MICHIGAN DEFENSE
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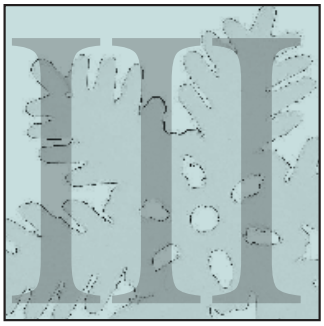



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## President's Corner

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

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

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

It has been a long time since I went to law school. Long ago I realized that I forgot some of the case law precedent I struggled so hard to understand back then. But I had not realized how much I'd forgotten until my daughter, now a 1L, began peppering me with questions about the *Erie* doctrine, *International Shoe*, *Palsgraf, t*he "hairy hand" case and *Hadley v. Baxendale*. Frankly, I could not remember much about any of them. And I was a little chagrinned to find that some of the case law I thought was set in stone is no longer taught. Society changes, case law changes, statutes change, and we change.

Not remembering law school precedent probably is not a problem for most of us in our day-to-day practice, but keeping up on the law in our chosen practice area is critical. However, now there is no professor urging us to read the cases, no "study group" to challenge us in our interpretation of new cases, statutes or court rules. It is on us to be disciplined enough to keep up.

This year, the amendments to Michigan law that many of us deal with have been significant. The new no-fault law changes just about everything in that area of practice. Interpretation of the changes will probably be fodder for appellate court decisions for years to come. Similarly, the complete overhaul of the Michigan Court Rules has everyone digging out their highlighters, and carefully studying each change.

At my firm, as with most firms, we have had many in-house meetings and training regarding the changes. But in our in-house discussions, we all agreed on what the changes meant. There was no real debate. This is probably because, practicing together, we have the same perspectives. I was concerned that this was not enough. I wanted to know what lawyers outside of my firm thought, so I attended a number of seminars (including particularly excellent MDTC seminars) on the changes. At the seminars, I was very encouraged by the number of attorneys attending representing every level of experience. The differences of opinion on interpretation of the changes was surprising, and the Q and A sessions were lively, to say the least.

Not remembering law school precedent probably is not a problem for most of us in our day-to-day practice, but keeping up on the law in our chosen practice area is critical.

I learned a lot at the seminars. But, there was no requirement that anyone attend any presentation. While mandatory continuing legal education has become the norm in most jurisdictions, there is no requirement here. Michigan is one of only six jurisdictions not requiring any continuing legal education. The arguments against mandatory CLE are many: they are too expensive, not relevant, a "waste of time", just a "moneymaker" for CLE companies, and "I have to bill hours, I can't afford to take time off". While at least some of those arguments have some merit, there is no substitute for a really good seminar, put on by a reputable organization, with top flight speakers whose brains the audience can pick.

The MDTC puts on seminars regularly and endeavors make them the best possible experience for our members at a reasonable cost. I encourage our members to attend as many MDTC seminars as you possibly can. They are extremely affordable and tailored to the needs of our membership. They may not take the place of a law school class, but they are the next best thing. I hope to see you at our next seminar!

# On What Authority? DIFS Exercises Its Regulatory Power To Impact No-Fault Reform[1]

By: Matthew LaBeau, *Collins Einhorn Farrell PC*

***Executive Summary***

*Since the passage of the no-fault reform legislation, interested parties have been diligently working to interpret the new statutory language, and determine how it will impact the landscape going forward. The State of Michigan Department of Insurance and Financial Services (DIFS) has issued several orders and bulletins instructing insurance carriers on how to proceed under the new legislation. The orders issued by DIFS impact the ability of carriers to utilize new statutory language that limits the scope of coverage, and the ability of the Michigan Automobile Insurance Placement Facility (MAIPF) to impose caps on benefits. The bulletins issued attempt to clarify certain provisions under the amended legislation. A dispute, however, has arisen as to whether DIFS has authority to issue these promulgations, and whether these clarifications modify the language of the statute. Regardless of the outcome of that dispute, observers on both sides of no-fault claims are watching intently.*

**Matthew LaBeau** is an attorney at Collins Einhorn. Matthew focuses his practice on defense litigation in first party no-fault claims, uninsured and underinsured motorist claims, automobile negligence, premises liability, general liability, and contractual disputes. He also defends numerous corporations against product liability and construction defect claims.

## Introduction

Since the passage of the no-fault reform, the State of Michigan Department of Insurance and Financial Services (DIFS) issued two orders, and several bulletins, addressing the applicability of the amended provisions of the no-fault act. While there are disputes pending as to DIFS authority to issue these pronouncements, they provide clarity as to some of the ambiguities created by the new legislation. This article summarizes the statutory authority of DIFS and impact of its recent orders and bulletins.

## DIFS Regulatory Authority

DIFS is an administrative agency with the purpose of regulating the insurance and financial services industries in the state of Michigan.[2] Under MCL 500.200, DIFS has the obligation to execute the laws of Michigan in relation to insurance. DIFS also has the authority to issue rules and regulations to effectuate the purposes and to execute and enforce the provisions of the insurance laws of Michigan.[3] That being said, DIFS authority comes solely from the Legislature, and has no inherent regulatory authority beyond that.[4]

DIFS has the authority to investigate insurers for unfair claim practices and initiate civil actions against insurers.[5] Those investigations can result in cease and desist orders and/or monetary penalties.[6] As part of the reform legislation, DIFS was tasked with updating its website to make claims of fraud by claimants and providers, and unfair claims practices by insurers, easier to submit.[7]

The recent legislation limits what factors insurers can consider in establishing or maintaining rates. Insurers now are prohibited from considering sex, marital status, home ownership, educational level attained, occupation, postal zone, or credit score.[8] The new legislation also provides for different coverage levels for allowable (i.e., medical related) expenses and insurers are required to reduce premiums by certain percentages of the average premium in effect as of May 1, 2019 for each coverage level.[9] Insurers are required to create forms that inform policyholders of the potential coverage options for personal injury protection and bodily injury coverages, and the forms must be signed by insureds and submitted to insurers.[10] DIFS is responsible for enforcing these provisions and approving proposed rates and forms.

MCL 500.6301 establishes an anti-fraud unit within DIFS, which is a criminal-justice agency dedicated to the prevention and investigation of criminal and fraudulent activities regarding insurance. The agency may investigate all persons, including insurers and agents subject to DIFS authority, who have allegedly engaged in criminal

or fraudulent activity. The agency may also conduct criminal background checks on individuals seeking licensure, maintain records of fraudulent and criminal activity, and share information with other criminal agencies.

Pursuant to MCL 500.3157a, medical providers are required to submit to utilization reviews performed by an insurer. An insurer may require a provider to explain the necessity or indication for treatment in writing. If an insurer deems treatment to be overutilized or inappropriate, or the cost of a treatment to be inappropriate, the provider may appeal the decision to DIFS and will be bound by the decision. A provider who knowingly submits false or misleading documents or other information to an insurer, the MCCA, or DIFS, commits a fraudulent insurance act and is subject to criminal penalty.

## Orders Regarding Scope of Coverage

Before delving into the specifics of these orders, it is important to keep in mind how the new legislation changed the order of priority framework. Under the prior law, a pedestrian or occupant that did not have their own coverage, or coverage through a spouse or resident relative, would seek coverage from the vehicles involved in the accident. Those individuals would be entitled to lifetime allowable expenses, or medical related benefits. Under the new law, those individuals automatically seek coverage through the MAIPF,[11] and are limited to no more than $250,000 in allowable expenses. The only exception is that, in the case where a person is allowed to opt out of coverage and that coverage lapses, the coverage limit is $2,000,000. Since the amended statutory language did not have a specific effective date, there is an assumption by many that it is entitled to immediate effect.[12]

On September 20, 2019, DIFS issued its first order relative to the no-fault reform legislation.[13] This order was meant to address the "limited number of automobile insurers [that] have attempted to apply the amended provisions to claims made under existing, in-force policies without first submitting revised forms and rates for the Director's review and approval."[14] The order prohibits automobile insurers from utilizing the amendments to the no-fault act that affect the scope of coverage without first submitting revised forms and rates to DIFS. In doing so, DIFS relied upon statutory authority requiring such submission before policies can be delivered or issued for delivery.[15]

Furthermore, the order prohibited insurers from relying upon "conformity to law clauses" as a method of modifying existing policy language, indicating that such reliance would constitute an unreasonable and deceptive policy provision in violation of MCL 500.2236(5). Lastly, the order relies upon the position that the Michigan Insurance Code prohibits automobile insurers from reducing coverage without first providing notice to policyholders.[16] The order also prohibits MAIPF from providing coverage to claims submitted to it based on the amended provisions that limited scope of coverage where there otherwise would have been a policy in place, unless there was prior approval by DIFS.

On September 24, 2019, DIFS issued its second order.[17] This order specifically targets MAIPF. It prohibits MAIPF from imposing the $250,000 cap on allowable expenses, which is found in MCL 500.3172(7). DIFS asserts that, since that statute references opt out provisions that do not go into effect until July 2, 2020, the entire statute must have an effective date of July 2, 2020.[18] The order also expresses concern that, if allowable expenses were capped at $250,000, at-fault drivers would be exposed to future allowable expenses without the benefit of the higher mandatory bodily injury policy limits that go into effect on July 2, 2020.[19]

The September 20, 2019 order issued by DIFS is primarily aimed to prevent insurers from denying claims on order of priority and sending potential claimants to the MAIPF for coverage. Under the terms of the order, insurers must first submit rates and forms to DIFS and have them approved before using the new statutory provisions. The September 24, 2019 order, which is more direct, prohibits the MAIPF from enforcing the $250,000 cap on benefits. Taking these orders together, DIFS is, in effect, prohibiting insurers from sending claimants, presently otherwise entitled to coverage, to the MAIPF for coverage and prohibiting MAIPF from capping benefits.

Not surprisingly, MAIPF did not agree with DIFS interpretation of the law, and filed an action in the Michigan Court of Claims seeking to invalidate the orders. MAIPF argues that the orders are beyond the authority of DIFS. MAIPF also argues that the orders are unconstitutional based on the separation of powers doctrine and constitute an attempt to usurp the power of the Legislature. Lastly, MAIPF argues that DIFS is ordering it to violate the law because it is being told to deny coverage when the statute indicates it must be provided.

If MAIPF prevails, it is important to point out that insurance carriers will have a basis to deny PIP claims on the basis that MAIPF is responsible for benefits. Moreover, at fault drivers and their insurance carriers will face immediate exposure for future allowable expenses, without the benefit of higher limits or fee schedules, when the plaintiff has PIP coverage through MAIPF.

## DIFS Bulletins Clarify No-Fault Reform Provisions

DIFS also has issued bulletins on a wide range of topics. Some of the bulletins clarify issues that seem self-explanatory. This article will focus on the more impactful interpretations issued by DIFS.

**Reasonable Charges –** A bulletin issued on June 28, 2019 notes that the fee schedule for medical expenses does not go into effect until July 1, 2021. Therefore, automobile insurers and health care providers were reminded that, until that time, insurers are obligated to pay, and providers are obligated to charge, a reasonable charge. DIFS also confirmed that the changes to MCL 500.3112, permitting providers to file a direct cause of action against insurers, were effective as of June 11, 2019.

**Inapplicability of PIP Choice to Self-Insurers** – A bulletin issued on September 27, 2019, relates to self-insurers and municipal governmental insurance pools. DIFS notes that these entities do not provide coverage under a policy, but instead a certificate of self-insurance. The language for PIP coverage limits contained in MCL 500.3107c refers to an "applicant or named insured," neither of which applies to a self-insurer or self-insurance pool. It also makes reference to "insurance policies," which these groups do not issue. Therefore, PIP coverage limits (i.e., $50,000, $250,000, $500,000, or unlimited) do not apply to self-insurers or municipal governmental insurance pools.

Insurers now are prohibited from considering sex, marital status, home ownership, educational level attained, occupation, postal zone, or credit score.

**Liens on Attorney Fees** - One of the more noteworthy changes brought on by no-fault reform is that, under MCL 500.3148(1), an attorney lien could only be claimed if the benefits are both authorized and overdue (i.e., not voluntarily paid benefits).[20] Many interpreted this as a prohibition on attorneys claiming a fee when benefits are voluntarily paid. A bulletin issued on October 14, 2019, provides that an injured person could contract with an attorney to assist in the recovery of no-fault benefits, and that an attorney may hold in trust any funds paid to a claimant via two party check. This would suggest that, as long as there is a contract between the injured person and the attorney, an attorney fee can be charged for payment of voluntarily paid benefits, taking a narrow interpretation of the broad language of MCL 500.3148(1).

**Out-of-State Residents** – The reform legislation eliminated the requirement under MCL 500.3163 that authorized insurance carriers file certifications to provide coverage to non-resident policyholders. It also eliminated eligibility for no-fault benefits to non-residents unless they owned a motor vehicle registered and insured in Michigan. DIFS clarified on October 18, 2019, that these certifications were valid for accidents occurring prior to June 11, 2019, but had no effect and could not be relied upon to claim coverage on or after that date.

**Limits on Attendant Care** – DIFS issued a bulletin on November 1, 2019, making it clear that automobile insurers are not permitted to apply the 56-hour per week limitation on non-professional attendant care under MCL 500.3157(10) until on or after July 2, 2021.[21] DIFS also made note that, under MCL 500.3157(11), insurers are allowed to offer additional hours of attendant care to injured persons. The more significant portion of the bulletin is the assertion that "[i]nsurers decisions whether to contract for additional attendant care benefits will be subject to the Director's authority to perform utilization review under Section 3157a of the Code, MCL 500.3157a." Thus, it appears DIFS may be reserving unprecedented oversight over attendant care agreements between claimants and carriers.

## Looking Ahead

Considering the regulatory authority DIFS possesses over insurance carriers, promulgations such as these referenced above carry great weight. To the extent that these promulgations may contradict statutory language, you can expect that insurers, claimants, or other state agencies or associations to challenge the scope of DIFS authority as it pertains to orders and bulletins, and the accuracy of its analysis. DIFS has signaled that it intends to issue several orders and bulletins going forward to provide guidance to the insurance industry. Only time will tell as to how that guidance is interpreted and received.

### Endnotes

1 This article was originally published in The Journal of Insurance & Indemnity Law, Vol. 13 No. 1 (Jan. 2020), a publication of the State Bar of Michigan's Insurance and Indemnity Law Section, Republished with permission.

2 MCL 550.991.

3 MCL 500.210.

4 Blue Cross and Blue Shield of Mich v Demlow, 403 Mich 399; 270 NW2d 845 (1978).

5 MCL 500.2026.

6 MCL 500.2038; MCL 500.2040.

7 MCL 500.261.

8 MCL 500.2111.

9 MCL 500.2111f ($50,000 - 45% or more; $250,000 - $35% or more; $500,000 - $25% or more; Unlimited – 10%; Opt-Out – no premium charged).

