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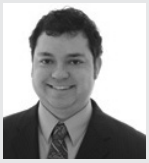

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President's Corner

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Terence Durkin's practice blends labor and employment law with medical malpractice and general litigation. His years of experience as a litigator gives him a unique ability to help clients sort through the challenging and ever-changing world of labor and employment rules and regulations. Clients come to Terence and the firm's labor and employment practice group for guidance because they understand the priorities and risks involved with managing a diverse workforce, creating contracts, and implementing the best policies and procedures.

Terence and the Kitch labor and employment practice group offer a full array of employment and labor law services, including dispute resolution in all types of forums: the courts, mediation panels, arbitration, and administrative agencies. Clients rely on Terence to help them navigate collective bargaining, contract administration, and grievance and arbitration proceedings, and he often participates with them in those proceedings.

Terence plays an active role in the community by serving on the Executive Board of the Michigan Defense Trial Counsel, chairing the Ascension Providence Foundation, and being a member of the Plymouth Rotary. Most recently, he was elected to the Board of Directors and the Core Leadership Team of Oak Mac SHRM (Society of Human Resource and Management).

Terence received his Bachelor of Arts in political science from Millikin University in Decatur, Illinois, and his Juris Doctorate from Western Michigan University Cooley Law School, where he was Article Editor of the Journal of Practical and Clinical Law. He is licensed to practice law in Michigan as well as the United States District Courts of Eastern and Western Michigan.

He is married to Jessica and lives in Northville.

As the nation continues to grapple with issues regarding the COVID-19 pandemic, businesses have had to make difficult decisions on how they operate to ensure the safety of their employees and the public. These difficult decisions have included canceling events or moving them to a digital format. The MDTC has not been immune from these decisions.

The MDTC canceled its annual summer meeting, golf outing, Past Presidents' Dinner and Meet the Judges event. It was determined that holding these events would not be in the best interest of its members and attendees. Despite these numerous cancellations, the MDTC held its Fourth Annual Legal Excellence Awards as a virtual event on August 20, 2020 (I refer to this event as the first and hopefully only virtual Legal Excellence Awards).

The Legal Excellence Awards reminds us what Michigan lawyers stand for in their pursuit of justice. Each year, the MDTC offers the Legal Excellence Awards to honor members of the legal community. These members embody the legal profession's spirit of service: high standards of ethics, justice, honor, civility, professionalism, and advocacy skills. This year the event emcee was Roop Raj from Fox 2 Detroit. The following recipients received awards:

Respected Advocate Award – Jody L. Aaron of McKeen & Associates, P.C.

Judicial Award of Excellence – Hon. Christopher P. Yates of the 17th Circuit Court

Golden Gavel Award – Javon L. Williams of Secrest Wardle

John P. Jacobs Appellate Advocacy Award – Susan H. Zitterman of Kitch Drutchas Wagner Valitutti & Sherbrook

Excellence in Defense Award – Patricia Nemeth of Nemeth Law P.C.

Please join me in congratulating these most worthy recipients.

This virtual event could not have been possible without the efforts of the planning committee, sponsors, and Madelyne Lawry and her staff at Shared Resources. I am truly grateful for all of your efforts.

The MDTC will continue with virtual programming later this year when it holds its winter meeting. This year, unlike its meetings in the past, it will be a three-part session: Part 1 on October 2, 2020, Part 2 on November 6, 2020, and Part 3 on December 4, 2020. Each session will be from 12:00 p.m. to 1:30 p.m. The topic is Mastering the Craft, Winning Methods in the Dying Art of Trial Advocacy. I encourage you to sign up for these very interesting and educational sessions where you can improve your performance as an advocate at trial.

As always, if there is anything that you think we can do better or have any suggestions for virtual or future in-person events, please do not hesitate to let me know.

The Legal Excellence Awards reminds us what
Michigan lawyers stand for in their pursuit of justice.

Feeling Blue: Federal Court Blue-Pencils Non-Compete Agreement and Enforces Modified Version

By: Javon R. David, *Butzel Long*

Executive Summary

Employee non-compete agreements generally are valid in most states. A failure to carefully craft a reasonable, narrowly tailored non-compete agreement, however, may result in a court modifying the contract to manage overbroad language contained in the non-compete agreement.

A recent case in the United States District Court for the Eastern District of Michigan is a prime example of how a court can blue-pencil an employer's non-compete agreement and enforced a modified version of the agreement.

Introduction

Non-compete agreements generally are valid and enforceable in most states. However, drafters of non-compete agreements must exercise caution to ensure the restrictions imposed are reasonable and narrowly tailored. Failure to carefully craft a reasonable, narrowly tailored non-compete agreement can have devastating consequences. A court may find the overbroad agreement to be unenforceable, or the court may elect to blue-pencil overbroad language and enforce a *modified* agreement. In the recent case of *Konica Minolta Bus Sols, USA, Inc v Lowery Corp,*[1] the federal district court blue-penciled the plaintiff's non-compete agreement and enforced a modified version, serving as a cautionary tale for businesses, non-compete drafters, and litigators alike.

In *Konica*, the plaintiff, Konica Minolta Business Solutions ("Konica"), and the defendant, Applied Imaging Systems ("AI"), were direct competitors in the copier industry. Each company engaged in the sale, lease, and maintenance of printing devices in Michigan. When AI expanded its business into the Detroit market in 2011, it hired Konica's director of sales for the Detroit area and five other Konica sales employees. In the years that followed, AI hired additional employees from Konica. Many of those employees were subject to a Confidential Information and Employment Agreement ("agreement"), which precluded them from soliciting Konica customers, disclosing confidential information, and/or performing certain tasks on behalf of a Konica competitor.

In 2015, Konica filed suit against several former employees for breach of contract, tortious interference with contractual relationship, misappropriation of trade secrets, and civil conspiracy. The claims largely stemmed from the Agreement, which contained a choice of law provision making New York law govern the contractual claims. The court issued several rulings, which are addressed, in turn, below. Of significance is the court's decision to blue-pencil portions of Konica's non-compete agreement and enforce a modified agreement.

Breach of Contract

Konica alleged breach of contract against all the defendants except its former director of sales, Steven Hurt ("the contract defendants"). The contract defendants moved for partial summary judgment on the breach of contract claim and asserted that the that (1) the non-compete and non-solicitation provisions were overbroad and unenforceable; (2) the protection given to the alleged confidential information was overbroad in scope and duration, and; (3) certain undefined terms in the contract rendered the agreement ambiguous. Konica also moved for partial summary judgment on all counts in its complaint.

Javon David is a litigation attorney based in Butzel Long's Bloomfield Hills office. She dedicates her practice to defending clients in the areas of Commercial Litigation, Toxic Torts, and Media Law.

The Non-Compete and Non-Solicitation Agreements were Reasonable in Scope and Duration

In reviewing the reasonableness of the agreement, the court ultimately decided to forgo an "all or nothing" approach. Instead, the court selected to "blue-pencil" the restrictive covenant language, making the agreement enforceable *as modified*. Under New York law, "where courts find restrictions to be unreasonable… they may 'blue pencil the covenant to restrict the term to a reasonable limitation, and grant partial enforcement for the overly broad restrictive covenant.'"[2]

Before blue-lining the restrictive covenant, the court found that the non-compete and non-solicitation provisions of the agreement were reasonable in duration and scope. The agreement provided for a *one-year* duration of non-competition, which New York courts have routinely upheld as reasonable.[3] In addition, the agreement only temporarily prohibited the contract defendants from providing competing services, and AI was still free to compete in the eastern Michigan market so long as the contract defendants were not involved.[4]

As for the scope of the agreement, the contract defendants argued that the agreement was "void for overbreadth where it prohibits former [Konica] employees from 'directly or indirectly rendering services' in any geographical territory in which they 'performed duties' while at [Konica]."[5] The court noted that this argument relies on the erroneous misstatement and interpretation of the phrase "performed duties."[6] The agreement states "performed my duties," rather than the generalized "performed duties." The court believed the additional term "my" sufficiently limited the scope of the agreement to each contract defendants' assigned territory.

The Court Blue-Penciled the Non-Compete and Non-Solicitation Provisions

While the court found that the non-compete and non-solicitation provisions of the agreement were reasonable in duration and geographic scope, the contract defendants sufficiently established that certain portions of the agreement were overbroad. As a result, the court partially enforced three aspects of the non-solicitation agreement and found as follows: (1) the agreement was overbroad to the extent that it prohibited solicitation of prospective or potential clients of Konica; (2) the court refused to enforce the non-solicitation of potential customers provision because the non-disclosure of confidential information provision makes this provision unnecessary; and (3) the court **removed** language that precluded contract defendants from "communicating with" customers, noting that such language was unreasonable as it prohibited *any* communication—even non-work-related communication.

The court also blue-penciled the phrase "or whose identity I have learned" from the non-solicitation provision, which limited enforcement of the provision to customers whom the contract defendants dealt with while employed by Konica. In doing so, the court held that such phrases are overbroad to the extent they prohibited solicitation of prospective or potential customers of Konica. The court ruled that "case law is clear that 'protection of client relationships' does not justify prohibiting former employees from soliciting *potential* or *prospective* customers.'"[7]

The Perpetual Non-Disclosure/ Confidentiality Provision was Enforceable

The contract defendants also argued that that agreement's non-disclosure/ confidentiality provision was overbroad because it was perpetual in duration. In finding the perpetual confidentiality provision to be enforceable, the court determined that the "open ended nature of the non-disclosure of confidential information provision did not, by itself, mean the restriction is overbroad or unenforceable."[8] Indeed, "protecting trade secrets and truly confidential information does not have to be time limited in every instance where the covenant does not otherwise prevent a former employee from pursuing his or her livelihood or interfere with competition."[9]

Since the agreement did not prohibit the contract defendants from using publicly available information related to Konica's customers and business, there was no reason to believe the agreement would prevent the contract defendants from pursuing their livelihood or competing with Konica after the one-year non-compete and non-solicitation restrictions expired. *Id.*

The Agreement was Unambiguous and Enforceable *as Modified*

In evaluating the agreement's enforceability, the court reviewed whether the agreement was ambiguous, as alleged by the contract defendants. Because the contract defendants failed to show that an essential term was undefined, the agreement was clear, unambiguous, and enforceable as written.[10] Further, even if there were inconsistencies among the provisions of the agreement, the court held that such inconsistencies would not render the agreement unenforceable because (1) the parties agreed on the essential terms; and (2) the more specific provisions (which were included in the agreement) would govern over the general clauses under longstanding principles of contract law.[11]

Since the court determined that the agreement was unambiguous and enforceable as written, the question then turned to whether the defendants breached the agreement. By signing the agreement, the contract defendants expressly agreed that they would (1) not call on any customer of Konica with whom they dealt with while employed by Konica; (2) forgo rendering direct or indirect services in their assigned geographic territories; (3) return all Konica property at the conclusion of their employment, including documents, records, and material related to Konica customers and business.

