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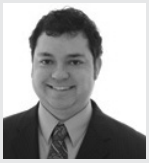

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President's Corner

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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.

In January 2020, I became an owner and manager of a law firm.

In March 2020, a pandemic was declared and the world seemed to come to a halt.

It is now March 2022 and there is finally a bit of time and space to catch a breath and reflect a bit on lessons learned from the experience of being an employer and managing a law firm in the midst of a world-wide health crisis. Not all of what I learned came to me naturally, but with the help of colleagues, family and friends, I have muddled through and come up with a few lessons – values actually – that I am working to live by.

The value of empathy. Empathy is often defined as the ability to understand or share the feelings of others. Another definition focuses more on the act of being aware of the feeling of others, and that is the value that I have concluded is critical in today's world. Not everyone has responded to the pandemic in the same way as I. I do not like working remotely – but many people do. I no longer have children at home, attending school virtually and disrupting my work – but many people do (including employees of my firm). I am a proponent of vaccines, masks, and social distancing – but not everyone believes the same. I may not fully understand or share those feelings or circumstances that differ from my own, but I certainly can and should be aware of other's feelings, and take them into account when making decisions about how our law firm should run.

The value of flexibility – **extreme** flexibility - in the light of a constantly changing virus, which led to constantly changing responses, rules, and public health announcements, cannot be understated. The answer or advice I give tomorrow quite likely will be different from what I said today, and I just had to get over that feeling of uncertainty. All I could do was come up with the best possible solution at a given moment, knowing that it could quickly change. Pivoting should be an Olympic event.

The value of taking it day by day while still planning for the future. This has been a challenge, because, as you likely have noticed, the future is pretty uncertain (actually, the future is always uncertain but it somehow feels even less so now). But coming up with a fix for today's problem is shortsighted if I do not also think about what impact it might have on next year's budget, next year's marketing plan, or next year's staffing levels. It is hard to do both, but I try to be sure next month or next year are part of my calculus in reaching decisions.

The value of humility. I'm an attorney, and I counsel people for a living, and have done so for many years. But I have had to come to grips with the fact that I am not always right, and sometimes I am even wrong. What I've learned, though, is that, more important than always being right (which would be nice), is how I respond and fix things when I am wrong. And what helps here is the next value:

The value of not taking oneself too seriously. I am working on this one.

The value of laughter. In conjunction with the immediately preceding value, it is good to laugh at oneself. But I also like New Yorker cartoons, cat videos, our two pandemic cats (one of which we suspect is a dog, or possible a Big Cat), and silly Internet memes. Find something that makes you laugh, as long as it does not conflict with empathy, above.

The value of deep breathing. This is especially useful in two situations: it keeps me from screaming when faced with yet another disgruntled client, employee, or family member, and it helps me go back to sleep at 3:00 a.m.

I suspect many of you have landed on other values during the last two years, or have come up with other lessons. If you are so inclined, share those with me at dbrouwer@nemethlawpc.com. That could well make it easier to write my next, and last, President's Report for the *Quarterly*. Until then, we'll all just continue working on how to be the best lawyers, employers, employees, and colleagues in this never-to-be-normal-again world.

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.

MDTC
PROMOTING EXCELLENCE IN CIVIL LITIGATION

Wrongful-Death Damages in the Denney Era[1]

By: Michael J. Cook and Trent B. Collier, *Collins Einhorn Farrell, PC*

Damages in wrongful-death cases experienced a tectonic event in 2016--the Court of Appeals held that estates can recover the decedent's lost earning capacity. *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016). That was new. And with new rules come new questions.

This article assumes that *Denney* is controlling (though there's an argument that it isn't) and explores the next battlefront: personal consumption and tax reductions. Had they lived, decedents would have necessarily incurred expenses (personal consumption and taxes on their income). Can estates standing in their shoes recover the entirety of the decedents' future earning capacity? Or, do we account for the expenses that the decedents won't incur?

Michigan's wrongful-death act

Statutes are always a good starting point. Michigan has a survival statute. MCL 600.2921. It says that all "actions and claims" survive death, but it says nothing about damages. And when it comes to wrongful-death claims, the survival statute points to "the next section"—Michigan's wrongful-death act, MCL 600.2922.

The wrongful-death act says that if the decedent could have "recover[ed] damages," the person who caused their death remains "liable to an action for damages." MCL 600.2922(1). It doesn't say the "same" damages or even "those" damages. It just says, "damages."

Scrolling down, the wrongful-death act has a damages provision. MCL 600.2922(6). That provision allows damages that are "fair and equitable, under all the circumstances including" a couple specific categories of damages. It doesn't mention the decedent's personal consumption or use terms like gross or net earning capacity. So it doesn't directly answer our entirety-versus-reduction query.

We're left to glean and infer. The phrase "under all the circumstances" favors considering personal consumption; it certainly doesn't prohibit it. But is awarding the entirety of the decedent's earning capacity "fair and equitable"?

The rationale for the entirety

Some say that the estate should recover everything the decedent could have recovered if he had lived. Awarding less, the argument goes, would be inequitable because the wrongdoer would pay less if he killed someone than if he didn't.

This argument essentially compares a deceased plaintiff to a permanently incapacitated plaintiff. Because the incapacitated plaintiff could recover the entirety of his earning capacity (not to mention substantial medical expenses and noneconomic damages), the estate shouldn't recover anything less. If the estate recovered less than

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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.to recall veridical memories was published in the Thomas M. Cooley Law Review.

the incapacitated plaintiff, the defendant would be rewarded for killing instead of disabling.

Michigan law on awarding the entirety

There's some support in Michigan for the entirety argument. In 1904, the Supreme Court held that earning-capacity damages in wrongful-death cases brought under the former survival act aren't reduced for personal consumption. *Olivier v Houghton Cty St R Co*, 138 Mich 242, 243; 101 NW 530 (1904). That requires some explanation, particularly the survival act part.

In the late 19th and early 20th century, Michigan had a survival act and a death act. Under the survival act, if someone had a claim when they died, their estate could pursue the claim—it survived the death. Under the death act, a decedent's survivors could recover damages caused by the wrongful death. Back then, wrongful-death clams could fall under either act. Whether a claim was under one or the other depended on whether the death was instantaneous. If it was instantaneous, the death act applied. If not, the survival act applied.