10 MCL 500.3009(6); MCL 500.3107c(2); MCL 500.3107d(3).

11 The MAIPF is an insurance pool that is the insurer of last resort. The MAIPF previously only provided benefits when no PIP coverage is applicable to the injury, no PIP coverage applicable to the injury can be identified, there is a dispute between two or more carriers concerning their obligation to provide benefits, or the identifiable coverage is inadequate due to financial inability to fulfill its obligations. A significant revision to the statute is that additional claimants are eligible to receive benefits through the MAIPF.

12 Const 1963, art. 4, sec. 27.

13 DIFS, Order No. 2019-048-M.

14 Id.

15 MCL 500.2106, 500.2108, 500.2236.

16 MCL 500.2104(5); Casey v. Auto Owners, 273 Mich App 388; 729 NW2d 277 (2006).

17 DIFS, Order No. 2019-049-M.

18 MCL 500.3107d(6)(c) and MCL 500.3109a(2)(d)(ii).

19 The mandatory minimum bodily injury limits prior to July 2, 2020 are $20,000 per person and $40,000 per accident. The limits on or after July 2, 2020 re $250,000 per person and $500,000 per accident, but a policyholder may choose limits as low as $50,000 per person and $100,000 per accident with the submission of certain documentation. MCL 500.3009.

20 MCL 500.3148(1)(a) and (b) –

> An attorney advising or representing an injured person concerning a claim for payment of personal protection insurance benefits from an insurer shall not claim, file, or serve a lien for payment of a fee or fees until both of the following apply:
> (a) A payment for the claim is authorized under this chapter.
> (b) A payment for the claim is overdue under this chapter.

21 Under MCL 500.3157(10), the limitation on attendant care only extends to care provided by an individual related to the injured person, domiciled in the injured person's household, an individual with whom the injured person had a business or social relationship before the injury.

# Chains of Causation in § 1983 Actions: Speculative Links are Prohibited

By: Timothy Mulligan, *Cardelli Lanfear P.C.*

***Executive Summary***

*Claimants in § 1983 cases must show a chain of causation between the defendant's acts and the harm suffered. The claimant's theory of causation must be based on reasonable inferences of cause and effect. The required inferences are like links in a chain. Where the inferences are not probable, or are speculative, or not direct, the links in the chain are too weak to carry the burden of proof.*

**Timothy Mulligan** specializes in legal research and writing, especially dispositive and complex motions, filings related to trials and verdicts, and appeals. A results-oriented lawyer, Mulligan has won summary relief for defendants in a federal case that case-evaluated for over $1 million, and for an insurer and its insured in a subrogation and commercial insurance coverage case also with acknowledged seven-figure damages. Mulligan has worked for a trial court as well as an appellate court, where he authored dozens of authoritative published opinions in civil cases. He is a published legal author on insurance coverage and tort reform.

## Introduction

The Sixth Circuit Court of Appeals has acknowledged that causation is an essential element of a 42 USC 1983 claim.[1] Where the causation theory of such a claim is based on conjecture, it may be insufficient as a matter of law. This article will focus mainly on published cases of appellate courts in non-employment cases.

## Common-Law Background

In Michigan, prohibiting speculative causation theories is the rule in tort.[2] The concept of "proximate cause" requires a fairly direct link of cause and effect between the defendant's conduct and the harm to the plaintiff. Factual causation, a component of proximate cause, means that "but for" the defendant's acts, the injury would not have occurred.

## Prohibiting Speculative Causation in Federal Courts

Federal courts apply traditional common-law causation principles to § 1983 actions.[3] Also, the statutory language of § 1983 requires causation: "Every person who … subjects, or causes to be subjected . . . [any person] to the deprivation of any rights . . . [is liable]."[4] Under the language of the statute, the plaintiff must show that the defendant caused a deprivation.

Speculative causation arises in a variety of fact patterns in § 1983 cases and the cases do not provide a common theoretical thread. However, where too many inferences are required to reach a conclusion on causation, where the inferences required are not probable, or where the plaintiff cannot exclude other causes to a reasonable degree of certainty, the chain of causation is too weak to carry the burden of proof.

A § 1983 action generally illustrating weak causation is helpful to the defendant. In *Cameron v City of Pontiac*,[5] police responded to a burglary, located the burglars in the house, identified themselves as police, and ordered the burglars to halt. When the two suspects ignored the commands, the officers drew their pistols and fired in the direction of the fleeing suspects. One suspect stopped but the other, the plaintiff's decedent (Cameron), continued to flee. In hot pursuit, an officer fired again. Cameron continued to run along the fence line of an expressway. Other officers approached in the opposite direction. Cameron then scaled the right-of-way fence onto the expressway where he was struck and killed by a vehicle.

Cameron's mother commenced an action under § 1983, arguing that the officers unjustifiably used deadly force in attempting to apprehend Cameron. The Sixth Circuit affirmed the district court's grant of summary judgment. The Court held that, "[e]

ven if Cameron had been seized by unreasonable means, his estate could not recover unless the constitutional violation was a proximate cause of his death."[6] "[The] use of the firearms by the officers in the attempted apprehension of Cameron was not, as a matter of law, the proximate cause of his death. He was killed when he, at his own election, ran onto a high speed freeway."[7] The Court concluded that "this was unforeseeable," and it was Cameron's own choice of an escape route that caused his death.[8]

## Two Michigan Cases Involving Speculative Causation: Claims of "Deliberate Indifference" and Due Process

State courts in Michigan limit speculative causation in § 1983 cases. In *Morden v Grand Traverse Co*,[9] the plaintiff's decedent was a pretrial detainee in the county jail. One of the defendants, Dr. Conlon, the jail's psychiatrist, administered strong psychotropic medications, purportedly because the decedent was on suicide watch. After experiencing heavy side effects from the medications over time, the decedent exhibited seizure-like activity and died. An autopsy found no determinable cause of death.

The decedent's estate filed an action in state court, claiming in part, deliberate indifference to serious medical needs under § 1983. Plaintiff argued that Dr. Conlon's treatment caused neuroleptic malignant syndrome (NMS), which caused the decedent's death. Although the plaintiff's psychiatrist expert opined that the decedent died from NMS, the county medical examiner testified that the decedent "probably" died of cardiac arrhythmia caused by medications, and the plaintiff's pathology expert testified that decedent did not die of NMS. The Michigan Court of Appeals found that plaintiff's theory of causation was speculative: "While plaintiff's psychiatrist-expert concluded that the decedent died from NMS, this testimony amounts to speculation and conjecture, because it does not exclude other possibilities to a reasonable degree of certainty."[10]

The Michigan Court of Appeals also applied this anti-speculation rule to due process claims. In *Mettler Walloon LLC v Melrose Twp*,[11] the township rejected a developer's proposal to build boathouses with living spaces on lakeside land zoned for commercial uses. The developer sued the township, its planning commission, and the zoning board of appeals. Although mediation resulted in approval of a revised plan, the developer continued to seek damages under procedural and substantive due process theories stemming from the first plan's rejection.

One part of the plaintiff's claim was that the township supervisor improperly removed the planning commission's chairman. Following a bench trial, the trial court concluded, among other things, that although the removal was improper, it did not proximately cause the rejection of the development plan where the commission's vote against the plan was 5 to 0, the zoning board of appeal's vote against the plan also was unanimous, and the theory that the chairman's presence and advocacy would have swayed other members was speculation because it was unsupported by evidence.[12] The Court of Appeals agreed with the trial court, stating that "[s]peculation in proving causation is prohibited."[13]

Federal courts apply traditional common-law causation principles to § 1983 actions.

## Speculative Causation in Other "Deliberate Indifference" Cases

A Fourth Circuit case, *Cuffee v Newhart*,[14] is similar to *Morden*. The decedent, Sotina Chuffee, was in a city jail. Wexford Health had a contract to provide medical services to inmates in the city jail. Over the course of months, Chuffee suffered from various symptoms including a toothache, chest pain, and tingling. Wexford's LPNs provided examinations, processed Chuffee's health services request forms, and gave her antacids. Wexford, however, never provided Cuffee with a visit by a doctor or a RN, despite a contractual term. Cuffee's condition worsened, and despite the declaration of a medical emergency, she lost consciousness, and died. The cause of death was coronary artery disease. The decedent's estate sued Wexford and the city sheriff (Newhart), among others. Against Newhart, the plaintiff argued that he oversaw the contract with Wexford, knew there were medical staffing shortages at the jail, and failed to take action.[15]

The Court of Appeals affirmed the district court's summary judgment. The Court stated that there was a lack of evidence that Cuffee was not correctly assessed, or seen by a doctor, because of the apparent staffing shortages (of which Newhart was allegedly deliberately indifferent).[16] According to the Court, the evidence did not establish a "reasonable probability" of a "causal link," an element essential to the claim.[17]

In *Shaw v Stroud*,[18] the Fourth Circuit Court of Appeals entertained arguments regarding speculative causation as to a claim of "deliberate indifference" against police supervisors. In that case, a state trooper, Morris, shot and killed an arrestee. The decedent's family sued Morris and his supervisors, claiming the supervisors "caused" Morris's violation of decedent's fourth amendment rights through a "failure to train," supervise, and discipline Morris in response to prior concerns.[19] The plaintiffs alleged that a supervisor, Stroud, caused the violation through "deliberate indifference" to past complaints.

The Court of Appeals stated that an "affirmative causal link" is required in order to survive summary judgment of a claim of supervisor liability under § 1983.[20] The Court found a question of fact with respect to causation because there was substantial evidence of prior problems with Morris's behavior with arrestees.[21] The causation theory was not speculative.

The Alabama Supreme Court rendered a holding on speculative causation

in another case alleging "deliberate indifference." In *DAC v Thrasher*,[22] a teacher sexually molested a student, DAC. Other students had complained about the teacher, but the school principal did not convey that information to the school superintendent, who might have tried to remove the teacher. DAC asserted a state law claim of negligence and a claim of "deliberate indifference" under § 1983 against the principal.[23] DAC claimed that the principal's failure to inform the superintendent of the prior complaints proximately caused her injury.

The Alabama Supreme Court disagreed. Analyzing causation for both the state law and § 1983 claims together, the Court held that it was speculative whether a disclosure to the superintendent would have resulted in the teacher's termination. The Court found that the teacher had tenure, and the superintendent lacked apparent authority to fire him. For those reasons, the Court affirmed summary relief for the principal.[24]

## Federal "Standing" Law Limits Speculative Causation

Federal courts have rules for proving causation as an element of standing. "Standing" is the right to bring a lawsuit in the first instance. In federal court, standing rules may be stricter than in state court, since federal jurisdiction requires "cases or controversies."[25]

In order to have standing in federal court, the plaintiff must have (1) suffered an injury in fact, (2) that is "fairly traceable" to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.[26] The second element is causation, and § 1983 claims with speculative causation are "weeded out" at a prior stage of proceedings, before the merits are reached.

Problems with speculative causation arise in a variety of standing cases. But, where the harm to plaintiffs results more from the intervening actions of private actors than from governmental action, or where doubtful inferences are required, the chain of causation breaks.

Tax cases illustrate this general principle. In its 1976 decision in *Simon v E Ky Welfare Rights Org*,[27] the United States Supreme Court held that the IRS's advantageous tax treatment of hospitals that denied certain services to indigent people did not cause the indigent plaintiffs' injuries. "It is purely speculative whether the denials of service . . . fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by hospitals without regard to the tax implications."[28] The Court stated that if "speculative inferences are necessary to connect [a plaintiff's] injury to the challenged action," causation fails.[29] If the independent action of a third party not before the court—rather than that of the defendant—was the direct cause of the plaintiff's harm, causation is lacking.[30]

In *Arizona Christian Sch Tuition Org v Winn*, Arizona allowed taxpayers who contribute to a "student tuition organization" to receive a tax credit. The student tuition organizations were in turn permitted to contribute to students' tuition at religious schools. The plaintiffs, taxpayers in the general sense, sued, arguing that the law violated the establishment clause. The United States Supreme Court stated that the plaintiffs had no "standing" because any injuries sustained by plaintiffs were not fairly traceable to the state. There were too many independent, non-governmental intervening links in the chain of causation: "Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs."[31]

A D.C. Circuit case is also helpful. In *State Nat'l Bank of Big Spring v Lew*,[32] the plaintiff, a small bank, challenged a law seeking to monitor stability in the financial system by designating certain "too big to fail" entities for additional regulation. The plaintiff did not allege that it was subject to additional regulation from the law, but that it was a competitor of an entity designated for greater regulation, which it said received a "reputational subsidy." The Court held that the link between any such benefit to other banks, and harm to the plaintiff, was "simply too attenuated and speculative to show the causation necessary to support standing."[33]

## Conclusion

Speculative causation appears in various fact patterns in § 1983 cases, and there is no single common verbal test. However, where too many inferences are required to show causation, where those inferences are tenuous, or where there are intervening causes, the links in the chain of causation are too thin and cannot bear the burden of proof.

### Endnotes

1 *Horn v Madison Co Fiscal Ct*, 22 F3d 653, 659 (CA 6, 1994).
2 *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).
3 *Sanchez v Pereira-Castillo*, 590 F3d 31, 50 (CA 1, 2009).
4 42 USC 1983.
5 *Cameron v City of Pontiac*, 813 F2d 782, 783-784 (CA 6, 1987).
6 *Id*. at 786.
7 *Id*.
8 *Id*.
9 *Morden v Grand Traverse Co*, 275 Mich App 325, 335; 738 NW2d 278 (2007).
10 *Id*. at 335-336.
11 *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 217-218; 761 NW2d 293 (2008).
12 *Id*. at 218.
13 *Id*. at 217-218.
14 *Cuffee v Newhart*, 498 Fed Appx 233, 237 (CA 4, 2012).
15 *Id*. at 236.
16 *Id*. at 237.
17 *Id*. at 237.
18 *Shaw v Stroud*, 13 F3d 791 (CA 4, 1994).
19 *Id*. at 797.
20 *Id*. at 798-799 (emphasis supplied).
21 *Id*. at 800-801.
22 *D.A.C by & Through D.D. v Thrasher*, 655 So2d 959 (Ala 1995).
23 *Id*. at 961.
24 *Id*. at 961-962.
25 US Const, art III, § 2.
26 *Lujan v Defenders of Wildlife*, 504 US 555, 560-561 (1992).
27 *Simon v E Ky Welfare Rights Org*, 426 US 26 (1976).
28 *Id*. at 45 (emphasis added).
29 *Id*. (emphasis added).
30 *Id*. at 41.
31 *Ariz Christian Sch Tuition Org v Winn*, 563 US 125, 143 (2011).
32 *State Nat'l Bank of Big Spring v Lew*, 795 F3d 48 (CA DC, 2015).
33 *Id*. at 55.