Konica set forth undisputed evidence that each of the contract defendants breached at least one or more of the agreement's above provisions. As such,

partial summary judgment was granted on two issues: (1) the agreement was valid and partially enforceable as modified; and (2) the contract defendants breached the agreement. The court denied Konica's request for summary judgment on damages since causation was not sufficiently established.

Tortious Interference with a Contractual Relationship

Konica asserted a claim for tortious interference with contractual relations against AI and Steve Hurt, its former director of sales who allegedly recruited the contract defendants. Michigan's substantive tort law applied to these claims. The court determined that Konica established the first two elements of tortious interference -- the existence of a contract and breach of that contract. The remaining issue was whether the breach was unjustifiably instigated by the defendants. Since AI and Konica could not establish that AI and Hurt solicited the contract defendants, the "**intentional** interference" element lacked support warranting summary judgment.

Trade Secrets/Misappropriation

Konica also alleged a claim for misappropriation under the Michigan Uniform Trade Secrets Act ("MUTSA") against the defendants. To establish a claim for misappropriation of trade secrets under MUTSA, a plaintiff must prove (1) it has a protectable trade secret; and (2) that the defendant improperly acquired, disclosed, or used its trade secret and knew, or had reason to know, that the trade secret was acquired by improper means.[12] Konica alleged that hundreds of its documents and files were misappropriated, including various customer lists and price lists. The court determined that Konica failed to identify any trade secrets with sufficient specificity, as required by the governing case law. As such, Konica was not entitled to summary disposition. Interestingly, the court ruled that, even if Konica identified its trade secrets with specificity, their claim still failed because their alleged trade secrets were not entitled to protection. Konica's pricing information were not trade secrets since the information contained in the documents were publicly available.

As for Konica's customer lists, the court found a question of fact existed as to whether Konica's customer lists were trade secrets, but indicated that Konica presented strong evidence that their customer lists were protectable trade secrets. Indeed, the customer lists contained more than just customer information; they included insight on how Konica builds its pricing and structures its sales territories. As such, the court found a question of fact existed as to whether the customer lists qualify as protectable trade secrets.

In sum, the court was only willing to grant partial summary judgment on two issues: (1) that the agreement was valid and enforceable as modified; and (2) that the contract defendants breached the agreement.

The *Konica* case serves as a cautionary tale for all involved in the drafting and enforcement of a non-compete agreement. Do not count on a judge to do the job for you– draft a non-compete agreement to be reasonable and narrowly tailored to avoid a ruling that the agreement is overbroad, and therefore, unenforceable or modifiable. Moreover, while a judge may have the power to partially enforce, or even modify, a non-compete agreement, he/she does not have to do so. The judge may simply rule that the agreement is unenforceable as written. Exercise caution in drafting and enforcing non-compete agreements; the failure to do so may result in a judge deciding the fate of your case – and business.

Endnotes

1 *Konica Minolta Bus Sols, USA, Inc v Lowery Corp,* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued July 7, 2020 (Case No. 15-11254); 2020 WL 3791601.

2 *Id*. at 5, citing *Poller v BioScrip, Inc*, 974 F Supp 2d 204, 229 (SDNY 2013).

3 *Id.* at 6 (citations omitted).

4 *Id.* at 8.

5 *Id.* at 7.

6 *Id.*

7 *Id*. at 8 (citations omitted).

8 *Id*. at 10-11.

9 *Id*. at 11 (citations omitted).

10 *Id.* at 12.

11 *Id*.

12 *Id*. at 18 (citations omitted).

U.S. Supreme Court Update: Qualified Immunity vis-à-vis Fourth Amendment Use of Force Claims

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

Executive Summary

Government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The U.S. Supreme Court has applied the doctrine of qualified immunity in excessive force cases in a way that affords breathing room to police officers and cautions against judicial second-guessing.

Timothy Mulligan specializes in legal research and writing, especially dispositive 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 $1 million, and won summary relief for an insurance company in a subrogation and commercial insurance coverage case also with seven figure damages. He has worked for a trial court as well as an appellate court, for which he authored dozens of authoritative published appellate opinions in civil cases. He is a published legal author on insurance coverage and tort reform. Mulligan practices at Cardelli Lanfear P.C., and does insurance defense and insurance coverage litigation.

There is new law from the United States Supreme Court on qualified immunity. The Court has been active in applying this doctrine, usually to shield law enforcement officers and prison officials from damages liability for excessive force claims under the Fourth Amendment and 42 USC 1983.

Qualified Immunity Generally.

Government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[1] A right is clearly established only where existing case law precedents demonstrate the existence of the right to be beyond dispute, such that "every reasonable officer would have understood that what he is doing violates that right."[2]

The protection afforded by qualified immunity includes mistakes in judgment by government officials, whether the mistake is one of fact or one of law.[3] Qualified immunity seeks to strike a balance between two competing factors: (1) vindicating constitutional guarantees; and (2) the fact that damages suits against government officials impose substantial social costs and may unduly inhibit officials in the discharge of their duties.[4]

On qualified immunity, a court considers only the facts that were knowable to the defendant officers.[5] The Court has made it clear that qualified immunity is a question of law for courts.[6] This is true even in the context of an excessive force claim.[7]

Police Use of Force Generally

A court's analysis in police conduct cases must allow for the fact that police officers are often forced to make split-second judgments in tense, uncertain, and rapidly evolving circumstances.[8] Among the split-second decisions they must make under those fleeting circumstances is the amount of force necessary in the particular situation.[9] The general factors for analysis of an officer's use of force in a given situation are: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[10]

The operative question in a Fourth Amendment excessive force case is whether a law enforcement officer's seizure is reasonable.[11] This is consistent with the text of the amendment. The Supreme Court reaffirmed this principle in the 2018 case of *Los Angeles Cty. v Mendez*[12] (discussed in further detail below). The reasonableness of the use of force is an objective inquiry judged from the perspective of a reasonable officer on the scene, not the 20/20 vision of hindsight.[13]

Qualified Immunity Provides Vigorous Protection.

A 2018 Supreme Court decision illustrates the protection provided by qualified immunity in the police use of force context. In *Kisela v Hughes*, Hughes had a knife in her hand and was behaving erratically. Hughes's roommate Chadwick was nearby. Police arrived, drew their weapons, and ordered Hughes to drop the knife. The officers did not know Chadwick was Hughes's roommate and believed Hughes was a threat to Chadwick. Chadwick said "take it easy" to Hughes and the officers, and Hughes appeared calm, but she did not acknowledge the officers' presence. One officer, defendant Kisela, apparently fearing for Chadwick's safety, opened fire on Hughes from behind a fence and shot her, non-fatally, four times.[14] Even under those ambiguous circumstances, the Supreme Court still held that Kisela was entitled to qualified immunity on a Fourth Amendment excessive force claim.[15]

Thus, even if an officer uses a high degree of force under questionable circumstances, her conduct may still be protected.[16] In the Supreme Court's 2017 decision in *White v Pauly*, police shot decedent through a house window while investigating an earlier road rage incident involving the decedent's brother. A defendant officer arrived late at an ongoing police action and witnessed shots being fired by one of several individuals in a house surrounded by other officers. The defendant shot and killed an armed occupant of the house without first giving a warning.[17] The plaintiffs alleged excessive force. The Supreme Court reversed lower courts and afforded qualified immunity because the officer did not violate a clearly established right.[18] It is a per curiam opinion in which all justices joined.

Mistakes as to the amount of force needed are covered. "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed."[19]

Qualified Immunity Affords Breathing Room To Police Officers And Cautions Against Judicial Second Guessing.

Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.[20] Not every push, pull, or shove, though it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.[21] It is inappropriate for a court in the quietude of chambers to second-guess the on-the-scene judgment of an officer.[22]

Even if law enforcement officers did violate a constitutional right, they can still enjoy qualified immunity.[23] In the Supreme Court's 2018 decision in *District of Columbia v Wesby*, the court stated that even if officers lacked probable cause to arrest partygoers, the officers may still enjoy qualified immunity.

This is because the issue of an officer's qualified immunity invokes a two-pronged inquiry. First, the court addresses whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right.[24] (This first step is not mandatory, but is often appropriate.)[25] Second, if a plaintiff has satisfied this first step, the court must decide whether the right at issue was clearly established at the time of the defendant's alleged misconduct.[26]

A Claimant Must Show That The Alleged Right Was "Clearly Established" In A Specific Context, Not As A General Proposition.

Courts may not define "clearly established law" at a high level of generality ("plaintiff had a right to be free from excessive force in effectuating an arrest"), but rather must focus on whether the "particular conduct" at issue is established to be violative of law.[27] The Supreme Court reaffirmed this in its 2017 decision in *Ziglar v Abbasi*. Qualified immunity shields an officers who decide that, even if constitutionally deficient, reasonably misunderstand the law governing the circumstances they confronted.[28]

In *Ziglar* the plaintiffs were alien detainees held on immigration violations in the wake of September 11. They brought a putative class action including a Fourth Amendment claim and a claim under 42 USC 1985, which forbids conspiracies to violate equal protection. The Fourth Amendment claim argued that the defendant detention facility wardens subjected them to punitive strip searches unrelated to penological interests. In relevant part, the Supreme Court held that the defendants (federal executive officials and the wardens) were entitled to qualified immunity vis-à-vis the civil rights conspiracy claim.[29]

In reaching that conclusion in *Ziglar*, the Court discussed qualified immunity on Fourth Amendment claims. The Court acknowledged that although the fourth amendment prohibits unreasonable searches and seizures, "it may be difficult for [a law enforcement] officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered."[30] Therefore, "the dispositive question is whether the violative nature of the *particular conduct* is clearly established."[31] Thus, even though the court in *Ziglar* only granted qualified immunity on the conspiracy claim, its discussion of qualified immunity vis-à-vis Fourth Amendment claim is helpful, and it certainly did not render a holding denying qualified immunity on the Fourth Amendment claim.[32]

The Supreme Court is active in enforcing the "clearly established" requirement. In the 2015 case of *Taylor v Barkes*, it held that any right of a prisoner to proper implementation of adequate suicide prevention goals was not clearly established.[33]

In the Supreme Court's 2015 decision in *Millenix v Luna*,[34] Millenix, a state trooper, pursued Leija, an intoxicated fleeing motorist, in a 25-mile high-speed chase. Twice during his flight, Lieja had threatened to shoot police officers. Millenix attempted to disable Leija's vehicle by shooting it, but Leija was shot and killed. His estate sued and alleged excessive force. The Fifth Circuit denied summary judgment based on qualified immunity. The Supreme Court reversed, holding that qualified immunity law may not define "clearly established law" at a high level of generality.[35]

Even where the facts are not entirely clear, summary judgment may be proper

where the plaintiff's evidence is thin, and the Supreme Court will uphold qualified immunity.[36] In *Salazar-Limon v City of Houston*, an officer shot the plaintiff because he saw him turn toward him and reach for his waist, though the reaching for the waist was disputed. Lower courts afforded the officer qualified immunity through summary judgment, and the Supreme Court denied certiorari.[37] Though a denial of certiorari is not substantive, even the justices dissenting from the denial acknowledged that the case law from the Supreme Court strongly supports this defense.[38]

The Supreme Court's 2018 case of *Los Angeles Cty v Mendez* [39] addresses Fourth Amendment excessive force claims, but does not address qualified immunity on those claims. Rather, it focuses on a question that is logically before qualified immunity analysis: whether there was a constitutional violation in the first place.

