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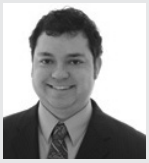
MDTC
Promoting Excellence in Civil Litigation
P.O. Box 66
Grand Ledge, Michigan 48837
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Editor's Notes

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

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



Matthew A. Brooks
mbrooks@smithbrink.com

Katharine Gostek
katharine.gostek@kitch.com

Victoria L. Convertino
victoria.convertino@gmail.com

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President's Corner

By: Deborah Brouwer,, *Nemeth Law P.C.*
DBrouwer@nemethlawpc.com

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

It was not my intention to write my first MDTC President's Letter about the pandemic. I was quite sure that we would be beyond COVID-19 by now – at least beyond it being the center of all we do and think. I was sure there would be other issues I wanted to talk about, other ideas I wanted to share. But I was wrong (something I have definitely experienced a lot in the last 18 months). There are other things to talk about, but those are for another day. This day, this letter, I want to talk about connections. Not the virtual connections that we are now so skilled at making, but real connections, those I am afraid we have become rusty in making.

MDTC had its first in person event this month: our annual (well, except for 2020) golf outing at Mystic Creek Golf Club in Milford. From all accounts, the weather was perfect, the golf was…well, at least adequate and at best perfect… and the golfers were very, very happy to be out of their offices, actually seeing and talking to colleagues, friends, judges and our sponsors. It was, finally, a chance to really connect. It was such a success, such a relief, and I want to be sure we keep those connections coming.

We hear much about how working remotely is here to stay -- that remote depositions, meetings and hearings (and yes, even trials) will continue to be the standard, because of all of the conveniences remote work offers, all of the time and cost savings at a time when we all are so busy. No need to drive to Wayne, Macomb, or Ingham County courthouses, try to park, and then sit in a courtroom waiting for your motion to be called. No need to worry about traveling out of state to your client, to be with her during her deposition. No need to get the insurance adjuster to actually come to a facilitation in person, because we are now so used to everyone just appearing in that square Zoom box. You know what, though? I really miss being in Wayne County Circuit Court, seeing how the judge on my case interacts with other counsel and parties, and how he is deciding motions. I miss hearing counsel argue legal issues in case types that I never handle, like custody, sentencing, and guardianships. I don't miss the hard benches, but I do miss feeling the tension increase, as my case gets closer to being called. I miss what I learn from other attorneys, by watching how they argue their cases, how they respond to the judge's questions. I even miss the drive to the far away courthouse, during which I can go over my argument, again and again, in the car. (And that does not even address missing visits to some of Michigan's beautiful old courthouses.) I miss the high ceilings in the federal courtrooms.

All of this just is not there when I am in my office, on Zoom but with camera and sound muted, working on some other case while waiting to argue my motion. I might be connected virtually, but I am not really connected, connected to the process of litigating, of being a lawyer, of solving my client's problems. When the connection is remote, it is just not as solid, as *right.* It is not there in hearings by Zoom, where we all talk over each other. It is not there in facilitations by teleconference, where it is so easy for everyone to just sign off without resolving the matter, rather than be forced to stay in the facilitator's conference room until 5:00 p.m., when everyone is finally so tired of being there that the case does indeed settle. I miss that, really.

But, most of all, I miss my colleagues. Practicing law, especially litigating, is not a solitary process. While there are solitary moments, perhaps brief writing, being a litigator is mostly a collegial and collaborative process, spiced with those occasional moments of battle. We are not meant to do this alone, in our offices, by ourselves. We are meant to do this together. So what I urge you to do, is to fight always taking the easy out, to fight automatically agreeing to remote connections, and at times insist on real connections. There are times when it will make sense to handle matters remotely, but not always. Find ways to attend in person conferences and seminars, to actually meet with your clients, in person (safely of course) and meet your judges, and meet your opponents. I am guessing that they have missed you, too.

The MDTC is excited to announce its annual Best Article Award! Starting with volume 38, the MDTC will select an article from each volume of *Michigan Defense Quarterly* to recognize as the best.

The editors and judges will consider the following criteria when selecting finalists and the award recipient:

- **Timeliness**—Does the article address a novel issue or developing area of the law?
- **Originality**—Does the article offer a unique perspective on an issue?
- **Organization**—Does the article follow a logical progression?
- **Writing Style**—Is the writing clear, succinct, and understandable? Is it engaging?

The award will be announced in September and presented at the Past Presidents Dinner. Judges will be invited to attend and recognized at the Past Presidents Dinner. The award recipient will also be recognized in the Member News section of the October issue and on the MDTC's social media pages.

Litigating the Value of Medical-Expense Damages

By: Michael J. Cook, *Collins Einhorn Farrell PC* and Anthony D. Pignotti, *Foley, Baron, Metzger & Juip, PLLC*

Executive Summary

The plaintiffs' bar has generally shifted away from emphasizing non-economic damages to "blackboarding" large economic damages. Medical expenses are often a large component of that. Too often, the medical expense component reflects the amount billed. The issue, however, is that oftentimes, the amount billed is much higher than the amount medical providers generally will accept. The amount recoverable in personal injury should be limited to the reasonable value of the medical expenses.

Michael J. Cook is a shareholder at Collins Einhorn Farrell PC and co-chair of its appellate department. His practice focuses on appellate and post-verdict litigation. He also frequently works with trial counsel to minimize risk exposure and posture a case for appeal through dispositive and other pre-trial motions. Before joining Collins Einhorn, Mike was a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr. from 2007 to 2009.t

Anthony D. Pignotti is a Partner at Foley, Baron, Metzger & Juip, PLLC where he specializes in complex medical malpractice and birth trauma litigation. He also has significant experience defending healthcare providers in § 1983 litigation in federal court. He has a growing trial practice, having tried numerous cases in both federal and state courts to verdict. He can be reached at apignotti@fbmjlaw.com.

There's a common adage for buying a car: Never pay the sticker price. That's good advice for medical-expenses damages too.

It's no secret that the price of medical treatment isn't what the bill says. Medical providers commonly accept less than the billed amount. So why should billed amounts set the damages for medical expenses? They shouldn't.

The key is reasonable value. More specifically, the key is what is admissible to show the reasonable value of medical expenses. There are a couple layers to that legal onion, and the trip through them is fraught with tear-inducing peril. Some will get lost in the collateral-source rule. Others will shuck aside valid hearsay objections. But, simply put, the amount billed for medical expenses doesn't always equate to reasonable value when calculating damages.

This part is undeniable: plaintiffs can recover the reasonable value of their medical care.

A plaintiff's damages include the reasonable value of his or her medical care.[1] So reasonableness is the touchstone.

The Michigan Supreme Court, when discussing attorney fees, explained that a reasonable fee is "a fee similar to that customarily charged in the locality for similar legal services."[2] That, the Court said, may "differ from the actual fee charged."[3] It also may not be "the highest rate the attorney might otherwise command."[4]

The Supreme Court's comments on the reasonableness of fees meld with the purpose of awarding damages—compensating a loss.[5] The purpose isn't to punish the defendant.[6] And it isn't to give the plaintiff a windfall.[7] "[T]he amount of recovery for [the losses actually suffered] is inherently limited by the amount of the loss; the party may not make a profit …."[8]

So reasonable value isn't actual value or the highest possible value for a medical expense. It's something else. And whatever else it is, it cannot lead to a profit for the plaintiff. So what evidence is admissible to establish reasonable value?

In Michigan, the amount billed and the amount accepted as payment for healthcare don't stand on equal footing.

Under Michigan law, a medical bill alone is not evidence of the reasonable value of the plaintiff's medical expenses. The Supreme Court settled that point in *Herter v Detroit*, which held that it was error to admit "two bills handed [to] plaintiff by the bookkeeper of the surgeon who attended him, without evidence of the reasonable value of the service rendered."[9]

The amount actually paid, on the other hand, stands on better evidentiary footing. In *Alt v Konkle*, the Supreme Court held that the fact that "bills and charges for services … had been paid in full was some evidence of their reasonableness."[10] In other words, the amount paid for medical services is, at the very least, some evidence of reasonable value.

So, where do we get evidence of the amount paid for similar medical care? From those who pay and accept payment for those services. But how to convert those potential sources into admissible evidence isn't necessarily obvious.

Testimony, even expert testimony, about or based on what medical providers told someone they charge is inadmissible.

Litigating medical-expense damages—past or future—requires rooting out hearsay. For example, a life care planner might be prepared to testify that a particular service costs $100. When asked, they might say that they surveyed local medical providers to determine the price. For a moment, leave aside whether that's $100 billed, paid by insurers, or paid in cash. When witnesses repeat what providers said they charge as proof of what they charge, the witnesses' testimony is hearsay.[11] It's the medical provider's out-of-court statement offered for proof of the matter asserted (what the provider charges). It's classic, unequivocal hearsay.[12] There's no "price of something" exception to the rule against admitting hearsay.[13] So testimony about what providers said they charge is inadmissible.[14]

Expert testimony based on what a provider said they charge is also inadmissible. The experts likely won't express their opinion on reasonable value in terms of who they spoke to or what they reviewed. This will require some unpacking during a deposition or through voir dire of the witness during trial. But, in Michigan, the data that an expert relies on must be in evidence.[15] So, even if plaintiffs qualify their life care planners as experts, their testimony about prices based on their survey of local providers is inadmissible. Likewise, expert testimony based on their review of medical bills is inadmissible under *Herter*.

Since neither side can rely on a witness's survey of local medical providers, how can they present evidence of what is paid and accepted for medical services? One workaround would be to subpoena and present testimony from local providers about what they accept in payment for their services. That would avoid hearsay. But it's also cumbersome and time-consuming. Fortunately, there are other sources.

Private insurers frequently determine reasonable fees for medical services.

Litigants aren't the only ones who struggle to define reasonable charges for healthcare services. Medical providers and insurers are in the same boat. For them, the issue comes up in the context of out-of-network services, i.e., when insureds receive treatment from medical providers who have not negotiated a rate with their healthcare insurers.[16] In that situation, insurers approve what they deem a "usual, customary and reasonable fee" (UCR)—an industry term.[17] To determine the UCR, insurers use data services that compile billed rates (also called the "usual and customary" rates) in a given area.[18] Insurers then generally approve either the rate at a specific percentile (typically the 75th or 80th percentile) from that data or the rate that the provider actually charged, whichever is less.[19]

Several national services compile data on healthcare charges. The best known may be FAIR Health, Inc. It's the product of a settlement between UnitedHealth Group and the New York State Attorney General.[20] FairHealth's prices are based on billed amounts.[21] It's useful for insurers determining the UCR.[22] It's not useful for determining what insurers pay and providers accept for in-network services. Several courts have held that, based on hearsay and other objections, FairHealth's data isn't admissible to show the reasonableness of a charge.[23]

The Health Care Cost Institute's web service, Guroo.com, provides estimated costs based on the actual amounts paid by insurers. The costs are only estimates because the data is adjusted for inflation. For several reasons, Guroo's cost estimates likely aren't admissible and are informational only. For example, FairHealth reports that an MRI brain scan without contrast costs $3,296 out of network or uninsured. Guroo reports that the same test costs an average of $777.

The collateral-source rule isn't an obstacle to using evidence of the amount paid to establish the reasonable value of medical expenses.

Let's pause before discussing the mechanics of presenting testimony on what is actually paid for various services. There's an elephant in the room. It's the common-law collateral-source rule. And it has divided courts throughout the country on this topic.[24]

The collateral-source rule prohibits the argument that the plaintiff has no damages because a third party (typically an insurer) compensated him.[25] Using past payments to show reasonable value is different from using it to eliminate damages.[26] That point stands out when you move away from what a particular plaintiff's insurer paid for that plaintiff's specific medical care.

For a moment, forget what the plaintiff in your case was billed and what anyone actually paid for those billed services. Think in terms of what the market pays for each medical service in general. The market includes what private insurers and Medicare would pay for the medical service, regardless whether it's provided to the plaintiff or a different patient. Some courts won't grasp the difference. But some will. More important, Michigan law compels consideration of the amount actually paid for a service to determine its reasonable value.[27]

Evidence of what insurers and Medicare pay doesn't eliminate the plaintiff's damages; it shows reasonable value.[28] So it doesn't violate the collateral-source rule.

Using private insurance rates or payments to establish reasonable value.

As the comparison between FairHealth and Guroo demonstrates, insurers typically pay much less for in-network services. Those rates may be closer to the 50th percentile than the 80th percentile.[29] But how can you get and present evidence of those rates?

Private insurers won't simply give you a payment schedule in response to a subpoena, probably.[30] They have a proprietary interest in keeping that information confidential. So sending a subpoena will likely lead to a long, expensive fight that won't produce usable information.

There are medical billing experts—people whose job it is to set, negotiate, and obtain payment schedules with insurers. Such an expert may be able to provide information on private insurer rates. But their testimony likely comes encumbered with the foundation and hearsay problems discussed earlier.

The best, most unobjectionable avenue to private insurer rates may be to ask any medical provider who testifies in the case (e.g., standard-of-care, causation, or damages experts) what they accept in payment for their medical services. They may know which insurance they accept and what those insurers pay for their services. And odds are they provide services relevant to the plaintiff's care.

Asking the medical providers involved in the case what they accept as payment for their services is no different than subpoenaing and asking local providers. It's unlikely to cover the full gambit of charges that the plaintiff claims he or she needed and will need in the future. But it can illustrate the point that the amount accepted in payment is far less than the amount billed.

