurance of their own in their household, whether individually or through a spouse or family member, would turn to the insurer of the owner, registrant or operator of the motor vehicle they were occupying. Similarly, under the old law, non-occupants of motor vehicles who did not have insurance of their own in their household, whether individually or through a spouse or domiciled relative, would turn to the insurer of the owner, registrant or operator of the motor vehicle involved in the accident for their nofault benefits. After June 11, 2019, these individuals now file their claims with the Michigan Automobile Insurance Placement Facility (MAIPF), which operates the Michigan Assigned Claims Plan (MACP). Although the statute purported to change the priority provisions effective June 11, 2019, there were insurance policy forms that remained in effect that still defined these "strangers to the insurance contract" as "insureds," entitled to benefits under the applicable insurance contract. The question then became which controlled – the statute or the insurance contract?

After many months of uncertainty, with different insurance carriers taking different positions and the Legislature seemingly unable to arrive at a common-sense solution (by simply postponing the effective date of the priority changes), the Director of Insurance stepped in on September 20, 2019, and issued Order number 19-048. This Order effectively preserves the old priority system until the insurer files new policy forms, reflecting the change in the priority system. The author believes that most insurers will opt to incorporate the new nofault priority scheme when it submits the new policy forms to DIFS to take into account the new PIP choice provisions and corresponding premium rate reductions. Some carriers, though, have opted to take a two-step approach by filing one set of revised policy forms, reflecting the new priority system and making

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a partial premium reduction, with a second set of filings to follow, effective for policies issued or renewed on or after July 2, 2020, which will reference the new PIP choice provisions and further premium reductions. In either event, the old priority system remains in effect until the new policy forms are issued and, in the case of personal lines insurance, are approved by DIFS.

In an effort to take advantage of the new priority system without revising its policy forms, some insurers were taking the position that their "conformity to law clause" automatically converted the insurance policy to reflect the new priority scheme. DIFS Order 19-048 expressly prohibits an insurer from relying on any "conformity to law clause" to change its policy forms.

Bottom line – whether you are representing a "stranger to the insurance contract" or defending a claim filed by such an individual, it is imperative that you obtain a copy of the policy form that was in effect at the time of the accident, to see whether or not the policy form still reflects the old priority system or the new priority system. It will also be important to pay attention to the effective date of that policy. For example, if a policy is renewed on June 1, 2020, for six months, it will still reflect the old priority scheme (assuming that the insurer decided not to do a "two-step" filing) which means that the so-called "strangers to the insurance contract" would be entitled to lifetime, unlimited benefits under that old policy form until the policy is renewed on December 1, 2020.

DIFS Order 19-049

On September 22, 2019, Detroit Free Press columnist Mitch Albom wrote an article about the plight of a three-year-old girl who was crossing the street when an uninsured motorist struck her. Because her parents did not have a policy of insurance in their household, and because the owner, registrant, and operator of the motor vehicle were uninsured, her family was forced to file a claim for nofault benefits through the Michigan Assigned Claims Plan (MACP), which is administered by the Michigan Automobile Insurance Placement Facility (MAIPF). The new law provided that for claims payable by the MACP, there was a $250,000 cap in "allowable expense" coverage. This cap was effective on June 11, 2019. Because this little girl's accident occurred after that date, her benefits were seemingly capped, by statute, at $250,000. The problem here, though, is that the girl's inpatient hospitalization bill at Children's Hospital was $140,000, meaning that she only had $110,000 left on her benefits package before her nofault benefits would be exhausted.

Two days later, Governor Whitmer directed her Insurance Director to postpone the effective date of the MACP $250,000 allowable expense cap to July 2, 2020. The Director's legal basis for doing so is dubious at best, and the MAIPF challenged her action in the Court of Claims. The MAIPF moved for a temporary restraining order, to be followed by a preliminary injunction, which would preclude DIFS Orders 19-948 and 19-049 from going into effect. However, Court of Appeals Judge Michael J. Kelley, sitting in the Court of Claims, denied the Motion for a Temporary Restraining Order and Preliminary Injunction. Thus, these two Orders remain in effect, and for accidents occurring through July 1, 2020, those individuals who would have gone to the MAIPF for their nofault benefits will continue to receive lifetime, unlimited benefits – just like the three-year-old girl mentioned in Mitch Albom's article.