In *Mendez*, police searched for an armed, at-large parolee, and entered a residence (a wooden "shack") without a warrant to search for him based on an informant's tip. After various events, shots were fired, and occupants of the shack were injured. The focus of the Supreme Court's decision is the invalidity of the Ninth Circuit's "provocation rule." *Mendez* does not in any way deny or limit qualified immunity.

The Supreme Court's 2017 border shooting decision in *Hernandez v Mesa*, does not contradict the overall trend.[40] The Court denied qualified immunity, but not as to a Fourth Amendment claim.[41] A border patrol agent fatally shot a 15-year-old Mexican boy who was on the Mexican side of the border. The plaintiffs asserted Fourth and Fifth Amendment claims against various defendants. Among other holdings, the Supreme Court reversed a grant of qualified immunity to the border agent. However, this was only as to the Fifth Amendment claim. The Court did not address qualified immunity vis-à-vis the Fourth Amendment claim.[42]

The Supreme Court's 2018 case of *Sause v Bauer*[43] only weakly stands against qualified immunity on Fourth Amendment claims, and it does not address excessive force. In that case, police visited the plaintiff's residence to investigate a noise complaint. Once inside, the police committed a series of other acts including, mainly, allegedly telling the plaintiff to stop praying. Sause, proceeding pro se, sued the officers and other town officials, asserting First and Fourth Amendment claims.[44]

The Supreme Court mainly addressed Sause's First Amendment claim, but stated that the First and Fourth Amendment issues may be inextricable.[45] It reversed a grant of qualified immunity to both claims, even though the plaintiff had previously elected only to address the First Amendment argument on appeal.[46] However, (1) the procedural posture was a motion to dismiss the complaint for failure to state a claim, not summary judgment, and (2) a pro se litigant's complaint is given greater leeway.[47]

In City of *Escondido v Emmons*,[48] the Supreme Court faced an issue of qualified immunity of police officers from civil damages for their use of force in arresting a man at the scene of a domestic violence incident. The issue was whether the constitutional right at issue was "clearly established" at the time of the officers' actions. In *Emmons*, the Ninth Circuit denied the officers qualified immunity, defining the right deprived as the "right to be free from excessive force." This was far too broad, so the Supreme Court reversed the denial of immunity as to one officer, and as to the other, remanded for the proper analysis.[49]

CONCLUSION

Recent Supreme Court cases augur in favor of qualified immunity for law enforcement officers and prison wardens vis-à-vis Fourth Amendment excessive force claims.

Endnotes

1 *Harlow v Fitzgerald*, 457 US 800, 818 (1982).
2 *Mullenix v Luna*, 577 US 7; 136 S Ct 305, 308 (2015).
3 *Pearson v Callahan*, 555 US 223, 232 (2009).
4 *Ziglar v Abbasi*, __US__; 137 S Ct 1843, 1866 (2017).
5 *White v Pauly*, 137 S Ct 548, 550 (2017).
6 *Kisela v Hughes*, ___ US ___; 138 S Ct 1148 (2018).
7 *Plumhoff v Rickard*, 572 US 765 (2014).
8 *Kisela*, 138 S Ct at 1152.
9 *Id*.
10 *Id*.
11 *Los Angeles Cty v Mendez*, ___ US ___; 137 S Ct 1539 (2017).
12 *Id*.
13 *Id*. at 1546.
14 *Kisela*, 138 S Ct at 1150-1151.
15 *Id*. at 1152-1154.
16 *White v Pauly*, __US __; 137 S Ct 548, 551-553 (2017).
17 *Id*. at 549.
18 *Id*. at 552-553.
19 *Saucier v Katz*, 533 US 194, 205 (2001), receded from in part on other grounds by *Pearson v Callahan*, 555 US 223 (2009).
20 E.g., *Ziglar v Abbasi*, __ US __; 137 S Ct 1843, 1866-1867 (2017); *San Francisco v Sheehan*, ___ US ___; 135 S Ct 1765 (2015).
21 *Graham v Connor*, 490 US 386, 398 (1989).
22 See *Ryburn v Huff*, 565 US 969, 991-992 (2012).
23 *District of Columbia v Wesby*, ___ US ___; 138 S Ct 577, 591 (2018).
24 *Pearson v Callahan*, 555 US 223, 232 (2009).
25 *Id*. at 236.
26 *Id*.
27 *Ziglar*, 137 S Ct at 1866.
28 *Brosseau v Haugen*, 543 US 194, 198 (2004).
29 *Ziglar*, 137 S Ct at 1866-1868.
30 *Id*.
31 *Id*. at 1866 (internal brackets, quotation marks, and citations omitted).
32 *Id*.
33 *Taylor v Barkes*, 575 US 822; 135 S Ct 2042 (2015).
34 *Mullenix v Luna*, 577 US 7; 136 S Ct 305 (2015).
35 *Id*. at 308-312.
36 *Salazar-Limon v City of Houston*, ___ US ___; 137 S Ct 1277 (2017).
37 *Id*.
38 *Id*. at 1282; see also *Stanton v Sims*, 571 US 3, 9-10 (2013).
39 *Los Angeles Cty v Mendez*, ___ US ___; 137 S Ct 1539 (2017).
40 *Hernandez v Mesa*, ___ US ___; 137 S Ct 2003 (2017).
41 *Id*. at 2007.
42 *Id*.
43 *Sause v Bauer*, ___ US ___; 138 S Ct 2561 (2018).
44 *Id*. at 2563.
45 *Id*.
46 *Id*.
47 *Id*.
48 *City of Escondido v Emmons*, ___ US ___; 139 S Ct 500 (2019).
49 *Id*. at 502-503.

The Op-Ed(ish) Column

By: Chelsea Pasquali, *Collins Einhorn Farrell PC*

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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The Secret About Staying Motivated[1]

We've all felt the push of motivation. Motivation sparks, and the energy to work comes easily. Work is enjoyable when you're motivated. But then, without fail, the flame is smothered. Motivation appears and then leaves on its own terms. You get tired or distracted. Your argument is rejected or criticized. Your work plateaus.

Productivity happens while motivation flows. And it doesn't feel a lot like work because there is excitement behind motivation. It's no wonder we think the key to success is staying motivated.

So what's the secret behind staying motivated? It's simple: Don't.

Don't rely on motivation. Instead, teach yourself discipline. Motivation is a fair-weather friend. It's undependable and dramatic. Discipline is steadfast and reliable. Discipline is behind the scenes, working hard when motivation gets flakey.

Merriam-Webster's *English Language Learner's Dictionary* defines "self-discipline" as "the ability to make yourself do things that should be done." Notably, the dictionary refers to what **should** be done, not what we want to do. Let's break down a few ways to use discipline to accomplish tasks after the motivation that made you want to work has worn off.

Set Goals

First, identify the task that needs to be accomplished and when it needs to be done. Focus on a specific task that you can identify and achieve. Perhaps you need to meet a few deadlines this week or write a few dispositive motions this month. Maybe you have three days to accomplish a series of tasks.

Don't get caught in the trap of an unspecific goal, like wanting to do "more" or "improve" certain aspects of your job or life. These are too subjective to reach. Whatever your goal, it should be objective and measurable. A goal that cannot be measured is an ideal, not a goal.

Break It Up

Break up goals into smaller portions. Determine what you need to do each day, week, and month to finish timely. Breaking up a goal into smaller portions helps to mentally manage the goal and to get a realistic idea of what is required.

Determining exactly what you need to do each day, week, and month also ensures that your goal stays on course. And if tasks fall behind pace, you know exactly what you need to do to make up for the lost time. Smaller portions allow you to know whether you are on track and, if not, how to adjust accordingly and with precision.

Smaller portions also help you to feel accomplished in the pursuit of your goal. Instead of finishing each day with the notion that your goal has not been achieved, smaller portions allow you to finish each day with the knowledge that you've achieved that day's goal and the comfort that you're right where you need to be.

Prioritize

Goals cannot be achieved by waiting until the timing is right. This is all too often the breaking point where motivation gives way to the status quo. Look ahead at the schedule each day and determine how to accomplish the portion assigned to the day. Determine where it will fit.

But don't just prioritize. Be willing to sacrifice. A new task cannot be added to an already packed schedule with any realistic expectation that it will get done. Determine what you may need to remove from the schedule to fit in the new task. This doesn't look the same from person to person. A night owl may give up an hour of TV for the task. A morning person may give up an hour of sleep. Perhaps you can skip your lunch with colleagues for one day.

Priorities and sacrifices are essential to avoid an overcrowded schedule and burnout. But these decisions do not have to be permanent or even consistent. You can and should constantly reassess as each day presents new challenges and opportunities.

Make Yourself Do It

Ultimately, the key to discipline is the ability to just do it. As made clear by Merriam-Webster, discipline comes down to the ability to **make yourself**. Block out excuses. Put your phone away, get out of bed, or turn the TV off. Force yourself to get started. Force yourself to continue.

Motivation is a great jumping off point. It can teach you a lot about yourself and help shine a light on what drives you. Motivation is a great way to set goals. Discipline achieves them.

Endnote

1

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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Taxation of Costs in Michigan Appeals

The winning party in a civil appeal may be entitled to tax costs against the non-prevailing party. See MCR 7.219 (Court of Appeals); MCR 7.318 (Michigan Supreme Court). Although the prevailing party can generally seek costs with or without an express invitation in the Court's opinion, it's common for the Court of Appeals to include language noting that the winner can seek costs. Costs are off the table only if the Court of Appeals expressly states that a prevailing party is not entitled to costs. MCR 7.219(A).

To obtain costs, the prevailing party must file a certified or verified bill of costs "[w]ithin 28 days after the dispositive order, opinion, or order denying reconsideration is mailed." MCR 7.219(B). The objecting party may file a response within seven days after service of the bill of costs. MCR 7.219(C). The clerk must "promptly" verify the prevailing party's costs and tax as appropriate. MCR 7.219(D). Any party who wishes to challenge the clerk's action may file a motion "within 7 days from the date of taxation." MCR 7.219(E). Review, however, is limited to "those affidavits or objections which were previously filed with the clerk...." *Id.*

As this procedural outline indicates, it can take some time to put together an application for costs. The application must be verified and capable of withstanding an objection. It must also preserve all the arguments necessary for motion practice if the clerk's award is deficient in some way.