Let's return to *Olivier*. The decedent lived for 14 hours after the defendant injured him. So it was a survival act case. The Court held that the estate could recover the same damages that the decedent could have if he lived. It said that reducing the damages for consumption would make the survival statute "in part inoperative" because the action would survive "in a limited degree." *Id.* at 244. It also said that it would be "inequitable" to reduce earning-capacity damages because "it is none of the defendant's business how the injured party disposes of the money received in compensation for the injury." *Id.* at 245.

The rationale for reduction

The upshot of the argument for reduction is that awarding the decedent's entire earning capacity isn't compensatory. Awarding earning capacity without reduction for personal-consumption and taxes puts the estate in a better position than if the decedent lived. Stated differently, without reduction, the decedent is more valuable dead than alive.

Compare non-death cases to death cases. In non-death cases, the plaintiffs still have the necessary expenses of life. After paying those expenses, the plaintiffs end up with their net earnings. In death cases, the estates don't have the necessary expenses that a living plaintiff would. They also don't pay taxes on personal injury settlements and judgments. See 28 USC 104(a)(2); MCL 206.30. So, without a reduction, estates end up with more than the decedents would have if they survived—far more than if they had not been injured. Subtracting personal consumption and taxes from earning capacity in a death case, on the other hand, produces the same result as the non-death case. The estate, standing in the decedent's shoes, ends up with the difference between the decedent's earnings and expenses.

Michigan law on reduction

Olivier isn't binding precedent. The Legislature repudiated that opinion when it enacted the wrongful-death act. See *Baker v Slack*, 319 Mich 703, 713; 30 NW2d 403 (1948). So lower courts aren't required to follow it. The question is whether *Olivier* is the phoenix rising from the ashes. There are reasons to think that it isn't.

With few exceptions, Michigan only permits compensatory damages. The wrongful-death act isn't one of the exceptions. See *Tobin v Providence Hosp*, 244 Mich App 626, 638; 624 NW2d 548 (2001). So wrongful-death damages must be compensatory, not punitive—you probably see where this is going.

Compensatory damages aren't concerned with the defendant. Their only concern is making the injured party whole for the loss actually suffered. Since the goal is to put the estate in the same position the plaintiff would have been if he lived, personal consumption should be subtracted from earning capacity in wrongful-death cases.

Concern that subtracting consumption rewards the defendant is a punitive damages concept. It views the reduction as a reward for the wrongdoer and seeks to take it away. So it's a punishment, which isn't permitted in Michigan.

Death stops both income and expenses. Compensatory damages recognized both effects. A parent or spouse, for example, can only recover the value of a decedent's personal services if it exceeds the cost of the decedent's care and maintenance. *Thompson v Ogemaw Co Bd of Rd Comm'rs*, 357 Mich 482, 497; 98 NW2d 620 (1959). A company that was tortiously put out of business can recover its lost profits, not its lost revenue. *Couyoumjian v Brimage*, 322 Mich 191, 193; 33 NW2d 755 (1948). So, in other areas, expenses that aren't incurred due to the tort are deducted to ensure a compensatory award. The same principle should apply to earning-capacity damages in wrongful-death cases.

What's everyone else doing?

35 states permit lost-financial-support damages instead of earning-capacity damages in wrongful-death cases. In other words, the estate only recovers the financial support that the decedent was providing to others. One state (Alabama) is on an island, permitting only punitive damages. That leaves Michigan and 13 other states.

Ten of the 13 other states subtract personal consumption from earning capacity in wrongful-death cases. Three—Georgia, Kentucky, and West Virginia—don't. Each of those states permit punitive damages. Georgia and West Virginia have specific, statutory bases for their rules and Kentucky's courts have observed that it's "in the minority, and possibly a minority of one …." *Charlton v Jacobs*, 619 SW2d 498, 500 (Ky App, 1981).

Conclusion

Again, based on the wrongful-death act's damages provision, the question is whether awarding the entirety of the decedent's earning capacity is "fair and equitable." It would put estates in a better position than decedents would

have occupied if they had not been injured—all the income without the expense. Of course, the counter point is that subtracting personal consumption puts the defendant who kills in a better position than the defendant who disables.

These are uncharted waters in Michigan. There's no definitive answer (yet). But separating the compensatory rationale from the punitive rationale may cut the Gordian knot. With few irrelevant exceptions, Michigan doesn't do punitive damages. So what damages are necessary to put the estate in the same position the decedent would have been if he lived? The overwhelming majority view is that personal consumption reduction is necessary to ensure that a plaintiff is made whole and that a defendant is not punished. It seems obvious that courts applying *Denney* should follow the same course.

Endnotes

1 A version of this article was originally published in Michigan Lawyers Weekly on December 20, 2021

Appellate Practice Report

By: Phillip J. DeRosier and Trent B. Collier

Effect of a Change in the Law on Appeal

On occasion, a development in the law while a case is pending on appeal may present an additional argument to raise. Although the general rule is that an appellant cannot raise issues for the first time on appeal, Michigan and federal courts have recognized an exception for changes in the law.

As a general matter, an issue that is not preserved in the trial court will not be considered on appeal.[1] As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), "[u]nder our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court," such that "a failure to raise an issue waives review of that issue on appeal." *Id.* at 386. See also *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (explaining that to preserve an issue for appeal, a party must specifically raise it before the trial court). The rule is the same in federal court. See *American Bank, FSB v Cornerstone Community Bank*, 733 F3d 609, 615 (CA 6, 2013) ("For the first time on appeal, Cornerstone adds several new theories . . . . But this is too late and too little. It is too late because Cornerstone did not raise these arguments below. Cornerstone thus forfeited the arguments.").

At the same time, however, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotations omitted). The Sixth Circuit expressed the same view in *Golden v Kelsey–Hayes, Co*, 73 F3d 648, 657–658 (CA 6, 1996):

We will deviate from [the rule requiring issues to be raised in the trial court] only in exceptional circumstances, such as when following the rule would cause a miscarriage of justice, and particularly where the question is entirely legal and has been fully briefed by both parties. We have also made exceptions when the proper answer is beyond doubt, no factual determination is necessary, and injustice might otherwise result.

