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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.

One of the many pleasures of being President of the Michigan Defense Trial Counsel is having the opportunity to connect with our members, at conferences, board meetings, webinars and through this quarterly letter to you. This is my last such letter, and I want to use it to remind you what the MDTC has accomplished this past year, as we emerged (and then returned and re-emerged) from life informed by the COVID pandemic. Despite that, we got a whole lot done.

We moved from strictly virtual events to meeting in person, first dipping our toes in those waters in September at the MDTC Open Golf Tournament. It was a beautiful day, and a terrifically successful event. Next came the Winter Meeting and Conference in November, perhaps with fewer attendees than usual but still energizing and educational. In March, we gathered at the Gem for the extremely well-attended and very fun Legal Excellence Awards event, with Charlie Langton as our emcee. (And next year there will be cocktails!) The Past Presidents' Reception returned from a several year hiatus, in April, at a new venue – the Detroit Golf Club, where we were able to hang out in the same rooms as PGA golfers will in July. And tomorrow I head to Treetops Resort, for our Annual Meeting and Summer Conference, in person for the first time since 2019. I can't wait!

Just because we were able to meet in person on some occasions did not mean we moved completely out of the virtual world. Under the leadership of regional and committee chairs, the MDTC offered regular webinars on wide-ranging topics, like civility and professionalism, succeeding as a law firm associate, qualified immunity law, and how best to use social media in litigation. Our annual Future Planning session was held virtually in February, with great attendance and even better brainstorming. You can count on seeing some of the ideas developed at that meeting during **John Mucha**'s upcoming presidency.

There have been other developments. We have strengthened our relationship with the State Bar Negligence Section (shout out to **Robert Riley**), co-sponsoring a Young/New Lawyer's Reception in August, and with plans are in the works to present our Respected Advocate Award at the Negligence Section's meeting next year. We had the honor of meeting with two Supreme Court justices – Justice Zahra and Justice Welch -- at our board meetings, always a fascinating experience. The Public Policy Committee was revamped and relaunched (thanks to **Ric Joppich** and **Mike Watza**); we are already reaping the benefits of their work, with regular legislative updates. The Michigan Defense Quarterly is preparing for its first annual Best Article awards, thanks to the efforts of **Mike Cook**. We increased our law firm sponsorships, and continue to see strong interest in vendors who want to work with the MDTC and its members.

We are definitely enjoying the best of both worlds, in person and virtual. I am positive that will continue, because it offers flexibility as well as new opportunities to meet, learn, and network.

I cannot take much credit for these accomplishments, though, because the real work was done by our Executive Director, **Madelyne Lawry**, along with our Board, and our regional and section chairs. And I cannot thank enough **Terry Durkin** and **Irene Hathaway**, my immediate past presidents, for their support and wisdom, as well as the work done by Executive Committee members **John Mucha**, **Mike Jolet** and **John Hohmeier**. (And for those of you who might not easily see Jolet and Hohmeier in executive roles, you are quite wrong, as you will see in upcoming years, as they each move into the presidency!)

I mostly want to thank you, as MDTC members, for your ideas and inspiration. What amazes me about this organization is that it does what it does because you volunteer your time – time that increasingly is hard to come by, with busy litigation practices and lives. Together, we accomplished much this year, but there is always more to do. We want to expand our interactions with other affinity bar organizations, revise our diversity and inclusion policy, increase our memberships, and offer services and products that are useful to all of you. Together, I am sure we can do that, and more. Thanks for what you have done, and for what you will do going forward.

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.

It's 2022 and We're Still Arguing These Motions?!? HIPAA QPOs and Best Strategies to Push Back Against the Imposition Non-HIPAA Related Conditions.

By: David A. Occhiuto & Randall A. Juip, *Foley, Baron, Metzger & Juip, PLLC*

Executive Summary

Ex-parte meetings with a plaintiff's treating healthcare providers are an important and necessary tool of informal discovery in personal-injury litigation and have been repeatedly certified as such by our courts. To proceed with a lawsuit that places their health condition at issue, a plaintiff must waive multiple privileges. In the world of HIPAA, a defense attorney must get a HIPAA-compliant qualified protective order ("QPO") in order to have ex-parte meetings with treating physicians. HIPAA QPOs are required by regulation and are only necessary to ensure that plaintiff's protected health information ("PHI") remains protected. Generally, any conditions or requirements imposed on a QPO are impermissible, improper, an abuse of discretion, and should be denied. Our traditions provide for full, free, and fair access to crucial at-issue evidence, and attempts to game the HIPAA system for litigation benefit by opposing counsel should be rejected.