Using Medicare rates or payments to establish reasonable value

Medicare is the largest single payer for medical services in the United States.[31] So it provides a useful source of determining reasonable fees for healthcare. Since 1992, Medicare has used and published its fees, which are adjusted for location.[32]

Using Medicare rates has a few benefits. First, Medicare payment schedules are self-authenticating public records.[33] Second, the Medicare fee schedules don't carry hearsay burdens like other evidence.[34] Third, Medicare rates, which may be less than what private insurers pay,[35] are, under *Alt*, evidence of reasonable value.

> There's a common adage for buying a car: Never pay the sticker price. That's good advice for medical-expenses damages too.

To use the Medicare fees, you're going to need a translator. In particular, you'll need someone who knows the current procedural terminology (CPT) codes for each service. Most life care planners know those codes.

Once you have someone who can decipher the CPT codes and fee schedules, there are two ways to use Medicare fees. A life care planner could create a report using those figures or prepare a report that mirrors the plaintiff's life care plan but uses Medicare rates to show the differences in value. Alternatively, you could use a few prominent examples to cross-examine the plaintiff's life care planner or other damages expert (if they're familiar with CPT codes and Medicare payment schedules).

Medicare is not the end-all, be-all of reasonable value. It's a data point, one that typically falls well below the billed amount, which shows that damages claims based on billed amounts are inflated and unreliable.

Conclusion

The plaintiffs' bar has generally shifted away from emphasizing non-economic damages to "blackboarding" large economic damages. Medical expenses are often a large component of that. Too often, the medical expense component reflects the amount billed.

Defense attorneys generally loathe discussing damages in front of a jury. But whether it's blocking efforts to use billed amounts through *Herter* and hearsay objections, or demonstrating that the billed amounts aren't reality though medical provider testimony about the rates they accept or Medicare rates, there are ways to burst the billed amount bubble without belaboring the point to a jury. So, just like buying a car, when you're litigating medical-expense damages, don't pay the sticker price.

Endnotes

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

2 *Smith v Khouri*, 481 Mich 519, 528; 751 NW2d 472 (2008).

3 *Id.*

4 *Id.*

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

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

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

8 *McAuley*, 457 Mich at 520.

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

10 *Alt v Konkle*, 237 Mich 264, 270; 211 NW 661 (1927); see *id.*, quoting *Dewhirst v Leopold*, 194 Cal 424; 229 P 30 (1924) ("Amounts paid for medical treatment and attention are some evidence of reasonable value thereof, and sufficient in absence of showing to contrary.").

11 MRE 801.

12 MRE 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

13 MRE 803.

14 MRE 802.

15 MRE 703; see *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011) ("[MRE 703] permits 'an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.'"), quoting 468 Mich xcv, xcvi (staff comment to the 2003 amendment of MRE 703).

16 Research and Planning Consultants, LP, *Determining Usual, Customary, and Reasonable Charges for Healthcare Services* (July 2019), p. 1.

17 *Id.*, p. 2.

18 *Id.*, pp. 2-3.

19 See *id.*, pp. 3-5, for an excellent explanation of this process and percentiles in general.

20 *Folweiler Chiropractic, PS v Fair Health, Inc*, unpublished opinion of the Washington Court of Appeals, issued June 4, 2018 (Docket No. 75864-1-I); 2018 WL 2684374, *1.

21 *Id*. ("The database includes the actual, nondiscounted fees charged by providers before network discounts or other allowances are applied.").

22 Research and Planning Consultants, LP, *Determining Usual, Customary, and Reasonable Charges for Healthcare Services* (July 2019), p. 11.

23 See, e.g., *Patriot All Pro Physical Therapy Centers, Inc. v Vermont Mut Ins Grp*, 2017 Mass App Div 195 (Dist. Ct. 2017); *Lomibo LLC v Vermont Mut Ins Grp*, 2018 Mass App Div 79 (Dist. Ct. 2018).

24 See *Slayton v Del Health Corp*, 117 A3d 521, 527 (Del, 2015) ("Even though the collateral source rule has been recognized by most states, it has not been uniformly applied to healthcare provider write-offs." (footnote omitted)).

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

26 *Stanley v Walker,* 906 NE2d 852, 857–858 (Ind, 2009).

27 See *Alt*, 237 Mich at 270; see also MCL 600.1482 (codifying this requirement for medical-malpractice cases).

28 *Gaddy v Terex Corp*, unpublished opinion of the United States District Court for the Northern District of Georgia, issued July 21, 2017 (Docket No. 1:14-CV-1928-WSD); 2017 WL 3473872, *3 ("The Court finds these opinions of the market rates paid for care by all market payers do not violate the collateral source rule, because they are not offered as evidence of payments by a third party to reduce the defendant's liability for damages—they are instead offered to establish the reasonableness of the amount of damages.").

29 See Davis, James B. Ed. Medical Fees 2015, pp. 2-3 ("HMOs and other managed care groups typically negotiate fees that are closer to the 50th percentile for a given area.").

30 We haven't tried. They might readily hand over this information, but that seems unlikely.

31 Research and Planning Consultants, LP, *Determining Usual, Customary, and Reasonable Charges for Healthcare Services* (July 2019), p. 7.

32 It's an exceedingly complex system, which the American Medical Association describes here: RBRVS Overview, American Medical Association, https://www.ama-assn.org/about/rvs-update-committee-ruc/rbrvs-overview.

33 MRE 902, 1005.

34 MRE 803(8) (public records), (6) (business records).

35 *Gaddy v Terex Corp*, unpublished opinion of the United States District Court for the Northern District of Georgia, issued July 21, 2017 (Docket No. 1:14-CV-1928-WSD); 2017 WL 3473872, *3 (expert testified that "private sector professional fees are paid at a rate equal to 128 percent of the Medicare rate for various services and items").

On The Liability or Immunity of Judicial Law Clerks

By Timothy Mulligan, *Zausmer, P.C.*

Executive Summary

This article will consider both the liability of a law clerk or judicial attorney, as well as immunity. Both analyses point to the same conclusion: law clerks ought not to be liable to litigants or the public at large from their research and writing activities for a judge. As to liability analysis, courts should hold that law clerks do not owe duties of care to litigants or the public, and that proximate cause is absent because of the presence of an intervening, superseding cause (the judge's own decision-making). As to immunity, law clerks should be and are held to enjoy quasi-judicial immunity, and it should be broad and vigorous – no less vigorous than the types of immunity enjoyed by judges since law clerks' role is intimately associated with the judicial function.

Timothy Mulligan, a civil litigation specialist, has been an attorney since 1996. After practicing law for nine years, he was with the Michigan Court of Appeals for six and a half years, where he drafted decisions in hundreds of cases, and over two dozen opinions he drafted became authoritative published opinions. A published legal author on tort reform and insurance, Timothy has been a Judicial Attorney for a trial court and an appellate court, where he drafted decisions on a wide variety of issues. Having lived abroad several times, Timothy is fluent in Spanish (he and his wife speak Spanish at home).

Introduction.

What is the basis for liability of a law clerk or judicial attorney (herein "law clerk")? As always, it depends on the circumstances. Was the plaintiff a criminal defendant (say, someone who was wrongfully imprisoned)? Was the plaintiff a civil litigant before the court who was held liable by the trial court, but the decision was reversed on appeal? Is the plaintiff a person who was injured by a criminal defendant who was let go? Each of these is a possible claimant against a law clerk.

Lack of duty of care owed.

It is rare that judges are sued, and concomitantly rare that their law clerks are sued. This is probably a good thing for the reasons stated herein. First of all, there is obviously no attorney-client relationship with parties who appear before the court that employs the law clerks. So there is no duty of care in that respect. The "no duty" argument is one that needs to be deployed in many or most lawsuits against law clerks, and that argument goes beyond—well beyond—the fact that there is not an attorney-client relationship between a clerk and a litigant or member of the public.

In many negligence actions, the defendant in question owes no duty to the plaintiff. Negligence cannot be asserted against just anyone who allegedly causes or contributes to harm.[1] Generally speaking, there is no duty at common law to aid or protect another person.[2] The plaintiff must generally fall within some zone of protection or have some relationship with the defendant.[3] "[T]he law does not require … vigilance in all cases, or on behalf of all persons."[4] It ought to be rare that a law clerk would be found to have such a special (legal) relationship with a litigant. Certainly, the mere fact of being a litigant before the judge in question cannot normally give rise to a general common-law duty to avoid negligence. If the mere fact of being a litigant before the court were sufficient to impose a duty of care on the law clerks, the duty of care of law clerk's would be excessively broad—broader than that of a judge, which would not make sense. To put it another way, law clerks are not insurers of accurate or correct outcomes of the cases before the court. That is simply not their role or function.

Lack of duty: foreseeability.

In the main of cases, often the duty issue turns on foreseeability of harm. In that respect, the duty issue is related to or resembles the proximate cause issue.[5] In *Robertson v Swindell-Dressler Co*, the Court of Appeals stated:

The questions of duty and proximate cause are interrelated because the question of whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability whether it is foreseeable that the actor's conduct

may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.[6]

To be sure, it is foreseeable that if a law clerk commits, for example, an error in analyzing the law, researching the law, or presenting the law to the judge, the error could negatively affect a litigant. The judge might not catch the error, and the litigant's attorney might not be able to fix it through, say, a motion for reconsideration. But this is a circumstance where mere foreseeability should not be enough to impose a duty of care – to impose liability. This should be viewed as something inherent in a judicial system run by and made up of human beings.

Other duty-related factors besides foreseeability.

A no-duty argument does not always turn on foreseeability. That is but one basis on which a no-duty argument may sometimes arise. Even though a harm is foreseeable, the law will sometimes not impose (retroactively) a duty on the defendant. This is true for two reasons.

First, the law will sometimes view the defendant's conduct as beneficial and want to promote vigor and activity of the kind engaged in by the defendant at the time of or prior to the harm.[7] This kind of reasoning has some applicability to law clerks. In their case, the law ought to want law clerks to be creative and proactive in their work, not excessively cautious, fearful, or excessively "conservative," or defensive in their analysis. Moreover, law clerks should be encouraged to give their own opinions to the judge – their independent analysis, and not simply ask for or rubber-stamp what the judge wants. This exercise of independent judgment is inherently desirable to the judicial function.

Second, and relatedly, sometimes the "no duty" analysis turns on social costs and benefits and whether, as a matter of public policy, the law should want to impose liability for the activity allegedly giving rise to harm.[8] When courts analyze the social costs and benefits of imposing a duty (and therefore possible liability), they are engaged in making public policy.

Public policy analysis (social costs and benefits) favors a no-duty conclusion.

Some courts do not often do this kind of public policy analysis. They are sometimes not used to it. Indeed, even when courts note that a negligence-related duty depends on social costs and benefits, they sometimes revert back to questions of the relationship between the parties and foreseeability.[9] This seems incorrect. These three factors can be analyzed independently (though perhaps that is not true in all cases). Courts can and should engage in public policy analysis to determine whether a duty should be imposed by the law on a given defendant.

On the other hand, foreseeability is key to the duty issue and is well within the ken of courts – they are accustomed to analyzing it. In the case of law clerks, although it is foreseeable that their mistakes could harm litigants or the public at large, the social benefits of imposing liability on them do not outweigh the social costs. The social benefit would be that they would (allegedly) have an increased incentive to research the law, analyze the law, and present the law to the judge accurately. But this incentive already exists in the nature of the law clerk's job. The law clerk can already be held accountable to the judge for not accurately researching, analyzing, and presenting the law (as well as the facts of the case).

Further, the social costs of imposing the duty onto law clerks, and therefore imposing possible liability, would be high. Law clerks would have a "black mark" on their record from having been sued—and held liable—for professional negligence or constitutional torts. This might affect their post-clerking employment and employability, which would, in turn, discourage attorneys from becoming law clerks. Public policy ought to encourage qualified attorneys to become law clerks. Further, if such lawsuits against law clerks became common, the malpractice liability of courts would have to change (after all, such suits would have to be defended). For example, law clerks might have to be added to the policies.

Furthermore, a law clerk's job is, by its nature, sensitive and unique. A clerk must be faithful to the law. That is her duty. This is true whether she is a trial court law clerk or an appellate judicial attorney. She must analyze the facts of the case before the court and research the law to find similar cases with similar issues. She must also refer to other legal sources, determine which are applicable, and analyze them intelligently, such as rules of evidence, civil and criminal procedure rules, and professional responsibility.

But a law clerk must also tailor her work to her boss (or to the judges of an appellate court in general). Her boss or bosses are the ultimate decision-makers on all cases before the court (at least on judicial decisions – obviously, a jury can also be an ultimate arbiter of the merit of a case). Lawsuits against law clerks might give rise to finger-pointing between the law clerk and her judge or the members of a panel of judges. If a law clerk is worried about being sued by a litigant or party to an appeal, that might skew her analysis. And it would be likely to skew the analysis toward litigants who are most likely to sue. That would presumably include personal injury plaintiffs and other claimants whose attorneys are less averse to filing "thin" lawsuits – lawsuits with more tenuous theories and more tenuous bases of liability. In sum, if a law clerk has to worry about being sued, she might skew her analysis toward the more litigious litigants.

For these reasons, a no-duty argument should generally be presented in favor of a law clerk sued for negligence or a constitutional tort. In addition, a proximate cause argument is in order. This is not because of a lack of foreseeability. Rather, it is because there is an intervening, superseding cause—the judge's decision-making.

The judge's ultimate decisions are an intervening/superseding cause.

The judge makes the final decisions. Law clerks propose solutions and draft opinions. But the judge ultimately "makes the call." She has the final say on the outcome of any motion, for example. This should be viewed as an intervening, superseding cause as a matter of law.