# The Op-Ed(ish) Column

By: Michael J. Cook

*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.*

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## *Condolences to Zealous Advocates*

Practicing law, particularly litigation, isn't pretty. Litigators know that we're not going to win every argument. But we have an obligation to be zealous advocates.[1] So, if there's an arguable basis for it, we raise the argument for our clients, or at least advise them of the option. That's our job. Judges get to tell us that we're wrong. That's their job. And there are an infinite number of ways for them to do it. Sometimes they decide that they need to chastise the attorneys who were wrong. Though perhaps understandable for frivolous arguments, what about those that fall short of frivolous? Zealous advocacy shouldn't be punished or deterred, I think.

I've never been a judge. But I clerked for a judge. I know from that experience that it's easy, even somewhat tempting, to read a brief and move beyond assessing right or wrong into being very critical of the argument—how it was framed, what facts were emphasized, and even what issues were and weren't raised. Occasionally, judges succumb to that temptation. *Wigfall v City of Detroit*,[2] which the Michigan Supreme Court decided last term, gives a recent example:

> [T]he Corporation Counsel and his Law Department have done themselves and their client little service in advancing the argument made here.[3]

That rebuke wasn't necessary. It also yielded some collateral damage because, before it reached the Supreme Court, five judges agreed with the "argument made here."

The issue in *Wigfall* was whether sending a notice to the Law Department of the City of Detroit is the same as serving "the city attorney of a city."[4] The city argued that it wasn't. Four Court of Appeals judges and one circuit court judge agreed. The Supreme Court unanimously disagreed and Chief Justice McCormack wrote a concurrence that, in entertaining and compelling fashion, debunked the city's position.

Leave the substantive issue aside. The rebuke didn't add to the analysis. Believe me, Chief Justice McCormack thoroughly ended any potential for dispute before that final sentence. The rebuke was an effort to encourage the best in lawyers. Chief Justice McCormack was concerned that the city's lawyers had raised the "kind of pseudo technicality [that] can give lawyers a bad name."[5] But there's a tension between abstaining from all potentially pseudo-technicality-type arguments and our obligation to be zealous advocates. It's often a gray area. The lower courts' decisions in *Wigfall* counsel in favor of zealous advocacy instead of argument abstention.

For example, imagine being an attorney in another city's legal department. Your client asked whether service on the law department instead of the city attorney was sufficient and you said, "That's a puzzling position."[6] Then you see the Court of Appeals

decision in *Wigfall*. Gasp! Your client suddenly has some serious questions about the competence of its legal counsel.

The Supreme Court's decision in *Wigfall* saved our hypothetical city attorney. But *Wigfall* produced some real-world collateral damage. While the rebuke was aimed at the lawyers in *Wigfall*, it implicitly put the five lower court judges who agreed with the lawyers' argument in the crosshairs. Should the public have serious questions about the competence of its judiciary?

The premise of the rebuke in *Wigfall* was, I believe, understandable: lawyers often make the law confusing, complex, or hyper-technical when it doesn't need to be. I hate that too. It's annoying and, at times, infuriating to explain that the sky is blue.[7] That, though, is an unfortunate yet inevitable by-product of our adversary system, which requires zealous advocacy. We're tasked with mining the details to ensure that our clients get the outcome that the law requires. Occasionally, our efforts lead to what others (too frequently) label "absurd" or "ridiculous" arguments.[8] But we've seen that sometimes the argument "deride[d] as ridiculous is instead correct."[9] So we make the arguments that the law permits. Our duty to our clients requires it.

The last line of the *Wigfall* concurrence reminded me of some infamous opinions from Judge Samuel Kent in Galveston, Texas.[10] I enjoyed reading Judge Kent's scathing opinions in law school until someone pointed out they would be less entertaining for those on the receiving end. The attorneys who represented the city in *Wigfall* were on the receiving end this time and that's unfortunate. Their argument was viable, if imperfect. Five judges agreed with it. So it's difficult to fault them for being zealous advocates and raising it. Yet they were faulted for that exact reason. Here's hoping that the attorneys and judges reading this don't meet the same fate. And to the attorneys who represented the city in *Wigfall*, I'm sorry that happened to you.

**Endnotes**

1 See MRPC 1.0, Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *Wright v Rinaldo*, 279 Mich app 526, 538; 761 NW2d 114 (2008) ("A lawyer has an ethical duty to serve the client zealously."), quoting *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 538-539; 599 NW2d 493 (1999); 1 Mich Pl & Prac § 4:10 (2d ed) ("An attorney has a duty to be a zealous advocate and to assert that view of the law most favorable to the client.").

2 *Wigfall v Detroit*, 504 Mich 330; 934 NW2d 760 (2019).

3 *Id.* at 349 (McCormack, C.J., concurring). Justice Bernstein joined the Chief Justice's concurrence.

4 MCR 2.105(G)(2); MCL 691.1404(2).

5 *Wigfall*, 504 Mich at 349.

6 *Wigfall*, 504 Mich at 347 (McCormack, C.J., concurring) (describing the city's argument as a "puzzling position").

7 It is, though I'll admit that I've never searched for a published decision supporting that proposition.

8 Sixth Circuit Judge Raymond Kethledge captured this point best: "There are good reasons not to call an opponent's argument 'ridiculous,' which is what State Farm calls Barbara Bennett's principal argument here. The reasons include civility; the near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief); and that, even where the record supports an extreme modifier, 'the better practice is usually to lay out the facts and let the court reach its own conclusions.' *Big Dipper Entm't, L.L.C. v. City of Warren,* 641 F.3d 715, 719 (6th Cir.2011). But here the biggest reason is more simple: the argument that State Farm derides as ridiculous is instead correct." *Bennett v State Farm Mut Auto Ins Co*, 731 F3d 584, 584-585 (CA 6, 2013).

9 *Id.*

10 See Lubet, *Bullying from the Bench*, 5 Green Bag 2d 11. For those who remember Judge Kent, but, like me, lost track of him, his story didn't end well. See McKinley, *Judge Sentenced to Prison for Lying About Harassment*, The New York Times (May 11, 2009).

# Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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## Proper Scope of Amicus Briefs

When significant issues are pending before a court, especially an appellate court, it is common for interested parties to submit amicus briefs in order to offer their own unique perspective. In fact, one of the many important roles that the MDTC serves is to submit amicus briefs in cases impacting its members. Most courts welcome helpful amicus briefs. As the Michigan Supreme Court long ago remarked, "[t]his court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae." *City of Grand Rapids v Consumers' Power Co*, 216 Mich 409, 415; 185 NW 852 (1921). But what is the appropriate role of an amicus brief? May it raise new issues or inject new facts?

## The Role of Amicus Briefs

The general rule is that a good amicus brief should strive to assist the court by shedding additional light on the questions before it, and not seek to raise new issues or expand the record on appeal. While it has sometimes been criticized as offering too narrow a view, then-Chief Judge Posner's in-chambers opinion in *Ryan v Commodity Futures Trading Comm*, 125 F3d 1062 (CA 7, 1997), is often cited for its overview of the criteria for a useful amicus brief. In Judge Posner's view, amici should offer "unique information or perspective that can help th[e] court beyond the help that the lawyers for the parties are able to provide." *Id.* at 1063. They should not merely "duplicate the arguments made in the litigants' briefs." *Id.* After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Id.* See, e.g., *WildEarth Guardians v Zinke*, 368 F Supp 3d 41, 59 (DDC, 2019) (denying motion to file amicus brief because it did not offer anything beyond the parties' own briefs).

## Limits on Amicus Briefs

There are also specific limits on amicus briefs that most courts recognize. Amicus briefs generally should not raise issues that haven't been raised by the parties. See *Burwell v Hobby Lobby Stores, Inc*, 573 US 682, 721 (2014) ("We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party."); *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007) ("'Absent exceptional circumstances, amicus curiae cannot raise an issue that has not been raised by the parties.'") (citation omitted).

There is, however, an oft-cited exception for important legal issues or policy questions. See, e.g., *Teague v Lane*, 489 US 288, 300 (1989) (addressing question of retroactivity raised in an amicus brief); *People v Hermiz*, 462 Mich 71, 76; 611 NW2d 783 (2000) (opinion of Taylor, J.) (citing *Teague* and observing that the prohibition against amici raising new issues "is not a hard and fast rule" and that "exceptional circumstances" may warrant it).

One area where Michigan courts and federal courts appear to diverge is when an issue is raised by an amicus and incorporated by a party into its own brief. In *Genova v Banner Health*, 734 F3d 1095 (CA 10, 2013), the Tenth Circuit opined that it would be appropriate for a court to address an argument if "a party has done something to incorporate the argument 'by reference' in its own brief." *Id.* at 1103. Compare that to the Michigan Court of Appeals' decision in *Ile v Foremost Ins Co*, 293 Mich App

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309; 809 NW2d 617 (2011), rev'd on other grounds 493 Mich 915 (2012). In that case, the court was critical of an appellant's attempt to "agree [with] . . . and incorporate [] by reference" in its reply brief two arguments raised by an amicus, finding the practice to be "lazy and sloppy." *Id*. at 328. In the Michigan appellate courts, the best practice would be to file a motion seeking to incorporate an amicus brief by reference. The Michigan Supreme Court recently granted such a motion in *People v Tillman*, 504 Mich 894; 928 NW2d 702 (2019).

When it comes to the record on appeal, amicus briefs that seek to "introduce new facts at the appellate stage" are generally disfavored. *Corrie v Caterpillar, Inc*, 503 F3d 974, 978 (CA 9, 2007). However, courts do typically distinguish between adjudicative facts (i.e., case-specific facts) and so-called "legislative facts" (social or scientific studies, statistics, and the like), the latter being commonly offered by amici in support of broad policy arguments. See, e.g., *State ex rel TB v CPC Fairfax Hosp*, 129 Wash 2d 439, 453; 918 P2d 497 (1996) (permitting amicus to offer "scholarly articles and excerpts" in connection with minor's constitutional challenge to her involuntary confinement at a mental hospital).

## Conclusion

Amicus briefs can be a helpful resource to courts as they decide the important issues before them, so long as amici don't simply repeat the parties' arguments, raise new issues, or inject extra-record facts.

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The idea is to update checklists as problems arise so they continually narrow the gap through which errors can slip.

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## If Checklists Help Surgeons, They Just Might Help Lawyers, Too

Atul Gawande, a surgeon at Brigham and Women's Hospital, seems to spend equal time in the operating room and on the New York Times' bestseller list. His writing usually focuses on medical issues, but he uses insights from medicine to address wider themes. His latest book, *Being Mortal,* proposes a fundamental shift in how we think about death and end-of-life care. The book that prompted this column, however, deals with a more mundane subject: checklists. It happens that Dr. Gawande has something to teach lawyers about how to be more effective in briefing and oral argument.

### Dr. Gawande's Manifesto

*The Checklist Manifesto*,[1] originally published in 2009, is exactly what its title promises. It advocates for the use of checklists and demonstrates their utility. And Dr. Gawande's argument for using checklists is compelling.

He writes that there are two basic kinds of errors: those caused by ignorance and those caused by "ineptitude."[2] In the first category, we fail because we lack the necessary knowledge. In the second, "the knowledge exists, yet we fail to apply it correctly."[3] Dr. Gawande shows that, although medical and scientific knowledge has expanded at an almost exponential pace, serious, avoidable errors persist.

So the problem isn't knowledge; it's making sure we apply knowledge correctly. Using a checklist is a simple way to make sure we do so.

And it works. For example, *The Atlantic* cited a program at Veterans Affairs suggesting that the use of checklists reduced annual mortality by 18%.[4] The World Health Organization developed its own surgical checklist and reports that its use decreases mortality, surgical complications, and the length of hospital stays.[5]

Of course, simply writing a checklist isn't a panacea.[6] It requires consistent use—and a change of culture.

### The Case for Legal Checklists

Lawyers face many of the same knowledge-management issues as doctors, including increasing specialization and complexity. Dr. Gawande notes a "36 percent increase between 2004 and 2007 in lawsuits against attorneys for legal mistakes—the most common being simple administrative errors, like missed calendar dates and clerical screw-ups, as well as errors in applying the law."[7]

And it's no wonder. We have to master an ever-widening body of substantive law. We have to put that knowledge into practice based on complicated court rules, local rules, and individual judges' practice guidelines. We have to do the work of zealously representing our clients—producing quality work, keeping track of deadlines, looking ahead for forks in the road—while spending time developing relationships that will lead to future cases. All the while, we're inundated with concentration-sapping emails, texts, and phone calls.

Modern law—modern *life*, for that matter—is a recipe for the second kind of error that Dr. Gawande identifies: those where we have the know-how and fail to employ it.

Many of these errors won't break a case. Forgetting to attach an exhibit, for example, may not destroy a client's legal position. But sometimes it might. Employing checklists might be a simple, cost-effective way for lawyers to cut down on errors. Indeed, some courts provide their own checklists. The Sixth Circuit Court of Appeals, for example, provides a checklist for briefs.[8]

### Sample Checklists

Here, for example, is a checklist for filing a brief:

- ☐ Obtain client approval for filing
- ☐ Review relevant court rules or local rules
- ☐ Include each section required under court rules (e.g., questions presented, standard of review, etc.)
- ☐ Verify compliance with rules concerning formatting and page limits
- ☐ Proofread
- ☐ Check for misspellings that might evade spellcheck (e.g., names, "trail" instead of "trial," etc.).
- ☐ Proofread again
- ☐ Include request for oral argument if necessary
- ☐ Shepherdize/make sure all cases are current
- ☐ Verify that all exhibit references/pin cites direct reader to correct page
- ☐ Redact exhibits as necessary to preserve privilege and to comply with redaction rules
- ☐ Verify that exhibits are complete and legible

- ☐ Include relief requested
- ☐ Include proof of service that lists the necessary parties
- ☐ Verify that next date or task is calendared

**Here's a sample checklist for oral argument:**

- ☐ Make travel arrangements and verify location/time of argument
- ☐ Notify client of argument date/time
- ☐ Review briefs
- ☐ If there are other represented parties on your side of the "v," contact those attorneys to discuss division of allotted time.
- ☐ Review underlying record to prepare to answer factual questions
- ☐ Review key cases
- ☐ Update cases to determine whether any have been overruled, modified, or questioned
- ☐ Prepare outline for oral argument
- ☐ Research judges on panel to assess relevant jurisprudence
- ☐ Prepare references for oral argument (e.g., timeline, critical citations to record)
- ☐ Prepare list of possible questions from panel and short answers
- ☐ Analyze opponent's likely arguments and prepare rebuttals
- ☐ Prepare and memorize short introduction
- ☐ Verify court rules regarding use of electronics or visual aids

A checklist shouldn't be a static creation. The idea is to update checklists as problems arise so they continually narrow the gap through which errors can slip. And if that practice works for surgeons, maybe it can help us avoid errors like forgetting to request oral argument, accidentally attaching a privileged document, or being surprised by a question at oral argument that we should have anticipated.