The scope of taxable costs is limited under the Michigan Court Rules. The prevailing party may collect only "reasonable costs incurred in the Court of Appeals." MCR 7.219(F). These include the cost of (1) printing briefs, (2) an appeal or stay bond, (3) transcripts, (4) documents necessary for the appeal record, and (5) fees paid to court clerks. *Id.* If the prevailing party wishes to tax any additional costs, it must connect the right to do so to a statute or court rule. See MCR 7.2119(F)(6)-(7).

This list of taxable costs is not long. In some appeals, recoverable costs are less than the attorney fees for compiling a bill of costs—which means that pursuing costs isn't worthwhile economically. Still, costs in some appeals may be large enough to justify their pursuit.

When an attorney receives an order allowing a client to tax costs incurred in an appeal, they should provide their client with a realistic picture of the likely expense of pursuing costs, and the possible recovery before pursuing an order taxing costs. Doing these calculations upfront allows a client to make an informed judgment about whether the pursuit of costs is worthwhile.

Tips for Filing Interlocutory Appeals in the Michigan Court of Appeals

Most appeals in the Michigan Court of Appeals are appeals of right after the entry of a final judgment or order. But occasionally, a party may wish to challenge an interlocutory order – such as a discovery order, an order denying summary disposition, or an order regarding a pretrial motion in limine. With limited exceptions (such as an order denying governmental immunity), such orders are appealable only by leave of the court.

MCR 7.205 governs applications for leave to appeal. To be timely, an application for leave to appeal must be filed within 21 days after entry of the order being appealed, or within 21 days after the entry of an order denying a timely motion for reconsideration or other relief from the order being appealed. MCR 7.205(A)(1), (2). Depending on

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the circumstances, such as an impending trial, it may not be advisable to wait until the last day to file the application. When time truly is of the essence, the application should be filed as soon as possible. If action is required within 56 days, the application should be designated an "emergency." See MCR 7.205(F)(1). A motion for immediate consideration should be filed if the order being appealed will have consequences within 21 days of the filing of the application. MCR 7.205(F)(2).

It is important to remember that unlike a claim of appeal, an application for leave to appeal is a full appeal brief on the merits.

It is important to remember that unlike a claim of appeal, an application for leave to appeal is a full appeal brief on the merits. This means that it must comply with the rules applicable to an appellant's brief (see MCR 7.212(C)) and should explain as concisely as possible why leave to appeal should be granted.

MCR 7.205 also requires an application for leave to appeal from an interlocutory order to set forth "facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal." See MCR 7.205(B)(1). In other words, why should the appeal be heard immediately as opposed to waiting until the end of the case? Some orders, such as orders involving preliminary injunctions or those denying discovery or the admission of critical evidence, lend themselves more readily to an argument that an immediate appeal is necessary. But interlocutory appeals are certainly not limited to such orders. In the appropriate case, it might make sense to seek leave to appeal from an order denying summary disposition, such as if the motion raised a statute of limitations issue or some other legal issue that would dispose of the case in its entirety and avoid the need for discovery and a time-consuming and expensive trial.

In seeking leave to appeal from an interlocutory order, parties should also keep in mind that the Court of Appeals has authority to enter a final decision at the application state instead of granting leave to appeal. See MCR 7.205(E)(2) ("The court may grant or deny the application; enter a final decision; [or] grant other relief."). As a result, a party might consider making a specific request that the Court enter a peremptory order (e.g., granting summary disposition) as an alternative to granting leave to appeal.

Finally, it is important to remember that filing an application for leave to appeal, like claiming an appeal of right, does not automatically stay proceedings in the lower court. Again, there are exceptions, such as in appeals from orders denying governmental immunity. But in most cases, a party seeking a stay must first request it from the trial court, and then from the Court of Appeals if the trial court denies a stay.

Legal Malpractice Update

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell, P.C.*[1]
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ARBITRATION CLAUSE IN ATTORNEY FEE AGREEMENT UPHELD

Tinsley, et al v Lawyer-Defendant, No 349354, 2020 WL 4722061

Facts and Procedural History:

Lawyer-defendants represented plaintiffs in a legal malpractice action (the "underlying litigation") against plaintiffs' former attorneys and business broker. Before the lawyer-defendants' representation, they entered into an Engagement Agreement. The Agreement was four pages and included an arbitration clause in capital letters. It stated:

> THE CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT, BY AGREEING TO BINDING ARBITRATION, THE CLIENT WAIVES THE RIGHT TO SUBMIT THE DISPUTE TO A COURT FOR DETERMINATION AND ALSO WAIVES THE RIGHT TO A JURY TRIAL OR TO PROSECUTE A CLASS ACTION.

Plaintiffs claimed legal malpractice in the underlying litigation, alleging the lawyer-defendants "forced" plaintiffs to settle their case for less than its value. In response, lawyer-defendants filed a motion for summary disposition based on the arbitration clause, arguing that plaintiffs' suit was barred. To support the arbitration clause's validity, the lawyer-defendants argued that independent counsel reviewed the Agreement; plaintiffs understood its contents and voluntarily signed.

Plaintiffs, however, claimed that the arbitration clause was unenforceable. Specifically, plaintiffs relied on Michigan Rule of Professional Conduct 1.8(h)(1). Rule 1.8(h) precludes a lawyer from prospectively limiting malpractice liability unless it is lawful, and independent counsel represents the client. Plaintiffs also cited the State Bar of Michigan Ethics Opinion R-23 (July 22, 2016)—interpreting the Rule to require that before signing, a client must either be fully informed, in writing, of the consequences of an arbitration clause or independently represented by counsel. Plaintiffs attested to not discussing the arbitration provision. The lawyer-defendants disclaimed any fault for plaintiffs' failure to discuss the provision.

The trial court agreed with the lawyer-defendants and granted them summary disposition, finding that plaintiffs consulted with independent counsel and voluntarily signed the Agreement containing the arbitration clause. Plaintiffs appealed. The Court of Appeal affirmed.

Holding:

The Court of Appeals held that a lawyer has no professional duty to advise a client represented by independent counsel to discuss an arbitration clause contained in a fee agreement. The Court stated that all MPRC 1.8(h)(1) requires is that the client have independent representation when making an agreement prospectively limiting legal malpractice liability. And EO R-23 requires nothing more than an option for the client to consult with independent counsel before signing a fee agreement.

Practice Note:

If your engagement agreement contains an arbitration clause, be sure to comply with the holding of this case.

Endnote

1 The authors would like to thank Crinesha Berry for her work on this article.

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Medical Malpractice Update

By: J. Luke Brithinee, *Kerr Russell*
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Stuck in the Middle: Nurse Practitioners as Standard of Care Experts

Anticipated and actual shortages of primary care physicians, exacerbated by the COVID-19 pandemic, have led policymakers around the country to consider the roles of nurse practitioners ("NPs") in providing primary healthcare services. Greater autonomy for NPs has been a point of contention between the medical and advanced practice nursing communities, but the consistent increase in the numbers of NPs, coupled with the increased demand for primary care services, has led many states to expand the scope of practice for NPs. The Michigan Legislature took its first step towards granting full practice authority to NPs when it enacted 2016 PA 499 (effective 04/09/2017), which permits NPs to prescribe nonscheduled drugs, dispense complimentary starter doses of qualifying pharmaceuticals, go on hospital rounds, perform independent house calls, and order physical or speech therapy all without the oversight of a physician. Although Michigan has been slow to further increase the role of NPs since the enactment of PA 499, the recent strain on the healthcare system has revitalized the efforts of NP advocacy groups calling for full practice authority.

If the Michigan Legislature does follow the trend of increased authority for NPs, we will likely see an even greater increase in the number of malpractice cases against NPs. As such, courts must be prepared to face an old question with a new twist: Who is qualified to give standard-of-care testimony for these defendants?

Who are Nurse Practitioners?

An NP is a registered nurse ("RN") with a master's or doctoral degree and advanced clinical training who can provide primary, acute, chronic, and specialty care to patients of all ages, depending on their field of practice. As a result of their advanced training, NPs generally have more authority than RNs. NPs can prescribe nonscheduled drugs, examine patients, and provide specific treatments much like physicians do. NPs have increasingly become an integral part of medical teams as hospitals and healthcare facilities recognize their flexibility and ability to provide cost-effective care.

All NPs are required to have an active RN license in addition to either a Master's of Science in Nursing ("MSN") or a Doctor of Nursing Practice ("DNP"). After completing an MSN or DNP, an NP must also obtain national certification from an accredited certifying body. Each accredited certifying body offers different specialty certifications such as adult-gerontology, family, pediatric primary care, and women's health. After obtaining national certification, an NP can then apply for a license to practice from the Michigan Board of Nursing. The Michigan Board of Nursing certifies qualified registered nurses to work within nursing specialties in the state. These specialists, which include NPs, are called advanced practice registered nurses ("APRNs").

NP Scope of Practice

The scope of practice for NPs varies state by state, but there are three generally recognized categories of NP practice authority. These categories include full practice authority, reduced practice authority, and restricted practice authority. There are currently 22 states which allow full practice authority for NPs. In states with full practice authority, NPs have no limitations placed on their ability to treat, diagnose, and prescribe medication to patients. NPs in states with full practice authority can work as independent healthcare providers similar to physicians.

Additionally, 16 states allow reduced practice authority for NPs. NPs in states with reduced practice authority are limited in engaging in one or more areas of practice. In most cases, these reduced practice states require a collaborative agreement between a physician and NP, though they do not require direct supervision.

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Michigan is one of the remaining 12 states that have restricted practice authority for NPs. NPs working in states with restricted practice authority must work directly under a supervising physician present in the practice location. While Michigan seems far from the point of full practice authority for NPs, the gradual shift has begun with PA 499. NPs are now authorized to prescribe nonscheduled drugs, dispense qualifying pharmaceuticals, go on hospital rounds, perform independent house calls, and order physical or speech therapy, without a physician's oversight. Despite all of their advanced training and education, the Michigan Supreme Court held that NPs are not "specialists" under MCL 600.2912(a) because they do not engage in the practice of medicine. *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 20, 651 NW2d 356 (2002). However, if the Michigan Legislature moves toward full practice authority for NPs, then *Cox* and its 18-year progeny are certain to face serious challenge.

The Future of NPs as Expert Witnesses

Generally, every medical malpractice case requires expert testimony to establish the standard of care and the defendant's breach of that standard. *Lince v Monson*, 363 Mich 135, 140, 108 NW2d 845 (1961). Before an expert witness may testify, the trial court must determine whether the witness possesses the requisite qualifications. *Siirila v Barrios*, 398 Mich 576, 591, 248 NW2d 171 (1976). The requirements for experts testifying in a medical malpractice trial are set out in MCL 600.2169. This statute requires that experts testifying about standard of care have the same specialty as the defendant if the defendant is a specialist. *Id*. If the defendant is board certified, the expert must also be board certified in that specialty. *Id*. On the other hand, if the defendant is a general practitioner, the standard of care expert must be licensed in the same health profession. *Id*. Additionally, the proffered expert for both general practitioners and specialists must have spent a majority (greater than 50%) of their time practicing or teaching in the same medical field or specialty as the defendant in the preceding year. *Id*.