The case law in Michigan on this issue does not always emphasize that intervening, superseding causes is a question of law.[10] In *Arbelius v Poletti*, plaintiff's decedent was killed in an auto driven by a drunken minor, and he sued, among others, an adult who bought beer for the minors.[11] The Court of Appeals held that the jury could decide whether the driver's intervening act of negligence was a superseding cause, relieving the adult who purchased the beer of liability.[12]

One of the basic principles of the intervening/superseding causation analysis is that where the original negligence is **too remote** from the injury (in time or in other respects), and another cause in between, more directly caused it, then as a matter of law the originally negligent party should not be held liable.[13] Although not binding on Michigan Courts, *Taylor v Brentwood Union Free Sch Dist* is a key case here.

In *Taylor*, the plaintiff was an African-American middle school teacher who was suspended, allegedly because he used excessive force with students. One defendant was a principal of the school. Taylor brought a § 1983 action against the school district, the board of education, the principal, and others. Taylor claimed that his one-year suspension from teaching constituted race discrimination in violation of equal protection. The court of appeals held as a matter of law, with respect to the claim against the principal, that the intervening actions of the school district, school board, and disciplinary panel were independent, superseding causes of any injury sustained by Taylor.

The case of claims against law clerks is analogous to *Taylor*. *Taylor* stands for the proposition that where another person or body had ultimate authority and took the ultimate decision that affected the claimant, that decision is an intervening, superseding cause as a matter of law with respect to an earlier, more preliminary decision-maker.

Taylor relied in part on the U.S. Supreme Court decision in *Martinez v California*,[14] which held that a girl's death at the hands of a parolee was too remote a consequence of the parole officers' actions of releasing the parolee on parole to hold them responsible under federal civil rights law.

As a matter of law and public policy, a judge's decision on whether to accept and use the analysis or work product of a law clerk should be an intervening, superseding cause of any harm caused by a law clerk. This is not because the judge's action is unforeseeable (though it may be unforeseeable in some cases that a judge would accept erroneous analysis by her law clerk). Rather, it is because, for public policy reasons, the judge should be the one to be held accountable, if at all, for judicial decisions.

Quasi-judicial immunity is applicable.

In addition to a lack of duty and proximate causation, the law clerk should be defended with an argument from quasi-judicial immunity. The quasi-judicial immunity defense should be presented vis-à-vis constitutional tort claims and claims of conspiracy to violate someone's civil rights.[15] It has been held that a court clerk (i.e., a clerk in the clerk's office) enjoys quasi-judicial immunity when she performed a judicial act, such as entry (or not) of a default judgment.[16] Similarly, in *Moore v Brewster*,[17] the panel stated that a judicial law clerk is "probably the one participant in the judicial process whose duties and responsibilities are **most intimately connected with the judge's own exercise** of the judicial function." (Emphasis added.)

The connection to the exercise of the judicial function is important. Why? Because a judge's exercise of the judicial function is entitled to absolute immunity. This is the rule in Michigan.[18]

This rule also applies in the federal jurisdiction.[19] In *Antoine v Byers & Anderson, Inc*,[20] the Supreme Court noted that, at common law, judicial immunity was an absolute immunity from all claims relating to the exercise of judicial functions, and cited, for that proposition, Thomas Cooley, Law of Torts, 408-409 (1880). What is more, at common law, absolute immunity for the exercise of judicial functions extended not only to judges narrowly speaking, but to other officials when exercising judicial functions.[21]

Therefore, insofar as a law clerk's work is part and parcel of the judicial function (which it definitely is), a law clerk is entitled to absolute immunity, and this rule applies to state law claims as well as federal civil rights claims.

The touchstone for the judicial function is "the function of resolving disputes between parties, or of authoritatively adjudicating private rights."[22] Judicial immunity preserves the **independent and impartial exercise of judgment** vital to the judiciary, which would be impaired by exposure to potential damages liability.[23] When judicial immunity is extended to officials other than judges, it is because their judgments are functionally comparable to those of judges – because they, too, exercise a discretionary judgment as part of their function.[24]

Although the function performed by court reporters, preparing transcripts, falls outside this category, because they transcribe things verbatim,[25] the function performed by law clerks falls squarely within it. Law clerks exercise discretion and assist in the judicial resolution of disputes. Those are their core functions. Therefore, their immunity should be comparable to that of the judges whose function they are assisting. In other words, the immunity should, as it relates to those functions, be absolute (as opposed to qualified immunity or an immunity requiring good faith or some sort of reasonableness).

Conclusion.

Law clerks owe no duty to litigants or members of the public when they analyze legal issues or draft opinions for judges. Proximate cause is also absent, because of the presence of an intervening, superseding cause (the judge's or judges' own decision-making). As to immunity, law clerks should be and are held to enjoy absolute quasi-judicial immunity, and it should be broad and vigorous – no less vigorous than the immunity enjoyed by the judges whom they serve.

Endnotes

1 *Bailey v Schaaf*, 494 Mich 595; 835 NW2d 413 (2013).

2 *Id*. at 604.

3 *Id*.

4 *Hargreaves v Deacon*, 25 Mich 1, 4 (1872).

5 *Robertson v Swindell-Dressler Co*, 82 Mich App 382, 389; 267 NW2d 131, 135 (1978).

6 *Id*.

7 See generally O.W. Holmes, Jr., *The Common Law* (1881), Lecture III: Trespass and Negligence.

8 *Miller v Ford Motor Co (In re Certified Question)*, 479 Mich 498, 505; 740 NW2d 206 (2007); compare *Roberts v Salmi*, 308 Mich App 605; 866 NW2d 560 (2014) (licensed professional counsellor did owe a limited duty of care to a patient's parents to ensure that the patient's treatment did not cause the patient to have memories of child sexual abuse).

9 *Roberts v Salmi*, 308 Mich App at 613-615.

10 See e.g., *Arbelius v Poletti*, 188 Mich App 14; 469 NW2d 436 (1991).

11 *Id*.

12 *Id*.; see also *Warren v Mich. Gas Utilities Co*, 91 Mich App 231; 283 NW2d 703 (1979) (passive negligence of the worker's employer was not established as a superseding, intervening cause as a matter of law, but evidence was admissible to that effect, and the trial court correctly instructed the jury on intervening/superseding cause).

13 *Taylor v Brentwood Union Free Sch Dist*, 143 F3d 679 (CA 2, 1998).

14 *Martinez v California*, 444 US 277, 285; 100 S Ct 553, 559; 62 L Ed 2d 481 (1980).

15 See *Peker v Steglich*, 324 Fed Appx 38 (CA 2, 2009) (judicial law clerk's actions of folding, filing, and storing exhibits were cloaked with judicial immunity); also compare, e.g., *Geitz v Overall*, 62 Fed Appx 744 (CA 8, 2003) (attorney for judicial clerk's office, court specialist, and judicial legal assistant were entitled to quasi-judicial immunity), and *Brown v Glasser*, 869 F2d 1488 (CA 6, 1989) (plaintiff failed to state a claim against clerk because judicial support staff are entitled to quasi-judicial immunity, absent evidence that they acted maliciously or corruptly).

16 *Reardon v Hillman*, 735 Fed Appx 45 (CA 3, 2018), citing *Lundahl v Zimmer*, 296 F.d 936, 939 (CA 10, 2002).

17 *Moore v Brewster*, 96 F3d 1240, 1245 (CA 9, 1996).

18 *Serven v Health Quest Chiropractic, Inc*, 319 Mich App 245; 900 NW2d 671 (2017), citing *Diehl v Danuloff*, 242 Mich App 120, 128; 618 NW2d 83 (2000).

19 See *Forrester v White*, 484 US 219, 225; 108 S Ct 538 (1998).

20 *Antoine v Byers & Anderson, Inc*, 508 US 429; 113 S Ct 2167 (1993).

21 See *Burns v Reed*, 500 US 478, 499; 111 S Ct 1934 (1991).

22 *Antoine*, 508 US at 435-436.

23 *Id*.

24 *Id*.

25 *Id*. at 436.

Affinity Bar Spotlight: Black Women Lawyers Association of Michigan

Rita White B*WLAM President,* Family and Criminal Defense Attorney at Law Office of Rita O. White

1. **When did you join the Black Women Lawyers Association of Michigan?**
   2011

2. **What compelled you to get involved with the Black Women Lawyers Association of Michigan?**
   I joined the organization to get to know more women of color attorneys in the State of Michigan, broaden my networking horizons, and seek out opportunities to engage in more legal outreach activities.

3. **What is the mission statement of the Black Women Lawyers Association of Michigan?**
   The Black Women Lawyers Association of Michigan (BWLAM) was founded on July 28, 1992, and incorporated on March 25, 1993, out of necessity to promote reform in the law, to facilitate the administration of justice, and to uphold the highest standard of integrity in the legal profession. BWLAM works to accomplish this goal by promoting programs that enhance civic education through law and promotion of scholarship and opportunity for black women at all levels of education.

4. **What are the criteria for membership?**
   For membership eligibility, one must be an Attorney, Judge, or Associate (Student, Retired Person over 62, Non-Lawyer) and pay a yearly association due to maintain membership.

5. **How does membership with the Black Women Lawyers Association of Michigan benefit legal professionals?**
   BWLAM helps keep members informed of events and trends in the legal community. BWLAM also keeps members aware of opportunities and allows them to increase their professional knowledge and skills through information, practice exchange, and networking with other members in various areas of expertise.

6. **Are there special events, volunteer opportunities, committee groups, or community relationships that the Black Women Lawyers Association of Michigan is particularly proud of?**
   BWLAM is particularly proud of their annual events driven to provide benefits for the community.

   - BWLAM sponsors a yearly *BWLAM Cocktail Sip Fundraiser Benefit* to support children in the foster care system. The event is usually held in the late fall and is a successful event regularly prompting large turnouts within the legal community.

- BWLAM also sponsors a yearly event called *Operation Good Cheer*. Every year, BWLAM members meet at local malls and shop for Christmas gifts for foster children in need. BWLAM then meets afterward and wraps the gifts for the children. This event routinely turns out to be very rewarding and successful for the foster children.
- BWLAM sponsors a bi-annual social justice event called the *Harriet Tubman Social Justice Forum*. Select social justice issues are discussed at the event, typically with a panel of social justice professionals and experts. In the past years, BWLAM has held the event addressing social issues such as the Flint Water Crisis and, most recently, the new upcoming Michigan Criminal Expungement Laws. BWLAM has also incorporated an Awards Ceremony into the event in the past years honoring several of our esteemed BWLAM members.

7. What inspired the establishment of the Black Women Lawyers Association of Michigan?

BWLAM was founded on July 28, 1992, by a group of African American women from the metro-Detroit area who wanted to form a bar organization that focused on women's issues, increase black female representation in the judiciary and public office, and take a proactive stance on political issues. BWLAM focuses on the professional advancement of women lawyers and the promotion of women's rights.

8. As a leader of the Black Women Lawyers Association of Michigan, how do you define "diversity, equity, and inclusion"?

Diversity, equity, and inclusion (DEI) is a term used to describe policies and programs that promote the representation and participation of different groups of individuals, including people of different ages, races and ethnicities, abilities and disabilities, genders, religions, cultures, and sexual orientations. This also covers people with diverse backgrounds, experiences, skills, and expertise.

I believe every human being should be treated equally and fairly despite the differences they may share with others. In particular, each and every African American woman should be entitled to the same rights, opportunities, and access to justice as any other human being. African American women are particularly known to be strong women continuously creating more and more innovations and education in the legal field while showing how it applies to social circumstances and social changes.

9. What are some meaningful actions that law firms and legal employers can take to improve diversity, equity, and inclusion in their workplace (without simply "checking a box")?

Regularly hold engaging activities such as group trainings, forums, workshops, seminars, etc., incorporating the entire workforce and the community at large in efforts to work towards the goal of recognition and mitigation of implicit bias in the workplace and the community as a whole.

10. How can individuals support the Black Women Lawyers Association of Michigan, its mission, and its members?

Individuals can become involved in BWLAM community activities that we hold yearly. Information regarding these activities can be found by accessing the BWLAM social media sites (listed in #12). Individuals can also learn more about us through the Black Women Lawyers Foundation of Michigan (BWLFM), which is a nonprofit 501(c)(3) organization. BWLFM's main mission is to promote and provide scholarships to students for educational purposes in the furtherance of community enhancement and development.

11. What else would you like the *Michigan Defense Quarterly* readers to know about the Black Women Lawyers Association of Michigan?

BWLAM meets once a month each Sunday.

On a yearly basis, BWLAM holds a monthly general meeting on the 3rd Sunday of each month (from September – June). After the general meeting, BWLAM normally holds a presentation where elected officials, medical experts, financial experts, specialized legal administrative professionals, judges, and more are invited to speak about specialized issues affecting the legal community and the community at large.

12. How can *Michigan Defense Quarterly* readers reach out if they are interested in joining or learning more about the Black Women Lawyers Association of Michigan?

BWLAM has several social media accounts where one can learn more about the organization:

- Facebook: "BWLAM" & "Michigan Women Lawyers of Color"
- Twitter: @blckwmnlawMI
- Website: BWLAM.org
- Foundation Website: BWLAM.org/the-foundation

The BWLAM website is a place people can go to join the organization. The BWLAM website and social media sites also provide members updates and information on job opportunities, event notices, business referrals, and more.