Developing appropriate checklists, updating them, and using them consistently may require an investment of time. But, if the impact of checklists in the medical world is any guide, that time will be well spent.

**Endnotes**

1 Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Picador 2010). Dr. Gawade's book is based on his 2007 article for *The New Yorker*, which is available here: http://www.newyorker.com/magazine/2007/12/10/the-checklist

2 *Id.* at 8.

3 *Id.*

4 James Hamblin, *Save a Brain, Make a Checklist*, The Atlantic, March 17, 2014. Available at: http://www.theatlantic.com/health/archive/2014/03/save-a-brain-make-a-checklist/284438/ (last visited January 3, 2020).

5 http://www.who.int/patientsafety/safesurgery/faq_introduction/en/#Q4

6 See Hamblin, *supra,* describing a controversial study reported in the *New England Journal of Medicine*.

7 Gawande, *supra*, at 11.

8 See https://www.ca6.uscourts.gov/sites/ca6/files/documents/forms/Briefs%20Checklist_0.pdf (last visited January 3, 2020).

# Legal Malpractice Update

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***Reffitt v Lawyer-Defendant*, unpublished per curiam opinion of the Court of Appeals, issued Nov. 19, 2019 (Docket No. 343815); 2019 WL 6173669**

## Facts:

Lawyer-defendant represented the plaintiff in a divorce action. The plaintiff's brother died during the pendency of divorce and the plaintiff was the beneficiary of his brother's term life insurance policy. The defendant advised the plaintiff that the plaintiff didn't need to disclose the life insurance proceeds to his (soon to be) ex-wife because the proceeds were not considered marital assets.

The defendant drafted a divorce judgment, which contained a provision stating that any assets concealed in the divorce proceeding were forfeited to the opposing party. The divorce judgment was entered on April 17, 2013. In May 2013, the defendant notified plaintiff's bank that the life insurance proceeds were not subject to the divorce. The bank released the proceeds to plaintiff in June 2013.

In early 2015, the plaintiff's ex-wife moved to enforce the divorce judgment. She argued that she was entitled to the proceeds under the terms of the divorce judgment because the plaintiff concealed them from her.

The plaintiff filed a legal-malpractice suit against defendant in April 2015 on the basis that the defendant inserted the problematic language in the divorce judgment. By early June 2015, the judge in the divorce matter had not decided the motion to enforce. Therefore, on June 9, 2015, the plaintiff dismissed his legal-malpractice complaint without prejudice.

The legal-malpractice parties entered into a 180-day tolling agreement. The tolling agreement contained a provision allowing the parties to cancel the tolling agreement with 30 days' notice. The agreement further provided that the defendant "waives and agrees not to assert the statute of limitations as an affirmative defense to a legal malpractice action filed by [plaintiff] within thirty (30) days after the termination of the tolling period established under this Agreement . . . if the legal malpractice action filed relates to the same legal representation . . . ."

The parties extended the tolling agreement several times over the course of the next two years. In 2017, the plaintiff's ex-wife was awarded the life insurance proceeds. On June 29, 2017, the plaintiff notified the defendant of the cancellation of the tolling agreement. On August 8, 2017, the plaintiff re-filed a more detailed legal-malpractice complaint.

> Lawyers must be cautious when entering into tolling agreements to specifically delineate which claims are being tolled and to determine whether the tolling agreement extends the tolling period beyond the termination date.

The defendant moved for summary disposition, arguing that the plaintiff's complaint was untimely. Specifically, the defendant argued that the statute of limitations accrued in April 2013 (when the judgment was signed), and that the plaintiff only had three days after the tolling agreement expired to re-file the complaint. The defendant further argued that the tolling agreement only applied to the single claim in the 2015 complaint and that the limitations period had expired on the plaintiff's other malpractice claims.

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For his part, the plaintiff argued that the statute of limitations period didn't commence until late May 2013 (when defendant sent the letter to the bank), and, therefore, he had more than three days to re-file the complaint. He also argued that the limitations period tolled for all legal-malpractice claims—not just the single claim in the 2015 complaint.

The trial court agreed with the defendant, ruling that the representation ended upon the signing of the underlying consent judgment (in April 2013) and that the tolling agreement only tolled the single claim in the 2015 complaint. For these reasons, the court held that the complaint was untimely and granted the defendant summary disposition.

## Ruling:

The Court of Appeals reversed, holding that the trial court miscalculated the limitations period and that the defendant waived the statute-of-limitations defense.

The court held that the defendant's representation of the plaintiff continued until May 2013, when defendant wrote the letter to the bank. Therefore, when the plaintiff filed the original complaint in April 2015, he still had 35 days to file a timely legal-malpractice suit under the two-year statute of limitations. The court explained that the limitations period began running again on July 30, 2017 (30 days after the plaintiff notified the defendant of the cancelation of the tolling agreement) and ended on September 2, 2017 (35 days later). For this reason, the plaintiff had nearly a month left on the statute of limitations when he re-filed his complaint on August 8, 2017.

The court further held that the defendant's waiver of the statute of limitations as an affirmative defense to a legal-malpractice action filed within 30 days after termination of the agreement provided the plaintiff with a "30-day grace period" in which to file the complaint following the termination of the tolling agreement.

Finally, the tolling agreement tolled all legal-malpractice claims—not just the single claim raised in the 2015 complaint. The court concluded that the tolling agreement contained "permissive" language, such as a provision that the agreement applied to all "potential claims" relating to the legal representation of the plaintiff. The agreement didn't expressly limit the claims tolled under the agreement.

## Practice Note:

Lawyers must be cautious when entering into tolling agreements to specifically delineate which claims are being tolled and to determine whether the tolling agreement extends the tolling period beyond the termination date.

**Endnotes**

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

# MDTC Legislative Report

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When I wrote my last report in September, I expressed an optimistic hope that I might not need to be writing about road funding next year. That fleeting hope has now crashed and burned, and I cannot say that I am very much surprised. The budget discussions went up to the brink of the October 1st deadline for avoidance of a government shutdown as they did in the years before the Snyder administration, but there appeared to be an agreement that could be taken to the bank until the deal fell apart at the last minute over differences which continued to be irreconcilable. The Republican legislative leadership completed its work on the budget without Governor Whitmer's approval but included far less than the Governor had requested to fulfill her campaign promise to fix the state's "d _ _ _ " deteriorating roads and bridges. The Governor's response was to exercise 147 line-item vetoes, cutting $947,000,000 from the legislatively approved budget, including $375,000,000 of funding that the Legislature **did** approve for fixing the roads, and to then restore some of the vetoed funding by means of administrative transfers made by the State Administrative Board.

Governor Whitmer's strategy was apparently motivated by a mistaken belief that this would prompt the Republican legislative leaders to return to the bargaining table in a more cooperative frame of mind, producing the fair and effective compromise that many had been hoping for. The Governor had perhaps forgotten that it's generally the Republicans who are more likely to at least talk the talk about cutting the budget and failed to realize how much they might enjoy blaming her for any pain inflicted by the use of her veto pen. And the Governor's use of the Administrative Board to re-balance the expenditures was not favorably received. But whatever the reasons may have been, the legislative leaders were less than enthusiastic about coming back to the table to continue negotiating the budget for the remainder of the year without imposing some new conditions.

The road has been bumpy, but the discussions continued, and a new agreement was reached in the final days of this year's session for passage of supplemental appropriations bills **Enrolled Senate Bills 152** and **154 (Stamas - R)** that will restore approximately $573,000,000 of the vetoed funding. But the compromise will not provide any final solution to the road funding debacle and so, regrettably, we will be hearing more about that next year. And as many had expected, it came with some strings attached. Boilerplate language included in the supplemental appropriations has authorized the Legislature to reverse some of the Administrative Board's transfers, and **Enrolled House Bill 5176 (Hernandez – R)** will impose 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.

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## Public Acts of 2019

As of this writing on December 16, 2019, there are 146 Public Acts of 2019 – 99 more than when I last reported in September, but still far fewer than the number of Public Acts produced in prior sessions within recent memory. And the vast majority of these have addressed matters of little significance. Sixteen of the new acts were created by the enactment of appropriations bills, and 20 modified statutory fees of various kinds or extended sunsets to authorize continuation of collection. The few which may be of passing interest to our members include:

**2019 PA Nos. 143** through **146 (House Bills 4540** through **4543)** This bipartisan package of bills will amend the General Sales Tax Act and the Use Tax Act to facilitate the collection of sales and use tax on internet sales made by out of state sellers and facilitators of those sales.

A bipartisan 18-bill package enacted as **2019 PA Nos. 97 through 114** (8 Senate Bills and 10 House Bills) has amended the Juvenile Code and several related acts to raise the age threshold for prosecution of youthful offenders as adults from 17 to 18 years of age in most cases. These amendatory acts will take effect on October 1, 2021.

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But the compromise will not provide any final solution to the road funding debacle and so, regrettably, we will be hearing more about that next year.

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**2019 PA 48 – Senate Bill 23 (Runestad – R)** has created a new "Mail and Mail Depository Protection Act" providing new criminal penalties for theft of packages or other mail. A first offense violation will be a misdemeanor, punishable by imprisonment for up to a year and/or a fine of up to $500. A second or subsequent violation will be a felony, punishable by imprisonment for up to 5 years and/or a fine of up to $1,000. This new act will take effect today, December 16, 2019, just in time for Christmas, and this will undoubtedly bring the current epidemic of porch piracy to a screeching halt.

Other initiatives, in addition to the enrolled supplemental appropriations previously discussed, are awaiting the Governor's approval as of this writing. Most notably, those initiatives include a bipartisan ten-bill package of House Bills **– House Bills 4173, 4307, 4308, 4310** through **4312, 4323,** and **4316** through **4318 –** which, if approved as expected, will provide a substantial overhaul of the State's gaming laws. Although too numerous to discuss in detail here, the proposed changes will amend the Michigan Gaming Control and Revenue Act and other existing gaming laws, and create 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 will be provided for violations of the new provisions, with corresponding amendments of the Penal Code and Code of Criminal Procedure.

## Old Business and New Initiatives

The end of 2019 marks the halfway point for the current Legislature, and thus, all of the bills introduced this year that did not become Public Acts of 2019 will carry over to be passed or ignored in 2020. The many initiatives that may receive further attention in the coming year include:

**Senate Bill 342 (Lucido – R)**, which would amend the Code of Criminal Procedure to add a new Section MCL 760.21b, prohibiting the use of "real-time facial recognition technology" and any information obtained by the use of such technology by law enforcement officials to enforce any state laws or local ordinances, and require exclusion of all evidence obtained by the use of that technology. "Real-time facial recognition technology" would be defined as "a technological process that involves the constant scanning of live video feeds to instantaneously, or apparently instantaneously, match moving still faces with a database of still images."

The available legislative analyses provide no explanation of the reason or reasons underlying the introduction of this bill. The proposed limitation of law enforcement's ability to utilize new technology for purposes of law enforcement seems like a rather un-Republican idea to this former Republican prosecutor and Senate Judiciary Counsel, but it may well have been prompted by some current popular notions that the authority of law enforcement has been abused and should therefore be limited. **Senate Bill 342** was passed by the Senate on November 13, 2019 and has been referred to the House Judiciary Committee. **House Bill 4810 (Robinson - D)**, which proposes a similar limitation of law enforcement authority, has also been referred to the House Judiciary Committee, but has not been scheduled for hearing.

**House Bill 4329 (Vaupel – R)** would amend the Revised Judicature Act, MCL 600.2543, to increase the amount that circuit court reporters or recorders may charge for transcripts. The bill would increase that amount from $1.75 to $3.50 per original page, and from 30 to 75 cents per page for copies. The amount allowed for original pages was raised to the current $1.75 from $1.25 in 1986, following an increase to that amount from $1.00 in 1978. This bill appeared on the House Judiciary Committee's agenda once in the fall of this year but was not reported and has not yet been rescheduled.

**House Joint Resolution O (Brann – R)** proposes an amendment of Const 1963, art 6, § 19, to eliminate subsection (3), which provides that: "No person shall be elected or appointed to a judicial office after reaching the age of 70 years." This joint resolution was considered by the House Judiciary Committee in the last week of this year's session but was not reported in light of the variety of viewpoints expressed.

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The budget discussions went up to the brink of the October 1st deadline for avoidance of a government shutdown as they did in the years before the Snyder administration

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## What Do You Think?

Our members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated and may be submitted to the board through any officer, board member, regional chairperson or committee chair.

# Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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***Skanska USA Building Inc v Amerisure Ins Co*, __ Mich __; 933 NW2d 703 (2019) (Docket No. 159510).**

The most notable insurance coverage decision this quarter was the Michigan Supreme Court's leave grant in *Skanska*. I discussed the Court of Appeals' *Skanska* opinion in this column a few months ago, in Vol. 36, No. 1.

*Skanska* deals with whether an "occurrence" can "include damages for the insured's own faulty workmanship," in the context of commercial general liability ("CGL") coverage. *Skanska USA Building Inc v Amerisure Ins Co,* unpublished per curiam opinion of the Court of Appeals, issued March 19, 2019 (Docket No. 340871); 2019 WL 1265078, slip op at 10. The Michigan Court of Appeals has generally said "no," following *Hawkeye-Security Ins Co v Vector Construction Co,* 185 Mich App 369; 460 NW2d 329 (1990), notwithstanding subsequent changes to the standard CGL form's definition of "occurrence." But on October 18, 2019, the Michigan Supreme Court cast some doubt on that line of cases when it granted the insured's application for leave to appeal. *Skanska,* __ Mich at __; slip op at 1.

A review of the Court of Appeals' decision is helpful in demonstrating the importance of Supreme Court's decision. The Court of Appeals held that Amerisure was entitled to summary disposition in "a commercial liability insurance coverage dispute, arising from the faulty installation of parts in the steam heat system of a hospital construction project." *Skanska,* unpub op at 2. "The resulting damage required extensive repairs, in excess of $1 million." *Id.* Skanska was the construction manager for the project. *Id.* Skanska subcontracted the heating and cooling portion of the project; that subcontractor obtained a commercial general liability ("CGL") policy from Amerisure. *Id.* Skanska was an additional insured under that policy. *Id.* The panel found no genuine issue of material fact that the plaintiff sought coverage for replacement of its own work product, and there was therefore no "occurrence" under the terms of the Amerisure policy.