As we approach the July 2, 2020 implementation date, we need to take a look at some of the orders and bulletins issued by the Insurance Director

DIFS Bulletins

The following is a summary of the various bulletins issued by DIFS since June 11, 2019, that impact on the Michigan NoFault Insurance Act:

2019-11 This bulletin supersedes Bulletin 2018-13 which, in turn, superseded Insurance Bulletin 1992-3, regarding a nofault insurer's obligation to defend and indemnify their insureds in "balance bill" disputes with medical providers. This bulletin clarifies that the medical expense fee schedules will begin for medical services rendered on or after July 1, 2021. In the meantime, remember that nofault carriers are only obligated to pay a "reasonable charge" and that a healthcare provider "can charge no more than that." Healthcare providers are also reminded that for services rendered on or after June 11, 2019, they now have a direct cause of action against the nofault insurer for payment of any "balance bill." The intent is to dissuade a provider from suing the patient directly over a "balance bill."

2019-15 This bulletin, issued on September 27, 2019, makes it clear that group self-insurance pools, such as the Michigan Municipal Risk Management Authority, and self-insurers do not issue "insurance policies." Therefore, the PIP coverage choices found in MCL 500.3107c do not apply to them. These entities continue to provide lifetime, unlimited benefits to their members.

2019-17 As amended, MCL 500.3148(1) provides that it is improper for an injured claimant's attorney to claim a lien overpayment of nofault benefits unless (1) the payment is authorized by the NoFault Act and (2) the payment is "overdue." Notwithstanding this language, DIFS Bulletin 2019-17 states that:

> [The amended statute] does not prohibit an injured person from contracting with an attorney to assist in the recovery of nofault benefits. An attorney may, during the course of his or her representation, hold in trust any funds paid to a Claimant via a two-party check.

This bulletin was issued in response to the practice of the insurance carriers to issue checks solely to the injured person for, say, work loss or household replacement service expenses, even though their attorney attempts to claim a lien on any such payments. Although this bulletin seems to resurrect a claim for an attorney's charging lien on applications for work loss benefits and household replacement service expenses, by the reference to "any funds paid to a claimant via a two-party check," it seems that an extension to cover undisputed medical expense payments due and owing to a

provider would defeat the entire purpose behind the Legislative amendment to MCL 500.3148(1). This provision, after all, was designed to preclude an injured person's attorney from claiming a lien on payment of undisputed medical expenses.

2019-21 Under the old law, insurers doing business in Michigan were forced to file a certification, under MCL 500.3163(1), which would require them to provide Michigan nofault benefits to any of their insured out-of-state residents who were injured while traveling in the State of Michigan. Effective June 11, 2019, out-of-state residents are now barred from recovering Michigan nofault insurance benefits unless they own a motor vehicle registered and insured in Michigan. This bulletin clarifies that for losses occurring before June 11, 2019, an insurer that has filed a certification under MCL 500.3163(1) will still be obligated to provide lifetime, unlimited benefits to out-of-state residents injured in a motor vehicle accident in Michigan. However, for accidents occurring on or after June 11, 2019, "the certifications have no effect and cannot be relied upon by a non-resident to claim coverage from an insurer that previously filed a certification." For accidents occurring after June 11, 2019, an out-of-state resident's only recourse is a tort action against the other motorist who caused the accident (assuming that the out-of-state resident does not own a Michigan registered and insured motor vehicle).

2019-22 This bulletin clarifies the effective date of the 56 hours per week attendant care cap set forth in MCL 500.3157(10). Before that date, some insurers were taking the position that this 56 hour per week cap applied to any services rendered after June 11, 2019, despite the statutory language set forth in MCL 500.3157(14), which made it clear that this limitation applies only to care "rendered after July 1, 2021." The author was involved in a debate with a fellow defense attorney at the recent Insurance Alliance of Michigan Claims Seminar in late September 2019 over this very issue. This bulletin makes it clear that the 56 hour per week cap takes effect for services "rendered after July 1, 2021" and encourages claimants to file a complaint with DIFS if they believe that the insurer improperly limited their attendant care benefits before that date.

Bottom line – whether you are representing a "stranger to the insurance contract" or defending a claim filed by such an individual, it is imperative that you obtain a copy of the policy form that was in effect at the time of the accident, to see whether or not the policy form still reflects the old priority system or the new priority system.