Appellate Practice Report

By: Phillip J. DeRosier and Trent B. Collier

Conflicts in the Michigan Court of Appeals

The Michigan Court of Appeals generally decides cases through panels of three of its twenty-five judges. Naturally, there will be differences of opinion among those jurists. The Michigan Court Rules anticipate that differences will arise and provide a procedure for resolving them.

The Court of Appeals is only required to follow a published opinion "issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or a special panel of the Court of Appeals." MCR 7.215(J)(1). Although published opinions issued after November 1990 are binding, subsequent panels are not necessarily required to agree with them.

If a panel disagrees with a precedential opinion and follows it only because it's required to do so under MCR 7.215(J), it "must" indicate its disagreement and cite MCR 7.215(J)(2) in a published opinion. MCR 7.215(J)(2). That statement triggers the conflict resolution process in MCR 7.215.

Generally, within 28 days after the publication of an opinion citing a conflict under MCR 7.215(J)(2), the Court of Appeals' chief judge polls the other judges "to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of addressing the conflict that would have been created but for" the obligation to follow precedent. By requiring judges to ensure that issues are "outcome determinative" before wading into a potential conflict, the Michigan Court Rules ensure that the Court refrains from addressing conflicts in dicta.

If a special panel is convened, seven judges—excluding those who originally heard the case—are selected "by lot." MCR 7.215(J)(4). The conflict panel must "limit its review to resolving the conflict that would have been created but for" the requirement that the court follow published, post-November 1990 opinions. MCR 7.215(J)(5). Litigants may file supplemental briefs "and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument." *Id.* The resulting decision is, of course, binding on future panels.

For appellate lawyers, the key point is to be aware of the potential for a conflict and to specifically ask the Court beforehand—that is, in the merits briefing—to convene a conflict panel when appropriate.

Supreme Court Orders as Binding Precedent

The Michigan Supreme Court has a well-known practice of issuing peremptory orders on pending applications for leave to appeal that decide the application without actually granting leave. Consider this order in *DiLuigi v RBS Citizens NA*:[1]

On order of the Court, the application for leave to appeal the September 9, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.30[5](H)(1),[2] in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. The Court of Appeals erred in holding that a genuine issue of material fact existed regarding notice. To the extent that the Court of Appeals rested its holding on the proposition that MCL 600.3204(4)(a), as amended by 2009 PA 29, requires a borrower to receive actual notice of his or her right to seek a home loan modification, see MCL 600.3205a to MCL 600.3205d [repealed by 2012 PA 521], the Court of Appeals is mistaken. As Judge Riordan's dissenting opinion correctly observes, MCL

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He is a past chair of the State Bar of Michigan's Appellate Practice Section. He can be reached at pderosier@dickinsonwright.com or (313) 223-3866.

Trent Collier is a member of the appellate department at Collins Einhorn Farrell P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His e-mail address is Trent.Collier@CEFLawyers.com.

600.3205a(3) simply requires that notice be given "by regular first-class mail and by certified mail, return receipt requested, with delivery restricted to the borrower, both sent to the borrower's last known address." Because it is undisputed that defendants complied with the statutory requirements by providing plaintiffs with both forms of mailed notice, summary disposition in favor of defendants was proper. For these reasons, we REINSTATE the May 31, 2012 judgment of the St. Clair Circuit Court that granted the defendants' motion for summary disposition.

If a panel disagrees with a precedential opinion and follows it only because it's required to do so under MCR 7.215(J), it "must" indicate its disagreement and cite MCR 7.215(J)(2) in a published opinion. MCR 7.215(J)(2). That statement triggers the conflict resolution process in MCR 7.215.

Does a peremptory order issued by the Supreme Court constitute binding precedent in the same manner as a full-blown opinion? The answer depends on whether the order contains a rationale that can be understood.

Const 1963, art 6, § 6 provides that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision." The seminal Supreme Court decision construing this provision is *People v Crall*.[3] In *Crall*, the Supreme Court held that the Court of Appeals erred in rejecting a Supreme Court order as "not binding precedent."[4] The order, issued in *People v Bailey*,[5] found that "[t]he defendant waived the issue of entrapment by not raising it prior to sentencing." Finding "no basis" for the Court of Appeals' conclusion that the order in *Bailey* was not binding precedent, the Supreme Court in *Crall* observed that "[t]he order in *Bailey* was a final Supreme Court disposition of an application, and the order contains a concise statement of the applicable facts and the reason for the decision."[6] Thus, the *Crall* Court held that the Court of Appeals should have followed *Bailey* and rejected a similarly unpreserved entrapment issue.[7]

Numerous Court of Appeals decisions since *Crall* have variously stated that a peremptory Supreme Court order constitutes binding precedent if the Court of Appeals "can determine the applicable facts and the reason for the decision,"[8] if the order "can be understood,"[9] or if the order contains "an understandable rationale."[10]

This also includes situations where the Supreme Court's "rationale" is contained in **another** decision incorporated into the order by reference. In *DeFrain v State Farm Mut Auto Ins Co*,[11] the Supreme Court confirmed that the requirements of Const 1963, art 6, § 6 "can be satisfied by referring to another opinion."[12] The Court of Appeals has recognized this as well. In *Mullins v St Joseph Mercy Hosp*,[13] the Court of Appeals observed that it "consistently has adhered to the principle that the Michigan Supreme Court's summary disposition orders constitute binding precedent when they finally dispose of an application and are capable of being understood, even by reference to other published decisions."[14]

Sometimes a Supreme Court order may even reference a Court of Appeals dissenting opinion—as in *DiLuigi*. Such orders constitute binding precedent as well. As the Supreme Court explained in *DeFrain*, when the Court references a Court of Appeals dissent, it has "adopted the applicable facts and reasons supplied by the dissenting judge as if they were its own."[15] Thus, in *Evans & Luptak, PLC v Lizza*,[16] the Court of Appeals relied on an analysis of an ethical rule contained in a Court of Appeals dissent because the Supreme Court's order reversing the Court of Appeals majority's decision expressly stated that it "agree[d] with the Court of Appeals dissent's discussion of [the] principles pertaining to [the ethical rule]."[17]

In sum, so long as the Supreme Court's rationale for a decision can be understood and applied beyond the circumstances of the particular case, it is binding precedent regardless whether the decision takes the form of an order or an opinion.

Endnotes

1 See *DiLuigi v RBS Citizens N A*, 497 Mich 1042; 864 NW2d 146 (2015).

2 Formerly MCR 7.302(H)(1).

3 *People v Crall*, 444 Mich 463; 510 NW2d 182 (1993).

4 *Id*. at 464 n 8.

5 *People v Bailey*, 439 Mich 897; 478 NW2d 480 (1991).

6 *Crall*, 444 Mich at 464, n 8.

7 *Id*.

8 *Weschler v Wayne Co Road Comm'n*, 215 Mich App 579, 591 n 9; 546 NW2d 690 (1996), remanded on other grounds 455 Mich 863 (1997). See also *Dykes v Wm Beaumont Hosp*, 246 Mich 471, 483; 633 NW2d 440 (2001) ("An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent.").

9 *People v Edgett*, 220 Mich App 686, 693 n 7; 560 NW2d 360 (1996). See also *People v Phillips (After Second Remand)*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997) ("Supreme Court peremptory orders are binding precedent when they can be understood."); *Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61; 613 NW2d 733 (2000) (same), overruled on other grounds *Kurtz v Faygo Beverages, Inc*, 466 Mich 186; 644 NW2d 710 (2002).

10 *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006) (rejecting reliance on a Supreme Court order because it could not be "understood as expressing an opinion on how the issue should be decided").

11 *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359; 817 NW2d 504 (2012).

12 *Id*. at 369.

13 *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006), rev'd on other grounds 480 Mich 948 (2007).

14 *Id*. at 508; see also *People v Ackley*, ___ Mich App ___; ___ NW2d ___; 2021 WL 1150195, at *2 (2021) ("Peremptory orders from our Supreme Court constitute binding precedent to the extent they can be comprehended, even if that comprehension must be achieved by seeking out and analyzing other opinions."), citing *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018).

15 *DeFrain*, 491 Mich at 369.

16 *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002).

17 See *Abrams v Susan Feldstein, PC*, 456 Mich 857 (1997). See also *Love v City of Detroit*, 270 Mich App 563, 566; 716 NW2d 604 (2006) (relying on a peremptory Supreme Court order that in turn had adopted the Court of Appeals dissent).

MDTC Insurance Coverage Report

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

***Atain Ins Co v Katalyst Fitness LLC*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2021 (Docket No. 354005); 2021 WL 2026207.**

After devoting three of my last four reports to COVID-19 related business interruption claims,[1] it is almost comforting to discuss a familiar, non-pandemic related topic: the duty to defend. But here, the allegations in the underlying suit were quite discomforting. This appeal arose from a declaratory judgment action brought by Atain to determine the scope of coverage provided under a policy it issued to Katalyst Fitness. That policy was allegedly implicated in two separate lawsuits filed against Katalyst and its owners. Both complaints alleged that one of Katalyst's owners "installed hidden surveillance cameras in restrooms and changing facilities in Katalyst's gym to record its patrons." *Katalyst*, unpub op at 2.

The Atain policy contained a "combined coverage and exclusion endorsement," with an exclusion for "physical-sexual abuse." *Id.* The "physical-sexual abuse" exclusion provided that there was no liability coverage for claims that arise out of "or that in any way" involve "the physical abuse, sexual abuse or licentious, or immoral or sexual behavior, whether or not intended to lead to, or culminating in any sexual act…." *Id.* The policy also included "Sexual and/or Physical Abuse" liability coverage ("SPAL"). In this form, Atain agreed to provide liability coverage for "injury to any person arising out of SEXUAL AND/OR PHYSICAL ABUSE, caused by one or your EMPLOYEES, or arising out of your failure to properly supervise." *Katalyst*, unpub op at 3. "Sexual and/or physical abuse" was defined under the SPAL as "sexual or physical injury or abuse, including assault and battery, negligent or deliberate touching." *Id.* However, the SPAL contained an exclusion for acts by "persons insured," which this form defined as "the organization ... and any executive officer, director or stockholder thereof while acting within the scope of his duties as such." *Id.*

After filing the declaratory judgment action, Atain moved for summary disposition based on the exclusions. The trial court agreed and held that Atain had no duty to defend or indemnify Katalyst for either suit. *Katalyst*, unpub op at 3. The Court of Appeals reversed in part, finding that although there was no duty to indemnify, the underlying complaints' allegations *arguably* fell within the SPAL, so there was a duty to defend. *Id*. at 7.

The panel had little trouble finding that the "physical-sexual abuse" exclusion applied. *Id*. at 4-5. Coverage, therefore, turned on the SPAL. *Id.* at 5. The insured argued that, although the underlying complaints did not allege physical injury or abuse, they did allege "sexual injury," which fell within the SPAL. *Id.* at 5-6. The panel agreed that the alleged conduct "was clearly sexual in nature," but framed "the relevant inquiry" as to whether there the complaints alleged an "injury." *Id.* at 6. Looking at dictionary definitions of the word "injury" as well as context clues within the policy,[2] the panel held that the term "sexual injury" required "physical contact." *Id.* "Physical injury, physical abuse, and sexual abuse all involve physical contact." *Id.* "Similarly, assault, battery, and negligent or deliberate touching all involve physical contact or the imminent threat of physical contact." *Id.*

"Given this context," the panel accepted Atain's argument "that 'sexual or physical injury or abuse' all involve physical contact, so 'sexual injury' as used in the SPAL would likewise involve physical contact." *Katalyst*, unpub op at 6. The conduct attributed to the insured in the underlying cases "did not involve physical contact or the imminent threat of physical contact, and was therefore not covered by the SPAL." *Id*

The insured argued for coverage because the SPAL was – at least in the insured's view – intended to essentially write the "physical-sexual abuse" exclusion out of the

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

policy. *Id.* at 6-7.[3] However, the panel did not read the provisions this way. "The 'physical-sexual abuse' exclusion excludes from coverage 'physical abuse, sexual abuse or licentious, or immoral or sexual behavior,' while the SPAL covers damages for 'injury to any person arising out of SEXUAL AND/OR PHYSICAL ABUSE.'" *Id.* at 7. "Thus, while physical and sexual abuse are normally excluded under the policy, the SPAL covers that conduct." *Id.* "But the 'physical-sexual abuse' exclusion is broader than the SPAL coverage"; that exclusion also precludes coverage for "licentious, or immoral or sexual behavior," and the SPAL does not provide coverage for such conduct. *Id*. So the panel affirmed the trial court's ruling as it related to the duty to indemnify.

The panel did find a duty to defend, however. "The SPAL provides that [Atain] has 'the right and duty to defend any suit against you seeking' damages 'because of injury to any person arising out of SEXUAL AND/ OR PHYSICAL ABUSE.'" *Id.* "Despite this opinion's conclusion that [Atain] ultimately did not have a duty to indemnify … under the SPAL, the underlying allegations nevertheless arguably fell under the SPAL." *Id.* (emphasis in original). For this reason, even though Atain "did not have a duty to indemnify … it did have a duty to defend" the insured in the underlying litigation. *Id*.

This outcome may be confusing because there is case law pointing both ways on this point. On the one hand, the Supreme Court has held that the "duty to defend is broader than the duty to indemnify," and an "insurer has a duty to defend, despite theories of liability … that are not covered under the policy, if there are any theories of recovery that fall within the policy." *Hastings Mut Ins Co v Mosher Dolan Cataldo & Kelly, Inc,* 497 Mich 919, 920; 856 NW2d 550 (2014). On the other hand, the Court has stated that the duty to defend "is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy," and if "the policy does not apply, there is no duty to defend." *American Bumper & Mfg v Hartford Fire Ins,* 452 Mich 440, 450; 550 NW2d 475 (1996).