The exception permitting issues to be raised for the first time on appeal appears to include a change in the law affecting the outcome of the case.[2] In *Morris v Radley*, 306 Mich 689; 11 NW2d 291 (1943), the Michigan Supreme Court addressed whether a governmental entity that was not entitled to immunity at the time the case was tried should be able to take advantage on appeal of a new decision recognizing the availability of immunity to the claim at issue. The Court began by reciting the general rule: "It is axiomatic that an objection not properly and timely presented to the court below will be ignored on review. . . ." *Id.* at 699 (citation and internal quotation marks omitted). The Court noted, however, that "in the exercise of supervisory control over all litigation, appellate courts have long asserted the right to consider manifest and serious errors although objection was not made by the party who appeals." *Id.* (citation and internal quotation marks omitted). Finding that it would be "remiss in doing justice" if it allowed the judgment to stand, the Court set it aside. *Id.* at 700.

The United States Supreme Court has likewise recognized that "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case the court must decide according to existing laws, and if it be necessary

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to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.'" *Carpenter v Wabash Ry Co*, 309 US 23, 27 (1940) (citation omitted).

So while appellants should always be wary of making arguments that were not raised in the trial court, changes in the law occurring after the judgment has been entered can provide an appropriate basis for doing so.

Endnotes

1 This discussion is limited to issue preservation in civil cases, as the rules differ somewhat when it comes to criminal cases, particularly when a claimed constitutional violation is at issue.

2 This necessarily assumes, of course, that the change in law can validly be applied as a matter of substantive law. At least in civil cases, judicial decisions are typically given full retroactive effect. See *Harper v Virginia Dept of Taxation*, 509 US 86, 94 (1993) ("'[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.'"), quoting *Robinson v Neil*, 409 US 505, 507; 93 S Ct 876; 35 L Ed 2d 29 (1973); *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002) (observing that "the general rule is that judicial decisions are given full retroactive effect"). On the other hand, determining retroactive application of statutes can be tricky. See generally *Landgraf v USI Film Prods*, 511 US 244, 264 (1994) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); *Allstate Ins Co v Faulhaber*, 157 Mich App 164, 166; 403 NW2d 527 (1987) ("Generally, a statute is presumed to operate prospectively unless the Legislature either expressly or impliedly indicates an intention to give the statute retroactive effect.").

MEMBER NEWS

Work, Life, and All that Matters

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

MDTC Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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Santo's Italian Cafe LLC v Acuity Ins Co, 15 F4th 398 (CA 6, 2021).

Several times throughout the pandemic (see Vol. 37 No. 1, Vol. 37 No. 3, and Vol. 37 No. 4), this report has focused on the effects of COVID-19, and various government responses to it, on the world of insurance coverage. In particular, we have looked at several business interruption suits relating to the pandemic. Some of those suits have since reached the appellate courts and are now generating precedent.

Santo's is the most important decision so far from the Sixth Circuit. In *Santo's,* the panel held that under Ohio law – as predicted in accordance with *Meredith v Winter Haven*, 320 US 228; 64 S Ct 7 (1943) – losses caused by state's shut-down orders, which suspended in-premises dining operations during COVID-19 pandemic, did not give rise to direct physical loss, or damage to, the insured's restaurant. The losses therefore did not fall within the commercial property insurance policy's risks covered, i.e., direct physical loss of or damage to covered property. The panel also held that the policy's additional coverage for business income losses – business income and extra expense caused by direct physical loss of or damage to property – was not triggered. This was because the restaurant had not been tangibly destroyed, and its owner had not been tangibly or concretely deprived of the restaurant or anything inside the space, though it could not be used for in-person dining. The Sixth Circuit therefore affirmed the district court's decision to grant the insurer's motion to dismiss.

The insured argued that the pandemic and the related government-imposed restrictions on in-person dining constituted a "direct physical loss of" property because it was unable to fully use its restaurant. The panel recognized that "[w]hether one sticks with the terms themselves (a 'direct physical loss of' property) or a thesaurus-rich paraphrase of them (an 'immediate' 'tangible' 'deprivation' of property), the conclusion is the same. The policy does not cover this loss." *Santo's,* 15 F4th at 401. The panel noted that the restaurant was not tangibly destroyed, nor was the owner "tangibly or concretely deprived of" the restaurant. *Id.* Because the coronavirus did not physically alter the property in a way a fire or water damage would, and the governmental orders did not create a direct physical loss of or damage to property, the Sixth Circuit held that coverage did not exist.

"A loss of use simply is not the same as a physical loss," and to hold otherwise "would create problems of its own." *Santo's,* 15 F4th at 402, 404. The owner "can still put every square foot of the premises to use, even if not for in-person dining use." *Id.* at 401.

Finding that the policy was unambiguous as to the meaning of physical loss, *id.* at 405, the panel found persuasive authority in the form of *Oral Surgeons, PC v Cincinnati Ins Co,* 2 F4th 1141 (CA 8, 2021) (discussed below), as well as the Eleventh Circuit's unpublished decision in *Gilreath Family & Cosmetic Dentistry, Inc v Cincinnati Ins Co,* No. 21-11046 (issued August 31, 2021). Consistent with these decisions, the *Santo's* panel held that other policy terms, such as the "period of restoration," and the "traditional uses of commercial property insurance," support the absence of direct physical loss in these kinds of business interruption cases. *Santo's,* 15 F4th at 403-404. When interpreting the "period of restoration" language, the *Santo's* panel recognized that "[b]aked into this timing provision is the understanding that any covered 'direct physical loss of or damage to' property could be remedied by repairing, rebuilding, or replacing the property or relocating the business." *Id.* at 403. Santo's did not need one of these physical remedies but rather, an end to the on-premises dining ban. *Id.* Unfortunately for the insured, commercial property insurance does "not cover losses

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indirectly caused by a virus that injures people, not property." *Id.* at 403 (citation omitted). See also *Mastellone v Lightning Rod Mut Ins Co,* 175 Ohio App 3d 23; 884 NE2d 1130 (2008), which the panel cited for the proposition that under Ohio law, a physical change or alteration that affects the "structural integrity" of the property is required to trigger business interruption coverage. *Santo's,* 15 F4th at 403-404.