Skanska contended that the problems with the steam heat system resulted from the work of the subcontractor. Skanska fixed the problems and then made a claim to Amerisure. *Id.* Amerisure denied the claim and Skanska filed suit. *Id.* at 3.

Amerisure moved for summary disposition on the grounds that (1) the subcontractor's allegedly defective construction was not a covered occurrence within the CGL policy; (2) Skanska failed to provide proper notice of a claim; (3) Skanska entered into a settlement without Amerisure's consent; and (4) several exclusions barred coverage. *Skanska,* unpub op at 3. Skanska filed a counter-motion for summary disposition. *Id.* at 5-6. The trial court denied both sides' motions for summary disposition, finding "a question of material fact … as to the extent of the property affected by the defective workmanship of" Skanska's subcontractor and whether "it extends beyond the scope of work to be performed by Plaintiff for the contract with" the hospital. *Id.* at 4. According to the trial court, "[t]he resolution of this question of fact requires the matter be submitted to the trier of fact, so summary disposition is not appropriate at this time." *Id.* Both sides appealed. *Id.* at 5-6.

The Court of Appeals reversed, finding that the undisputed facts established that there was no "occurrence" within the meaning of the policy. *Skanska,* unpub op at 3. The panel's analysis involved a close look at *Hawkeye,* 185 Mich App at 369. Skanska argued that *Hawkeye* was not controlling because it interpreted "a prior version of the CGL form." *Skanska,* unpub op at 7-8. The panel acknowledged that the form at issue in *Hawkeye* had a slightly different definition of "occurrence" than the Amerisure policy at issue here. *Skanska,* unpub op at 8. But the panel found that this was a distinction without a difference; "cases that have considered the post-1986 language … still

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followed *Hawkeye* such that what defines 'occurrence' is a principle of law." *Skanska,* unpub op at 8, citing *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134; 610 NW2d 272 (2000).

The *Skanska* panel noted that "*Radenbaugh* examined the precise policy term at issue … and clearly affirmed *Hawkeye's* admonishment that an 'occurrence' cannot include an accident that results in damage to the insured's own work product." *Skanska,* unpub op at 10. The panel cited *Liparoto Constr, Inc v Gen Shale Brick, Inc,* 284 Mich App 25; 772 NW2d 801 (2009) for the proposition "that an accident *can* arise from the insured's negligence or breach of warranty," *if* the damage "extended beyond the insured's own work product." *Skanska,* unpub op at 10. The policy at issue in *Liparoto* defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," *Skanska,* unpub op at 10 – the same definition contained in Amerisure's policy here, *Id.* at 3. Based on these and other decisions published since *Hawkeye,* the panel found "an established principle of law that an 'occurrence' cannot include damages for the insured's own faulty workmanship." *Skanska,* unpub op at 10.

Applying that principle, the *Skanska* panel found that the incident for which Skanska sought liability coverage was not an "occurrence" under the policy. *Id.* "If, as the trial court ruled, the CGL policy does not cover defective workmanship within the scope of the original project under *Hawkeye,* the summary disposition analysis turned on evidence of the scope of the repair and replacement work as compared to the scope of the original project." *Id.* "Amerisure presented evidence to demonstrate that all of the repair and replacement work was within the scope of plaintiff's original project…." *Id.* Skanska "presented no evidence or argument concerning the scope of its repair or replacement work," so Amerisure was entitled to summary disposition. *Id.* "[C]overage was not triggered due to lack of an 'occurrence' and there is no genuine issue of material fact that the only damage was to plaintiff's own work product (rather, that of its subcontractor)." *Id.*

Skanska applied for leave to appeal to the Michigan Supreme Court. On October 18, 2019, the Supreme Court granted the application, directing the parties to address "whether: (1) the definition of 'occurrence' in *Hawkeye* … remains valid under the terms of the commercial general-liability policy at issue here; and (2) the plaintiff has shown a genuine issue of material fact as to the existence of an 'occurrence' under those terms." *Skanska,* __ Mich at __; slip op at 1.

Insurers have long argued that the term "occurrence" cannot be interpreted to include damages for the insured's own faulty workmanship because otherwise, CGL policies would be converted into performance bonds or warranties. See *Westfield Ins Co v Bellevue Holding Co,* 856 F Supp 2d 683, 694 (ED Pa 2012); *Wis Label Corp v Northbrook Prop & Cas Ins Co,* 233 Wis 2d 314, 343; 607 NW2d 276 (Wis 2000). On the other hand, the Michigan Supreme Court has consistently held that the scope of liability coverage is controlled, first and foremost, by the policy language. See, e.g., *Citizens Ins Co v Pro-Seal Serv Group, Inc,* 477 Mich 75, 82; 730 NW2d 682 (2007). The Michigan Supreme Court probably will not render its decision in *Skanska* until late 2020.

***United Specialty Ins Co v Cole's Place, Inc*, 936 F3d 386 (CA 6, 2019).**

Although this case was decided under Kentucky law, it is relevant here because it illustrates the proper use of the federal Declaratory Judgment Act ("DJA"), 28 USC 2201(a), in resolving coverage disputes.

In this case, eight people were shot in the insured's bar. Six of them sued, "arguing that Cole's Place had failed to protect the plaintiffs from a foreseeable harm." *Cole's Place,* 936 F3d at 391. The bar's liability insurer filed a declaratory judgment action in the U.S. District Court for the Western District of Kentucky, arguing that "an assault-and-battery exclusion in Cole's Place's insurance policy with USIC" meant there was no duty to defend or indemnify the bar for the shooting victims' suits. *Id.* The district court agreed with the insurer and found no coverage. The insured appealed.

On appeal, one of the insured's arguments was that the district court should not have decided the issue in the first place because jurisdiction under the DJA is discretionary, and the underlying tort cases in state court made the federal forum inappropriate. The Sixth Circuit, applying the five-factor test it articulated in *Grand Trunk W RR Co v Consol Rail Corp*, 746 F2d 323, 326 (6th Cir, 1984), rejected the insured's argument and affirmed the district court's exercise of jurisdiction.

The five so-called "*Grand Trunk* factors," for determining whether the exercise of DJA jurisdiction is appropriate, are "(1) [w]hether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective." *Cole's Place,* 936 F3d at 396. The Sixth Circuit has divided the fourth factor into three sub-factors: "(1) [w]hether the underlying factual issues are important to an informed resolution of the case;

(2) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and (3) whether there is a close nexus between underlying factual and legal issues and state law and/or public policy, or whether federal common or statutory law dictates a resolution of the declaratory judgment action." *Cole's Place,* 936 F3d at 396.

The panel found that "*Grand Trunk* factors one and two support jurisdiction; factor three is neutral; factor four is neutral; and factor five arguably disfavors the exercise of jurisdiction." *Cole's Place,* 936 F3d at 402. This was not materially different from the district court's analysis, and ultimately the standard on appeal is abuse of discretion – i.e., whether the lower court "has taken a good look at the issue and engaged in a reasoned analysis of whether issuing a declaration would be useful and fair." *Id.* Although the opinion delves into each of the *Grand Trunk* factors in some detail, in the end the panel saw no overriding reason why

the coverage issue needed to be decided by a state court.

Once the panel determined that the case was properly in federal court, it had relatively little trouble affirming on the merits.[1] We will not dig too deeply into this aspect of the case, as it was decided under Kentucky law. Suffice it to say, the policy had a broad and unambiguous "assault and battery" exclusion, *id.* at 393-394, and all of the underlying tort claimants pled some form of assault and/or battery in their state court complaints, *id.* at 404-407.

Rescission has been a hot topic in insurance coverage circles for the last few years, particularly after *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018).

This decision serves as a useful reminder that federal court may be an option for your declaratory judgment action. However, the DJA does not "extend" the jurisdiction of federal courts; it only expands the relief available. *Medtronic, Inc v Mirowski Family Ventures*, LLC, 571 US 191, 197; 134 S Ct 843 (2014). So even in a declaratory judgment action, practitioners need to make sure that diversity jurisdiction exists. *Id.*; *Skelly Oil Co v Phillips Petroleum Co*, 339 US 667, 671; 70 S Ct 876 (1950).

***Doa Doa, Inc v PrimeOne Ins Co,* unpublished per curiam opinion of the Court of Appeals, issued October 31, 2019 (Docket No. 339215); 2019 WL 5680994.**

Rescission has been a hot topic in insurance coverage circles for the last few years, particularly after *Bazzi v Sentinel Ins Co,* 502 Mich 390; 919 NW2d 20 (2018). Here, PrimeOne sought to rescind a fire policy, which it had issued to a bar, based on misrepresentations in the application for insurance. On October 23, 2015, the insured bar ("Bar 153") was destroyed by a fire of "undetermined" origin. *Doa Doa,* unpub op at 2. This case demonstrates that rescission can be a very complicated matter even in those rare cases where the insurer can clearly show misrepresentations in the application.

At the time of the fire, PrimeOne insured Doa Doa (which owned Bar 153) under a policy that Doa Doa had applied for on January 24, 2015, and PrimeOne had issued on February 6, 2015 (eight months before the fire). Another entity, Garden City Real Estate, LLC ("GCRE"), was named as an additional insured. GCRE owned the building and real estate. There was a dispute over whether GCRE was an additional insured only for liability purposes, or for both liability and property (the policy only listed GCRE for liability coverage but there was some suggestion that this was a mistake).

That was not the main issue, however. "[A] t the core of this case" was Doa Doa's "response to a question in [the] insurance application seeking the number of police calls within the past year." *Doa Doa,* unpub op at 2. Doa Doa only reported one incident. *Id.* PrimeOne's post-fire investigation revealed nine other incidents where the police had been called to Bar 153 during the relevant time period. *Doa Doa,* unpub op at 3-4. Two of those incidents involved violence. *Id.*

PrimeOne purported to rescind the policy, denying coverage for the fire on the grounds that the policy was procured through fraud and therefore void *ab initio*, *id.* at 1 – in other words, "as if the insurance policy did not exist." *Id.* at 5. The trial court found a question of fact as to whether the misrepresentation about the number of police calls was "material." *Id.* at 1. The Court of Appeals initially reversed on a peremptory basis (i.e., without full briefing or oral argument), finding that PrimeOne was entitled to rescind the policy. *Id*. The Supreme Court vacated that order, however, and remanded the case to the Court of Appeals "for consideration as on leave granted." *Doa Doa, Inc v PrimeOne Ins Co,* 502 Mich 881; 912 NW2d 862 (2018).

With the case in front of it for a second time, the Court of Appeals again found that PrimeOne was entitled to rescind the policy. *Doa Doa,* unpub op at 4. The panel focused on whether the misrepresentation was material, citing MCL 500.2218(1), which provides in relevant part: "No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract." *Doa Doa,* unpub op at 5. The panel also looked closely at *Oade v Jackson Nat'l Life Ins Co of Mich,* 465 Mich 244, 253-254; 632 NW2d 126 (2001) ("a fact or representation in an application is 'material' where communication of it would have had the effect of substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium").

With these standards in mind, the panel was persuaded by PrimeOne's evidence that it "would not have insured Bar 153 if they had known that the bar had such extensive police activity in the year preceding submission of its application." *Doa Doa,* unpub op at 4. Although the insured claimed that there were questions of fact regarding the credibility of PrimeOne's representatives – based on evidence that PrimeOne often issued policies where the application did not ask the "number of police calls in the past year" question, *Id.* at 8 – the panel disagreed that this presented a question of fact for the jury. The panel found Doa Doa's positon "unavailing" because it focused "too narrowly on the inquiry into the number of police calls without considering that the police-call question has two parts." *Id.* The insurance application asked for the "[n] umber of police calls within the past year (If any describe in detail)." *Id.* "Thus, in addition to reporting the number of calls, applicants must also describe in detail the nature of the calls reported." *Id.* So if Doa Doa had "reported the actual number of police calls to Bar 153 in the year before submitting its insurance application to defendant, it would also have had to reveal at least two incidents of assault and battery." *Id.* According to its underwriting guidelines, PrimeOne would not insure "[a]ny risk with (2) or more assault or battery incidents in the last 3 years." *Id.*

Although the materiality of this misrepresentation was fatal to Doa Doa's claim, the panel remanded the case for the trial court to consider whether the additional insured, GCRE, may still be covered as an "innocent third-party"

under *Bazzi,* 502 Mich at 401-403. The panel saw "no indication in the record that GCRE was involved in providing information to defendant in support of the application for insurance." *Doa Doa,* unpub op at 10. Rather, there was testimony that all of the information provided in the insurance application process came from Doa Doa's president. *Id.* On remand, the trial court will also need to consider whether the policy should be reformed "to include GCRE as an insured under the property coverage portion of the policy." *Id.* at 11.

***State Farm v Ravenscroft, et al.*, unpublished per curiam opinion of the Court of Appeals, issued September 17, 2019 (Docket No. 345377); 2019 WL 4455974.**

State Farm filed this declaratory judgment action, arguing that it had no duty to defend or indemnify its insured, Noah Ravenscroft, in a wrongful-death action that resulted from Noah stabbing his wife, Kristi Jo, while he was having a psychotic episode. State Farm argued that the stabbing did not constitute an "occurrence" under the policy terms and even if it did, "coverage was precluded because the homeowners policy excluded coverage for bodily injury which is expected or intended by the insured." *Ravenscroft,* unpub op at 2. The decedent's parents claimed that there could be liability coverage under the homeowners policy because Noah "was found not guilty of first-degree murder by reason of insanity" and therefore, may not have "expected or intended" the injury. *Id.*

The trial court agreed with the decedent's parents, finding that because "the insured was diagnosed as having suffered serious mental illness, audio hallucinations, visual hallucinations, unable to recall one's name, etc.," he was "unable to form the required intent…." *Id.* at 3. "The trial court did not address whether Kristy Jo's death constituted an 'occurrence' or whether the exclusion provision for intentional or expected acts as separate matters were applicable." *Id.* at 3 n 2. However, the trial court determined that there was coverage as a matter of law. *Id.* at 3.

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The most notable insurance coverage decision this quarter was the Michigan Supreme Court's leave grant in *Skanska.*

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The Court of Appeals reversed, finding no "occurrence" and alternatively, that the exclusion for "expected or intended" injury applied. *Id.* at 6-7. In finding no occurrence, the panel distinguished *Allstate Ins Co v McCarn,* 466 Mich 277; 645 NW2d 20 (2002), where the insured aimed a gun, pulled the trigger, and killed the decedent. The *McCarn* Court found that this was an "accident" for the purposes of liability coverage, based on the insured's testimony that he thought the gun was not loaded. Here, in contrast, the record made it clear "that the death of Kristy Jo was not the result of an accident, or that the harm inflicted was not intended." *Ravenscroft,* unpub op at 6. Finding it impossible that Noah could have "accidently stabbed his wife twenty-four times, 13 of which were to her chest," the panel found this case to be quite different from *McCarn,* 466 Mich at 282. Focusing on both "the injury-causing act or event and its relation to the resulting property damage or personal injury," *Id.*, the panel held "that the bodily injury to Kristy Jo was not an 'occurrence' under the terms of the policy." *Ravenscroft,* unpub op at 6.