***McIntosh v Auto-Owners Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued March 11, 2021 (Docket No. 351339); 2021 WL 940984.**

Sticking with the "return to normal" theme of this report, here we have an old-fashioned homeowners' claim for snow and ice damage to a roof. The trial court found no coverage, and the Court of Appeals affirmed based on the insured's failure to file suit "within one year after the loss or damage occurs." *McIntosh,* unpub op at 2.

After leaving for the winter, the insureds noticed in the spring and early summer of 2017 that their house suffered damage to the roof system and trusses. *Id.* at 1. Later that summer, a contractor hired by the insureds concluded "that the roof system had been compromised from the weight of ice and snow." *Id.* The insureds made a claim a few weeks later, stating a loss date of September 14, 2017. *Id.* A sworn statement in proof of loss followed on October 30, 2017. *Id*. After investigating, Auto-Owners denied the claim on December 14, 2017, based on its engineer's determination that "the damage to the roof and ceiling resulted from long-term creep deflection that occurred over a period of many years and not from accidental direct physical loss." *Id.* The insureds filed suit on September 13, 2018. *Id.* at 2.

The policy contained a "WHAT TO DO IN CASE OF LOSS" clause that required the insured to give Auto-Owners "immediate notice" of a loss and send Auto-Owners a sworn statement in proof of loss "within 60 days after you notify us or our agency of the loss…." *McIntosh,* unpub op at 2. The policy also contained a "SUIT AGAINST US" clause, which stated: "Suit must be brought within one year after the loss or damage occurs. The time for commencing a suit is tolled from the time you notify us of the loss or damage until we formally deny liability for the claim." *Id.*

During discovery, one of the insureds "testified that he incorrectly identified the date of loss as September 14, 2017, when in fact, the loss occurred during the winter of 2017, and [the insured] observed the roof damage during the spring and summer of 2017." *Id.* Auto-Owners therefore sought summary disposition on the grounds that the insureds "failed to timely file their lawsuit under the policy's one-year lawsuit limitation period." *Id.* In response, the insureds invoked "the common law discovery rule," arguing that "they did not know of the loss until September 14, 2017," when an Auto-Owners adjuster allegedly told them to submit a claim for coverage. *Id*. Auto-Owners argued that *Trentadue v Buckler Lawn Sprinkler Co,* 479 Mich 378; 738 NW2d 664 (2007) "fully abrogated the common law discovery rule in Michigan precluding plaintiffs from relying upon it to extend the contractual limitation period." *McIntosh,* unpub op at 2-3. The insureds, in turn, claimed that *Trentadue* only precluded "the application of the common law discovery rule to extend statutes of limitations with few exceptions." *McIntosh,* unpub op at 3. The trial court agreed with Auto-Owners. *Id.*

On appeal, the insureds raised two new arguments: "that the conduct or representations of Auto-Owners or its agent tolled the contractual limitation period," and that the insureds "were deprived of due process because they claim that the trial court incorrectly applied the *Trentadue* holding." *McIntosh,* unpub op at 3. The panel declined to review these unpreserved issues instead of focusing on whether the common-law discovery rule could help the insureds here. *Id.* at 4.

The panel held that it could not, not because of any misapplication of *Trentadue*, but because the suit was late under the plain language of the policy and the undisputed facts. *McIntosh,* unpub op at 4. "Initially, Auto-Owners challenged the date of loss identified by Robert in the sworn statement in proof of loss subscribed and sworn to before a notary on October 30, 2017, because it averred that the roof trusses suffered caving on September 14, 2017, because of ice and snow which could not have happened on that date." *Id.* at 5-6. When the insured "corrected his error by clarifying that he observed the damage to the roof trusses during the spring and early summer of 2017, and specified that the loss occurred during the winter of 2017," there remained no factual dispute about the date of loss. *Id*. at 6. With this much earlier loss date established, the panel found "no justifiable reason why plaintiffs did not file suit until September 13, 2018." *Id*. at 7. The record reflected that, "after the illogical nature of [the] sworn statement in proof of loss became apparent" – once "Auto-Owners pointed out that the date of loss or damage resulting from snow and ice could not have happened on September 14, 2017, because the temperature had

been 80 degrees" – the insured "submitted his affidavit testimony to correct his error and to clarify that the loss or damage actually occurred during the winter of 2017 and not during September 2017." *Id.* "The truth required enforcement of the policy's terms as written and necessitated the finding that plaintiffs not only failed to provide Auto-Owners notice immediately, but they also failed to timely file suit against Auto-Owners, both of which barred their suit." *Id.* "Moreover, plaintiffs lacked entitlement to tolling under the common-law discovery rule or any other equitable tolling doctrine because the terms of the policy specified the only condition for tolling and did not permit noncontractually defined tolling of the contractual limitation period." *Id.*

***Council v Allstate Vehicle & Prop Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2021 (Docket No. 351676); 2021 WL 646827.**

Council also involved a homeowners' claim with some questionable statements made by the insured, where the insurer (represented by the undersigned's firm) obtained summary disposition, and the Court of Appeals affirmed.

The claim arose out of a fire at a home the insured bought in March of 2014 for $10,000 in cash. *Council,* unpub op at 1. Three years after that purchase, the insured went to the Hickman Insurance Agency (which was also named as a defendant) "and consulted with an agent to obtain an insurance policy." *Id.* The insured testified "that the agent asked him typical questions to fill out the application for insurance…." *Id.* However, "the completed application contained several inaccurate statements," the most important being that it listed "the purchase price and current market value of the home" as $75,000. *Id.*

The insured "stated that he did not know where the agent came up with that answer because he did not tell him that number." *Council,* unpub op at 1. However, the insured acknowledged that "he was given the application to read and sign" and "his initials were on the page that contained the misstated purchase price…." *Id.* The application further stated:

> To the best of my knowledge the statements made on this application … are true. I request the Company, in reliance on these statements, to issue the insurance applied for. … In the event of any misrepresentation or concealment made by me or with my knowledge in connection with this application, the Company may deem this binder and any policy issued pursuant to this application, void from its inception. This means that the company will not be liable for any claims or damages which would otherwise be covered. *Id.* at 1-2.

The insured acknowledged that he signed this statement. *Id.* at 1.

After a fire in October 2017, the insured made a claim to Allstate for the home's replacement value. *Id.* at 2. Allstate rescinded the policy based on the inflated market value stated on the application. *Id.* The rescission letter stated:

> The application reflects that you paid $75,000.00 for the property. During your examination under oath you advised that the signature on the application was yours. Had Allstate been made aware of the actual cash amount you paid for the property this policy would not have been issued." *Id.*

Allstate returned the premium. *Id.*

The insured sued Allstate for breach of contract and also sued the agency for supposedly "misrepresenting the nature of the coverage and failing to inform plaintiff about the changes to the application." *Council,* unpub op at 2. The trial court granted summary disposition to all defendants on the grounds that the insured "was responsible for the contents of the application after he signed the application and acknowledged that the information contained within was true." *Id.* The Court of Appeals affirmed, finding the case indistinguishable from *Montgomery v Fidelity & Guaranty Life Ins Co,* 269 Mich App 126, 128; 713 NW2d 801 (2005).

In *Montgomery*, the plaintiff and her decedent husband applied for a life insurance policy and erroneously stated in the application that the decedent had not used tobacco within the last five years, despite his significant smoking habit. *Id.* at 127-128. When the decedent was killed in a car accident, the life insurance company denied the claim because of the material misrepresentation on the application. *Id.* The surviving spouse sued, and the insurer prevailed on summary disposition. *Id.* The surviving spouse argued that the case had to go to a jury because there was a question of fact as to whether the plaintiff or the agent made the misrepresentation. *Id.* Specifically, the plaintiff argued that the agent completed the application and that neither she nor the decedent read the application before signing it. *Id.* at 129-130. The Court of Appeals rejected that argument, finding that "[w]hether it was plaintiff, the decedent, or the agent who misrepresented the decedent's tobacco use on the application is not material because plaintiff and the decedent signed the authorization, stating that they had read the questions and answers in the application and that the information provided was complete, true, and correctly recorded." *Id.* "A contracting party has a duty to examine a contract and know what the party has signed, and the other contracting party cannot be made to suffer for neglect of that duty." *Id.* This is true without regard to "who actually completed the application," where the insured signed it and attested "to the completeness and truth of the answers, after the application was completed."

The claimant in *Council* argued that *Montgomery* was wrongly decided based on Michigan Supreme Court decisions from the 1930s and earlier, but the panel was not impressed by this argument. *Council,* unpub op at 4. Mr. Council also argued that rescission was not warranted because the purchase price discrepancy was not material. *Id.* at 6. However, the panel found that materiality was established by an affidavit submitted by Allstate from "a field product manager in the underwriting department," stating that "Allstate would not have issued the policy had it known the truth." *Id.*

Although the *Council* panel did not delve into this issue– likely because the insured failed to raise it below, see *Id.* at 6 – practitioners must be mindful of the materiality requirement when handling rescission issues. A misrepresentation is material only when the correct information would have resulted in either a higher premium or the refusal to issue the policy at all. *Darnell v Auto-Owners Ins Co,* 142 Mich App 1, 9;

369 NW2d 243 (1985).[4] Put another way; a misrepresentation is material when it "naturally and reasonably influences the judgment of the insurer in making the contract…." *Howell v Colonial Penn Ins Co*, 842 F2d 821, 824 (CA 6, 1987). A misrepresentation "naturally and reasonably influences the insurer's judgment" if it "denies the insurer information which they in good faith sought … [and] deemed necessary to an honest appraisal of insurability." *Id.* "[T]he determination of whether a misrepresentation increases the risk of loss is to be made by the court as a matter of law." *Id.*

Endnotes

1 We have not heard the last of those suits. However, the pace of new decisions seems to have slowed to the point that there were no particularly notable developments since last quarter's report. There are still many such claims in litigation. See, for example, *Gourmet Deli Ren Cen v Farm Bureau Ins Co,* Michigan Court of Appeals Docket No. 357386 (claim of appeal filed June 3, 2021); *Massage Bliss v Farm Bureau Ins Co,* Michigan Court of Appeals Docket No. 356445 (claim of appeal filed March 2, 2021).

2 The panel cited "the doctrine of *noscitur a sociis*, i.e., that a word or phrase is given meaning by its context or setting." *Katalyst,* unpub op at 3 (citation omitted). "This principle states that when several words are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." *Id.*

3 The argument makes sense in that "endorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails." *Besic v Citizens Ins Co of the Midwest,* 290 Mich App 19, 26; 800 NW2d 93 (2010).

4 Rev'd on other grounds, *Bazzi v Sentinel Ins Co*, 502 Mich 390, 401-402; 919 NW2d 20 (2018).

Legal Malpractice Update

By: David Anderson and James J. Hunter

Reducing Risk through Engagement Agreements[1]

Attorneys can mitigate the risk of a malpractice claim from the moment a prospective client knocks on their door. A critical step to insulate an attorney from a potential claim—and even build in defenses to a future lawsuit—is through the thoughtful preparation of an engagement agreement.

Preparing an engagement agreement may seem routine, but its importance shouldn't be overlooked. And attorneys should pay close attention to changes in the law governing engagement agreements. For example, in the past two years, there have been several important decisions regarding the enforceability of arbitration provisions in engagement agreements. See *Delaney v Attorney*, 244 NJ 466; 242 A3d 257 (2020) (holding that, for an arbitration provision in a retainer agreement to be enforceable, an attorney must explain to a client the pros and cons of arbitration); *Imman v Attorney*, 485 P3d 396; 2021 Wy 55 (2021) (applying Utah law holding arbitration provision in retainer agreement not void on public policy grounds); *Tinsley v Attorney*, 333 Mich App 257; __ NW2d __ (Aug. 13, 2020) (Docket No. 349354) (holding arbitration clause in engagement agreement enforceable when client consults with independent counsel).

There isn't a "one-size-fits-all" engagement agreement that works for every client and situation. So it's important to include key terms of the representation in a written agreement to ensure the attorney and client are on the same page. The basic requirements include: 1) identifying the client, 2) defining the scope of representation, and 3) delineating the fees and anticipated expenses. Failure to do so could negatively affect the representation and, unfortunately, may lead to a lawsuit.

Frequently, disputes arise out of disagreements about the scope of representation. If a client sues, the client's new lawyer may weaponize any deficiencies in the engagement agreement to the attorney's disadvantage. On the flip side, properly defining the scope of representation can be the key to defending against the lawsuit. There's no way to ward off every potential lawsuit, but there are certain steps attorneys can take to limit their exposure with respect to defining the scope of representation.

Don't Just Fill in the Blanks

An attorney-client relationship is contractual in nature. ABA Model Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Yet an engagement agreement that simply states: "Lawyer agrees to represent the client's interests with regard to _____. . ." may not effectively define the scope of representation.

In a Michigan case illustrating this point, the plaintiff hired the defendant-attorney "to represent her in the sale of a restaurant and tavern business." *Chapman v Attorney,* 161 Mich App 558;411 NW2d 754 (1996). The plaintiff later alleged that the attorney was negligent because he didn't protect her security interest or draft a reassignment agreement. Arguing that the action was untimely, the defendant asserted that the plaintiff retained him only to assist with the sale and that the attorney-client relationship did not continue after the sale. The Court of Appeals agreed with the defendant. It wrote, "The defendant was retained by plaintiff to perform a specific legal service, i.e., to advise and represent her in the sale of her business and draft certain documents in connection with the sale. Defendant was not retained to represent plaintiff in any pending or proposed litigation." Although *Chapman* concerns the statute of limitations, it illustrates the importance of well-crafted engagement agreements.