The *Santo's* panel concluded by noting a "hard reality about insurance" that applies to many of these sorts of claims: that business interruption coverage "is not a general safety net for all dangers." *Santo's,* 15 F4th at 407. "Fair pricing of insurance turns on correctly accounting for the likelihood of the occurrence of each defined peril and the cost of covering it." *Id.* When policyholders "push coverage beyond its terms," it "creates a mismatch, an insurance product that covers something no one paid for and, worse, runs the risk of leaving insufficient funds to pay for perils that insureds did pay for." *Id.* For those reasons, courts must "honor the coverage the parties did—and did not—provide for in their written contracts of insurance." *Id.*

Santo's has already been followed in *Dakota Girls, LLC v Philadelphia Indem Ins Co,* 17 F4th 645 (CA 6, 2021) and *Henderson Rd Rest Sys, Inc v Zurich Am Ins Co (On Remand),* opinion of the U.S. District Court for the Northern District of Ohio, issued November 2, 2021 (No. 20-1239).

Oral Surgeons, PC v Cincinnati Ins Co, 2 F4th 1141 (CA 8, 2021).

As noted above, *Oral Surgeons* is one of several decisions that the Sixth Circuit found to be persuasive in *Santo's*. As a published federal appellate decision, it warrants particular attention here (even though, like *Santo's,* it was not decided under Michigan law). In *Oral Surgeons,* 2 F4th at 1143, the insured was an oral and maxillofacial surgery practice which ceased non-emergency services in March 2020 to comply with COVID-19 restrictions imposed by the Governor of Iowa. *Id.* at 1143. The restrictions were lifted and non-emergency surgeries resumed in May 2020. *Id.* Oral Surgeons filed a claim with its insurer for losses suffered during the suspension of non-emergency procedures. *Id.* The policy insured Oral Surgeons against lost business income and certain extra expense resulting from the suspension of operations "caused by direct loss to property." *Id.* The policy defined "loss" as "accidental physical loss or accidental physical damage," *Id.*, but Oral Surgeons did not allege physical alteration to its property, *Id.* at 1145. The district court found no coverage and granted the insurer's motion to dismiss.

The Eighth Circuit affirmed. Finding that the policy required the dental office's "loss" to be "physical," the panel held: "The complaint pleaded generally that [the insured] suspended non-emergency procedures due to the COVID-19 pandemic and the related government-imposed restrictions," but "alleged no facts to show that it had suspended activities due to direct 'accidental physical loss or accidental physical damage,' regardless of the precise definitions of the terms 'loss' or 'damage.'" *Id.* at 1145. The panel therefore rejected the insured's argument that "the lost business income and the extra expense it sustained as a result of the suspension of non-emergency procedures were caused by direct loss to property." *Id.*

The panel concluded: "[t]he policy here clearly requires direct 'physical loss' or 'physical damage' to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property – e.g., a physical alteration, physical contamination, or physical destruction." *Oral Surgeons,* 2 F4th at 1144. *Oral Surgeons* was a diversity case controlled by Iowa law. *Id.* at 1143-1144. However, the panel was unable to find any analogous Iowa cases, so it reached this result under Eighth Circuit "precedent interpreting 'direct physical loss' under Minnesota law…." *Id.*

In addition to being cited by the Sixth Circuit in *Santo's*, *Oral Surgeons* has been referenced as persuasive authority by the Ninth Circuit (see *Mudpie,* discussed below) and by numerous federal district courts.

Mudpie, Inc v Travelers Cas Ins Co of Am, 15 F4th 885 (CA 9, 2021).

In *Mudpie,* 15 F4th at 892, the Ninth Circuit found that "California courts would construe the phrase 'physical loss of or damage to' as requiring an insured to allege physical alteration of its property." The panel found that "[i]nterpreting the phrase 'direct physical loss of or damage to' property as requiring physical alteration of property is consistent with other provisions of" Traveler's policy. *Id.* Under the terms of that policy, coverage for business income and extra expenses "extends only until covered property is repaired, rebuilt, or replaced, or the business moves to a new permanent location suggests the Policy contemplates providing coverage only if there are physical alterations to the property." *Id.* "California courts have carefully distinguished 'intangible,' 'incorporeal,' and 'economic' losses from 'physical' ones." *Id.* Moreover, "[t]o interpret the Policy to provide coverage absent physical damage would render the 'period of restoration' clause superfluous." *Id.*

On May 11, 2020, Mudpie filed a class-action complaint on behalf of itself and a putative class of all retailers in California that purchased comprehensive business insurance coverage from Travelers, and were subsequently denied coverage for claims of lost business income following state and local emergency orders. On June 3, 2020, Travelers filed a motion to dismiss the complaint on the grounds that (1) the policy contained a Virus Exclusion that excepted coverage for any "loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease," and (2) Mudpie did not allege facts demonstrating a "direct physical loss of or damage to" the insured property.

On September 14, 2020, the district court granted the motion to dismiss without prejudice, ruling that Mudpie failed "to allege any intervening physical force beyond the government closure orders." The district court declined to consider Travelers' argument that the Virus Exclusion categorically barred recovery. The insureds later decided that they were not going to amend their complaint, which turned the dismissal into a final order that they could appeal by right.

The Ninth Circuit affirmed the dismissal based on the lack of direct physical loss as noted above.

The panel also found that "the Policy's Virus Exclusion bars coverage for

Mudpie's claims" because Mudpie did not dispute that "the Stay at Home Orders that impacted Mudpie's business were issued in response to the COVID-19 pandemic, and the point is not debatable." *Id.* at 894. This echoes two Michigan decisions which found – without addressing the question of direct physical loss – that analogous virus exclusions foreclose these kinds of claims. *Dye Salon, LLC v Chubb Indem Ins Co*, 518 F Supp 3d 1004 (ED Mich, 2021); *Stanford Dental, PLLC v Hanover Ins Group, Inc*, 518 F Supp 3d 989 (ED Mich, 2021).

Gilreath Fam & Cosm Dentistry, Inc v Cincinnati Ins Co, unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, issued August 31, 2021 (Docket No. 21-11046); 2021 WL 3870697.

Of the four federal appellate decisions dealing with this issue in the last few months, *Gilreath* is the only one that was not published. However, the Sixth Circuit found it persuasive in *Santo's,* as have several District Courts. In *Gilreath,* unpub op at *1, the insured postponed routine and elective dentistry procedures due to the COVID-19 pandemic and the executive shelter-in-place mandates issued by Georgia's Governor. The insured filed a claim under its Cincinnati policy's "Business Income" and "Extra Expense" provisions, which insured against the necessary suspension of business activities and the extra expenses sustained during such suspension caused by a "Covered Cause of Loss," defined as a "direct physical loss." *Id.* The insured also filed under the policy's "Civil Authority" provision, which insured against a civil authority's prohibition of access to the covered premises and the immediately surrounding area in response to damage caused by a "Covered Cause of Loss" to third-party property. *Id.* Cincinnati denied the claim, finding that the insured failed to assert any "direct physical loss" to the covered premises or to third-party property, and the district court agreed. *Gilreath,* unpub op at *2.