David A. Occhiuto David is an Associate Attorney with Foley, Baron, Metzger & Juip, PLLC.. He is a defense-minded litigator with experience handling complex cases involving general negligence and liability, first and third party auto, premises liability, products liability, medical malpractice, and Section 1983 claims. David also has experience with appellate work in the Michigan and federal courts of appeals.

During his time in law school, David participated in the MSU Law First Amendment Clinic, teaching lectures at Michigan high schools, providing instruction to students on the importance of free speech in the context of public school. He also worked for a mid-sized law firm in Okemos, specializing primarily in automobile negligence, premises liability, and no-fault work.

Before joining FBMJ, David practiced at a civil defense firm in Royal Oak, specializing in automobile negligence, general liability, and complex federal litigation. David prides himself on his oral and written advocacy and ability to obtain favorable results for clients, having secured numerous summary dispositions.

David is currently a member of the Administrative & Regulatory Law, Insurance law, Negligence Law, and Young Lawyers sections of the State Bar of Michigan.

Randall A. Juip is specializes in complex civil litigation including medical/professional malpractice, civil rights, 42 USC 1983, business/commercial litigation, public relations and crisis management and employment matters.

I believe in forming a trial strategy early; that working with full information, justified confidence, and good strategy puts my clients in a position of strength throughout the litigation process. My practice heavily incorporates technology to provide not only outstanding results at trial, but to effectively and efficiently share information and coordinate strategy. This focus on technology provides not only advantages at trial, but allows my clients to realize true cost savings in litigation.

At trial, my reputation for success is hard-won and indisputable. In over 40 trials, in both Federal and State Courts, I am proud of my greater than 95% success rate.

I also provide my clients with valuable legal guidance outside of the context of active litigation through risk-management, practice consulting, crisis management, and media relations.

I have appeared on television (both local and national) numerous times representing and speaking on behalf of various clients. I have helped many professionals avoid embarrassing and costly public relations disasters by quickly and quietly acting to resolve these high profile matters in confidence. I work closely with my professional clients to evaluate their policies and practices in an effort to effectively manage the risk that is part of doing business in a litigious society.

Finally, but perhaps most importantly, I have long believed that my reputation as a thorough, competent, and civil advocate—with the Courts, and in both the plaintiff and defense bar—serves my clients well. I strongly believe that my ethics, civility, and toughness reflect the high quality of the individuals and businesses who seek my representation.

Introduction

In civil litigation, meeting with a witness to learn about your case is not only a good idea, it's good practice. Indeed, there is a long history in Michigan of attorneys meeting ex parte with witnesses—including physicians—to learn more about their cases. There is nothing wrong with this practice; judges in Michigan almost always instruct juries at the conclusion of civil trials that "[t]here is nothing wrong with a lawyer talking with a witness for the purpose of learning what the witness knows about the case and what testimony the witness will give."[1]

Given the critical importance of medical evidence in personal-injury cases, meeting with a plaintiff's treating physicians as fact witnesses has been necessary and common for as long as personal-injury lawsuits have existed. Denying the defendants access to this critical evidence—when it is freely and openly available to the plaintiff—raises serious considerations of fundamental fairness. The enormity of the consequence of this denial is even recognized in our court rules, which provide that a plaintiff who prevents discovery of at-issue medical information may not themselves present evidence on their medical condition.[2]

When these fundamental rights to witness access were questioned in 1991, our Supree Court observed in *Domako v Rowe*[3] that it was "routine practice" for attorneys to meet with witnesses for the purposes of "learn[ing] what the witness knows about the case and what testimony the witness is likely to give" at trial. Indeed, our Supreme Court offered that "such informal methods are to be encouraged."[4] Accordingly, Michigan has enjoyed a rich tradition of open and fair access—for both sides—to medical witnesses in personal-injury cases.

In 1996, the U.S. Congress enacted the Health Insurance Portability and Accountability Act (HIPAA). HIPAA was designed not only to allow individuals to protect their health care coverage when changing jobs (the portability part) but offered a co-primary purpose of protecting and preventing the disclosure of protected health information (PHI). These protections were commonsense, and arguably necessary in an age of increasingly transmittable digitized health information.