David Anderson is a partners at Collins Einhorn Farrell, P.C. in Southfield. He specialize in the defense of professional liability claims against lawyers, insurance brokers, real estate professionals, accountants, architects and other professionals. Michael also have substantial experience in product and premises liability litigation. His e -mail addresses are Michael.Sullivan@ceflawyers.com.

James J. Hunter is a member of Collins Einhorn Farrell PC's Professional Liability, Commercial Litigation, and Trucking & Transportation Liability practice groups. He has substantial experience defending complex claims in both practice areas. As a member of the Professional Liability practice group, Jim has successfully defended claims against attorneys, architects, real estate professionals, and others. Before joining Collins Einhorn, Jim worked on complex litigation and Federal white-collar criminal defense. He also served as an Assistant Prosecuting Attorney in Wayne County, Michigan.

The Michigan Court of Appeals reached a similar conclusion in *Heller v Attorney*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 1998 (Docket No. 194219); 1998 WL 2016612. In that case, the attorney and client agreed in writing that the attorney would represent the client in a business dispute. The agreement specifically excluded the pursuit of any potential malpractice claims from the contractual terms of the relationship. Yet the client later blamed the attorney for not pursuing a malpractice claim. The Court of Appeals rejected that argument, holding that the attorney didn't have any duties beyond what was specified in the agreement.

> But a well-defined scope of representation in an engagement agreement can be useful to determine when, precisely, an engagement terminates.

The Kansas Supreme Court has also weighed in on this issue. In *Kansas Public Employees Retirement System v Law Firm*, 273 Kan 481; 44 P3d 407 (2002), the KPERS brought a legal-malpractice claim seeking to recover losses from an investment in a now-bankrupt company. The engagement agreement with the attorney defendants including drafting and preparing the purchase agreement on behalf of KPERS. The agreement also expressly provided: "In addition, we will perform such due diligence inquiries and activities as may be required by the investors in connection with its investment." KPERS alleged that the law firm failed to provide proper financial and compliance advice regarding the transaction. The court determined that the law firm agreed only to those duties set forth in the engagement agreement, which did not include a duty to determine if the investment was prudent, dooming the legal-malpractice claim.

More recently, New York's Appellate Division reiterated its law that an attorney may not be liable for failing to act *outside* the scope of an engagement agreement. In *Attallah v Law Firm*, 168 AD3d 1026; 93 NYS 3d 353 (2019), the plaintiff, for whom the defendant attorneys agreed to represent on a pro bono basis, alleged that her attorneys failed to negotiate reconsideration of her expulsion from medical school. The engagement agreement, however, provided for a very limited scope of representation: "Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from [medical school]. This engagement does not, however, encompass any form of litigation . . ." Because the alleged failure to negotiate or commence litigation fell outside the scope of the engagement agreement, the appellate upheld dismissal of the legal-malpractice claim.

Identify Collateral Issues

The attorney-defendants in the above cases successfully defended against malpractice lawsuits based on the terms of their engagement agreements. However, simply defining the scope of representation may not always be enough. When a plaintiff's need is multifaceted, an attorney should consider whether additional limiting language or other disclosures are necessary.

In *Campbell v Law Firm*, 642 NYS 2d 819 (Sup Ct 1996), the plaintiff was injured at a worksite and hired the defendant attorneys in connection with a workers' compensation claim. The form retainer agreement provided that the firm would represent the client before the Workers' Compensation Board. But the attorney-defendants did not specifically inform the plaintiff that the firm didn't practice in areas other than workers' compensation or that any possible third-party claims should be handled by another attorney. The court held that an attorney has an affirmative duty to ensure that the client understands any limits imposed by the attorney on the extent of the work to be performed and denied the attorney-defendants' dispositive motion.

This is a relatively common occurrence. The Appellate Court of Illinois reached the same conclusion in a similar case, holding that a retained workers' compensation attorney has a duty to advise an injured worker that they might have a claim against third parties and that a third-party claim may be barred if not brought within the statute of limitations period. *Keef v Attorney*, 321 Ill App 3d 571; 747 NE2d 992 (2001); see also *Nichols v Attorney*, 15 Cal App 4th 1672; 19 Cal Rptr 2d 601 (1993).

In sum, identifying foreseeable collateral issues (including applicable limitations periods) and advising the client in writing about those issues are important steps in the client-engagement process.

Follow Through

Like any contract, an engagement agreement is the product of negotiation between the client and the attorney. For example, a client may ask the attorney to perform a specific task, which the parties could incorporate into the engagement agreement. When an attorney agrees to perform a specific task, it's critical to follow through on that promise. Failing to do so could have unintended consequences.

Generally, claims against an attorney related to allegedly inadequate representation, however labeled, sound in tort and the malpractice statute of limitations applies. But plaintiffs can also allege harm to an interest other than a breach of the standard of care—for example, breach of contract. An allegation that an attorney failed to perform a specific task (rather than an allegation that the attorney *negligently* performed their duties) could have a longer limitations period than a malpractice claim.

That was the case in *Jones v Law Firm*, unpublished per curiam of the Michigan Court of Appeals, issued December 22, 2020 (Docket No. 348378); 2020 WL 7636610. In *Jones*, the engagement agreement expressly provided that the attorneys were retained to represent plaintiff "with respect to a divorce/Motion to Dismiss matter." But the attorneys never filed the motion to dismiss. The plaintiff filed a complaint alleging legal malpractice and breach of contract. While the legal-malpractice claim was dismissed as untimely, the breach-of-contract claim survived. The Court reasoned that, in this instance, the plaintiff properly alleged a special agreement to perform a specific act, which is separate from the general agreement to provide competent legal representation. Thus, the plaintiff could maintain a separate breach-of-contract action.

Other states follow the same general rule that allegations that an attorney

performed *negligently*, rather than failing to perform a specific task set forth in an engagement agreement, sound in tort. See, e.g., *Keonjian v Attorney*, 216 Ariz 563; 169 P3d 927 (2007) (allegation that deed was negligently drafted versus not having been drafted at all sounds in tort and is governed by the two-year legal-malpractice limitations period); *Letizia v Law Firm*, 292 So3d 547 (Fla App, 2020) (holding that alleged breach of engagement agreement promising "to represent the Client(s) interest professionally and efficiently according to the highest legal and ethical standard" sounds in tort).

Till Death do us Part

For better or worse, not all engagements last forever. At the outset, it may not be possible to address when the attorney-client relationship will end. But a well-defined scope of representation in an engagement agreement can be useful to determine when, precisely, an engagement terminates. And that fact is critical when calculating the limitations period in a malpractice action.

Generally, a claim accrues at the time the attorney discontinues serving the plaintiff in a professional capacity as to the matters out of which the malpractice claim arose (See, e.g. Michigan's accrual statute MCL 600.5838). Determining the last date of service isn't always easy. Sometimes the last date of service is clear; for example, when a client discharges the attorney by a certain date (i.e., by sending a letter stating that the attorney no longer has authority to act on their behalf), or when a client hires another attorney to replace their former counsel. Courts may consider orders, attorney billing, and other factors to determine the last date of service. But trouble may arise when attorneys represent clients in various matters or over a long period without properly defining the scope of representation in an engagement agreement. This is imperative both in litigation and non-litigation settings.

In *Maddox v Attorney*, 205 Mich App 446; 517 NW2d 816 (1994), an attorney provided representation concerning the sale of a business. More than two years later, a problem arose with the security agreement for the sale. The clients called the attorney, who performed some research and billed the clients for one hour of work. The court determined that performing the work and billing the client constituted a continuation of the representation, thus extending the otherwise expired limitations period on a malpractice claim. Similarly, in *Red Zone LLC v Law Firm*, 118 Ad3d 581; 988 NYS2d 588 (2014), the New York Appellate Division applied the continuous representation doctrine to toll the statute of limitations period when, after a two-year gap, the defendant attorneys provided additional legal advice and never communicated that the prior representation ended.

While it may be easier to ascertain the end date of a representation in the litigation setting (i.e., when a lawsuit ends), it's not always clear cut. In *Baright v Attorney*, 151 Call App 3d 303; 198 Cal Rptr 510 (1984), plaintiff alleged he retained the defendant attorney to recover "all damages provided by law" in a workplace accident. The attorney handled the worker's compensation claim for a matter of years, during which the limitations period for a third-party claim expired. The court determined that the broad language constituted continuous representation covering any time-barred third-party claims, tolling the limitations period while the attorney handled the workers' compensation claim and saving the otherwise untimely legal-malpractice claim.

An engagement agreement can also be an attorney's saving grace. In *Hotchkiss v Law Firm*, unpublished per curiam opinion of the Michigan Court of Appeals, issued October 24, 2016 (Docket No. 270143), whether the plaintiff's malpractice claim was timely hinged on whether the attorney's representation ended in 2002 with a consent judgment of divorce or continued post-judgment. The initial engagement agreement expressly limited the attorney's services to the divorce action and expressly advised that any additional work beyond entry of the divorce judgment would require another retainer. And, in fact, the parties entered into a second retainer contract specifically concerning post-judgment issues. Because the representation was not continuous, and the malpractice claim related to the attorney's pre-judgment representation, the claim was time-barred.

Conclusion

A poorly drafted engagement agreement may arm the client's new lawyer even when the malpractice claim is otherwise weak. Preparing an engagement agreement that accurately describes the scope of representation can go a long way to avoid future headaches. Steps to consider include 1) carefully identifying the subject matter of the representation, 2) identifying and, if necessary, expressly excluding collateral matters from the representation, and 3) creating separate agreements when handling discrete matters for existing or long-term clients.

Endnotes

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Municipal Law Report

By: Matthew J. Zalewski, *Rosati Schultz Joppich & Amtsbuechler, PC*
mzalewski@rsjalaw.com

Qualified Immunity: Where Undisputed Video Evidence Exists, Facts are to be Viewed in Light of the Real-Time Video, Not with Hindsight in a Light Favorable to Plaintiff.

Cunningham v Shelby Co, Tenn, 944 F3d 761 (CA 6, 2021).

Facts:

The Sixth Circuit recently issued an opinion in *Cunningham v Shelby Co, Tenn,* that clarifies the standard of review and appropriate procedures for a court to follow when evaluating the qualified immunity defense in light of video evidence. The case was brought by the estate of Nancy Lewellen, who was fatally shot by two Shelby County Sheriff's deputies. The deputies were dispatched to Lewellen's house with information that Lewellen had called 911, told the dispatcher that "she was depressed and suicidal, that she had a gun, and that she would kill anyone who came to her residence."[1] The deputies were also informed that Lewellen was suffering from a "mental illness and/or crisis" and that she had "what may be a .45 caliber pistol."[2]

When deputies arrived, Lewellen walked out of her house carrying what deputies ultimately determined to be a BB handgun, but which resembled a .45 caliber pistol. As captured by a dashboard camera in one of the deputies' cruisers, Lewellen started walking down the driveway and began to raise the gun. One deputy then began to yell at her, and it is at this point that the parties disputed whether the video showed Lewellen starting to turn toward the deputies. One deputy then shot Lewellen twice, after which Lewellen continued walking toward her car in the driveway (behind which one deputy had taken cover) while extending her arm holding the handgun. A second deputy then began shooting. Lewellen was shot eight times and died at the scene. Investigation revealed that Lewellen at some point had dropped the gun on her car, but this had happened out of view of the deputies and the video.

Lewellen's estate filed a lawsuit in the U.S. District Court for the Middle District of Tennessee, alleging excessive force in violation of the Fourth Amendment of the U.S. Constitution. The County and Sheriffs' deputies sought summary disposition based on qualified immunity. The trial court denied their motion, relying upon three case precedents that relied upon the standard of review of viewing facts in a light most favorable to the nonmoving party, and where there was disputed evidence as to whether the officers were facing an imminent threat that justified the use of lethal force. In this case, the trial court determined that questions of fact existed based on a frame-by-frame review of the dashboard camera video, several screen shots of which the trial court included in its opinion to illustrate that questions of fact existed regarding whether Lewellen had pointed the gun in the deputies' direction. Defendants appealed, and the Sixth Circuit reversed.

Ruling:

In reversing the trial court, the Sixth Circuit prioritized review of the second prong of the qualified immunity analysis, namely whether the deputies' use of lethal force violated a "clearly established" Fourth Amendment right of which the deputies should have known. Contrary to the trial court's reliance on the general summary judgment standard, the Sixth Circuit ruled that, where facts are recorded on video, and no competing versions of fact are in the record, "the facts are viewed in the video's light, not in a light favorable to plaintiff."[3] The Sixth Circuit emphasized that the facts are also to be viewed from "the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight."[4] Here, the Sixth Circuit noted that the entire series of events unfolded over 11 seconds and found that the trial court erred

Matthew Zalewski is an Associate at Rosati, Schultz, Joppich, and Amstbuechler, PC, where he specializes in municipal law. He concentrates his practice primarily in land use and zoning, construction, and constitutional and civil rights litigation, general municipal law, and appellate practice. He also provides general counsel services to municipal clients on a wide range of issues. He can be reached at mzalewski@rsjalaw.com or at (248) 489-4100.

in employing 20/20 hindsight vision by relying upon screenshots to find questions of fact. It held that resting a finding of reasonableness on "leisurely stop-action viewing of the real time situation" that the deputies encountered "is unsupported by any clearly established law and would constitute reversible error."[5] Accordingly, the Sixth Circuit reversed the trial court and remanded with instructions to enter summary judgment for defendants based on qualified immunity.[6]

Practice Note:

In addition to reinforcing that the typical summary judgment standard of review to view facts in favor of the nonmoving party is adjusted to view facts in light of undisputed video evidence when it exists, this case establishes clear parameters on a court's ability to find factual disputes. A qualified-immunity defense should emphasize the real-time perspective of officers and resist attempts to employ hindsight based on slow-motion replay of the video.