Turning to the exclusion, the panel looked to *Auto-Owners v Churchman,* 440 Mich 560; 569-570; 489 NW2d 431 (1992), where the Court held "that an insane or mentally ill person can intend or expect the results of his actions within the meaning of an insurance policy's exclusionary clause." *Churchman* also rejected the notion that a criminal adjudication of the insured's insanity was dispositive of coverage. *Id. Churchman* held "that it is possible for an insane or mentally ill person to intend or expect the injuries he causes within the meaning of the insurance policy language." *Id.* at 572-573. While not "criminally liable for his acts," an "insane or mentally ill individual can still form the requisite intent to injure another….." *Id.*

After a lengthy summary of Noah's mental illness, the panel found that – under *Churchman* and other precedents –Noah "may not have been criminally liable for his acts," but he "was capable of foreseeing their consequences and understanding what he was doing, i.e., intentionally killing Kristy Jo." *Ravenscroft,* unpub op at 9. "The record makes clear that Noah retrieved a knife and stabbed Kristy Jo 24 times, striking her in the chest 13 times, killing her." *Id.* "When police arrived at the home, Noah told them that he had killed Kristy Jo." *Id.* "From this record … there is no other conclusion but that Noah intended to take a knife and kill Kristy Jo, despite the fact that Noah was delusional." *Id.* "Accordingly, the exclusionary clause of the homeowners policy applies and there was no coverage." *Id.*

**Endnotes**

1 Judge Helene White dissented on the jurisdictional issue and the substantive coverage question. The insured requested an *en banc* rehearing, which the Sixth Circuit denied on October 30, 2019.

# Municipal Law Report

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## MICHIGAN'S RECREATIONAL AND MEDICAL MARIJUANA LAWS

On December 1, 2019, Michigan officially joined ranks with nine other states that allow "adult use" recreational marijuana sales. Just one month after the voter initiative was passed in November 2018, the Michigan Regulation and Taxation of Marihuana Act (MRTMA) went into effect, becoming the latest in a series of three statutes to regulate marijuana activities in Michigan. On July 3, 2019, the Marijuana Regulatory Agency (MRA), through the Department of Licensing and Regulatory Affairs, released emergency rules to implement the MRTMA.

While the MRA was busy creating the licensing procedures and process for recreational marijuana, local governments tackled the difficult issue of deciding whether and how to permit commercial operations within their boundaries. The issues at stake have united some communities and divided others as residents on both sides of the issue have taken to town halls and government meetings to voice their opinions on commercial marijuana establishments in their communities. The following is a review of Michigan's marijuana regulations.

### Michigan Regulation and Taxation of Marihuana Act (MRTMA)

The MRTMA legalizes both the **personal** use, possession, and cultivation of adult use marijuana for persons 21 and older, and the **commercial** production and distribution of marijuana from licensed facilities. Under MRTMA, adults age 21 and older may possess, use, purchase, and transport up to 2.5 ounces of marijuana – roughly equivalent to 220 joints - for recreational use.[1] Adults may possess four times that amount in their homes, up to 10 ounces, and an unlimited amount from plants cultivated on the premises, provided not more than 12 marijuana plants are on the premises at once.

Any amount over 2.5 ounces kept in a residence must be stored in a locked container or area.[2] Up to 2.5 ounces may be gifted to an adult 21 and older, as long as the transfer is not advertised or promoted to the public.

Personal use aside, the commercial component of the MRTMA under the licensed facilities portion of the Act has generated the most attention. The MRTMA and emergency rules create nine license classifications: retailer, safety compliance facility, secure transporter, processor, microbusiness, grower (Class A, B, C, and excess marijuana grower), designated consumption establishment, temporary marijuana event license, and marijuana event organizer.

The MRA will not issue a State license if the municipality where the proposed marijuana establishment will be located notifies the MRA that the proposed establishment is not in compliance with an ordinance that was adopted under the act and in effect at the time the licensing application was filed.[3]

A municipality may adopt an ordinance to limit the number of marijuana establishments within its boundaries or may "opt out" of the licensed facilities portion of the act by completely prohibiting marijuana establishments.[4] If a municipality limits the number of marijuana establishments that may be licensed in the municipality, and that limit prevents the MRA from issuing a license to all qualified applicants, the municipality must decide among competing applicants by a competitive process.[5] Licensed facilities are not allowed in areas zoned exclusively for residential use or within 1,000 feet of a school unless the ordinance reduces the distance requirements.

The MRTMA allows municipalities to adopt other ordinances to regulate the time, place, and manner of operations, establish signage regulations, and authorize sales for consumption in designated areas not accessible to minors, provided such ordinances

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are not "unreasonably impracticable" and do not conflict with the act.[6]

A municipality may adopt an ordinance to limit the number of marijuana establishments within its boundaries or may "opt out" of the licensed facilities portion of the act by completely prohibiting marijuana establishments.

## Medical Marihuana Facilities Licensing Act (MMFLA)

In 2016, the Michigan Legislature enacted the MMFLA to license and regulate medical marijuana facilities. Under the MMFLA, registered primary caregivers and qualifying patients are given immunity from criminal prosecution for purchasing medical marijuana from a provisioning center if the amount purchased is within the limits established under the Michigan Medical Marijuana Act.[7]

Unlike MRTMA, where a municipality must "opt out" of the licensed facilities portion of the statute if it does not want commercial recreational marijuana establishments in its community, a municipality must "opt in" to allow medical marijuana establishments under the MMFLA and must have an ordinance authorizing the type of medical marijuana facility requested before a license will issue.[8]

The MMFLA and administrative rules create five types of medical marijuana facilities: grower (Class A, B, C), processor, provisioning center, secure transporter, and safety compliance facility. A municipality may adopt an ordinance to authorize 1 or more types of marijuana facilities within its boundaries and to limit the number of each type of facility. If a municipality does nothing, and does not authorize medical marijuana operations by ordinance, no medical marijuana facilities can be licensed to operate in that municipality.[9] Municipalities may adopt zoning regulations and other ordinances relating to marijuana facilities within their jurisdiction.[10]

## Michigan Medical Marihuana Act (MMMA)

The MMMA allows a limited class of individuals the right to use medical marijuana free from the risk of prosecution or other penalties for MMMA-compliant conduct.[11] Under the MMMA, the "medical use of marihuana is allowed under State law to the extent that it is carried out in accordance with the provisions" of the Act.[12] "Medical use" includes the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana or paraphernalia."[13]

The MMMA does not create a general right for individuals to use and possess marijuana in Michigan.[14] Rather, the MMMA provides registered patients with immunity from prosecution for the medical use of marijuana, when their medical marijuana activities are in compliance with the MMMA. The act generally limits possession to 2.5 ounces and 12 marijuana plants for each qualifying patient.[15]

Medical marijuana can be grown only in an "enclosed, locked facility" equipped with functioning locks or other security devices. Marijuana plants grown outdoors may not be visible from an adjacent property and can only be grown in a stationary structure that is enclosed on all sides by fencing or other material preventing public access to the plants.

On December 1, 2019, Michigan officially joined ranks with nine other states that allow "adult use" recreational marijuana sales.

## Case Review

*Ter Beek v City of Wyoming*, 495 Mich 1, 846 NW2d 531 (2014)

The Michigan Supreme Court ruled that a local ordinance may not prohibit activity specifically allowed under the MMMA, while at the same time acknowledging that local governments are not precluded from all regulation of medical marijuana activities.[16] Marijuana is a Schedule I controlled substance prohibited under federal law. The City's zoning ordinance prohibited the use of property in any manner that violated federal, state, or local law, effectively imposing a complete ban on MMMA-compliant activities. The Michigan Supreme Court ruled that the zoning ordinance was in direct conflict with and was preempted by the MMMA.

*DeRuiter v Township of Byron*, 325 Mich App 275; 926 NW2d 268 (2018)

Whether and to what extent zoning regulations apply to MMMA activities is not addressed in the MMMA and remains an open question in the courts. In *DeRuiter*, the Township zoning ordinance allowed MMMA-compliant caregivers to operate as a home occupation, but did not allow such activities in its commercial district. The plaintiff, a registered caregiver who cultivated marijuana at a commercial location, filed suit against the Township, alleging that the Township's ordinance was preempted by the MMMA. The Michigan Court of Appeals held that the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, regardless of zoning designations as long as the activity occurs in an enclosed, locked facility and is otherwise compliant with the MMMA. The court concluded that the ordinance conflicted with and was preempted by the MMMA. An application for leave to appeal is currently pending before the Michigan Supreme Court.

*Eplee v City of Lansing*, 327 Mich App 635; 935 NW2d 104 (2019).

The Lansing Board of Water and Light (BWL) did not violate the MMMA when it rescinded the plaintiff's conditional job offer after the plaintiff tested positive for tetrahydrocannabinol (THC) during a drug screen that was part of the hiring process. While the MMMA provides immunity from penalties and the denial of rights or privileges based on the medical use of marijuana, the court found that it does not create an affirmative right protecting the perceived employment rights of plaintiff. BWL had the right to terminate plaintiff's at-will employment and conditional job offer for any reason or no reason, regardless of plaintiff's medical use of marijuana. Since plaintiff did not have a right to at-will employment and could not show that she would have begun employment with the BWL but

for her medical marijuana use, she could not demonstrate that the withdrawal of the at-will employment offer constituted a "penalty" in violation of the MMMA.

## Conclusion

The statutes and administrative rules governing medical and recreational marijuana in Michigan create a complex regulatory scheme that no doubt will continue to evolve as the industry matures. As of December 2019, approximately 1,418 municipalities across the state have opted out of the MRTMA. Some of those municipalities are likely taking a wait-and-see approach as they consider appropriate regulations and monitor the public and industry response to existing regulations.

**Endnotes**

1 MCL 333.27955.
2 *Id.;* MCL 333.27954(1)(i).
3 MCL 333.27959; Emergency Rule 9.
4 MCL 333.27956.
5 MCL 333.27959.
6 MCL 333.27958.
7 MCL 333.27203.
8 MCL 333.27205.
9 *Id.*
10 *Id.*
11 *People v Kolanek,* 491 Mich 382, 393-94; 817 NW2d 528 (2012).
12 MCL 333.26427(a).
13 MCL 333.26423(f).
14 *Kolanek,* 491 Mich at 394.
15 MCL 333.26424(a).
16 *Ter Beek,* 495 Mich at 24, n 9.

# No-Fault Report

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## *DYE v ESURANCE PROPERTY & CASUALTY INS CO* – DEATH OF THE "INSURABLE INTEREST" ARGUMENT IN NO-FAULT CLAIMS?

Lost among the chaos created by the Legislature when it passed the recent no-fault reform amendments, 2019 PA 21 and 22, was an important decision from the Michigan Supreme Court regarding precisely who is obligated to maintain insurance on an automobile. For years, no-fault insurers were arguing that in cases where their named insureds had no insurable interest in a motor vehicle being insured under their policy, the insurance contract was void as being against public policy. Closely related to this line of reasoning was the Michigan Court of Appeals' decision *Barnes v Farmers Ins Exch*, 308 Mich App 1, 862 NW2d 681 (2014), which held that an owner or registrant of a motor vehicle was obligated to insure it, and their failure to insure their motor vehicle, in his or her own name, triggered the application of the "uninsured motor vehicle" exclusion found at MCL 500.3113(b).

In *Dye v Esurance Property & Casualty Ins Co*, 504 Mich 167, 934 NW2d 6745 (2019), the Michigan Supreme Court overruled *Barnes* and essentially held that even if the owner or registrant of the motor vehicle is not insuring the vehicle in his or her own name, they are not excluded from recovering no-fault benefits under MCL 500.3113(b) so long as the vehicle itself is insured – even if a third party is insuring the vehicle in his or her own name.

However, as discussed below, the third party's insurer still may not be responsible for payment of the no-fault benefits incurred by the owner or registrant of the subject motor vehicle, based upon application of the priority provisions set forth in MCL 500.3114 and MCL 500.3115. In certain cases, application of the statutory priority provisions will extricate the third party's no-fault insurer from paying the owner or registrant's no-fault claim, and in these situations, the claim will end up being handled by the Michigan Assigned Claims Plan.

Consider the following scenario, which occurs rather frequently in situations involving families with young drivers. Jack and Diane have a son, John, who graduates from high school when he is 18 years old. When John first obtained his driver's license, Jack and Diane purchased a clean, late model car for John to use. John likes the car so much that he continues to use it throughout his college years. John later has a girlfriend, and together they move into a home in Warren. John utilizes the Warren address for purposes of registering the automobile, but in an effort to help John save some money, Jack and Diane, who live in Shelby Township, agree to keep insuring the vehicle under their auto policy, covering their other automobiles. John and his girlfriend are both listed as drivers under the policy, but the insurance company is never made aware of the fact that ownership of the vehicle has been transferred to John – until, of course, a loss occurs.

### Insurable Interest and PIP Claims

As noted below, denial of a claim for PIP benefits, utilizing an "insurable interest" argument, is questionable at best. More often than not, this type of argument fails because unlike the old case law that explicitly tied the validity of an insurance policy to the named insured's ownership of a specific vehicle, this rationale does not apply with regard to PIP claims, for the simple reason that PIP insurance is designed to insure **people**, not **vehicles**.

This issue was first addressed by the Michigan Court of Appeals in *Madar v League General Ins Co*, 152 Mich App 734, 394 NW 2d 90 (1986). In that case, the decedent,

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Albert Madar, had purchased a six-month auto policy from AAA, which was scheduled to run from November 2, 1982 through May 22, 1983. Midway through the policy term, though, the decedent sold the automobile named in the AAA policy to another individual. He neglected to cancel his auto insurance. Two weeks after he sold the vehicle, and while his AAA policy was still in effect, he was walking across the street when he was struck by a motor vehicle whose owner was insured by League General Insurance Company. As a result of the injuries he suffered in the accident, Mr. Madar died approximately one and half months later. His estate subsequently filed claims for no-fault benefits with AAA and League General Insurance Company. Plaintiff's position was that AAA occupied the highest order of priority under MCL 500.3114(1). However, if AAA succeeded in its argument that Mr. Madar no longer had an insurable interest in his automobile at the time of his accident, thereby voiding the policy, then League General Insurance Company would occupy the next order of priority pursuant to MCL 500.3115(1).