The language of MCL 600.2912, which sets forth the standard of care applicable to general practitioners and specialists, closely reflects the language of MCL 600.2169 for expert qualifications. In 2002, the Michigan Supreme Court held that the terms "general practitioner" and "specialist" used in Section 2912 only apply to physicians. *Cox*, 467 Mich at 18. Four years later, the Court of Appeals relied on the Supreme Court's reasoning in *Cox* when it held that the terms "specialist" and "general practitioner" in Section 2169(1) likewise only apply to physicians. *Brown v Hayes*, 270 Mich App 491, 500, 716 NW2d, 13 (2006). As a result, under Michigan law, any NP is qualified to offer standard of care testimony in support or against another NP (irrespective of their specialty certification or specific area of practice).

Both courts relied on the dictionary definition of the words "specialist" and "general practitioner" in concluding that these words do not apply to advanced practice registered nurses, physicians' assistants, and other health professionals. Neither "specialist" nor "general practitioner" are defined in Michigan's Public Health Code. Thus, the courts turned to *Random House Webster's College Dictionary* (1997) to give these undefined terms their plain and ordinary meanings. Both definitions refer to "medical practitioners" but with different scopes of practice. As such, both the Michigan Supreme Court and Court of Appeals concluded that for either term to apply, the individual must be **engaged in the practice of medicine**.

There is no serious question that RNs do not engage in the practice of medicine. In fact, the Public Health Code even defines "registered professional nurse" as "an individual licensed under this article to engage in the practice of nursing..." MCL 333.17201(1)(c). In contrast, "physician" is defined as "an individual licensed under this article to engage in the practice of medicine..." MCL 333.17001(1)(c). Unfortunately, there is no such definition for nurse practitioners (although it is reasonable to assume that NPs would engage in the practice of nursing rather than the practice of medicine, especially where NPs only possess restricted authority). Thus, because the generalist/specialist distinction does not arise unless the defendant is engaged in the practice of medicine, the only requirement for NP standard of care experts under section 2169(1) is that the expert spent a majority of their time practicing or teaching in the same health profession as the defendant in the preceding year. MCL 600.2169(b). Today, the mere fact that the proffered expert is also an NP, even with a different specialty certification, is enough to qualify an NP to testify as a standard of care expert. But, as we see a shift toward full practice authority for NPs, trial lawyers should be aware of how this change could impact expert witness qualifications as we know them.

Conclusion

As previously discussed, the Michigan Legislature made its first move toward the expansion of NP practice authority in 2016 when it enacted PA 499. This act allows NPs to prescribe nonscheduled drugs, dispense qualifying pharmaceuticals, go on hospital rounds, perform independent house calls, and order therapy for patients – all tasks previously limited to physicians. With this increased autonomy, the scope of NPs duties nudged closer to the practice of medicine. As the persistence of the COVID-19 pandemic increases the demand for primary care services and continues to place strain on the healthcare system, advocacy groups such as the Michigan Council of Nurse Practitioners and the American Association of Nurse Practitioners have stepped up their lobbying efforts for expanded practice authority. As the law stands today, any NP is qualified to give standard of care testimony in favor of or against any other NP. But if NPs are ultimately granted full practice authority here in Michigan, courts will be forced to consider whether the generalist/specialist distinction and board certification requirements should be extended to this new class of health professionals.

Is an NP with full practice authority who can perform all the duties of a physician still engaged in the practice of nursing? Or is this NP with full practice authority engaged in the practice of medicine such that the generalist/specialist distinction in Sections 2912 and 2169 apply? As the role of NPs in Michigan and throughout the country continues to rise, these questions become increasingly important for health professionals and those who represent them.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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The Michigan House and Senate convened for a handful of sessions during July and August and have now returned for a full schedule in September. Over the summer months, much of our Legislature's attention was devoted to considering a variety of measures to address the Covid-19 pandemic and the hardships it has visited upon so many of Michigan's citizens. Those discussions will continue in September as our legislators also focus on completing the budget for the new fiscal year beginning on October 1st. A few sessions have been scheduled for October to address any issues requiring prompt attention, but I do not expect to see much legislative activity in October when our politicians of both parties will be focused on the November election.

As I finish this report on September 15th, many of us are already profoundly sick and tired of this year's political campaigns' negative tone. We are looking forward to the day when the votes are finally tallied, for better or worse. Then, as we prepare for whatever may be coming next, the Legislature will reconvene for a few sessions before adjourning again for its customary two-week recess for deer hunting and the Thanksgiving holiday, followed by two or three weeks of "lame-duck" session marking the end of the current Legislature's two-year session. The outcome of the general election generally dictates the agenda for the lame-duck session. Since the predictions made in September are usually wrong, I will resist the urge to make any predictions now. But as always, I will be watching with interest and will report again in December based upon the established facts.

Public Acts of 2020

As of this writing, there are 150 Public Acts of 2020 – 21 more than when I last reported in July. These have addressed various issues, many of which have involved supplemental appropriations and efforts to ameliorate the effects of the Covid-19 pandemic, but none of them are likely to be of any particular interest to our members as civil litigators. However, it is noteworthy that Governor Whitmer has wielded her veto pen to reject 8 enrolled bills presented for her consideration since my last report. These included proposals to limit admission or retention of Covid-19 patients in nursing homes, provide limited immunity from liability for health care providers and facilities during a declared state of emergency, and defer collection of use tax, sales tax, income tax, and property taxes under certain circumstances.

Senate Bill 899 (MacDonald – R) would have amended the Emergency Management Act, MCL 30.411, to provide a broader scope of immunity from civil liability for health care providers and facilities providing services in aid of the state's response to a declared state of emergency or state of disaster. As enrolled, the bill specified that the newly-expanded scope of immunity would apply retroactively to March 10, 2020, and until January 1, 2021, concerning any health services rendered in support of the state's response to the Covid-19 pandemic, notwithstanding any other law to the contrary. On August 10th, Governor Whitmer vetoed Senate Bill 899, expressing her objection that the legislation exceeded the protections afforded by her prior executive orders and that the bill "goes much further in ways that are directly counter to the interests of those receiving care."

The Governor's veto of Senate Bill 899 was one of several manifestations of the tension between the Governor and the Republican legislative leadership regarding the scope of the Governor's authority to control the state's response to the Covid-19 epidemic by executive order. This issue has been the source of litigation in a number of cases. The Governor's recent executive orders have been based upon the authority conferred upon her by 1945 PA 302, often referred to as the Emergency Powers of the Governor Act. Our Supreme Court recently heard arguments as to whether her

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executive orders were supported by that authority. The Court has requested supplemental briefing on whether the Legislature intended to apply the act's provisions to a public health emergency. Questioning from the Justices suggested some skepticism as to whether this was intended, and thus, we will be awaiting the Court's decision with great interest.

The Governor's authority to prescribe emergency measures is also being threatened by voter initiative. A group calling itself "Unlock Michigan" has been circulating an initiative petition to repeal the 1945 act, and large numbers of supporting signatures have been collected during social functions or "signing parties" conducted for that purpose. Recent reports have indicated that the sponsors of this effort will soon be filing a sufficient number of petition signatures to require submitting the proposed repeal to the Legislature with a comfortable margin of extra signatures. If the proposed repeal is then passed by the Legislature as expected, the Governor will have no power to veto it.

Old Business and New Initiatives

In my last report, I mentioned the enrollment of **Senate Bill 686 (Barrett – R)**, which proposed the creation of a new single-section act providing new whistleblower-type protection for classified civil service employees of state departments, agencies and nonpartisan legislative staff for communications with a legislator or a legislator's staff. The new section would have prohibited disciplinary action by a state department or agency or a member or office of the Legislature for such communications unless the specific communication at issue was prohibited by law and the disciplinary action was taken in accordance with authority otherwise provided by law. Governor Whitmer vetoed Senate Bill 686 on July 8th, based upon her stated findings that the new act was an unnecessary effort "to score political points by codifying a piece of budget boilerplate" that violated the constitutional separation of powers and Const 1963, art 6, § 5, regarding the duties of the Civil Service Commission. On July 23rd, the proponents of this legislation attempted to override the Governor's veto without success.

Several other bills were introduced in response to the Covid-19 pandemic that are likely to receive consideration this fall. They include:

Senate Bill 1022 (Schmidt – R), would create a new act establishing responsibilities of, and protections for employees who have tested positive for Covid-19 or displayed its principal symptoms or have had close contact with another person who has tested positive or displayed the principal symptoms.

Senate Bill 1023 (Horn – R), would amend the Occupational Safety and Health Act to add a new Section MCL 408.1085 providing employers with immunity from suits for damages by employees arising from exposure to Covid-19 if the employer was operating in substantial compliance with applicable federal or state statutes, regulations, executive orders or public health guidance. The new provisions would apply retroactively to exposures to Covid-19 occurring after January 1, 2020.

> Over the summer months, much of our Legislature's attention was devoted to considering a variety of measures to address the Covid-19 pandemic and the hardships it has visited upon so many of Michigan's citizens.

Senate Bill 1024 (Theis – R) would create a new "Covid-19 Response and Reopening Liability Assurance Act," establishing several limitations of liability applicable to suits for damages based upon exposure to Covid-19. Like the new provisions proposed by Senate Bill 1023, these new limitations would apply retroactively to claims accruing after January 1, 2020.

This tie-barred package of Senate bills was referred to the Senate Economic and Small Business Development Committee. The Committee began hearing testimony on these bills on September 10th but deferred further action until a subsequent hearing can be held to present additional testimony. The same package of bills has been introduced in the House as **House Bill 6030 (Albert – R)**, **House Bill 6031 (Brann – R),** and **House Bill 6032 (Filler – R).**

And to ensure that no political stone has been left unturned with respect to the Covid-19 pandemic, **House Bill 6025 (LaFave – R)** would create a new "Coronavirus responsibility reimbursement act" requiring the state Treasurer to compile a detailed list of all damages, losses and expenses incurred by the state as a result of the coronavirus and present that list with a demand for reimbursement of those damages, losses, and expenses to the People's Republic of China.

Other bills and resolutions of interest include:

House Bill 6167 (Chirkun – D), which would repeal MCL 600.2967 – the "firefighter's rule" limiting the ability of a firefighter or police officer to recover damages for injury or death resulting from the normal, inherent and foreseeable risks of his or her profession while acting in his or her official capacity. This bill was introduced and referred to the House Judiciary Committee on September 3rd.