First Amendment: No Constitutional Violation to Require Pre-Registration and "Reasonable Decorum" for Public Comment at Meetings, but Regulations Targeting Abusive or Critical Comments are Unconstitutional Content-Based Restrictions.

Ison v Madison Local Sch Dist Bd of Educ, 3 F4th 887 (CA 6, 2021)

Facts:

On July 7, 2021, the Sixth Circuit issued a published opinion in Ison v Madison Local Sch Dist Bd of Educ,[7] regarding appellants who frequently commented on gun-related issues at school board meetings for the Madison Local School District. The school board operates under a Public Participation Policy that requires people wishing to speak at a school board meeting to preregister at least two days in advance of the meeting by filling out a public participation form, in person, at the school board office. Among other limitations, the policy authorized the meeting chair to: prohibit "comments that are frivolous, repetitive, and/or harassing;" interrupt a speaker when the comments exceed the three-minute time limit, "personally directed, abusive, off-topic, antagonistic, obscene, or irrelevant;" require a person to leave a meeting when the "person does not observe reasonable decorum;" and to request law enforcement officers to remove any person whose conduct interferes with the meeting.

The incidents giving rise to this case began in March 2018, when one plaintiff sought to speak but was denied the opportunity because he did not preregister. At the next meeting, the plaintiffs preregistered and spoke in opposition to the school district's treatment of school protestors and also in opposition to a resolution to arm teachers. The plaintiffs reappeared at the May 2018 meeting, where plaintiff Billy Ison accused the school board of "threatening" schools if they did not punish student protestors, and claimed that the school board's "true motivation" for adopting the resolution to arm teachers was to "push its pro-gun agenda."[8] The board president interrupted Ison to ask him not to use the word "threatening" and to not put words in the board's mouth.[9] As Ison continued his speech, the president had him escorted out by law enforcement, even though video of the meeting showed that he had delivered his remarks calmly and did not exceed the three-minute limitation. The board president asserted that his removal was necessary because he was not following rules, being hostile, and that some people were "starting to object and get offended by it."[10]

The final incident occurred when Ison completed a single public participation form ahead of the January 2019 school board meeting on behalf of all four plaintiffs. However, at the meeting, the board only allowed Ison to speak since the others did not submit their own forms.

The plaintiffs brought a First Amendment lawsuit in the U.S. District Court for the Southern District of Ohio, claiming that the Public Participation Policy and its implementation was vague and an unconstitutional content-based restriction.[11] Specifically, they challenged the policy's regulation of "personally directed," "abusive," and "antagonistic" statements and the application of that regulation to Ison at the May 2018 meeting. They also challenged the in-person preregistration requirement and its application to bar three of the plaintiffs from speaking at the January 2019 meeting. Finally, they challenged the policy and the board's discretion to implement it as unconstitutionally vague.[12] The trial court decided cross-motions for summary judgment in favor of the school board upon finding no First Amendment violation. The plaintiffs appealed, and the Sixth Circuit affirmed in part and reversed in part.

Ruling:

The Sixth Circuit reversed the trial court as to the policy's regulation of antagonistic remarks. While the court acknowledged case law cited by the defendant indicating that prohibiting "harassing" remarks may not indicate a content-based restriction where "harassing" is interpreted as being synonymous with "repetitive," restrictions on criticisms of public officials, as in this case, are impermissible content-based viewpoint discrimination.[13] Since the school board's policy itemizes critical speech and was applied in response to people being offended by Ison's remarks, the policy was unconstitutional both facially and as applied. Therefore, the Sixth Circuit remanded this portion of the action to the trial court to determine the appropriate remedy.[14]

However, the Sixth Circuit affirmed the trial court's finding that the pre-registration requirement survived First Amendment scrutiny. It was undisputed that the requirement was a content-neutral time, place, and manner restriction. The Sixth Circuit accepted the board's assertion of a legitimate interest in ensuring that time is reserved for persons who most want, and are most likely, to participate in the meeting. Though the preregistration requirement may be burdensome, it was not "substantially more burdensome than necessary" to effectuate the board's purpose, and left open ample alternative channels for the public to communicate with the board through e-mail and other means.[15] Further, the policy specifically required each speaker to communicate "their" intent to participate, and therefore it was not a First Amendment violation to decline to accept the plaintiffs' collective pre-registration when only Ison had followed the procedure of registering in-person.[16]

Finally, having already struck the policy's regulation of "abusive" and "antagonistic" remarks, the court limited the balance of its review to whether

the policy's grant of discretion to the board president to ensure "reasonable decorum" was vague. The court declined to find the term to be vague, noting that "perfect clarity and precise guidance have never been required" even in the First Amendment context.[17]

Practice Note:

While the Sixth Circuit's trend in recent First Amendment cases has been relatively harsh on government regulations of speech, this case shows its willingness to continue affording deference to content-neutral regulations that are carefully tailored toward maintaining orderly public meetings. However, where the policy is written or enforced so that maintaining order involves regulating or reacting to critical speech, a First Amendment violation is likely to be found.

Endnotes

1 *Cunningham v Shelby Co, Tenn,* 994 F3d 761, 763 (CA 6, 2021).
2 *Id.*
3 *Id.* at 763, 765, citing *Scott v Harris,* 550 US 372, 380-81 (2007).
4 *Id.* at 766.
5 *Id.* at 767.
6 *Id.*
7 *Ison v Madison Local Sch Dist Bd of Educ,* 3 F4th 887, 2021 WL 2820989, at *2 (CA 6, 2021).
8 *Id.* at *2.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.* at *4.
14 *Id.* at *5.
15 *Id.*
16 *Id.*
17 *Id.* at *6, citing *Lowery v Jefferson Co Bd of Educ,* 586 F3d 427, 436 (CA 6, 2021).

Supreme Court Update

By: Stephanie Romeo, *Clark Hill PLC*
sromeo@clarkhill.com

The National Highway Traffic Safety Administration recently released a report that traffic deaths in the United States soared to 36,680 in 2020 – the highest yearly total since 2007. This statistic is quite sobering, considering Americans drove 13% fewer miles in 2020 than they did in 2019 due to the COVID-19 pandemic. The number of traffic deaths in the State of Michigan increased, reaching the highest yearly total since 2007 and marking a 10% increase from the number of deaths in 2019. In line with these statistics, the Michigan Supreme Court reviewed a case involving Michigan's no-fault act this past quarter. The Court's opinion takes us back to the basics, reviewing some principles of contract interpretation and reminding defense attorneys to consider potential conflicts with public policy and the broader purpose of a law. *Bronner v. City of Detroit*, --- NW2d --- No. 160242, 2021 WL 2184084, at *3 (Mich. May 27, 2021)

Facts: In September 2014, Keith Bronner (Plaintiff) sued the City of Detroit in the Wayne County Circuit Court seeking no-fault benefits after he was involved in an accident with a garbage truck operated by GFL Environmental USA Inc. (GFL) while he was a passenger on a city-operated bus. The City self-insured its buses under MCL 500.3101(5) of the No-Fault Act. Following the accident, Bronner initially filed a claim with the City for personal protection insurance (PIP) benefits under MCL 500.3107. The City paid Bronner about $58,000 in benefits before the relationship broke down and Bronner sued the City. Shortly after Bronner sued the City, the City filed a third-party complaint against GFL pursuant to an indemnification agreement between GFL and the City, where GFL agreed to indemnify the City against any liabilities or other expenses incurred by or asserted against the City because of a negligent or tortious act or omission attributable to GFL.

GFL moved for summary disposition, arguing that the city was attempting to improperly shift its burden under the no-fault act to GFL, which was contrary to public policy. The circuit court denied GFL's motion and granted summary disposition for the city. The City later settled with Bronner, and the trial court ordered GFL to pay the city $107,529.29 to cover the PIP benefits the City had paid and certain other expenses. GFL appealed, arguing that the indemnification agreement was void because it circumvented the no-fault act. The Court of Appeals agreed with GFL and reversed the lower court's opinion, citing the comprehensive nature of the no-fault act and concluding that the act outlined the only mechanisms by which a no-fault insurer could recover the cost of benefits paid to beneficiaries. The City sought leave to appeal in the Michigan Supreme Court.

Ruling: In an opinion by Justice Clement, joined by five of the six other Supreme Court justices, the Court, instead of granting leave to appeal, held in favor of the City that an agreement between an insurer (the City) and a vendor (GFL) that requires the vendor to reimburse the insurer for the cost of mandatory benefits that the insurer had to pay out as a result of the vendor's negligence is not void as contrary to the no-fault act. First, the Court cited the general rule of contracts that when a contract is voluntarily and fairly made by competent persons, it shall be held valid and enforceable in the courts; yet, when there are definite indications in the law that a contractual provision conflicts with public policy, the contractual provision must yield to the public policy. Here, the Michigan Insurance Code did not expressly prohibit the parties' indemnification agreement. The Michigan Supreme Court noted that the Court of Appeals incorrectly construed the indemnification provision as a variation on contractual provisions that purport to shift liability for payment of the no-fault benefits in a manner that does not comport with the no-fault act and that the Court has struck down in previous rulings. The Court explained that the comprehensive nature of the Insurance Code's regulation of no-fault insurance serves to ensure that there is applicable insurance for accidents

Stephanie V. Romeo is an associate attorney in the Labor and Employment practice group in Clark Hill PLC's Detroit office. She focuses her practice on representing and advising management on a wide variety of labor and employment law matters, including claims involving discrimination, harassment, retaliation, family/medical leave, and disability accommodation. Stephanie also participates in conducting sensitive workplace investigations dealing with complex employment issues. She can be reached at sromeo@clarkhill.com or at (313) 309-4279.

and that benefits are paid. Here, the indemnification provision at issue did not relate to the insurance of motor vehicles or the payment of benefits resulting from motor vehicle accidents and, thus, did not jeopardize the availability of applicable insurance or the payment of mandatory benefits, and there was no issue of improper shifting.

Second, the Court noted that the Court of Appeals misconstrued the provisions of the Insurance Code that permit no-fault insurers to seek reimbursement for payment of some benefits as implicitly excluding any other reimbursement mechanism, such as the indemnification provision that was at issue in this case (this principle is known as *expression unius est exclusio alterius* – in stating some options, other options must not exist). The Court of Appeals identified the Michigan Catastrophic Claims Association and Michigan Assigned Claims Plan, yet these statutory provisions respond to specific problems unrelated to the issue in this case and do not represent the exclusive means of reimbursements. Thus, the Court held that the no-fault act's reimbursement options are not comprehensive and do not preclude parties from contracting for other reimbursement methods. Moreover, the indemnification agreement did not alter the relationship between the insurer and insured or beneficiaries and did not transform the nature of benefits paid by the insurer into something else. Therefore, the agreement did not conflict with the Insurance Code, and the Court reversed in favor of the City.

Practice Pointer: The Court's opinion outlines basic principles of contract interpretation while also describing principles of conflict preemption, reminding attorneys of basic guidelines they may have forgotten throughout the chaos and unknown of the past year. The case also touches on the importance of contracts complying with public policy, which may prove particularly significant over the next year. As the COVID-19 pandemic appears to begin to subside, plaintiffs are already beginning to file lawsuits claiming they were fired or otherwise discriminated or retaliated against in violation of public policy in relation to the pandemic. While case-by-case decisions are made pertaining to contract interpretation, the Court's opinion emphasizes the importance of reviewing a law's purpose and nature before concluding there is a conflict between the law and an agreement or contract at issue. In a year replete with "unprecedented times," this opinion is a welcome return to the "basics."

"The views expressed are those of the author and not necessarily of Clark Hill PLC."

Amicus Report

By: Lindsey Peck, *Collins Einhorn Farrell PC*
Lindsey.Peck@Ceflawyers.com

Since the last update, the MDTC voted to provide amicus-curiae support in *Estate of Corrado v Shelby Nursing Center*. There, the estate of a deceased nursing-home resident filed a claim against a nursing home and staff based on a nurse's alleged non-compliance with a standing order regarding patient care. The estate alleged that the nurse's failure to immediately contact a physician after the decedent's second episode of emesis, contrary to the standing order, caused the decedent to suffer severe respiratory distress and pass away from acute aspiration.

In a published opinion, the Court of Appeals held that the claim sounded in medical malpractice rather than negligence. The Court of Appeals reasoned that lay jurors wouldn't be able to draw upon their common knowledge and experience to determine the reasonableness of the nurse's decision to wait 20 minutes before she consulted with a physician.

The Court of Appeals further held that the standing order couldn't be relied on alone, or in conjunction with expert testimony, to establish the standard of care. The Court of Appeals went a step further and found that the standing order wasn't relevant or admissible for any purpose.

The estate filed an application for leave to appeal to the Supreme Court, which ordered a MOAA and invited the MDTC, among others, to weigh in on the following issues: (1) whether the claim sounds in ordinary negligence or medical malpractice, and (2) whether evidence of the standing order is admissible at trial.