Notwithstanding the guidance offered by *Domako*, the Michigan plaintiff bar has made attempts to reforge HIPAA's shield into a sword, transforming the routine HIPAA-required entry of a Qualified Protective Order (QPO) for ex-parte meetings into a tool to deny defendants and their attorneys' access to critical evidence. Because defense counsel does not have access to the plaintiff's signature—as plaintiff counsel does—they must seek stipulation for the entry of an order. Some plaintiff attorneys use this as a chance to insert conditions and provisions in the HIPAA QPO that have nothing at all to do with the purposes of HIPAA, holding hostage this longstanding and critical tool of informal discovery to gain an advantage in litigation.

This article will explore the purpose of HIPAA, Michigan's long history of ex-parte meetings as a discovery tool, the recent trend of imposing non-HIPAA-related conditions in stipulated QPOs (and their consequences), recent successes in the battle over HIPAA QPO conditions, and a framework recognizing and combating the abuse of HIPAA by plaintiff attorneys.

To ensure full and fair access to key evidence in civil litigation where a plaintiff's health is at issue, it is critical that the defense bar win, and keep winning, the HIPAA QPO battle.

I. HIPAA, its Purpose, and the Disclosure of Protected Health Information

Because the focus of this article is not to detail the various intricacies of HIPAA, but rather to highlight its role in personal-injury litigation concerning QPOs, only a brief overview of HIPAA and its legislative purpose is in order. In 1996, Congress enacted HIPAA, directing the Secretary of Health and Human Services to formulate and implement regulations to facilitate the transmission of PHI and, more germane to this article, to ensure the security and confidentiality of PHI by healthcare providers.[5] The regulations promulgated pursuant to the privacy prong[6] of this directive—aptly termed "Privacy Rules" and found in 45 CFR 164.500-164.534—set forth certain limitations on, as well as procedural prerequisites to, the release of PHI. The Michigan Supreme Court has examined the issue and has held that the purpose of HIPAA is to protect the privacy of health information while at the same time balancing the occasional need for disclosure.[7]

While HIPAA's privacy rule generally precludes healthcare providers from disclosing PHI,[8] this rule, like most, is defined by its exceptions. HIPAA actually permits the disclosure of PHI so long as there is compliance with certain procedural mechanisms. One such mechanism is the written authorization of a patient. Such authorization must provide specifics, including the following:

- a description of the information being disclosed,
- the name of the person authorized to make the disclosure,
- a description of the purpose of the disclosure,
- an expiration date,
- a signature and date, and,
- a "notice" statement adequately inform the authorizing individual of their right to revoke the authorization (in writing) and that the information disclosed may be subject to redisclosure by the recipient (and no longer protected by HIPAA).[9]

A second safeguard, the one most relevant here, is the disclosure of PHI pursuant to a court order in a judicial proceeding, such as a personal-injury lawsuit. This second safeguard specifically does not require authorization by the patient.[10] Pursuant to this exception, healthcare providers may disclose PHI if they receive "satisfactory assurance… from the party seeking the information

that reasonable efforts have been made by such party to secure a qualified protective order that satisfies the requirements of 45 CFR 164.152(e)(1)(v)."[11] Essentially, this exception permits healthcare providers to disclose PHI when authorized by a court's issuance of a HIPAA-compliant QPO.[12] To achieve HIPAA-compliance, a QPO must satisfy **only two requirements**. First, the QPO must "(1) prohibit[] the parties from using or disclosing the protected heath information for any purpose other than the litigation or proceeding for which such information was requested." Second, the QPO must "(2) require[] the return [of PHI] to the covered entity or destruction of the protected health information (including all copies) at the end of litigation."[13] Significantly, there are no other regulatory requirements necessary to satisfy the disclosure of PHI under a HIPAA-compliant QPO.

While HIPAA exists to protect against the disclosure of PHI for a whole host of business-related and legal purposes, HIPAA also explicitly contemplates the disclosure of PHI under certain circumstances and permits the same so long as certain procedural safeguards are in place. While Congress' primary focus in enacting HIPAA was to protect PHI, it clearly understood the potential necessity of disclosure of PHI in certain situations—like litigation—and Congress enacted rules to allow for this. These rules were never meant to give one side an advantage in litigation or to deny a defendant equal and full access to evidence.