House Bill 6158 (LaFave – R), which would amend the Governmental Immunity Act to add a new Section MCL 691.1407b. This new section would provide that, "A governmental agency and an employee or agent of the governmental agency are liable to a person for damages for personal injury or property damage that results from the employee or agent acting in willful, callous, or wanton disregard of protecting private property or the general safety of the person." To establish liability under this provision, a plaintiff would have to prove the required willful, callous, or wanton disregard by clear and convincing evidence, but would be entitled to recover three times the amount of the actual damages sustained. This bill was introduced and referred to the House Committee on Military, Veterans and Homeland Security on September 2nd.

House Bill 5970 (Anthony – D) proposes creating a new act that would prohibit the use of volunteer police officers, effective January 1, 2021. This bill was introduced and assigned to the House Judiciary Committee on July 22nd. It has not been scheduled for hearing as of this writing.

House Joint Resolution U (Chirkun – D) proposes an amendment of Const 1963, art 6, § 19 to increase the age limit for election or appointment to judicial office from 70 to 75 years. The proposed amendment would also add a new subsection 19(4), providing that "A person shall not serve as a visiting judge after reaching the age of 75 years." **House Bill 6166 (Chirkun – D)** proposes consistent amendments of the Michigan Election Law, which would take effect upon the voters' approval of the proposed constitutional amendment.

This Can Be Yours

As I mentioned at the end of my last report, I have enjoyed writing the Legislative Report for the *Quarterly* for a good many years but have recently decided, with some reluctance, that the time has now come for me to pass the baton to someone new – someone who will be willing to take over this very interesting and rewarding task when the One Hundred First Legislature convenes in January of next year. If you think you might be that person, the editors of the *Quarterly* would like to hear from you. And if you should need any information or encouragement to help you decide, I would be delighted to hear from you as well.

MEMBER NEWS

Work, Life, and All that Matters

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 QUARTERLY

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Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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***Skanska USA Building Inc v Amerisure Ins Co*, __ Mich __; __ NW2d __ (2020) (Docket No. 159510).**

The most notable insurance coverage decision this quarter was likely the Michigan Supreme Court's decision in *Skanska*. Last year, I discussed the Court of Appeals' *Skanska* opinion in this column, Vol. 36, No. 1. *Skanska* dealt with whether an "occurrence" can "include damages for the insured's own faulty workmanship" in the context of commercial general liability ("CGL") coverage. See *Skanska USA Building Inc v Amerisure Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued March 19, 2019 (Docket No. 340871), p 10. The Michigan Court of Appeals had 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 June 29, 2020, the Michigan Supreme Court "cabined" *Hawkeye* "to cases involving pre-1986 comprehensive general liability insurance policies." *Skanska,* __ Mich at __; slip op at 1-2.

To understand the importance of the Court's unanimous holding, a review of the Court of Appeals' decision is helpful. In *Skanska,* 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 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 … 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. The Supreme Court granted leave, and later reversed, finding that *Hawkeye* was not controlling for CGL policies issued after 1986. The Court began with the relatively uncontroversial definition of an "accident" as "an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Skanska,* __ Mich at __; slip op at 7. Although the operative policy term was "occurrence," this policy – like most of its kind – defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," *Id.* "Generally, faulty work by a subcontractor may fall within the plain meaning of most of these terms." *Id.* "It happens by chance, is outside the usual course of things, and is neither anticipated nor naturally to be expected." *Id.* at __; slip op at 7-8.

The Court further noted that Amerisure's policy contained "an exclusion precluding coverage for an insured's own work product," but that exclusion had "an exception for work performed by a subcontractor on the insured's behalf…." *Id.* at __; slip op at 8. If faulty workmanship by a subcontractor could never constitute an "accident" and therefore never be an "occurrence" triggering coverage in the first place, the Court reasoned that "the subcontractor exception would be nugatory." *Id.*

Although *Hawkeye* and decisions following it had reached a different result, the Court found that this was because post-*Hawkeye* case law failed to account for subsequent changes to the standard CGL language. *Hawkeye* involved a 1973 comprehensive general liability that contained an express exclusion of coverage for "property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof." *Skanska,* __ Mich at __; slip op at 5 n 2. But in 1986, the ISO revised the "your product" and "your work" exclusions to include coverage for construction defects by the insured's subcontractors. *Id.* The pre-1986 forms "featured the 'business risk' doctrine … under which many risks inherent in doing business were excluded." *Id.* at __; slip op at 15 (citation omitted). But the post-1986 forms expanded "coverage to include some those business risks, specifically damage caused by a subcontractor's faulty workmanship (with no carveout based on whose property is damaged)." *Id.* at __; slip op at 17. Cases that continued to follow *Hawkeye* after these changes to the ISO forms reflected "an outdated view of the insurance industry." *Id.* So while the Court did not declare *Hawkeye* wrongly decided, the Court limited *Hawkeye*'s application to "cases involving pre-1986 insurance policies." *Id.* at __; slip op at 18-19.

The Supreme Court's decision leaves open the possibility that coverage may be barred under the Amerisure policy's "your work" exclusion. *Id.* at __; slip op at 20 n 25. The Court also declined to address "whether there is a genuine issue of material fact as to the existence of an occurrence…." *Id*. The Court similarly declined to address whether its ruling should have prospective application only. *Id.* These are issues the Court of Appeals "may, but need not necessarily, address" on remand. *Id.*

Insurers have long argued that the term "occurrence" cannot be interpreted to include damages for the insured's faulty workmanship because otherwise, CGL policies would be converted into performance bonds or warranties. See *Skanska,* __ Mich at __; slip op at 14. The *Skanska* Court rejected this argument: the fact "that coverage may overlap with a performance bond is not a reason to deviate from the most reasonable reading of the policy language." *Id.* A "CGL policy covers what it covers," and coverage is not eliminated "simply because similar protection may be available through another insurance product." *Id.* (citation omitted).

***Cardinal Fabricating v Cincinnati Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued June 18, 2020 (Docket No. 348339).**

In a decision that foreshadowed the Supreme Court's decision in *Skanska* days later, this panel found an "occurrence" under a CGL policy despite the insurer's argument that the underlying claim was based on the insured's faulty workmanship.

The underlying suit involved steel material that Cardinal provided as part of a construction project. In February 2014, a joint venture of contractors subcontracted with another company, HSC, to manufacture support beams for a "visual screen" being constructed at the end of a runway owned by the Wayne County Airport Authority ("WCAA"). *Cardinal Fabricating,* unpub op at 1. HSC purchased and used steel material fabricated by Cardinal. "Defects in Cardinal's steel material compromised the integrity of the structure." *Id.* "The steel support columns cracked, causing panels to fall off the screen and damaging the structure's concrete base – each element constructed by other subcontractors." *Id.*

In an underlying lawsuit, the joint venture was held liable to the WCAA; HSC then had to indemnify the Joint Venture; HSC, in turn, sought indemnification from Cardinal. HSC claimed "that any damage, or liability, resulted from the defective materials supplied by Cardinal." *Id.*

Cardinal sought to be defended and indemnified for HSC's suit from its insurer, Cincinnati. Cincinnati denied owing a duty to defend, arguing that "the alleged property damage was not the result of an 'occurrence' as defined by the insurance policies…." *Cardinal Fabricating,* unpub op at 2. Cardinal went on to defend HSC's suit at its own expense, while also filing this declaratory judgment action.

Cardinal moved for summary disposition, seeking a declaration that coverage was owed. The trial court agreed with the insured, finding that the alleged property damage to the visual screen resulted from an "occurrence" within the insurance policies' scopes of coverage. *Id.* Cincinnati appealed, and the Court of Appeals affirmed. *Id.*

The panel began its analysis by reiterating that the duty to defend is broad, citing *Citizens Ins Co v Secura Ins,* 279 Mich App 69, 72; 755 NW2d 563 (2008). The duty "is not limited to meritorious suits and may even extend to actions which are groundless, false, or fraudulent, so long as the allegations against the insured even arguably come within the policy coverage." *Cardinal Fabricating,* unpub op at 3. "An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *Id.* "The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." *Id.* When there is "doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Id.*, quoting *Citizens Ins Co,* 279 Mich App at 74-75.

The panel rejected Cincinnati's argument "that Cardinal was required … to provide evidence that the underlying action actually involved an 'occurrence' triggering coverage." *Cardinal Fabricating,* unpub op at 3. "That simply is not Cardinal's burden." *Id.* Rather, the duty to defend is dictated by "the *allegations* made in the underlying action…." *Id.* (emphasis in original).

Turning to the policy language, the panel took stock of the fairly standard terms limiting liability coverage to property damage that is caused by an "occurrence," and defining an "occurrence" as "physical injury to tangible property, including all resulting use of that property ... or ... loss of use of tangible property that is not physically injured," and also as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Cincinnati also issued an umbrella policy to Cardinal with similar language.

The panel then took note of the (now "cabined") ruling in *Hawkeye,* 185 Mich App at 378 that "defective workmanship ... standing alone" does not qualify as an occurrence under the terms of a CGL policy. This rule did not carry the day for Cincinnati because "this Court has also held that incidents where defective workmanship or work product damages the property of others, beyond damage to the insured party's work product, can be classified as an occurrence under a CGL policy." *Cardinal Fabricating,* unpub op at 3, citing *Radenbaugh*, 240 Mich App at 146-148. Therefore, Cincinnati's duty to defend was triggered if "the pleadings in the underlying action … allege[d] that Cardinal's defective workmanship or work product caused damage beyond Cardinal's own work product." *Cardinal Fabricating,* unpub op at 3-4.

The panel easily concluded that it did. "When read together, the pleadings establish a causal chain linking the allegedly defective material supplied by Cardinal to the damage to the visual screen." *Cardinal Fabricating,* unpub op at 4. "One party's defective material causing physical damage to portions of a construction project in which the material has been incorporated is a type of unforeseen, unexpected, and unintended accident … that classifies as an occurrence under the terms of the insurance policies." *Id.* (citations omitted).

And the duty to defend was not excused by an "impaired property exclusion of the CGL policy," as Cincinnati argued. *Id.* The panel first noted that this exclusion had been waived, because (1) Cincinnati failed to plead it as an affirmative defense, and (2) Cincinnati's coverage denial letter did not clearly and specifically invoke it. *Id.* But "[i]n any event," the panel found the exclusion inapplicable because "the damage alleged in the underlying action" did not fall within the policy's definition of "impaired property." *Id.* at 4-5.

***Perfect Fence Co v Accident Fund Nat'l Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued June 11, 2020 (Docket No. 349114).**

Here, the panel considered both the duty to defend and the duty to indemnify under a CGL policy. The panel found that the insurer owed neither, where the insured "willfully disregarded" worksite risk. Although there was initially a duty to defend the injured worker's negligence action after that claim was dismissed, the worker amended his complaint to assert an intentional tort claim. The insured had no duty to defend or indemnify Perfect Fence for that claim because it was not based on an "accident," and because exclusions applied.