2020-01 This bulletin directs health insurers and health plans to develop a document to indicate whether a person's coverage is "qualified health coverage," for purposes of the Medicare opt-out provisions set forth in MCL 500.3107d. The document needs to list the full names and dates of birth of all individuals covered under the policy or plan, and contain a statement as to whether or not the coverage constitutes "qualified health coverage" such as Medicare, or that the health coverage does not exclude coverage for motor-vehicle accidents and has an annual deductible of $6,000 or less per covered individual. Insurers will require these forms if the insured decides to opt-out of the "allowable expense" coverage because they are Medicare recipients, and members of their household otherwise have "qualified health coverage."

2020-03 After numerous revisions, this bulletin contains the final draft of the Michigan Choice of Bodily Injury Liability Coverage Limits, and the selection of personal injury protection medical coverage amounts for both commercial lines insurers and personal lines insurers. Although insurers are required to use the DIFS Bodily Injury Choice Forms, insurers have the option of using the DIFS forms when it comes to the PIP choice provisions. If the insurer chooses to utilize their own forms, they must still be approved by DIFS.

If you want to see what your new PIP choices election form will look like when your policy comes up for renewal on or after July 2, 2020, you may want to take a look at these forms.

2020-05 This bulletin answers many of the questions posed by Medicare recipients regarding their ability to "opt-out" of the "allowable expense" portion of their nofault policy. This bulletin clarifies that Medicare enrollees who choose to opt out of the nofault "allowable expense" coverage will still be covered by Medicare, subject to any co-insurances, co-payments, and deductibles that may be imposed by Medicare. This bulletin further advises that the enrollee will be responsible for many services that Medicare does not cover, including "transportation to and from medical appointments, vehicle modifications, case management services, residential treatment programs, long-term and custodial care, and replacement services." The bulletin also notes that if the Medicare enrollee opts for lower "allowable expense" coverage (say $250,000 or $500,000), Medicare will pay for any medical expenses incurred by the injured claimant once the PIP coverage limits have been exhausted.

It will be necessary to keep a close eye on not only the Legislature but also DIFS as we near the July 2, 2020, implementation date. In the meantime, please be safe as we work our way through these uncertain times.

Supreme Court

By: Stephanie Romeo, *Clark Hill PLC*
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The Michigan Supreme Court begins 2020 on a quiet but unified front, issuing just one unanimous per curiam opinion in the year's first quarter. In this criminal case, the Court held that jury instructions cannot exclude a defendant's theory of self-defense if evidence exists to support it. The Court also discussed the relevancy of a particular piece of evidence, finding it relevant and admissible, and reaffirming the broad nature of Michigan Rules of Evidence 401 and 402. Despite being a criminal case, the Court's holding provides valuable insight for attorneys defending both criminal and civil cases, as it emphasizes the powerful effect even seemingly small pieces of evidence may have on a lawsuit and the incredibly low threshold for relevant evidence. *People v Rajput*, No. 158866, __ NW2d __; 2020 WL 407809 (Mich. Jan. 24, 2020)

Facts: On May 7, 206, the defendant Nadeem Rajput was driving his vehicle with another man known only as Haus. At the same time, Lakeisha Henry was driving a red Malibu with her boyfriend Dewayne Clay as her passenger. As the Malibu approached the defendant's vehicle, Henry and Clay began firing gunshots at the defendant and Haus. At this time, no one was injured, and the defendant and Haus drove away. However, shortly after, the defendant and Haus went out in search of the Malibu as they wanted to determine who was shooting at them and why. By the time the defendant and Haus found the Malibu and trapped it, Henry was the sole occupant. An argument ensued and multiple gunshots were fired, resulting in Henry's death.

At trial, the defendant argued that Haus shot Henry in self-defense when Henry reached for a gun in her vehicle. The defendant requested that a self-defense instruction be read to the jury, but the trial court denied the request, citing the proposition that a defendant who claims that another person committed the homicide is not entitled to the self-defense instruction. The Court of Appeals affirmed that the defendant was not entitled to the self-defense instruction, but for a different reason, claiming that the defendant and Haus were not the initial aggressors and could have fled the scene.