Briefing will begin this fall. **Michael Cook** from Collins Einhorn Farrell P.C. has volunteered to author the amicus-curiae brief on behalf of MDTC.

In other news, the Supreme Court recently denied leave in *El-Achkar v Sentinel Insurance Company*, the companion case to *Bazzi v Sentinel Insurance Company*. As you may recall from the last update, *Bazzi* involved the driver of the vehicle (owned by his mother), and *El-Achkar* involved the passenger of the vehicle. Both sought PIP benefits from the carrier that insured the vehicle under a commercial-automobile policy, which the driver's family members fraudulently procured. In *Bazzi*, a balancing of the equities led to a determination that rescission was available, which relieved the insurer from responsibility for the driver's claims. In *El-Achkar*, on the other hand, a balancing of the equities led to the opposite result. Because rescission wasn't available, according to the Court of Appeals, the insurer was responsible for the passenger's claims.

El-Achkar is unpublished. As such, there may be another opportunity in the near future to try to convince the Court of Appeals that rescission should be determined on a case-by-case basis, rather than a claimant-by-claimant basis and that rescission should mean that coverage isn't available—for anyone.

For a more thorough understanding of the facts and issues in these cases, members can access MDTC's amicus-curiae briefs in the brief bank on MDTC's website.

Lindsey Peck's well-rounded and versatile skill set has enabled her to wear many hats throughout her career—litigator, trial attorney, and appellate practitioner. She has litigated countless cases that resulted in summary disposition or summary judgment in favor of her clients. She has also tried multiple cases, all of which resulted in defense verdicts in favor of her clients. For the past few years, she has focused on appellate practice. Her eye for detail and penchant for writing have been the key to her success in both state and federal appellate courts.

In addition to her experience in general liability and personal injury defense, Lindsey has extensive experience in municipal law. She has defended municipal agencies, departments, appointed and elected officials, officers, and employees against a broad spectrum of claims, including statutory claims, civil rights claims, tort claims, zoning and land use claims, employment claims, and contract claims arising out of public works infrastructure projects and improvements. She has also advised boards, commissions, councils, departments, and other levels of government on a wide array of issues that arise in the context of municipal governance.

Lindsey has also handled legal matters on behalf of public utility companies. She has litigated contract claims arising out of indemnity provisions and release agreements, as well as tort and personal injury claims.

Lindsey can be reachd at lindsey.peck@ceflawyers.com or 248-663-7710.

Court Rules Report

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

PROPOSED AMENDMENTS

2002-37 – Modification of Electronic Filing Rules

Rule affected:	MCR 1.109
Issued:	March 10, 2021
Comment Period:	July 1, 2021
Public hearing:	Not set

The proposed amendment requires an e-filing authorized user to provide written notice to the court and the other authorized users in a case regarding any change to the users' authorized account, including a change in email address. The change would also provide that if electronic service is made using a party's known email address but is returned as undeliverable, service will still be considered proper, and neither the filer nor the court will need to take any further action.

ADOPTED AMENDMENTS

2020-26 – Protection of Personal Identifying Information Submitted to Courts

Rules affected:	MCR 1.109 and MCR 8.119
Issued:	June 30, 2021
Effective:	January 1, 2002

These amendments provide SCAO with flexibility in protecting a person's personal identifying information and clarify when a court is and is not supposed to redact personal identifying information.

2019-48 – Required Signature by Attorney of Record

Rule affected:	MCR 1.109
Issued:	March 24, 2021
Effective:	May 1, 2021

This amendment requires a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109.

2017-28 – Protection of Personal Identifying Information Submitted to Courts

Rules affected:	MCR 1.109 and MCR 8.119
Issued:	May 22, 2019
Effective:	Originally effective on January 1, 2021, but now extended to January 1, 2022

These amendments define what constitutes personal identifying information, when such information is prohibited from being filed with the court, and the process regarding redaction of personal identifying information. The effective date extension was issued to give the court time for programming changes.

2020-20 – Process of Service on Limited Liability Companies

Rule affected:	MCR 2.105
Issued:	March 24, 2021
Effective:	May 1, 2021

The proposed amendment establishes a procedure for service of process on limited liability companies, allowing service on the managing member, the non-member manager, the resident agent, or other person in charge of an office or business establishment. The new rule further provides that if reasonable service cannot be made on one of the above individuals, service may be made upon the administrator pursuant to MCL 450.4102(2)(a).

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

MDTC Schedule of Events

2021

Friday, September 10	Golf Outing – Mystic Creek, Milford, MI
Thursday, September 23	Board Meeting – Zoom
Wednesday, October 27	Young Lawyers Series – Zoom – Public Policy / Trial Attorney
Thursday, November 4	Board Meeting – Sheraton Detroit Novi Hotel, Novi, MI
Friday, November 5	Winter Meeting & Conference – Sheraton Detroit Novi Hotel, Novi, MI
Wednesday, December 8	Young Lawyers Series – Zoom – Reptile Tactics

2022

Friday, January 7	ADR Part 2 – Zoom
Thursday, January 13	Board Meeting – Zoom
Wednesday, January 26	Young Lawyers Series – Zoom – Civility / Professionalism
Friday, February 11	Future Planning – Soaring Eagle Casino
Saturday, February 12	Board Meeting – Soaring Eagle Casino
Wednesday, February 23	Young Lawyers Series – Zoom – Stand out Associate
Thursday, March 10	Municipal Law Section – Zoom – Municipal Law – TBA
Thursday, March 17	6th Annual Legal Excellence Awards – The Gem Theatre
Thursday, April 28	Board Meeting – Detroit Golf Club
Thursday, April 28	Past President Rec – Detroit Golf Club
Thursday, June 16 – Friday, June 17	Annual Meeting & Conference – Tree Tops, Gaylord
Thursday, October 6	Meet the Judge's – Detroit Golf Club

2023

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

2024

Thursday, June 13 – Friday, 14	Annual Meeting & Conference – H Hotel, Midland

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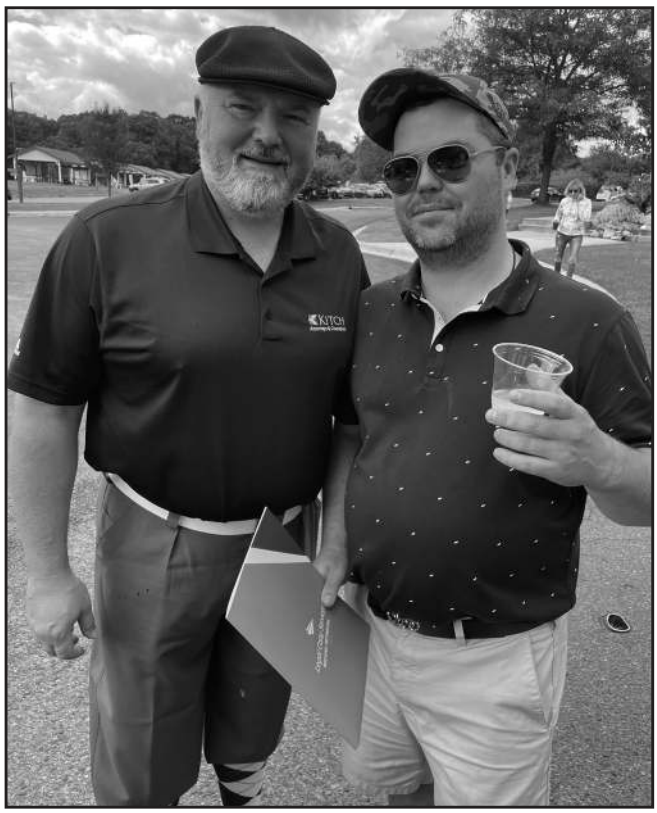

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President
Nemeth Law PC
200 Talon Centre Drive Suite 200
Detroit, MI 48207-5199
313-567-5921 • 313-567-5928
dbrouwer@nemethlawpc.com

John Mucha, III
Vice President
Dawda, Mann, Mulcahy & Sadler PLC
39533 Woodward Avenue Suite 200
Bloomfield Hills, MI 48304
248-642-3700 • 248-642-7791
jmucha@dmms.com

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

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

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

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

Board

Lisa A. Anderson
Rosati Schultz Joppich & Amtsbuechler PC
27555 Executive Drive Suite 250
Farmington Hills, MI 48331-3550
248-489-4100 • 248-489-1726
landerson@rsjalaw.com

Victoria L. Convertino
Michigan Dept Health & Human Services
333 S Grand Ave
Lansing, MI, 48933
victoria.convertino@gmail.com

Daniel Cortez
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road Suite 300
Livonia MI 48152-2660
734-742-1819 • 734-521-2379
dcortez@fbmjlaw.com

Michael J. Cook
Collins Einhorn Farrell PC
4000 Tpwm Center Suite 909
Southfield, MI 48075
248-351-5437 • 248-351-5469
michael.cook@ceflawyers.com

Javon David
Butzel Long
41000 Woodward Avenue,
Stoneridge West Bldg.
Bloomfield Hills, MI 48304
248-258-1415 • 248-258-1439
davidj@butzel.com

David Hansma
Seyburn Kahn PC
200 Town Center Suite 1500
Southfield, MI 48075
248-353-7620 • 248-353-3727
dhansma@seyburn.com

Veronica R. Ibrahim
Kent E. Gorsuch & Associates
20750 Civic Center Drive Suite 400
Southfield, MI 48076
248-945-3838 • 855-847-1378
veronica.ibrahim@gmail.com

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

Frederick V. Livingston
Novara Tesija & Catenacci PLLC
888 W Big Beaver Road Suite 150
Troy, MI 48084-4736
248-354-0380 • 248-354-0393
fvl@ntclaw.com

Edward P. Perdue
Perdue Law Group
447 Madison Ave., SE
Grand Rapids, MI 49503
616-888-2960 • 616-516-6284
eperdue@perduelawgroup.com

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

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

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MDTC LEADER CONTACT INFORMATION

Regional Chairs

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

Grand Rapids: Mark J. Magyar
Dykema Gossett PLLC
300 Ottawa Ave NW Suite 700
Grand Rapids, MI 49503
616-776-7523 • 855-259-7088
mmagyar@dykema.com

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

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

Petoskey: Matthew W. Cross
Plunkett Cooney PC
406 Bay Street Ste 300
Petoskey, MI 49770-2428
231-248-6430
mcross@plunkettcooney.com

Saginaw: Elise C. Boike
O'Neill, Wallace & Doyle P.C.
300 Street Andrews Road Suite 302
Saginaw, MI 48638
989-790-0960
eboike@owdpc.com

Southeast Michigan: Quendale G. Simmons
Butzel Long PC
150 West Jefferson Avenue, Suite 100
Detroit, MI 48226
313-983-6921 • 313-225-7080
simmonsq@butzel.com

Traverse City: Gregory R. Grant
Cummings McClorey Davis & Acho PLC
310 W. Front Street Suite 221
Traverse City, MI 49684
231-922-1888 • 231-922-9888
ggrant@cmda-law.com

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Frederick Livingston
Stephanie Arndt
Nathan Scherbarth

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice
Nathan Scherbarth
Zausmer, August & Caldwell PC
32255 Northwestern Highway, Suite 225
Farmington Hills, MI 48334
248-851-4111 • 248-851-0100
NScherbarth@zacfirm.com

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

Commercial Litigation
David Hansma
Seyburn Kahn
2000 Town Center, Suite 1500
Southfield, MI 48075
248-353-7620 • 248-353-3727
dhansman@seyburn.com

Commercial Litigation
Myles J. Baker
Pleasantrees
25000 N. River Road
Harrison Twp., MI, 48045
248-767-6365
m.baker@enjoypleasantrees.com

Commercial Litigation
Salina Hamilton
Dickinson Wright PLLC
500 Woodward Avenue, Suite 4000
Detroit, MI, 48226
313-223-3110 • 844-670-6009
shamilton@dickinsonwright.com

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

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

Immigration Law
Ahndia Mansoori
Kitch Law Firm
1 Woodward Avenue, Suite 2400
Detroit, MI 48226-5485
313-965-6730 • 313-965-7403
ahndia.mansoori@kitch.com

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

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

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

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

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

Law Practice Management
Fred Fresard
Klein Thomas & Lee LLC
101 W Big Beaver Road, Suite 1400
Troy, MI 48084
248-509-9271
fred.fresard@kleinthomaslaw.com

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

Municipal & Government Liability
Robyn Brooks
City of Detroit Law Dept
2 Woodward Avenue, Suite 500
Detroit, MI 48226
313-237-3049 • 313-224-5505
broor@detroitmi.gov

Municipal & Government Liability
Matthew J. Zalewski
Rosati Schultz Joppich & Amtsbuechler PC
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
248-489-4100 • 248-489-1726
mzalewski@rsjalaw.com

Professional Liability & Health Care
Kevin Lesperance
Henn Lesperance PLC
40 Pearl Street NW, Suite 1040
Grand Rapids, MI 49503
616-551-1611 • 616-323-3658
kml@hennlesperance.com

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

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

Trial Practice
Renee T. Townsend
Secrest Wardle
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007
248-851-9500 • 248-251-1782
rtownsend@secrestwardle.com

Young Lawyers
Morgan L. Esters
Miller Canfield
150 W. Jefferson, Suite 2500
Detroit, MI 48226
248-267-3267 • 313-496-7500
esters@millercanfield.com

Young Lawyers
Brandon M.H. Schumacher
Foster Swift Collins & Smith P.C.
313 S. Washington Square
Lansing, MI 48933
517-371-8255
bschumacher@fosterswift.com

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

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