Perfect Fence, unpub op at 2, involved an underlying personal injury suit brought by one of Perfect Fence's employees. The employee was injured while he and his supervisor were installing fence posts. Although the proper method to install the posts was to use an auger or a hand-digger to dig post holes, the supervisor instead used the bucket of a Bobcat front-loader to hammer the fence posts into the ground. The supervisor "miscalculated" in lowering the bucket, resulting in a

fence post going farther into the ground than anticipated. The claimant, who was underneath the bucket, was struck in the head by it.

The claimant initially sued Perfect Fence under a negligence theory. Accident Fund provided Perfect Fence with a defense. Perfect Fence obtained summary disposition of that claim under the exclusive remedy provision of the Workers' Disability Compensation Act ("WDCA"), MCL 418.131(1). In response to the motion for summary disposition, the worker moved for leave to file an amended complaint to include an intentional tort claim.[1] The trial court granted Perfect Fence's motion for summary disposition, and the employee was granted leave to file an amended complaint. The amended complaint included assertions that Perfect Fence had committed an intentional tort by allowing "a continuing operative dangerous condition that [Perfect Fence] or its representatives knew would cause injury." *Perfect Fence,* unpub op at 2. The coverage dispute arose; Accident Fund "advised Perfect Fence that it no longer had a contractual duty to defend or to indemnify Perfect Fence" for the underlying suit. *Id.*

Perfect Fence then filed a declaratory judgment action against Accident Fund. Accident Fund and Perfect Fence filed competing motions for summary disposition. The trial court denied Accident Fund's motion and granted Perfect Fence's motion, finding a duty to defend because the "duty to provide a defense is broader than the duty to indemnify under the insurance policy," and "we should err in terms of determining a duty to defend on the side of finding coverage." *Perfect Fence,* unpub op at 3.

But the Court of Appeals reversed, finding that the policy only obligated Accident Fund to defend Perfect Fence for claims of "bodily injury" caused "by accident." Per *Frankenmuth Mut Ins Co v Masters,* 460 Mich 105, 114; 595 NW2d 832 (1999), "an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Perfect Fence,* unpub op at 5. The panel also took note of policy exclusions for "[b]odily injury intentionally caused or aggravated by [the insured]" and "bodily injury caused by [the insured's] actual knowledge that an injury was certain to occur and [the insured's] willful disregard of that knowledge." *Id.* Accident Fund, therefore, was not required to defend Perfect Fence if, "from the standpoint of Perfect Fence," the bodily injury to the claimant "was either intentionally caused or aggravated by Perfect Fence, or if Perfect Fence had actual knowledge that an injury was certain to occur and Perfect Fence willfully disregarded that knowledge." *Id*.

In this case, the claimant's amended complaint alleged that he was subjected to "a continuing operative dangerous condition that [Perfect Fence] or its representatives knew would cause injury," and that Perfect Fence "had actual knowledge that an injury … was certain to occur and willfully disregarded that knowledge." *Perfect Fence,* unpub op at 6. More specifically, he claimed that Perfect Fence had "actual knowledge" that the supervisor was installing the posts improperly because "the employer" had visited the worksite and did not "stop the work" or "reprimand" the supervisor. *Id.* Rather, according to the amended complaint, the employer only stated, "you shouldn't do that because somebody's going to get hurt." *Id.* And Perfect Fence's owner purportedly admitted that installing fence posts in that manner (driving them down with the bucket of a Bobcat front-end loader) "guaranteed that someone would get hurt." *Id.*

The panel found that the conduct alleged in the amended complaint "was excluded from coverage by the policy…." *Id.* Therefore, Accident Fund "did not have a duty to defend Perfect Fence against the intentional tort claim." *Id.* The panel added that "even if the fact finder was to determine that Perfect Fence was not liable for an intentional tort" because an accident caused the injuries, the claim would be barred under the exclusive-remedy provision of the WDCA. *Perfect Fence,* unpub op at 6. So there was "no possibility of coverage under the policy…." *Id.*, citing *Auto Club Ins v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2001) (where "no theories of recovery fall within the policy, an insurer does not have a duty to defend").

This decision underscores that the "duty to defend is broader than the duty to indemnify"; if the "allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense." *American Bumper & Mfg Co v Hartford Fire Ins Co,* 452 Mich 440, 450; 550 NW2d 475 (1996). However, if "the policy does not apply, there is no duty to defend." *Id.*

Housing Enterprise Ins Co v Hope Park Homes Ltd, 446 F Supp 3d 229 (ED Mich, 2020).

This is a complex, multi-party declaratory judgment action that relates to the duties to defend and/or indemnify various parties in an underlying negligence action. The underlying case arose out of a residential carbon monoxide leak. Judge Judith Levy addressed multiple motions in this opinion. The issue that is particularly relevant here is Housing Enterprise Insurance Company's ("Housing Enterprise") argument that a pollution exclusion relieved it of any responsibility relative to the underlying case. The District Court – applying Michigan law in diversity – found a question of fact based on an "uncontrollable fire" exception to Housing Enterprise's pollution exclusion. Notably, Judge Levy found that the pollution exclusion *could* apply to the carbon monoxide leak if, as a factual matter, this exception to the exclusion did not apply.

The underlying suit arose out of a furnace malfunction in the rental home of Frederick Agee and his family. The Agee family was poisoned and injured by a carbon monoxide leak caused by the malfunctioning furnace. The Agee family sued various parties for negligence, arguing that the defendants had not properly equipped the underlying property with functioning carbon monoxide detectors and that the property did not have adequate ventilation to protect occupants from the harm of carbon monoxide. Housing Enterprise insured one of those defendants, Hope Park Homes Limited Dividend Housing Association Limited Partnership ("Hope Park"). Hope Park owned the home where the Agee family lived. Housing Enterprise's policy contained a pollution exclusion which read: "We do not pay for … bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release, or

escape of pollutants … at or from any premises, site, or location which is, or was at any time, owned by, occupied by, rented to, or loaned to any insured, unless the bodily injury or property damage arises from the heat, smoke, or fumes of a fire which becomes uncontrollable or breaks out from where it was intended to be located." *Housing Enterprise*, 446 F Supp 3d at __; slip op at 5. The policy defined "pollutants" as "any solid, liquid, gaseous, thermal, or radioactive irritant or contaminant, including acids, alkalis, chemicals, fumes, smoke, soot, vapor, and waste. Waste includes materials to be disposed of as well as recycled, reclaimed, or reconditioned." *Id.*

There is little Michigan law dealing with pollution exclusions to liability coverage.[2] Nonetheless, the District Court had little trouble applying this exclusion, on the guidance of *McKusick v Travelers Indem Co,* 246 Mich App 329; 632 NW2d 525 (2001) and *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co,* 220 Mich App 347; 559 NW2d 93 (1996). Comparing the policy's definition of "pollutant" to the underlying negligence complaint, the District Court noted: "The Agee family's complaint described the carbon monoxide poisoning as the result of carbon monoxide rich products of combustion creating a dangerously high "ratio of carbon monoxide molecules to breathable and inert air molecules, ultimately requiring the energy company to disconnect the natural gas." *Housing Enterprise*, 446 F Supp 3d at __; slip op at 9. There was "no dispute that the description above is an accurate summary of the way in which the Agee family was poisoned." *Id.*

"On these facts, and with a plain-language understanding of the pollution exclusion terms," the District Court found it "clear as a matter of law that the carbon monoxide poisoning constituted a gas that was either an irritant, a contaminant, a chemical, or a fume." *Id.* Judge Levy looked to Merriam-Webster dictionary, which defines a "contaminant" as "something that contaminates," and the definition of "contaminate" is "to make unfit for use by the introduction of unwholesome or undesirable elements." *Id.* The same dictionary defines a "fume" as "an often noxious suspension of particles in a gas (such as air)." *Id.* Judge Levy also found it instructive that the State of Michigan Department of Health & Human Services refers to carbon monoxide as a "deadly fume." *Id.* "It is undisputed in this case that the concentration of carbon monoxide in Underlying Plaintiffs' home was noxious and rendered the air unfit for use by the introduction of unwholesome or undesirable elements – here, the carbon monoxide itself." Therefore, as a matter of law, "carbon monoxide … falls within the 'pollution exclusion' in [Housing Enterprise's] Policy." *Id.*

The District Court rejected the Agees' arguments that "there is no case law applying Michigan law that has previously addressed carbon monoxide as a pollutant," and that carbon monoxide is distinguishable from typical airborne pollutants because "it is a naturally occurring chemical present in everyday life…." *Housing Enterprise*, 446 F Supp 3d at __; slip op at 10. Judge Levy found the Agees' first argument "unavailing because, regardless of whether Michigan courts have categorized carbon monoxide as a pollutant under previous pollution exclusions, there is no doubt that carbon monoxide was a pollutant within the meaning of *this* pollution exclusion." *Id.* (emphasis in original). Citing *McGuirk,* 220 Mich App at 347, the District Court noted that under Michigan law, "courts evaluate each insurance policy as its own contract in accordance with its own terms" and will not permit comparative rewriting "under the guise of interpretation." *Housing Enterprise*, 446 F Supp 3d at __; slip op at 10. "For this same reason, the Agee Defendants' arguments about 'historical' interpretations of separate pollution exclusions are similarly unsuccessful. *Id.*

As to the Agees' second argument, Judge Levy found "no language in the pollution exclusion requiring that a pollutant be man-made, and Michigan law would not permit the Court to 'engraft' such a requirement." *Id.* And while "Michigan courts have not yet specifically held that carbon monoxide is a 'pollutant' for the purposes of a pollution exclusion, they have long held that naturally-occurring chemicals may become "contaminates" in certain quantities." *Id.,* citing *McGuirk*, 220 Mich App at 356-357 (holding that petroleum – a naturally-occurring liquid found beneath the earth's surface – had so "contaminated" the water that it constituted a "pollutant").

The District Court next considered whether this pollutant "discharged, dispersed, seeped, migrated, released, or escaped from Underlying Plaintiffs' stove." *Housing Enterprise*, __ F Supp 3d at __; slip op at 10. The Agees' expert opined after examining the furnace that the carbon monoxide entered the Agee family's environment as part of the furnace's "exhaust gas, which mixed with the ambient air." *Id.* "On these facts, and under a plain-language understanding of the terms in Plaintiff's Policy, it is clear that the carbon monoxide either discharged, dispersed, seeped, migrated, escaped, or was released into Underlying Plaintiffs' air." *Id.* Again looking to Merriam-Webster dictionary, Judge Levy noted that "seep" is defined as "to become diffused or spread." *Id.* The same dictionary defines "disperse" as "to spread or distribute from a fixed or constant source." *Id.* While the Agees argued that "there is no discharge of pollutants where the people [a]re injured at their own premises," the District Court found that this argument ignored "the unambiguously broad terms of this particular insurance policy as applied to the facts of this particular case." *Housing Enterprise*, 446 F Supp 3d at __; slip op at 11.