The defendant also attempted to admit testimony from Pierre Carr, Clay's brother, to support his self-defense theory. Carr testified at an investigative-subpoena hearing that Clay had arrived at his house on the day of the shooting, called Henry on the phone as she was being pursued by the defendant and Haus, and told Henry to "shoot, shoot." The trial court refused to admit the testimony, finding it irrelevant, and the Court of Appeals agreed. Oddly, the Court of Appeals stated, "even if Clay told [Henry] to shoot at [D]efendant, that does not make it any more or less likely that [Henry] actually shot at [D]efendant."

Ruling: The Michigan Supreme Court reversed the judgment of the Court of Appeals on both issues. First, the Court found that the defendant satisfied his initial burden of producing some evidence "from which a jury could conclude that the elements necessary to establish a *prima facie* defense of self-defense exist." The Court explained that the sufficiency of this evidence is for the jury to decide under proper instructions. These instructions cannot exclude the theory of self-defense when this initial burden is met. Moreover, the Court explained that an aider and abettor is relieved of liability if the principal acted in self-defense, meaning the defendant was entitled to the instruction even though he was not the shooter. The Court also believed that the defendant and Haus were not the initial aggressors as they did not seek out the victim to harm, but rather to determine who was shooting at them and why. However, the Court explained

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that whether the defendant and Haus were the initial aggressors was another issue for the jury to decide.

Second, the Court found that Carr's testimony was relevant to the defendant's theory of self-defense under MRE 401 and 402. The court reiterated the "minimal" threshold for relevant evidence such that evidence having **any** tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable is considered probative and relevant. All relevant evidence is generally admissible under MRE 402. Here, the Court explained that Carr's testimony regarding Clay's instructions to Henry to "shoot, shoot" had probative value as Clay's instructions certainly had some tendency – however minimal – to make it more likely that Henry reached for a gun and that Haus responded in self-defense.

Practice Pointer: The Michigan Supreme Court's holdings remind us of the power of the jury to decide key issues and the broad scope of the Michigan Rules of Evidence. While the trial court and Court of Appeals attempted to make some conclusive, dispositive decisions, the Michigan Supreme Court found these decisions were made in error and continuously stated the issues were "for the jury to decide." Considering the low threshold for relevant evidence, it is important that attorneys take a critical look at any evidence they may offer to support their client, but to also devise strategies to combat harmful evidence that may be offered by the opposing party as it will be difficult to prevail on a relevance objection. Although attorneys should not necessarily assume that **any** piece of evidence will be deemed relevant, it is essential to search for these small pieces of evidence that will likely be deemed admissible and may change the trajectory of a case depending on a jury's views. As the saying goes, "a little bit goes a long way."

Court Rules Report

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

PROPOSED AMENDMENTS

2020-06 – Amendments to Case Evaluation/ADR

Rules affected: MCR 2.403, MCR 2.404, and MCR 2.405
Issued: March 19, 2020
Comment Period: July 1, 2020
Public Hearing: Not set

Pursuant to workgroup recommendations, this amendment would make numerous changes to the rules concerning case evaluation. Some of the changes include: (1) if the parties stipulate to an ADR process other than case evaluation, then the Court may not subsequently order the parties into case evaluation without the parties' written consent; (2) case evaluation summaries submitted within seven days of the hearing are timely (rather than 14 days); (3) if a case evaluation summary is submitted within 24 hours of the hearing, the party is assessed an additional $150 fee (for a total sanction of $300); and (4) MCR 2.403(O), pertaining to costs for rejecting the case evaluation award, is eliminated.

2019-26 – Amendment to Supreme Court Oral Argument Time Limitation

Rule affected: MCR 7.314
Issued: March 19, 2020
Comment Period: July 1, 2020
Public Hearing: Not set

This amendment would eliminate the oral argument time period (30 minutes per side) and instead provide for an amount of time established by the Court in the order granting leave to appeal.

2019-29 – Amendments to Appellate Rules Regarding Appendix

Rule affected: MCR 7.212 and MCR 7.312
Issued: March 19, 2020
Comment Period: July 1, 2020
Public Hearing: Not set

This amendment would allow practitioners to efficiently produce an appendix for all appellate purposes by making the appendix rule consistent within the Court of Appeals and Supreme Court.