On appeal, the Eleventh Circuit first noted that "Georgia courts interpret an insurance policy like any other contract: they begin with its text." *Id.* The panel emphasized that Georgia courts read the text of an insurance policy "as a layman would" and, "if that text 'unambiguously governs the factual scenario before the court, the policy applies as written, regardless of whether doing so benefits the carrier or the insured." *Id.* (cleaned up). The *Gilreath* panel further explained that "the Georgia Court of Appeals has already explained the 'common meaning' of 'direct physical loss or damage,' holding that there must be 'an actual change in insured property' that either makes the property 'unsatisfactory for future use' or requires 'that repairs be made.'" *Id.*

Applying these principles, the *Gilreath* court affirmed the district court's dismissal of the suit as follows: "Gilreath has alleged nothing that could qualify, to a layman or anyone else, as physical loss or damage." *Gilreath,* unpub op at *2. "Here, the shelter-in-place order that Gilreath cites did not damage or change the property in a way that required its repair or precluded its future use for dental procedures." *Id.* "In fact, though the practice postponed routine and elective procedures, Gilreath still used the office to perform emergency procedures." *Id.* "Gilreath finds it problematic that its office is an enclosed space where viral particles tend to linger, and where patients and staff must interact with each other in close quarters." *Id.* "Even so, we do not see how the presence of those particles would cause physical damage or loss to the property." *Id.* "Gilreath thus has failed to state a claim that Cincinnati Insurance breached the policy's 'Business Income' or 'Extra Expense' provisions." *Id.*

The *Gilreath* panel also rejected the insured's claim under the policy's "Civil Authority" provision because that provision is also "contingent on a 'Covered Cause of Loss' damaging property – albeit … property off the business premises." *Gilreath,* unpub op at *2. "The allegations about off-premises property are no different than those about the property at the dental practice – Gilreath offers no allegation of physical loss or damage." *Id.*

Milan d/b/a Birmingham Center for Cosmetic Dentistry v Cincinnati Ins Co, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued October 21, 2021 (Docket No. 20-12222); 2021 WL 4921193.

Milan is not an appellate decision – is it currently being appealed to the Sixth Circuit, Case No. 21-1758 – but is it notable because Judge Paul Borman summarized all of the decisions discussed above and found them to be persuasive under Michigan law. *Milan* involved a cosmetic dentistry office in Birmingham that was prohibited from performing "non-urgent dentistry procedures" during the initial months of the pandemic. *Milan,* unpub op at *1. To the extent it was allowed to operate, the insured "had to increase the frequency of cleaning, reduce hours, install new protective barriers between employee and customer, provide personal protective equipment to their workforce, and prohibit many customers from entering their facilities." *Id.* The insured also alleged that it had sustained physical losses to its property "because of the presence and effect of COVID-19 fomites, and respiratory droplets or nuclei directly on the property." *Milan,* unpub op at *2. It therefore sought business interruption coverage under its Cincinnati policy; Cincinnati denied the claim on the grounds that "that coverage was unavailable under the business income, extra expense, and civil authority provisions of the Policy because Plaintiff did not sustain direct physical loss or damage to its property." *Id*. When the insured filed suit, Cincinnati promptly moved to dismiss.

Citing *Santo's*, Judge Borman granted that motion. "This Court agrees with the Sixth Circuit that the ordinary meaning of the Policy language, 'direct' 'accidental physical loss or accidental physical damage' to property, does not include mere loss of use of the premises, absent tangible loss or damage to the property." *Milan,* unpub op at *8. "Neither the COVID-19 virus nor that Executive Orders physically altered or affected the structural integrity of the property." *Id.* Judge Borman further noted that *Santo's* is "in line with the overwhelming majority of district courts applying Michigan law that have decided this same issue and held that insurance policies with the same or substantially similar policy language require tangible, concrete alteration to property in order to fulfill the requirement of direct physical loss or damage to property, and that

COVID-19 and the Governor's Orders do not create a direct physical loss or damage to property." *Id*.

Judge Borman continued: "This construction also harmonizes with the Policy as a whole," something that "is particularly evident" when one looks at "the Policy provision addressing 'Business Income and Extra Expense' coverage, which is limited by the 'Period of Restoration.'" *Milan,* unpub op at *9. "The 'Period of Restoration' ends on 'the earlier of: (1) the date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed and similar quality, or (2) the date when business is resumed at a new permanent location." *Id.* "This provision plainly contemplates actual repair or replacement of physically damaged or lost property." *Id.* "Further, the Plaintiff's property was not rendered unusable or uninhabitable by the virus, or the government Orders. Rather, the Governor's orders simply prohibited one use of the property – non-urgent dental procedures – while permitting other procedures, and Plaintiff admits that customers and employees were on the premises providing and/or accessing these services while the Orders were in effect." *Milan,* unpub op at *10.

For similar reasons, "Civil Authority" coverage was not triggered. *Id.* "First, this provision plainly requires physical loss or damage to other property, which in turn results in civil authorities issuing an order prohibiting access to the insured premises." *Id.* The insured had not alleged any "physical loss or damage to other property." *Id.* "Similarly, as discussed above, the Executive Orders did not prohibit access to Plaintiff's property, as Plaintiff admits that its customers and employees did continue to access the premises." *Id.*

Inns by Sea v California Mut Ins Co, 71 Cal App 5th 688; 286 Cal Rptr 3d 576 (2021)

In *Mudpie,* the Fourth Circuit "predicted" how the California Supreme Court would treat the direct physical loss requirement in a COVID-19 related business interruption claim. Here, a panel of California's intermediate appellate court validated that prediction. As a matter of first impression – but referencing *Santo's, Oral Surgeons, Mudpie* and *Gilreath* as persuasive – the *Inns by Sea* panel found (A) that the insured's suspension of business was not caused by direct physical damage to insured's property; (B) that its inability to use lodging facilities to generate income as result of government orders was not "direct physical loss"; (C) that the absence of virus exclusion did not create ambiguity in insuring agreement; and (D) that the policy's "Civil Authority" provision provided no coverage.