AAA argued that it was not obligated to afford coverage for this loss, even though its policy was still in effect, because Mr. Madar no longer had an insurable interest in the motor vehicle that was insured under the policy. The Court of Appeals summarized AAA's argument as follows:

> Plaintiff first argues that once the Plaintiff's decedent transferred his ownership in the vehicle named in the policy, he no longer had an insurable interest and the Personal Protection Insurance coverage automatically terminated. An insurable interest in property is broadly defined as being present when the person has an interest in property, as to the existence of which the person will gain benefits, or as to the destruction of which the person will suffer loss. *Crossman v American Ins Co,* 198 Mich 304, 309, 164 NW 428 (1917). Plaintiff would apply this principal in the automobile context by relying upon *Payne v Dearborn National Casualty Co*, 328 Mich 173, 177, 43 NW 2d 316 (1950), for the proposition that automobile insurance is entirely dependent on ownership by the named insured of the automobile described in the policy, and that there is no insurance separate and distinct from ownership of the automobile. Consequently, Plaintiff argues that since Plaintiff's decedent did not have an automobile on the date of the accident, he could not have no-fault automobile insurance as a matter of law because he had no insurable interest in an automobile. [*Madar*, 152 Mich App at 737-738.]

The Court of Appeals **rejected** this argument, though, relying upon the Michigan Supreme Court's decision in *Lee v DAIIE*, 412 Mich 505, 315 NW 2d 413 (1981), in which the Michigan Supreme Court made it clear that:

> Our decision in this case rests, in the last analysis, upon our recognition that it is the policy of the no-fault act that persons, not motor vehicles, are insured against loss. [*Id.* at 509.]

After recognizing that PIP benefits are intended for the benefit of persons, not vehicles, the Court of Appeals had no difficulty rejecting the application of the "insurable interest" arguments in the context of a PIP claim:

> Thus, there is no requirement that there be an insurable interest in a specific automobile since an insurer is liable for personal protection benefits to its insured regardless of whether or not the vehicle named in the policy is involved in the accident. A person obviously has an insurable interest in his own health and well-being. This is the insurable interest which entitles person to personal protection benefits regardless of whether a covered auto is involved. [*Madar*, 152 Mich App at 739.]

As a result, Mr. Madar's personal no-fault insurer, AAA, occupied the highest order of priority for payment of his no-fault benefits, even though he no longer had an insurable interest in the motor vehicle that was being insured under the policy.

The "insurable interest" argument may succeed in cases where the injured Claimant has no relationship whatsoever to the named insured. However, for the reasons more fully discussed in the next section, it is usually not necessary to resort to an "insurable interest" argument if the claim can be denied based on a straight priority analysis. This was the situation in the recent, unpublished Michigan Court of Appeals' decision in *Bracy v Farmers Insurance Exchange*, unpublished per curiam opinion of the Court of Appeals, issued September 19, 2019 (Docket No. 341837); 2019 WL 4553433. In *Bracy*, the plaintiff was struck by a motor vehicle owned and operated by one Yolanda Nichols, while a pedestrian. Because the pedestrian, Bracy, did not have an automobile of her own, she filed a claim for no-fault benefits with the Michigan Assigned Claims Plan, which assigned the claim to Farmers Insurance Exchange. Further investigation showed that at the time of this occurrence, Ms. Nichols' motor vehicle had been listed on a policy of insurance issued by GEICO Indemnity Company to her son, Marcus. However, Marcus had no ownership interest in his mother's motor vehicle. Furthermore, his mother did not reside with her son, either. Therefore, the issue before the Court was whether or not GEICO Indemnity Company was the insurer of the "owner" of the motor vehicle (Yolanda) involved in the accident with the plaintiff. The lower court determined that GEICO did, in fact, occupy the highest order of priority, and GEICO appealed.

On appeal, the Court of Appeals reversed the decision of the lower court and remanded the case back to the lower court with instructions to grant summary disposition in favor of GEICO. In doing so, the Court of Appeals first determined that although GEICO undoubtedly insured the motor vehicle, it did not insure the owner, registrant or operator of the motor vehicle, under its policy terms. (This argument will be explored later in the next section). However, it then addressed the "insurable interest" raised by GEICO. After first observing that most of the cases where the "insurable interest" argument had been struck down involved owners or potential owners of the involved vehicle, the Court of Appeals distinguished those cases by noting that here, GEICO's named insured, Marcus, had no "insurable interest" in his own health or well-being with regard to

insuring his mother's vehicle. As stated by the Court of Appeals:

> Here, GEICO offered undisputed evidence showing that Yolanda was the sole titled owner and registrant of the Lumina when Marcus added it to his GEICO insurance policy in 2013. There is no evidence that Marcus had the use of the vehicle in a manner that might have afforded him the status of an owner under MCL 500.3101(2)(l). Nor did he undertake a contractual obligation to obtain insurance or have any intention of acquiring the vehicle as was the case in [*Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713, 635 NW 2d 52 (2001).] In addition, Marcus had his own insurance and was not a member of Yolanda's household, who could potentially turn to her insurance as a resident relative under MCL 500.3114(1), so his interest in protecting his own health and well-being could not form the basis of an insurable interest in the Lumina. There is simply no evidence that Marcus had a recognized insurable interest, and Farmers has offered no argument as to what type of alternative interest Marcus may have had that would support the issuance of an insurance policy covering the Lumina. Because Marcus had no insurable interest, the policy was void with respect to the Lumina… and the trial court erred by granting summary disposition in favor of Farmers because GEICO did not issue a valid policy from which Bracy could receive PIP benefits under MCL 500.3115(1).

The scenario posited above probably falls somewhere in between *Madar, supra* and *Bracy, supra*. That is, we are dealing with whether or not Jack and Diane could potentially have an "insurable interest" in the "health and well-being" of their son, in the event that he was injured in a motor-vehicle accident. As a result, I would exercise caution about using an "insurable interest" argument to void a policy in cases involving parental named insureds or their children, and reserve those arguments for cases involving complete "strangers to the insurance contract." As will be noted in the next section, it is simpler to deny the claim based upon a straightforward application of the priority provisions set forth in MCL 500.3114(1) and MCL 500.3114(4). In this regard, the recent no-fault amendments do not alter this analysis.

## Application of Priority Provision

The Court of Appeals' decision in *Stone v Auto-Owners Ins Co,* 307 Mich App 169, 858 NW 2d 765 (2014) is strikingly similar to the facts involved in our scenario. The *Stone* decision, released a few month earlier than *Barnes,* has been largely ignored because by utilizing the argument in *Barnes*, no-fault insurers were able to escape responsibility from paying no-fault benefits altogether in situations where the owner or registrant himself had failed to insure the vehicle in his or her own name. In *Stone*, Stephanie Stone was killed in an automobile accident while operating a motor vehicle that was owned and registered in her name. Neither the decedent Stephanie Stone nor her husband had an insurance policy on her vehicle. Rather, the widower's parents, John and Linda Stone, had added Stephanie's motor vehicle to their existing policy with Auto-Owners two months before the subject accident. Both the widower and the decedent had been listed as drivers under his parent's auto policy since 2008. However, the named insureds were listed as his parents, John and Linda Stone. There was an issue as to whether or not the agency knew that the vehicle was owned by Stephanie Stone. The lower court determined that Auto-Owners was obligated to afford coverage because it had accepted the premiums for the vehicle from John and Linda Stone, and that through the agency, it knew that Stephanie Stone did not live with them. Auto-Owners appealed.

On Appeal, the Court of Appeals reversed and, in doing so, applied a straightforward priority analysis. First, the Court of Appeals observed that neither the widower nor the decedent were domiciled relatives with Auto-Owners' named insured, John or Linda Stone. Despite the fact that they had both been listed as drivers, the Court of Appeals noted that pursuant to its earlier decisions in *Transamerica Ins Corp v Hastings Mutual Ins Co*, 185 Mich App 249, 460 NW 2d 271 (1990), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 333 NW 2d 322 (1983), simply being designated as a driver under a policy did not convert the drivers into a "named insured." Therefore, Plaintiff was simply not eligible for benefits under MCL 500.3114(1), the "general rule" of priority for payment of no-fault benefits.

Plaintiff then tried to argue that he was eligible for benefits under MCL 500.3114(4), because Auto-Owners Insurance Company was the insurer of the "owner" of the motor vehicle Stephanie Stone was occupying at the time of the accident – Stephanie herself. After reviewing the policy language at issue, the Court of Appeals rejected this argument, noting that there was nothing in the policy that would have extended coverage beyond the "named insured" — John and Linda Stone. Therefore, MCL 500.3114(4) had no application to this claim, either.

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However, for the reasons more fully discussed in the next section, it is usually not necessary to resort to an "insurable interest" argument if the claim can be denied based on a straight priority analysis.

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Finally, the Court of Appeals rejected the argument that the policy should be reformed, noting that because the agent was an independent agent, the insurance company was not bound by whatever the agent may have known about the true ownership of the vehicle being insured under the policy.

This rationale has been upheld in a couple of unpublished Court of Appeals decisions. For example, in *Culbert v Starr Ind and Liability Co,* unpublished per curiam opinion of the Court of Appeals, issued July 16, 2015 (Docket No. 320784); 2015 WL 4374139, one Tearra Mosby and her two companions were injured in an automobile accident while Ms. Mosby was driving her vehicle. Ms. Mosby did not have an auto policy of her own at the

time of the accident. However, her ex-boyfriend, Traves Fudge, had added the vehicle to his policy with Starr Indemnity and Liability Company. However, only Fudge was listed as the named insured on the policy, but both Mosby and Fudge were listed as drivers. In the Application for Insurance, Fudge represented that he owned all the vehicles listed in the application. However, there was no dispute that the owner of the involved vehicle was Mosby, not Fudge. All three Plaintiffs sued Starr Indemnity Company for their no-fault benefits. The lower court determined that all three individuals were entitled to claim benefits through Starr Indemnity Company and Starr appealed.

On appeal, the Court of Appeals reversed the decision of the lower court and in doing so, engaged in a straightforward priority analysis. First, the court observed that none of the three Plaintiffs were entitled to benefits under MCL 500.3114(1), as they were not the named insureds under the policy, and were not relatives domiciled with the named insured. The Court of Appeals then recognized that even though Mosby had been listed as a driver under the policy, this fact did not convert Mosby into a "named insured" under the Starr Indemnity and Liability Company policy.

The Court then engaged in a lengthy analysis of the Starr Indemnity and Liability Company policy language to determine whether or not the policy could be construed to insure the "owner" of the vehicle, Mosby, under its policy language. Significantly, the Court of Appeals noted that the vehicle occupied by the three individuals did not even qualify as "your covered auto" under the policy, because it was not "owned by you" — the named insured! Because the Plaintiffs were not occupying a vehicle that met the definition of "your covered auto," none of the individuals were entitled to benefits under the policy. Simply put, Starr Indemnity Company could not be construed as the insurer of the "owner" of the motor vehicle that the three individuals were occupying at the time of the accident.

Similarly, in *Spectrum Health Hosp v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued February 23, 2017 (Docket No. 330914); 2017 WL 727216, Spectrum Health Hospital attempted to obtain payment of medical expenses incurred by one Angela Grant as a result of a motor-vehicle accident. Ms. Grant was driving a motor vehicle owned by her husband, Arthur Grant, but insured under a motor-vehicle policy obtained by Mr. Grant's mother, Vera Herington through Auto-Owners Insurance Company. At the time of the accident, neither Angela Grant nor Arthur Grant were living with his mother. However, the vehicle was added to Mr. Grant's mother's policy during a period of time when Arthur Grant was separated from Angela Grant and living with his mother. The lower court ruled in favor of the insurer, and Spectrum Health appealed.

On appeal, the Court of Appeals affirmed the decision of the lower court, and simply observed that:

> Angela Grant is not entitled to no-fault benefits under Auto-Owners policy because she is not a named insured, and she is not a relative domiciled in the household of the named insured, Vera Herington. MCL 500.3114(1). Angela Grant is also not entitled to no-fault benefits under Herington's insurance policy because Auto-Owners is not the insurer of either Arthur Grant, the owner of the vehicle, or Angela Grant, its operator. MCL 500.3114(4).

Again, a straightforward priority analysis was sufficient to deny the claims in all three cases.

### *Dye v Esurance Property and Casualty Insurance Company*

But isn't John, as the titled owner of his motor vehicle, disqualified because he didn't insure it – his parents did. Until July 11, 2019, the answer would have been, "yes," based upon the Michigan Court of Appeals' decision in *Barnes, supra*. In *Barnes*, the co-owner of a motor vehicle attempted to have the vehicle insured through a friend from church, under his policy with State Farm. The co-owner was subsequently involved in a motor vehicle accident while driving the vehicle. She turned to State Farm for payment of her benefits. State Farm denied the claim on the basis that (1) the co-owner of the vehicle was not the "named insured" under the State Farm policy, and (2) because there was nothing in the State Farm policy language that would have rendered State Farm as the insurer of the "owner" of that vehicle. After all, State Farm's named insured had no ownership whatsoever in that vehicle. The plaintiff then turned to the Michigan Assigned Claims Plan, which had assigned the claim for Farmers Insurance Exchange. Farmers Insurance Exchange denied the claim on the basis that as an "owner" of the motor vehicle, the plaintiff was required to insure it in her own name. Because she failed to insure the vehicle in her own name, she was disqualified from recovering benefits. The Court of Appeals ruled in favor of Farmers Insurance Exchange. Thereafter, insurers routinely took the position that even though a vehicle may have been insured by a third party, coverage was denied because it was not the owner or registrant who insured it.

However, on July 11, 2019, the Michigan Supreme Court issued its decision in *Dye v Esurance Property and Casualty Ins Co*, 504 Mich 167, 934 NW 2d 674 (2019). In a 5-1 decision, authored by Justice Zahra, the Supreme Court observed that MCL 500.3101(1) only requires that the owner of a vehicle "maintain security" on that vehicle, but does not state how the owner must "maintain" insurance. All that is required is that the vehicle itself be insured and, in *Dye*, there was no doubt but that the vehicle was insured at the time of the accident. As to **where** the injured party would turn to for payment of the benefits, the matter was remanded back to the circuit court with instructions to apply an earlier settlement agreement that had been reached between the two disputing insurers, Esurance Property and Casualty Insurance Company and GEICO Indemnity Company.