2019-31 – Amendment to Allow Vexatious Litigator Sanctions

Rule affected: MCR 7.216
Issued: March 19, 2020
Comment Period: July 1, 2020
Public Hearing: Not set

This amendment would enable the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316), either by court initiative or motion of a party.

Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*
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The latest amicus brief filed on behalf of Michigan Defense Trial Counsel was in the case of *Griffin v Swartz Ambulance Service*, Supreme Court Docket No. 159205. The brief was authored by Michael C. Simoni of Miller, Canfield, Paddock and Stone, P.L.C.

Primarily at issue in *Griffin* is the application of the immunity provision in the emergency medical services act (E.M.S.A.), MCL 333.20901 *et seq*. The plaintiff in *Griffin* was injured in an automobile accident. While being transported to the hospital in the defendant's ambulance, the ambulance was involved in another accident. The plaintiff was transported to the hospital in a different ambulance. The plaintiff alleged that the driver of the defendant's ambulance (a licensed emergency medical technician) negligently caused the second accident. Further, the plaintiff claimed that the second accident caused a delay in the treatment of the plaintiff's original injury, ultimately resulting in the amputation of a portion of the plaintiff's leg.

Except in cases of "gross negligence or willful misconduct," the EMSA generally provides immunity to medical first responders (including emergency medical technicians) where the alleged conduct involves "the treatment of a patient." Thus, the issue was whether the operation of an ambulance is "the treatment of a patient."

In a divided 2-1 unpublished opinion, the Court of Appeals affirmed summary disposition in favor of the defendant ambulance company. With both the majority and dissent consulting different dictionaries to define the term "treatment," the majority held that "the treatment of a patient" "would not be limited to actual medical services rendered to patients being transported by ambulance but would include activities by first responders acting within the scope of their duties and training as first responders." The dissent would have held that "treatment" is defined more narrowly as "[m]anagement in the application of remedies; medical or surgical application or service."

The Supreme Court granted oral argument on the plaintiff's application for leave to appeal, specifically requesting briefing on how "the treatment of a patient" should be defined within the context of the EMSA The Supreme Court also invited amicus support from the MDTC.

Focusing on the language of the EMSA itself, MDTC's amicus brief submitted that the plain language of the relevant statutory provisions broadly defines the conduct that is subject to the act's immunity provisions. Specifically, the act's language should be read to broadly cover any services that were provided to the patient consistent with the level of life support services the individual was licensed to provide. In the *Griffin* case, the services were provided by an emergency medical technician. Transporting a patient to the hospital in an ambulance is an action within the licensure or additional training of an emergency medical technician.

This interpretation is consistent with the goal of EMSA, which is to encourage citizens to join the emergency medical services profession and to advance the public good by limiting liability in order to render emergency medical service workers less reluctant to perform their jobs.

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.

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

MEMBER NEWS
Work, Life, and All that Matters

Robert John Scarfone passed away April 2, 2020 at his winter residence in Sarasota, Florida. He and his loving wife, Patricia, were visiting her father at the time. When he spoke of Patricia, John always referred to her as "my bride," although they had been married for decades. He is survived by two brothers and three sisters, seven children, and one grandchild. To say that Bob was a "family man" is an understatement.

Bob was born on December 10, 1955 in Detroit, Michigan and spent his entire life in the Grosse Pointe area. In addition to being deeply religious, he also spent his youth as a standout hockey player noted for his often-achieved aspiration: "I just want to score goals." After high school, John went on to play for Villanova. He completed his undergraduate at the University of Detroit and then went on to law school. Practicing in the area of defense in the civil-law arena, he was an associate at house counsel for AAA and Highland & Currier, before eventually co-founding the private law firm of Scarfone & Geen in 1990. There are few who could deny that he was a "great boss."

John touched so many because he cared. He could, using a special sense that he had, discern when others had a problem. What is more, he would fix that problem for you and ask for nothing in return. He will be missed because he was unique and irreplaceable.

Kari L. Melkonian Receives Oakland County Bar Association Distinguished Service Award

Southfield, Mich., April 21, 2020 – Collins Einhorn is proud to announce that Kari L. Melkonian has received the Oakland County Bar Association Distinguished Service Award. This award recognizes a member of the Oakland County Bar Association who provides exceptional voluntary services to benefit the organization.

Kari's unquestionable passion for inspiring positive change is displayed through the magnitude of her involvement. Kari has been an active member of the Oakland County Bar Association for 12 years.