The insured in this case operated four lodging facilities in Northern California. In a now familiar fact pattern, starting in March 2020 local authorities issued orders requiring citizens to shelter in place and prohibited travel unless essential due to COVID-19. The insured closed its lodging facilities in response to the orders, and later made a claim to California Mutual for business income loss. California Mutual denied the claim on the basis that "[l]oss of business due to reasons other than covered physical damage is beyond the scope of the insurance policy." *Inns*, 71 Cal App 5th at 693.

The policy provided coverage for "direct physical loss of or damage to Covered Property at the premises … caused by or resulting from any Covered Cause of Loss." *Id.* at 694-695. It also provided Business Income coverage as follows: "We will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused by direct physical loss of or damage to property at [Inns'] premises…. The loss or damage must be caused by or result from a Covered Cause of Loss." *Id.* at 695. Similarly, the policy provided Civil Authority coverage for "the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." *Id.*

The insured (referred to in the opinion as "Inns") argued that it was entitled to coverage under the Business Income and Civil Authority sections because "the continued and increasing presence of the coronavirus on [Inns'] property and/or around its premises" led to the orders by local authorities, which in turn led to Inns' suspension of operations. *Id.* at 698. The panel assumed that at some point, a person infected with COVID-19 was known to have been present at one or more of Inns' lodging facilities. However, the panel found that for the purposes of the insurer's motion for demurrer (which is functionally the same as a motion to dismiss), this was irrelevant.

The *Inns* panel first looked at the question of whether the suspension of the Inns' operations was caused by "direct physical … damage to" Inns' property. *Id.* at 699. The panel found that it was not because the orders were issued in response to the presence of COVID-19 throughout the counties, not because of its presence at the Inns' premises. *Id.* at 703-704. Indeed, Inns alleged that it closed its premises due to the orders, not due to the actual presence of the virus. *Id.* The panel explained: "if Inns had thoroughly sterilized its premises to remove any trace of the virus after the Orders were issued," it "would still have continued to incur a suspension of operations because the Orders would still have been in effect and the normal functioning of society still would have been curtailed." *Id.* at 704. "[T]he property did not change. The world around it did. And for the property to be useable again, no repair or change can be made to the property – the world must change." *Id.*, quoting *Town Kitchen LLC v Certain Underwriters at Lloyd's, London,* 522 F Supp 3d 1216, 1222 (SD Fla, 2021). "Even if a cleaning crew Lysol-ed every inch of the restaurant, it could still not host indoor dining at full capacity. Put simply, Plaintiff seeks to recover from economic losses caused by something physical—not physical losses." *Inns*, 71 Cal App 5th at 704, quoting *Town Kitchen,* 522 F Supp 3d at 1222.

Like other courts, the *Inns* panel found that this reading was buttressed by "[t]he Policy's focus on repairing, rebuilding or replacing property (or moving entirely to a new location)…." *Inns*, 71 Cal App 5that 707. The panel found this to be "significant because it implies that the 'loss' or 'damage' that gives rise to Business Income coverage has a physical nature that can be physically fixed, or if incapable of being physically fixed because it is so heavily destroyed, requires a complete move to a new location." *Id.* In other

words, "[t]hat the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use." *Id.*, citing *Oral Surgeons*, 2 F4th at 1144.

The *Inns* panel further held that there was no Civil Authority coverage because that coverage would only apply if access were prohibited due to "direct physical loss of or damage to property" at other premises. *Inns*, 71 Cal App 5th at 711-712. "[T]he Orders make clear that they were issued in an attempt to prevent the spread of the COVID-19 virus," but they "give no indication that they were issued 'due to direct physical loss of or damage to' any property." *Id.*.

Legal Malpractice Update

By: David Anderson and James J. Hunter, *Collins Einhorn Farrell PC*

***New v Attorney Defendants*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2021 (Docket No. 354549); 2021 WL 5027961**

Facts

Plaintiffs in this legal-malpractice case allege that a default judgment entered against them in underlying litigation alleging violations of the Whistleblowers' Protection Act was the result of the attorney-defendants' malpractice. In the underlying case, plaintiffs—an individual and business—failed to respond to a second amended complaint, resulting in a default (referred to as the "pleadings default"). The plaintiffs also failed to comply with discovery requests and orders in the underlying case, resulting in a second default (referred to as the "discovery default").

According to plaintiffs, issues responding to discovery arose because they lacked the technical knowledge and resources to access documents necessary to respond to requests. In light of a pending motion to compel, defendant attorneys entered into a stipulated discovery order. But defendant attorneys did not consult with their clients before agreeing to the order. Following a hearing, the underlying court entered a default judgment against the plaintiffs.

Plaintiffs sued their former attorneys alleging that the defendant attorneys' malpractice caused the pleadings default, robbing them of a meritorious defense in the underlying case. But the lawsuit was filed *in propria persona*, despite one of the plaintiffs being a business. Attorney defendants filed a motion for partial summary disposition, arguing that the complaint as to the business-plaintiff was void because the individual plaintiff was not an attorney and could not represent the business. Moreover, by the time attorney defendants filed their motion, the statute of limitations period had expired for the company to pursue a legal-malpractice claim. Ultimately, the company retained an attorney. Nevertheless, the trial court granted the motion, leaving only the individual plaintiff's claim based on the failure to answer the second amended complaint.

Attorney defendants then filed another motion for summary disposition arguing that plaintiffs' discovery noncompliance made the pleadings default a nonissue. In other words, that **even if** they had responded to the second amended complaint (attorney defendants did not meaningfully dispute that failing to answer constituted malpractice), plaintiffs would have been defaulted anyway because of the discovery default. Attorney defendants relied on the attorney-judgment rule to justify entering into the stipulated discovery order on the basis that, in light of a pending motion to compel that would doubtlessly have been granted (potentially with sanctions), it was a tactical decision made in order to retain some control over the imminent document production,. Plaintiffs contended that **both** defaults proximately caused the adverse outcome in the underlying case, and both were caused by attorney defendants,

The trial court agreed with the attorney defendants granting the motion, and plaintiffs appealed.

Ruling

First, the Court of Appeals upheld the dismissal of the business, noting that courts may excuse parties *in propria persona* from some drafting deficiencies, but are not excused from substantive compliance with court rules and legal requirements. Thus, the *pro per* complaint on behalf of the business was defective. Nor did the defective complaint toll the period in which the company could submit an effective complaint. By the time plaintiffs retained counsel, it was too late.