This did not, however, end the District Court's analysis of the exclusion. "Although [Housing Enterprise's] pollution exclusion bars coverage for injuries due to pollution, this exclusion has an exception of its own," which the District Court dubbed the "uncontrollable fire" exception. *Id.* The policy provides that the pollution exclusion *did not apply* (1) if the injury arose "from the heat, smoke, or fumes of a fire" which became "uncontrollable"; or (2) if the injury arose "from the heat, smoke, or fumes of a fire" which "broke out from where it was intended to be located." *Id.* Judge Levy found "a material question of fact as to whether the bodily injury arose from the heat, smoke, or fumes of an uncontrollable fire…." *Id.* So Home Enterprise's motion for summary disposition was denied.

This decision illustrates that Michigan has a somewhat unique approach to pollution exclusions. The Court of Appeals specifically held in *McKusick*

that pollution exclusions are not limited to "traditional environmental pollution." This was a minority position - at least as of 2009, as explained in *Apana v TIG Ins Co,* 574 F3d 679, 682 (CA 9, 2009). "Most state courts fall roughly into one of two broad camps." *Id.* "Some courts apply the exclusion literally because they find the terms to be clear and unambiguous." *Id.* "Other courts have limited the exclusion to situations involving traditional environmental pollution, either because they find the terms of the exclusion to be ambiguous or because they find that the exclusion contradicts policyholders' reasonable expectations." *Id.* Michigan falls within the first camp, i.e., states that "apply the exclusion literally." See *Id.*, citing *McKusick*. In *McKusick,* 246 Mich App at 337-338, the panel noted: "Although we recognize that other jurisdictions have considered the terms 'discharge,' "dispersal," 'release,' and 'escape' to be environmental terms of art, thus requiring the pollutant to cause traditional environmental pollution before the exclusion is applicable, we cannot judicially engraft such limitation." See also *Bituminous Cas Corp v Sand Livestock Systems, Inc,* 728 NW2d 216, 221-222 (Iowa 2007); *Cincinnati Insurance Co v Becker Warehouse, Inc*, 262 Neb 746, 755-756; 635 NW2d 112 (2001).

Endnotes

1 The claimant's amended complaint also included a breach of contract claim relating to employee deductions and the employer's alleged failure to make certain disclosures and contributions as required by tax law. *Perfect Fence,* unpub op at 2. Perfect Fence agreed that the "breach of contract was not a theory of recovery that fell within the insurance policy…." *Id.* at 6.

2 See, for example, *Hobson v Indian Harbor Ins Co*, 499 Mich 941; 879 NW2d 255 (2016) (Zahra, J., concurring). The insurer in that case was represented by this author.

Amicus Report

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The Supreme Court, in its upcoming term, will be addressing an important issue impacting medical malpractice cases, specifically, the six-month "discovery" limitations period. Michigan Defense Trial Counsel has been invited to file briefs amicus curiae in this case.

The Supreme Court has granted full leave to appeal in *Bowman v St. John Hospital and Medical Center*.[2] Factually at issue in *Bowman* were allegations of a failure to timely diagnose breast cancer from a mammogram. As more than two years had elapsed since the alleged negligent act or omission (the allegedly misread mammogram), the plaintiff could not rely on the standard two-year medical malpractice limitations period. Thus, the legal issue was whether or not the plaintiff had timely commenced the action within the time afforded by the six-month "discovery" period of limitations, MCL 600.5838a(2). Under the "discovery" limitations period, a medical malpractice claim may be commenced within six months after the plaintiff discovered or should have discovered the existence of the claim.

For many years, the Supreme Court's decision in *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997) has been the leading case interpreting the "discovery" limitations period and, more particularly, the objective prong of the discovery limitations period, i.e., what is meant by "should have discovered" the existence of the claim. The *Solowy* Court held that a claimant need only know of a "possible" cause of action before the six month discovery period would begin to run. More specifically, the Court held that "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id*. at 223.

Several recent cases from the Court of Appeals have cast some doubt on the continued viability of *Solowy*. Most importantly, in *Jendrusina v Mishra*, 316 Mich App 621; 892 NW2d 423 (2016), a case involving an alleged failure to diagnose kidney failure, the Court of Appeals held that the trial court had erred in granting summary disposition to the defendants based on the expiration of the discovery limitations period. While the plaintiff in *Jendrusina* had learned of his kidney failure more than six months before commencing the action, the Court of Appeals held that this knowledge only indicated that the plaintiff "could" have known of a possible cause of action, not that he "should" have known. The Court further held that applying an "objective standard" requires determining what a reasonable person should have known, and not what a reasonable physician should have known. The Court of Appeals concluded that a reasonable layperson would not necessarily understand that the onset of kidney failure meant that medical malpractice may have occurred.

Following *Jendrusina*, the Court of Appeals, in another alleged failure to diagnose breast cancer case, *Hutchinson v Ingham County Health Dept*, 328 Mich App 108; 935 NW2d 612 (2019), held that the six month discovery period did not begin to run when the plaintiff was informed of the need for a biopsy of a lump in her breast to determine if cancer was present. Rather, the period began when the plaintiff later received a definitive diagnosis of breast cancer. Applying both *Solowy* and *Jendrusina*, the Court reasoned that, since the plaintiff was aware that she had been seeking treatment for the lump and had received mammograms as part of that treatment, she had sufficient information upon diagnosis of cancer where she "should have known" of a possible cause of action and that prior treaters may have missed the diagnosis. From this later date, the Court of Appeals concluded that the action was timely under the discovery limitations period.

Against this backdrop, the Court of Appeals in *Bowman* held that the plaintiff

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discovered a possible cause of action when she received a definitive diagnosis of breast cancer. As the plaintiff commenced an action more than six months after the diagnosis, the Court of Appeals remanded for entry of summary disposition in favor of the defendants. The plaintiff filed an application for leave with the Supreme Court which, in granting that application, has asked the parties to address the following issues: "(1) whether this Court's decision in *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997), adopted the correct standard for application of the six-month discovery rule set forth in MCL 600.5838a(2); (2) if not, what standard the Court should adopt; and (3) whether the plaintiff in this case timely served her notice of intent and filed her complaint under MCL 600.5838a(2)." Given the stated issues, it appears that the Supreme Court may be reconsidering the standard for application of the six-month discovery limitations period, long set forth in *Solowy*.

Briefing is currently in progress in *Bowman*. It is anticipated that MDTC's amicus brief will be filed later this year.

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 Nos. 160291 and 160292.

MDTC Schedule of Events

2020

Thursday, November 19, 2020	Insurance Section – Explico- 12 noon – 1:00 pm - Virtual
Friday, December 4, 2020	Winter Conference – Part 3, 12 noon -1:30 pm – Zoom

2021

Friday, January 8, 2021	Virtual Trials - 12:00 - 1:30 p.m. Zoom
Thursday, January 21, 2021	Board Meeting – 4:00 p.m. Zoom
Tuesday, February 9, 2021	How to Appeal Proof Your Case –- 12:00 - 1:30 p.m. Zoom
Friday, February 26, 2021	Future Planning – 4:00 p.m. – 6:00 p.m. Zoom
Friday, March 5, 2021	Trying Cases with Millennial Jurors & New Judges - 12:00 – 1:30 p.m. - Zoom
Thursday, March 18, 2021	Legal Excellence Awards – 6:00 – 8:00 p.m. Zoom
Friday, April 2, 2021	ADR / Remote Mediations –12:00 – 1:30 p.m. Zoom
Friday, May 7, 2021	Social Media Marketing – 12:00 – 1:30 p.m. Zoom
Thursday, June 17 – Friday, June 18	Annual Meeting & Conference – Indigo, Traverse City
Friday, September 10, 2021	Golf Outing – Mystic Creek, Milford, MI
Thursday, November 4, 2021	Board Meeting – Sheraton Detroit Novi Hotel, Novi, MI
Friday, November 5, 2021	Winter Meeting – Sheraton Detroit Novi Hotel, Novi, MI

2022

Thursday, June 16 – Friday, June 17, 2022	Annual Meeting & Conference – Tree Tops – Gaylord

2023

Thursday, June 15 – Friday, June 16, 2023	Annual Meeting & Conference – Tree Tops-Gaylord

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1. Where is your business located?
We are located in Grand Rapids, Michigan, but facilitate depositions nation-wide! We've even had business internationally.

2. What was your motivation for your business?
Our mission is to provide passion-filled and creative solutions for our clients through our investment in people, technology and best-in-industry resources.

3. What is your educational background?
Our founder and CEO, Shaun Fitzpatrick, attended Aquinas College, while our COO Collin Ritsema attended Grand Valley State University.

4. How long has Fortz Legal been in the legal industry and what is the nature of your business?
Fortz Legal Support was founded in December 2015 and has experienced tremendous growth in just five short years. Our business is focused on providing best-in-class litigation support. We are experts at providing court reporters, facilitating remote and in-person depositions, and doing whatever it takes to support our clients.

5. What are some of the greatest challenges/rewards in your business?
The most rewarding aspect of our business is providing game-changing solutions for our clients. Whether it's presenting exhibits for a seamless deposition or coming through at the last minute, we love helping our clients with every step of the legal process. No task is too big or too small for Fortz Legal.

One of our biggest (and most rewarding) challenges is helping our clients adapt to new technologies. While some of the firms we work with are well equipped to handle the changing legal landscape, others need more assistance. That's why we're prepared to go above and beyond to save the day for our clients.

6. Describe some of the most significant accomplishments of your career:
Fortz Legal was recently ranked on Inc. Magazine's prestigious Inc 5000 list, which is a ranking of the fastest growing privately held companies in the United States. This huge honor would not have been possible without the contributions of our dedicated court reporters, loyal clients, and hardworking staff members.

7. How did you become involved with the MDTC?
Fortz Legal is a proud partner of MDTC! We've presented webinars to MDTC members, and we continue to provide both services and opportunities for continuing education.

8. What do you feel the MDTC provides to Michigan lawyers?
The MDTC is not only a networking organization, it's a repository of knowledge for Michigan lawyers. MDTC provides invaluable resources and opportunities for its members, taking their legal practice to the next level.

9. What do you feel the greatest benefit has been to you in becoming involved with the MDTC?
The biggest benefit of joining MDTC is the opportunity to make lasting connections with other Michigan legal professionals. We're passionate about building our network and providing game-changing solutions, especially for Michigan firms.

10. Why would you encourage others to become involved with MDTC?
The MDTC is an excellent way to not only network, but also to continue your education. Whether you're an attorney or a legal service provider, MDTC will help you make lasting connections and learn about the latest technology.

11. What are some of your hobbies and interests outside of work?
Our founder and CEO, Shaun Fitzpatrick, is extremely active as a little league baseball coach. He and his wife, Hanh, have three children.

Michigan Defense Trial Counsel, Inc.
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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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