In *Dye*, the plaintiff had been injured while occupying his own motor vehicle, which he had asked his father to register and insure for him. His father obtained the insurance through Esurance. The plaintiff's wife owned the motor vehicle that was insured by GEICO. In fact, GEICO and Esurance had reached a tentative agreement whereby the insurers agreed to pay the benefits on a 50/50 basis. Before the settlement agreement could be finalized, though, the Michigan Court of Appeals released its published decision in *Barnes, supra*, at which point Esurance took the position that because the plaintiff was operating a vehicle that

he owned, but which was not insured in his name, but was insured under his father's name, the plaintiff was disqualified from recovering benefits. Although the Court of Appeals had affirmed Esurance's position, based upon its earlier, published decision in *Barnes, supra,* the Supreme Court reversed and, in overruling *Barnes, supra,* the Court simply noted that the no-fault act only requires that the owner or registrant "maintain" insurance on the vehicle. The act does not say **how** that insurance is to be "maintained." Because the plaintiff had "maintained" insurance on his motor vehicle, through his father's insurance policy, the Supreme Court concluded that the plaintiff was not disqualified from recovering benefits under MCL 500.3113(b).

Justice Clement dissented and posited a situation where a vehicle may be "insured" but the insurance may not cover the "owner" of that vehicle:

> To illustrate, let's say plaintiff hit a pedestrian not covered by a personal or household policy. The priority scheme, MCL 500.3115(1) directs the hypothetical pedestrian to submit a claim to 'insurers of owners… of motor vehicles involved in the accident,' but since plaintiff has no insurer, the pedestrian's claim would be outside the priority scheme, and he or she would be limited to recovery through the Assigned Claims Plan. The pedestrian's PIP benefits would then be funded through increased rates for all policy holders, as though the pedestrian were a hit and run victim.

In my opinion, Justice Clement's analysis, regarding the end result, is spot on. In the scenario referenced above, the vehicle's owner, John, properly "maintained" insurance on the vehicle, through Jack and Diane's policy. As a result, he is not disqualified from recovering benefits under MCL 500.3113(b). However, utilizing the straightforward priority analysis discussed above, he now turns to the Michigan Assigned Claims Plan for his benefits — just as predicted by Justice Clement in her dissent! This is because John is not domiciled with his parents, Jack and Diane and, as a result, there is no coverage available under MCL 500.3114(1). Jack and Diane are no longer "owners" of John's motor vehicle, either. Therefore, under the former version of MCL 500.3114(4)(a), there is no coverage through Jack and Diane's insurer, as the insurer is no longer the insurer of the **owner** of the motor vehicle occupied by John. Therefore, John turns to the Michigan Assigned Claims Plan for payment of his no-fault benefits. Under the new reform amendments, John likewise goes directly to the Michigan Assigned Claims Plan, as he is no longer domiciled with his parents.

In the majority opinion, Supreme Court made reference to the potential for fraud, but apparently gave it short shrift:

> GEICO also raises the specter of fraud to favor its interpretation by claiming that
>
> > For the system to work for all members of the pool, risk must be allocated and managed as accurately as possible. Through MCL 500.3101(1), the Michigan legislature recognized that what matters most for no-fault insurance is the identity of the vehicle owner or registrant. Otherwise, vehicle with high risk factors would be able to avoid premiums applicable to the risk they present by adding their vehicles to the policies of others, including friends and even roommates. And the problem is not resolved owners of other vehicles to be listed as drivers because listed drivers do not fill out applications; they do not receive the same scrutiny as an applicant.
>
> First, as plaintiff rightly points out, there is no indication of fraud in this case. Second, "[t]his court has been clear that the policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422, 697 NW 2d 851 (2005). In other words, the specter of fraud does not distract us from our goal of interpreting the applicable statutory language to determine the rule of law. Third, the Legislature clearly understands how to enact laws to mitigate fraud within the no-fault act. [*Dye*, 504 Mich 192 n. 66.]

In light of this footnote, the author cannot help but wonder if the Supreme Court is casting some doubt on an insurer's ability to rescind a policy for fraud, notwithstanding its holding in *Bazzi v Sentinel Ins Co*, 502 Mich 390, 919 NW 2d 20 (2018), decided one year earlier.

In any event, the court's holding in *Dye, supra* was recently applied by the Court of Appeals in *Howard v Progressive Michigan Ins Co,* unpublished per curiam opinion of the Court of Appeals, issued October 15, 2019 (Docket No. 343556); 2019 WL 5198611, in which the court determined that the plaintiff was eligible for no-fault benefits while driving a motor vehicle that he owned, but which was insured by his wife under her policy with Progressive.

## Concluding Remarks

It will be interesting to see how subsequent appellate court decisions apply the Supreme Court's decision in *Dye*. The Supreme Court seems to be saying that so long as there is insurance on the vehicle itself – regardless of who is insuring it – the owner or registrant of a motor vehicle who is injured while occupying that vehicle will be entitled to benefits. In light of the recent order from the Insurance Director, 19-049, even if the owner, John, ends up filing the claim with the Michigan Assigned Claims Facility, he will at least be able to recover lifetime, unlimited benefits if the loss occurs prior to July 2, 2020. After that date, though, he will be capped at recovering "allowable expense" benefits at $250,000.00, regardless of whether or not Jack and Diane may have opted for higher coverage limits on their own policy, covering John's vehicle. It will also be interesting to see if the Legislature tweaks these amendments as the effective date draws nearer.

# Supreme Court

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As winter falls upon us, the Michigan Supreme Court clarifies elements of property law with a summer-themed holding. In the only opinion issued by the Michigan Supreme Court this past quarter, the Court unanimously reaffirmed well-established law that an easement holder cannot make improvements to the servient estate if the improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement. Likewise, the Court reaffirmed that the conveyance of an easement gives to the grantee all the rights that are incident or necessary to the reasonable and proper enjoyment of the easement. In this lawsuit, the Court analyzed whether the scope of an easement necessarily included the ability to bring a boat trailer to the water's edge. The Court held in favor of summer-time adventures, finding that because the plaintiff had an easement to launch boats, including by boat trailer, and the ability to perform that action was necessary to the reasonable and proper enjoyment of the easement, he had the right to regrade the shoreline of his parcel for easier access to the water. Despite its seemingly narrow holding, this opinion emphasizes the importance of careful consideration of a document's unambiguous, clear language when determining its scope and the harm in relying on extrinsic evidence when it is not appropriate to do so. *Maniaci v Diroff*, ___ Mich __; ___ NW2d ___ (Nov. 21, 2019) (Dockt No. 158005); 2019 WL 6249561.

The Michigan Supreme Court's holding seems narrow at first glance, yet the Court of Appeals' error in reasoning offers insight into mistakes attorneys commonly make in practice.

**Facts:** Pursuant to a June 18, 2015 consent judgment, defendants Thomas and Mandy Diroff conveyed an easement across a parcel of land for ingress and egress access to and from the Tittabawassee River to plaintiff Jeffrey Maniaci. The judgment specified that the easement "may also be used for the temporary mooring and *launching of watercraft*, including by boat trailer, but may not be used for non-temporary mooring, docks, and/or wharfs." The plaintiff desired the ability to back a boat trailer all the way to the water's edge, which he believed required him to regrade the shoreline. The plaintiff believed the scope of the easement included the backing of the boat trailer to the water's edge. The Court of Appeals determined that regrading the shoreline was outside the scope of the easement, in part, because of evidence that the shoreline remained unchanged from the commencement of this litigation and evidence demonstrating that the issue of regrading the shoreline did not arise until long after entry of the consent judgment.

**Ruling:** The Michigan Supreme Court reversed the judgment of the Court of Appeals, holding that the unambiguous terms of the easement provided an express right to back a boat trailer to the water's edge. The Court of Appeals erred when it relied on extrinsic evidence despite the easement's unambiguous language. The Court also referred to the lay dictionary definition of the word "launch," which states "to set (a boat or ship) in the water." Because in order to "set a watercraft in the water, including by boat trailer," one must be able to bring a boat trailer at least to the water's edge, the scope of the easement must have included the ability to do so. The Court further explained that regrading of the shoreline was "necessary to the reasonable and proper enjoyment of the easement" as at the time of oral argument it was not possible to set a boat in the water by boat trailer on the parcel, yet this was a permitted use within the scope of the easement. By improving the land and regrading the shoreline, the plaintiff would be able to facilitate easy access to the water and launch boats by boat trailer, as the easement expressly allows. Ultimately, the Court reversed the judgment of the

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Court of Appeals, vacated the portion of the circuit court's order denying the plaintiff's request to regrade the slope of the parcel, and remanded to that court for further proceedings consistent with the opinion.

**Practice Note:** The Michigan Supreme Court's holding seems narrow at first glance, yet the Court of Appeals' error in reasoning offers insight into mistakes attorneys commonly make in practice. The defendants' reference to extrinsic evidence was misplaced and inappropriate given the clear and direct language included in the easement. The opinion highlights a simple, but important concept – remain aware of unambiguous language and fundamental principles of law. Although the defendants offered creative arguments in their attempt to stop the regrading of the shoreline, they ultimately ignored well-established principles of law regarding easements, a basic lay dictionary definition, and the actual, clear and direct language of the easement itself. While their arguments resulted in a temporary victory, this case reminds us to remain cognizant of even the most basic concepts when advocating for our clients to avoid a waste of judicial resources, time, and effort.

# 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.

## ADOPTED AMENDMENTS

**2002-37 – Amendments to E-Filing Rules**

| | |
|---|---|
| Rule affected: | Numerous |
| Issued: | September 18, 2019 |
| Effective: | January 1, 2020 |

The proposed amendments are a continuation of the process to implement a statewide e-filing system. There are numerous proposed changes with, particularly with respect to a request to change venue in general civil and domestic cases.

# Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*
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Michigan Defense Trial Counsel has filed two amicus briefs with the Supreme Court addressing premises-liability issues and, more specifically, different aspects of the distinction between premises-liability claims and ordinary-negligence claims.

MDTC's brief in *Smith v City of Detroit* was authored by Elizabeth A. Favaro of Giarmarco, Mullins & Horton, P.C.[1] The plaintiff in *Smith* alleged that he was injured while riding his bicycle on a sidewalk in the City of Detroit when he was suddenly thrown forward over the handlebars. The plaintiff claimed that the fall was caused by a missing slab of concrete in the sidewalk. An ongoing sidewalk restoration process was underway, which included updating the sidewalk in the area where the accident occurred. The Supreme Court, in its order granting oral argument on the application, indicated that it will be addressing whether the defendant subcontractor on the project maintained sufficient "possession and control" over the sidewalk to establish that the plaintiff's claim sounds in premises liability rather than ordinary negligence.

MDTC's brief submitted that possession and control is established where the injury occurred while the work on the land remained in the defendant subcontractor's "charge." To find that the work on the land is in the contractor's "charge," any evidence of ongoing work has been found to be sufficient. The best evidence of ongoing work in the *Smith* case was the missing concrete slab itself, indicating that the work was incomplete and ongoing.

This formulation of "possession and control" is consistent with the Restatement 2d of Torts, § 384, consistent with established Michigan case law, and should be adopted by the Supreme Court.

MDTC's brief submitted that possession and control is established where the injury occurred while the work on the land remained in the defendant subcontractor's "charge."

Jonathan B. Koch of Collins Einhorn Farrell PC authored MDTC's brief in *Scola v JP Morgan Chase Bank*.[2] The plaintiff in *Scola* was injured when the car in which he was a passenger turned the wrong way out of Chase Bank's parking lot on a one-way street and was involved in a head-on collision. The plaintiff argued that the claim was one of ordinary negligence since the accident occurred on the street, rather than on the defendant bank's property, and because the hazard posed by oncoming traffic was not a "condition on the land." The Supreme Court, in its order granting leave, asked the parties to address whether the claim sounds in premises liability or ordinary negligence.

Contrary to the plaintiff's claims, MDTC, in its amicus brief, submitted that the claim sounds in premises liability. Examining the "entire claim" reveals that the plaintiff in fact alleged that the defendant bank had a duty to erect warning signs and other design elements to alert drivers that they were exiting onto a one-way street. The plaintiff alleged that the defendant bank's failure to do so created the dangerous condition. Viewed in this light, the plaintiff's claim sounds exclusively in premises liability.

As a premises-liability claim, the Court of Appeals held that the open-and-obvious doctrine applied and barred the plaintiff's claim. While the Supreme Court did not request supplemental briefing on the open-and-obvious doctrine, or its application if the claim sounded in premises liability, the plaintiff nonetheless urged the Supreme Court to reconsider the doctrine in favor of "a unitary standard of care" in which there

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is no distinction between the types of negligence tort claims alleged. Addressing this issue, MDTC's brief submitted that the plaintiff was essentially urging the Court to overrule numerous prior decisions interpreting and applying the doctrine. However, application of the rules of *stare decisis* weigh against overruling the Court's prior decisions defining and applying the open and obvious doctrine.

The Supreme Court ordered oral argument on the application in these two cases and both will be argued during the Court's December 11, 2019 session.

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

**Endnotes**

1 Supreme Court Docket No. 158300.

2 Supreme Court Docket No. 158903.

MICHIGAN DEFENSE
# QUARTERLY

## Publication Schedule

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

For information on article requirements,
please contact: Michael Cook at michael.cook@ceflawyers.com

# MEMBER NEWS

## Work, Life, and All that Matters

**Simmons Attains Master of Jurisprudence Degree in Federal Indian Law**

Jana Simmons (Wilson Elser, Of Counsel-Michigan) has earned the University of Tulsa College of Law's Attorneys prestigious Master of Jurisprudence in Federal Indian Law, a specialized degree in federal Indian law, tribal law and governments, and Native American history and federal policy. Jana is a civil defense litigator with a focus on federal Indian law and tribal law. She also is engaged in assisting tribal governments with drafting laws, preventative risk and liability initiatives, and internal investigations. She recently was named to the Advisory Board of the National Native American Cannabis Association. "My professors were the very best and brightest scholars in Indian Country," said Jana. "It was exciting to learn from them and I am especially grateful for the insights they shared with me."

***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).*

**Michigan Defense Trial Counsel, Inc.**
**The Statewide Association of Attorneys Representing the Defense in Civil Litigation**

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Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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Please send notices and any suggestions to Michael Cook, Editor, at info@mdtc.org. Checks should be made payable to "Michigan Defense Trial Counsel."

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# MDTC Schedule of Events

## 2020

| | |
|---|---|
| **Tuesday, March 19** | Legal Excellence Awards – Gem |
| **Thursday, April 30** | Board Meeting – Lansing – Foster Swift |
| **Thursday, June 18- June 19** | Annual Meeting & Conference – Treetops Resort, Gaylord |
| **Friday, September 11** | Golf Outing - Mystic Creek, Milford |
| **Thursday, October 8** | Meet the Judges- Sheraton Detroit Novi, Novi |
| **Wednesday, October 21- 24** | DRI Annual Meeting – Washington DC |
| **Thursday, September 24** | MDTC Board Meeting – Detroit Golf Club, Detroit |
| **Thursday, September 24** | Past Presidents Dinner – Detroit Golf Club, Detroit |
| **Friday, November 6** | Winter Conference – Sheraton Detroit Novi, Novi |

## 2021

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

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