The primary purpose of HIPAA is to protect the privacy of PHI and, even with a proper QPO, post-disclosure security of PHI is important. Post-disclosure protections are contemplated in the restrictions HIPAA-complaint QPOs impose on recipients of PHI. Simply put, the purpose of HIPAA does not change simply because a QPO is on the table; rather, its purpose is bolstered. Even with a QPO, recipients of PHI must also take reasonable steps protect it from re-disclosure. This can all be boiled down into a single, central idea—HIPAA cares only about the protection of health information; it does not care about litigation, convenience, discovery rules, or efficiency.

II. *Domako* and its Progeny – Michigan's History of Privilege Waiver and Ex Parte Meetings as an Important Tool of Informal Discovery

Because it is important – for both sides – to gather and evaluate evidence in civil litigation, good attorneys must not only assess documentary evidence, but also should interview witnesses to learn what they know.[14] When a party to litigation puts their mental or physical condition at issue, discovery of medical information pertinent to that condition is expressly permitted by our court rules.[15] In a personal-injury lawsuit, a plaintiff's treating physicians are unquestionably fact witnesses[16] on issues, including plaintiff's medical history, prior health baseline, their own care and treatment as reflected in their record, any improvement or decline in the plaintiff's condition, and the plaintiff's current condition. Further, due to their particular knowledge, skill, training and experience, plaintiff's treating physicians may potentially also offer testimony in the form of an opinion[17] (with properly laid foundation) on core case elements including the standard of care, causation, and damages.

Because of the sensitive nature of medical information, it has been recognized in Michigan (at least since 1985) that a party to litigation who holds a valid privilege may assert that privilege—in writing—and prevent discovery of medical information relating to their mental or physical condition.[18] While such assertion of privilege is permitted, doing so in a way that prevents discovery in civil litigation is not without consequence. Should this happen, the party asserting their privilege is expressly prohibited from offering any physical, documentary, or testimonial evidence about their medical history or physical or mental condition at the time of trial, potentially leading to summary disposition[19] or a directed verdict[20] of their claim for failure to establish the basic prima facie elements.[21]

One important tool of investigation in civil litigation—generally available equally to plaintiffs and defendants—is an ex-parte meeting with a treating healthcare providers. Plaintiff attorneys, having access to their client's ready approval, have no barrier to this tool as their clients can easily waive the physician-patient privilege. In a pre-HIPAA world, when HIPAA-compliant QPO fights were only the shadow of a concern, defense attorneys still needed the plaintiff to waive their physician-patient privilege in order to gain equal access to the same ex-parte meetings that their colleagues in the plaintiff bar freely enjoyed.

Michigan's leading case on this issue in the context of medical-malpractice litigation is the 1991 Michigan Supreme Court decision *Domako v Rowe*.[22] In that case, the Court rejected the then oft-cited argument—recently revived by the plaintiff's bar with HIPAA's QPO requirement—that it is sufficient for defendants to simply rely upon written medical records, formal written discovery, and depositions of treating physicians. Recognizing the practical realities of the fact-specific and medically intensive nature of medical-malpractice litigation, the Court reasoned that,

> it is routine practice…to talk with each witness before trial to learn what the witness knows about the case and what testimony the witness is likely to give…The purpose of discovery is the simplification and clarification of issues…There is no justification for requiring costly depositions… without knowing in advance that the testimony will be useful.[23]

The *Domako* Court ultimately authorized the use of ex-parte communications with treating physicians in medical-malpractice cases (and in personal-injury litigation as well) between defense counsel and a plaintiff's treating physicians, noting that,

> no party to litigation has anything resembling a proprietary right to

> any witness's evidence. Absent a privilege, no party is entitled to restrict an opponent's access to a witness… Once the [physician-patient] privilege is waived, there are no sound legal or policy grounds for restricting access to the witness.[24]

In fact, the Court elucidated that "such informal methods are to be encouraged" because they facilitate early evaluation and settlement of cases, with decreased litigation costs.[25] The Michigan Court Rules have long stood by the proposition that they are to be construed to secure the just, speedy, and economical determination of every action;[26] the *Domako* Court certified that ex-parte meetings are designed to perfectly accomplish this goal.[27]