David C. Anderson is a shareholder of Collins Einhorn Farrell PC, and has over 20 years of litigation experience. He has successfully defended a wide variety of professional liability claims, ranging from legal malpractice to claims against accountants, insurance agents, architects and engineers, real estate/title agents and even fine art appraisers. He has also successfully defended numerous corporations against product liability claims, including death cases. Over those years, David has gained considerable jury trial and arbitration experience.. His e-mail addresses are david.anderson@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.

With respect to the malpractice claims, the Court of Appeals first analyzed the discovery default and plaintiff's argument that the attorney-judgment rule did not protect the attorney defendants. While the Court of Appeals questioned the conduct of the attorneys ("To the extent plaintiffs allege defendants entered into the stipulated discovery order without plaintiffs' knowledge or approval, we find such conduct concerning . . ."), it held that the decision was tactical and fell within the scope of the attorney-judgment rule. The Court emphasized that attorneys have a general duty to consult with a client regarding "important decisions," but are not necessarily required to obtain consent as to every tactical decision. And, given the circumstances, the Court noted that the stipulated order gave plaintiffs a slim chance for survival rather than no chance.

On appeal, plaintiffs also argued that all proceedings after the pleadings default were nugatory—including the discovery default. Essentially, plaintiffs' argument was that because both defaults provided the trial court an independent reason to enter a final judgment as to liability against the plaintiffs, and because the pleadings default occurred first, later events were of no consequences. The Court of Appeals disagreed, concluding only the discovery default was the **but-for** cause of that outcome. If the attorney defendants timely answered the second amended complaint and avoided the pleadings default, the court still would have entered the discovery default (the latter being outside of the attorneys' control).

Practice Note:

The Michigan Supreme Court has recognized that attorneys acting in good faith are not liable for mere errors in judgment. See, e.g., *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995). This is commonly referred to as the attorney-judgment rule. In this case, the Court of Appeals determined that the attorney defendants' decision to enter into the discovery order was a tactical decision that they could reasonably make autonomously. But the court was careful to limit that analysis to the circumstances of the case, noting the plaintiffs' history of noncompliance with discovery and likelihood they would face sanctions. In sum, it is of critical importance to keep clients reasonably informed during the litigation process.

Amicus Report

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

Since the last update, MDTC voted in favor of providing amicus support in *Estate of Jumaa v Prime Healthcare Services*, a medical-malpractice action under the wrongful-death act. The issue is whether the estate of a deceased minor can recover the earning capacity of the decedent. The issue is of significance because there's a conflict between a 2016 Court of Appeals decision and a 1948 Supreme Court decision. In *Denney v Kent County Road Commission*, the Court of Appeals held that the estate can recover the earning capacity of the decedent. In *Baker v Slack*, the Supreme Court held that the estate can recover only the financial support that the decedent would've provided to beneficiaries. Since *Denney*, which didn't address *Baker*, trial courts have been divided. Many have followed *Denney*, but some have followed *Baker*. Michael Cook of Collins Einhorn Farrell PC will be authoring MDTC's amicus brief.

MDTC also voted in favor of providing amicus support in *Spine & Health PLLC v Weick*, an employment action. The issue is whether a medical provider seeking no-fault benefits on behalf of a patient can rely on a confidentiality or non-compete agreement to prevent a current or former employee from testifying about the services rendered or practices engaged in by the provider.

In *Weick,* defense attorneys for insurance companies in provider lawsuits deposed an employee about the services and practices of her (now former) employer. After the employee exposed some questionable and allegedly fraudulent practices, her employer filed a lawsuit against her and initially obtained a restraining order based on a confidentiality and non-compete clause in her employment contract. The restraining order precluded her from providing testimony in any lawsuit about the allegedly fraudulent practices of her employer. Shortly after issuance of the restraining order, some of the insurance companies filed a RICO lawsuit against her employer.

Meanwhile, some of the other insurance companies moved to intervene in the employment action. The circuit court allowed the insurance companies, as aggrieved parties adversely affected by the restraining order, to intervene. The circuit court entertained competing motions for summary disposition, sided with the insurance companies, and dismissed the employment action with prejudice (which rescinded the restraining order). The employer appealed.

The insurance companies sought MDTC's support out of concern that a win on appeal would have broad ramifications for the future—namely, providers would be permitted to hide questionable practices through confidentiality and non-compete agreements. John Hohmeier of Scarfone & Geen, PC will be authoring MDTC's amicus brief.

In other news, MDTC submitted an amicus brief in *Estate of Corrado v Shelby Nursing Center*, which Michael Cook of Collins Einhorn Farrell PC authored. In *Corrado*, the estate of a deceased nursing-home resident sued 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. The estate framed the claim as an ordinary-negligence claim.

In a published opinion, the Court of Appeals held that the claim sounded in medical malpractice, rather than ordinary negligence. The Court 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 held that the estate couldn't rely on the standing order alone, or in conjunction with expert testimony, to establish the standard of care. The Court held

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.

that the standing order wasn't relevant or admissible for any purpose.

The Supreme Court granted MOAA and invited 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.

MDTC first argued that, contrary to the estate's position, the claim doesn't sound in ordinary negligence. MDTC observed that the claim raises questions of medical judgment beyond the realm of common knowledge and experience, such as whether the standing order was mandatory or discretionary and whether deviation from the standing order was appropriate. MDTC noted that the disagreement among medical experts on such questions compels the conclusion that the claim sounds in medical malpractice.

MDTC urged the Court to revisit the standard for determining the nature of the claim. MDTC noted that in *Trowell v Providence Hospital & Medical Center,* Justice Viviano penned a concurrence (joined by Justice McCormack and Justice Clement) in which he disagreed with the implication that the nature of the claim can be converted into a factual issue whenever the parties present evidence on the issue. Holding a trial to determine whether the claim sounds in medical malpractice or ordinary negligence would "be rather astounding," he opined. MDTC pointed out that adopting his concurrence would require overruling *Bryant v Oakpointe Villa Nursing Center,* a case in which the Court relied on material beyond the complaint to determine the nature of the claim. MDTC maintained that if the Court is inclined to revisit *Bryant,* the Court should also take the opportunity to bring the Court's precedent into alignment.