Currently, she sits on the OCBA Board of Directors and is an active member of the Circuit Court Committee and Inns of Court Committee. She volunteers as a discovery mediator and serves as a case evaluator in Oakland County Circuit Court.

Previously, Kari was a member of the Board of Directors Nominating Committee, New Lawyers Committee, and Mentor Program. As a board member, Kari has co-chaired the Circuit Court Bench-Bar Conference, Holiday Gala and serves on various board sub-committees. She regularly attends OCBA events, where she greets and makes new lawyers feel welcome.

Kari has also held chair and vice-chair positions on the Circuit Court and Criminal Law Committees. As chair of the Criminal Law Committee, Kari was responsible for organizing the Brown Bag Lecture Series for criminal defense attorneys. She served as chair of the Circuit Court Committee for two consecutive years; under Kari's leadership, the committee expanded and improved the discovery mediator program.

Kari is a sustaining member of the OCBA and a fellow of the Oakland County Bar Foundation. She has also written articles for LACHES and spoken on many topics at various OCBA CLE seminars.

The values of the Oakland County Bar Association are an ever-present element of Kari's service. Her commitment to improving the broader legal community is evident through her involvement in other bar and legal activities. Kari is a member of the Detroit Metropolitan Bar Association, Claims Litigation Management, and the Michigan Defense Trial Counsel, where she currently serves as a Social Media Committee Co-Chair. Kari has also has made multiple appearances on "Practical Law."

Kari is passionate about her community and volunteers her time in many activities and charities, including various animal rescue organizations, and as a speaker to volunteers of a women's shelter regarding the Personal Protection Order process. Every year, Kari participates as a volunteer for the University of Detroit High School Mock Trial Team program and has volunteered as a judge in various high school, college, and law school mock trial competitions. Kari was also an adjunct faculty instructor at Baker College of Auburn Hills, where she taught research and writing, and family law courses to students in the paralegal program.

Online Video Conferencing Allows for Virtual Mediation Amid COVID-19 Crisis

Grand Rapids, Mich. – The COVID-19 (Coronavirus) social distancing protocols have and will continue to change the way professionals conduct business for some time into the future. Working remotely is rapidly becoming the new norm in most industries.

Social distancing is particularly challenging for attorneys in litigation settlement discussions that must take place in the course of facilitative mediation. Although there is no substitute for "being in the same room", video-enabled conferencing platforms are bringing a new dimension to the ability to communicate online and therefore, work remotely.

Among the individuals to adapt to using video-assisted Alternative Dispute Resolution (ADR)is Foster Swift litigator and mediator Frederick D. Dilley. Using this technology allows for full-day mediation of cases with litigants and counsel "remoting in" from multiple locations. This includes the ability for the participants to have joint sessions, go into private caucuses in virtual breakout rooms for conferences with the mediator or with other individuals, as well as to share documents and other written material, all in the video conferencing format.

One of the most trusted online conferencing platforms to host virtual mediations is Zoom: (https://www.Zoom.US). All participants need in order to use this program are:

- WiFi internet connection,
- a computer or WiFi enabled mobile device,
- and the Zoom App, which is available from the App Store or through the Zoom website.

Today's technology has enabled online mediation and remote ADR so that professionals can work with their clients regardless of their geographical locations. In addition, without the need for travel time, scheduling difficulties are greatly reduced. Remote ADR allows for attorneys to easily integrate the online platform into their existing litigation practice and to greatly increase their availability as well as that of their clients.

If you would like more information about remote ADR or video conference assisted mediation, please contact Dilley at fdilley@fosterswift.com or 616-726-2247.

Member News *is a member-to-member exchange of news of* ***work*** *(a good verdict, a promotion, or a move to a new firm),* ***life*** *(a new member of the family, an engagement, or a death) and* ***all that matters*** *(a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Michael Cook (Michael.Cook@ceflawyers.com).*

Vendor Profile

LCS RECORD RETRIEVAL

Nate Kadau
Regional Account Manager
3280 N. Evergreen Drive N.E.
Grand Rapids, MI 49525 (877) 949-1119
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1. **Where are you originally from?**
   Grand Rapids, Michigan

2. **What was your motivation for your profession?**
   To provide personalized, innovative, and cost-effective record retrieval services geared toward legal, medical, and insurance communities.