Recall that *Bryant* sets forth a three-step approach for determining whether the claim sounds in medical malpractice. Specifically, *Bryant* directs the court to consider (1) whether the claim is against an individual or entity capable of medical malpractice, (2) whether the claim involves an error in the course of a professional relationship, and (3) whether the claim raises a question of medical judgment beyond the realm of common knowledge and experience.

MDTC urged the Court to do away with *Bryant*'s third step, which conflicts with an undisturbed line of precedent in which the Court acknowledged that expert testimony is usually—but not always—required to support a medical-malpractice claim. MDTC pointed out that no other form of professional malpractice, such as legal malpractice or accounting malpractice, is defined by whether the claim involves professional judgment. *Why should medical malpractice be treated any differently?,* MDTC queried. MDTC argued that the parties need to know the nature of the claim from the outset. *Bryant*'s third step encourages artful drafting—a tactic the Court has denounced time and time again—and tolerates an unfair, unworkable approach in which the parties don't know the rules of the game until the very end.

MDTC next argued that the standing order isn't relevant to the standard of care or otherwise admissible at trial. At the outset, MDTC noted that negligence involves the duty to use reasonable care, whereas medical malpractice involves the duty to follow the standard of care. From that premise, MDTC highlighted the "befuddling contradiction" in the estate's position. The estate characterized the claim as a negligence claim. Yet in the same breath, the estate contended that the standing order, when coupled with expert testimony, is admissible to establish the standard of care.

MDTC recognized that an internal policy could rise above, fall below, or land right on the standard of care. But an internal policy doesn't define, can't change, and isn't relevant to the standard of care. MDTC thus implored the Court to mind the longstanding rule of law, grounded in public policy, that violation of an internal policy doesn't give rise to liability. MDTC noted that in addition to the relevance problem, admission of an internal policy would cause unfair prejudice by confusing the jury and paving the way for imposition of strict liability.

MDTC also submitted an amicus brief in *Bryant v Service Employees International Union*, which Amanda Waske and Nathan Scherbarth of Zausmer, PC authored. In *Bryant,* an attendee at a rally suffered injuries at the hands of a third party and sued the rally host, among others, for negligence. After the trial court denied the rally host's motion for summary disposition, the Court of Appeals denied the rally host's application for leave to appeal. The rally host is asking the Supreme Court to take up the issue or remand to the Court of Appeals for consideration of the issue as on leave granted.

MDTC argued that the trial court discounted the longstanding rule that one doesn't owe a duty to protect another from harm in the absence of a special relationship. MDTC pointed out that finding a special relationship between an event organizer and a voluntary attendee would have dire consequences in both the private and public sector. The cost of insurance, the uncertainty regarding the scope of the duty, and the unpredictability of third-party behavior would have a chilling effect on the ability to hold events.

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

MDTC Schedule of Events

2022

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 13	Meet the Judge's – Detroit Golf Club

2023

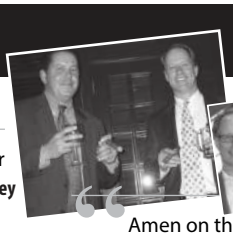
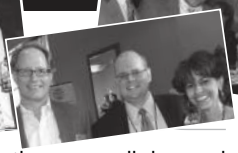
Thursday, June 15 – Friday, June 16	Annual Meeting & Conference – Tree Tops, Gaylord

2024

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



"Greg was a guy who always made your day better. Will miss him." - **Steven L Barney**


"Amen on the many well-deserved comments on Greg's character, civility, and humanity. And, despite the rigors of a trial lawyer's life, I rarely saw him without a smile and a kind word - even in the most challenging of moments. He will be missed." - **Joe Engel**

"I had the pleasure of working with Greg during the time that Mike Fordney and I joined forces…. Then and forever after I too recall his ready and sincere smile, coupled with the civility and the skills to always be an asset to our profession and his clients." - **Harry Ingleson, II**

"Greg was one of the most genuine people I've ever met. He shot straight, but not harshly. He was always good company, always easy to laugh. I treasure the times sitting with him and Jill over a cocktail. Supremely competent lawyers can be thoughtful and kind. I'm grateful to have known him. My deepest sympathies to Jill and the family." - **Jim Gross**

"A wonderful guy. It was always good to catch up with him every year at our past presidents meeting." - **Phillip C. Korovesis**

"Greg set the standard for civility and decency. We will all miss him." - **John Jacobs**

"A great man in so many ways." - **Pete Dunlap**

Celebrating

Gregory P. Jahn

6/12/1956 - 1/2/2022



A member of the Saginaw County Bar Association, past president and board member of the Michigan Defense Trial Council, and a member of the Saginaw Country Club for many years.

"Greg always saw the bright side, never had a bad word about others and loved to finish a hard workday with a cold beer. I will miss him." - **José Brown**

"I always enjoyed meeting him and swapping stories either in court or at MDTC functions. As others have stated, he always greeted you with a cheerful disposition and a welcoming smile. God bless him." - **Ray Morganti**

"A great loss." - **Irene Hathaway**

"I don't know what other wonderful things can be said about Greg which he well deserved. I have tremendous sympathy for Jill and the rest of his loved ones. They have my best during this tough time and hope their memories of Greg comfort them now and in the future." - **Jim Lozier**

"It's no accident fresh snow fell last night and the sun is out in full glory today. Greg was clever, kind and fun - practically the definition of an MDTC President." - **Robert Schaffer**

"Greg was not only a partner of mine at Fordney Cady but also a close friend. He was the law firm go to guy when the internet began to surface. He was also an outstanding trial lawyer who held civility as his highest standard. For that reason, Greg had a backstage pass wherever he went and when a judge was faced with a decision that was on the fence it always fell on Greg's side.

He was an avid snow skier and we traveled to Vail and Beaver Creek together on numerous occasions. Greg was a wonderful family man and throughout this trying time Jill was always with him. He will be missed.

I last heard from Greg on Dec 23 when he heard we had snow in Aspen. He never lost his sense of humor asking me if I had gone off AMF which has a twenty foot drop. told him I was waiting for him to be the first down. He said no problem. I'll be there to pick up your skis and get you to the toboggan."

- **Michael Fordney**

"Fine man. God rest his soul." - **Ed Kronk**

"All fitting comments on a truly good man!" - **Larry Donaldson**











"Greg was a great lawyer and a spectacular member, officer and President of MDTC. He will be missed." - **Terrence J. Miglio**

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