3. **What is your educational background?**
   Bachelors of Business Administration, Western Michigan University

4. **How long have you been with your current company and what is the nature of your business?** I have been with LCS Record Retrieval (LCS) for eleven years. We offer nationwide record retrieval with personalized service to our clients.

5. **What are some of the greatest challenges/ rewards in your business?** The most rewarding aspect of our business is the ability to provide services customized to meet the needs of each client. Providing these personalized services, as well as being able to deliver the information requested promptly, is truly gratifying.

   One of the biggest challenges we face involves working with non-responsive facilities when following up on record requests. We rely on relationships that we have built with the various healthcare providers to resolve these situations when they occur and to keep these occurrences to a minimum.

6. **Describe some of the most significant accomplishments of your career:** I have been fortunate enough to be a part of LCS for an extended period. Throughout my career with LCS, I have worked in almost every department. This time has also allowed me to build a thorough understanding of the record retrieval industry. I wanted to utilize my knowledge and experience in more impactful ways for the growth and excellence of LCS. This resulted in my transition to Account Manager, the goal for my career with my ideal company.

7. **How did you become involved with the MDTC?** LCS Record Retrieval has been a partner with the MDTC for many years. As my role grew within LCS, I became the liaison who would represent our company at the different MDTC outings and functions.

8. **What do you feel the MDTC provides to Michigan lawyers?** The MDTC is an exceptional organization for attorneys to network and share best practices. It also provides numerous educational opportunities for its members to stay up to date on current events within the industry.

9. **What do you feel the greatest benefit has been to you in becoming involved with the MDTC ?** The most significant benefit to me has been the relationships that I have been able to build with our clients and other vendors within the industry. Partnering with these prestigious groups allows me additional opportunities to learn how LCS can continue to grow and excel in our services.

10. **Why would you encourage others to become involved with MDTC ?** Being involved with the MDTC is an excellent opportunity to connect with others within the legal community and learn the newest information litigating within the State of Michigan.

11. **What are some of your hobbies and interests outside of work?** I enjoy spending time with my family. When the weather allows it, I enjoy golfing, fishing, and being outdoors. I am also a big sports fan and follow all the major Detroit teams each season.

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)
AOPP v ACIA, 472 Mich 91 (2005) Amicus
Armisted v State Farm, 675 F3d 989 (2012)
Bosco v Bauermeister, 456 Mich 279 (1997)
Bourne v Farmers, 449 Mich 193 (1995)
Cameron v ACIA, 476 Mich 55 (2006)
Covenant v State Farm, 500 Mich 191 (2017) Amicus
Cruz v State Farm, 466 Mich 588 (2002)
DAIIE v Gavin, 416 Mich 407 (1982)
DeVillers v ACIA, 473 Mich 562 (2005)
Joseph v ACIA, 491 Mich 200 (2012)
McKenzie v ACIA, 458 Mich 214 (1998)
Muci v State Farm, 478 Mich 178 (2007)
Popma v ACIA, 446 Mich 460 (1994)
Profit v Citizens Ins, 444 Mich 281 (1993) Amicus
Rohlman v Hawkeye, 442 Mich 520 (1993)
Thornton v Allstate, 429 Mich 643 (1986) Amicus
Wills v State Farm, 437 Mich 205 (1991) Amicus
Winter v ACIA, 433 Mich 446 (1989)
ACIA v Methner, 127 Mich App 683 (1983)
Allstate v Jewell, 182 Mich App 611 (1990)
American States v ACIA, 193 Mich App 248 (1991)
American States v Kesten, 221 Mich App 330 (1997)
Bradley v Allstate, 133 Mich App 116 (1984)
Boyd v GMAC, 162 Mich App 446 (1987)
Bronson Methodist v Forshee, 198 Mich App 617 (1993)
DAIIE v Krause, 139 Mich App 335 (1984)
DAIIE v Maurizio, 129 Mich App 168 (1983)
DAIIE v McMillan, 149 Mich App 394 (1986)
DAIIE v McMillan, 159 Mich App 48 (1987)
DAIIE v Tapp, 136 Mich App 594 (1984)
Dean v ACIA, 139 Mich App 266 (1984)
Gersten v Blackwell, 111 Mich App 418 (1981)
Goldstein v Progressive, 218 Mich App 105 (1996)
Grant v AAA Michigan (On Remand), 272 Mich App 142 (2006)
Grant v AAA Michigan, 266 Mich App 597 (2005)
Grier v DAIIE, 160 Mich App 687 (1987)
Hatcher v State Farm, 269 Mich App 596 (2005)
Henderson v DAIIE, 142 Mich App 203 (1985)
Hill v LF Transportation, 277 Mich App 500 (2008)
Incarnati v Savage, 122 Mich App 12 (1982)
Kalata v Allstate, 136 Mich App 500 (1984)
Kornak v ACIA, 211 Mich App 416 (1995)
Lee v National Union, 207 Mich App 323 (1994)
Marzonie v ACIA, 193 Mich App 332 (1992)
McCarthy v ACIA, 208 Mich App 97 (1994)
MHSI v State Farm, 299 Mich App 442 (2013)
Moultrie v DAIIE, 123 Mich App 403 (1983)
Mueller v ACIA, 203 Mich App 86 (1993)
Niksa v Commercial Union, 147 Mich App 124 (1985)
O'Hannesian v DAIIE, 110 Mich App 280 (1981)
Rajhel v ACIA, 145 Mich App 593 (1985)
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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DRI Exceptional Performance Citation (2004-2005)

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Michigan Super Lawyers (2007-present)

Detroit's Top Lawyers (2013)

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Michigan Supreme Court Historical Society Advocates Guild
Michigan Defense Trial Counsel
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- Negligence Law Section
- Appellate Court Administration Committee (1987-1994)

Appellate Bench-Bar Conference Committee (1994-2008)
American Judicature Society
Association of Defense Trial Counsel
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MDTC Legal Excellence Awards 2020

Fourth Annual

Thursday, August 20, 2020
Strolling Dinner and Reception
from 6:00 p.m. - 9:00p.m.
Gem Theatre
333 Madison Avenue, Detroit 48226

Judicial Award Recipient
Hon. Christopher P. Yates
17th Circuit Court

John P. Jacobs Appellate Advocacy Award Recipient
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Publication Schedule

Publication Date

July
October
January
April

For information on
article requirements, please contact:
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- SAVE THE DATE -

MASTERING THE Craft

Winning Methods
In The Dying Art Of
Trial Advocacy

MDTC Winter Meeting and Conference

November 6, 2020
Sheraton Detroit Novi Hotel
21111 Haggerty Road, Novi, MI

2020 Winter Meeting Committee: Chair Ed Perdue, Scott Pawlak & Mark Magyar

MDTC Schedule of Events

2020

Thursday, August 20	The Gem Theater – Detroit
Friday, September 11	Golf Outing - Mystic Creek, Milford
Thursday, September 24	Board Meeting – Detroit Golf Club, Detroit
Thursday, September 24	Past Presidents Reception – Detroit Golf Club, Detroit
Thursday, October 8	Meet the Judges – Detroit Golf Club, Detroit
Thursday, November 5	Board Meeting – Sheraton Detroit Novi, Novi
Friday, November 6	Winter Conference – Sheraton Detroit Novi, Novi

2021

Friday, February 12	Future Planning – Marriott, Detroit Tentative
Friday, February 12	Meet and Greet – TBA, Detroit
Saturday, February 13	Board Meeting – Marriott, Detroit Tentative
Thursday, June 17 – Friday, June 18	Annual Meeting & Conference – Indigo, Traverse City
Thursday, March 18	Legal Excellence Awards – The Gem, Detroit
Thurs, Fri & Sat, May 6-8	DRI Regional Meeting, Marriott Sanibel Harbor Resort, FL
Friday, September 10	Golf Outing – Mystic Creek, Milford, MI
Thursday, November 4	Board Meeting – Sheraton Detroit Novi Hotel, Novi, MI
Friday, November 5	Winter Meeting – Sheraton Detroit Novi Hotel, Novi, MI

2022

Thursday, June 16 – Friday, June 17	Annual Meeting & Conference – Tree Tops – Gaylord

MDTC

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24th Annual MDTC Open Golf Tournament

Friday, September 11, 2020

at the Mystic Creek Golf Club and Banquet Center

Milford, Michigan

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(...Judges attend for free!)

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