Moving forward from the opinion in *Domako* in 1991, the Court has remained remarkably consistent in its support for the efficiency and fairness of ex-parte communications with treating physicians. In *Holman v Rasak,*[28] the Court considered the implications of HIPAA (a relatively recent development at the time), holding unambiguously that "the Privacy Rule does not prevent this informal discovery[, such as ex parte interviews] from going forward, it merely superimposes procedural prerequisites."[29] The *Holman* Court recognized that while HIPAA applies to both oral and written communications,[30] the expedient utility of ex-parte communications had become so prevalent in Michigan the tool was used in other cases beyond medical malpractice, such as product-liability cases.[31]

The physician-patient privilege, like the privacy privilege created by HIPAA's privacy rule, is a valid privilege in Michigan. Waiver of the physician-patient privilege is necessary to allow for all discovery, formal or informal, to occur. This includes ex-parte communications with a party's treating physician. Generally, when the mental or physical condition of a party is at issue in a case, medical information about that party's condition becomes subject to discovery, given that it is otherwise discoverable pursuant to MCR 2.302(B) and the party does not assert a valid privilege.[32] In medical-malpractice cases in particular, MCL 600.2912f provides a statutory automatic waiver of the physician-patient privilege. This statute provides that any person who gives notice of an intent to file a medical-malpractice action, or has otherwise commenced such an action, waives, for purposes of that claim or action, the physician-patient privilege created by MCL 600.2157, as well as any other privilege. Thus, while a plaintiff in a general personal-injury case may waive their privilege, in medical-malpractice cases specifically, plaintiffs essentially waive the physician-patient privilege twice—first when he or she serves a notice of intent to sue,[33] and again when he or she files a complaint alleging medical malpractice.

It is the waiver of privileges by a plaintiff that essentially permits a personal-injury lawsuit to be litigated. Without waiver—and subsequent access to the party's at-issue medical information—key issues of consequential fact would not be able to be explored in discovery and subsequently adjudicated at trial. The adversarial nature of our system of justice contemplates both sides to a dispute having equal, full, and unfettered access to evidence. Without the waiver of privilege—physician-patient, HIPAA, or otherwise—our system of justice becomes laughable. While a plaintiff may choose to assert their privilege and deny the defense access to evidence, doing so would essentially preclude the plaintiff from submitting evidence of his or her own medical condition,[34] resulting in the effective end of the claim.

In the context of a personal-injury action, much less a medical-malpractice case, it is ludicrous to submit that there can be any privilege that protects medical information from disclosure between the parties or that prevents one party from gaining access to information and evidence to which another party has full and unfettered access. This includes access to ex parte meetings with a plaintiff's treating healthcare providers.

Ex-parte meetings are efficient. They are cost-effective. They are fair. Allowing for the examination of key medical facts ex parte promotes efficiency of discovery, reduces litigation costs, and may even facilitate early evaluation and settlement. These ex-parte meetings help defense attorneys better understand the merits of the cases they are defending—and also may help a plaintiff attorney understand their clients' claims.

In order to fulfill their responsibilities to their clients and to our system of justice, defense attorneys should be seeking ex-parte interviews with the plaintiff's treating healthcare providers when the plaintiff's medical condition is at issue in the case. While HIPAA's privacy rule has imposed certain procedural preconditions on ex-parte meetings, it does not prohibit them.[35] In order to gain access to ex-parte meetings, defense attorneys must seek entry of a HIPAA-complaint QPO. While this **should** be a relatively straightforward process, trouble arises when plaintiff attorneys weaponize HIPAA's privacy rule and obstruct reasonable QPOs for their own benefit. In doing so, they are attempting to gain an advantage in litigation that was never contemplated or intended by the HIPAA's laudable purposes.

III. HIPAA QPOs and the Attempted Imposition of Non-HIPAA Related Conditions

A reasonable first step to secure a HIPAA-compliant QPO is a phone call to opposing counsel seeking a stipulation. HIPAA itself imposes only two conditions on the entry of a QPO allowing for ex-parte meetings: first, that the QPO must prohibit the parties from disclosing PHI and second, that the parties must return (or destroy) the PHI and the conclusion of the litigation.[36]

Outside of these two HIPAA-required QPO terms, it is an abuse of discretion for a trial court to impose conditions on a QPO requested by defense counsel absent a showing of "good cause."[37] Notwithstanding the clear guidance offered by Michigan's Courts—and our tradition of open, full, and fair access to facts, evidence, and witnesses—some plaintiff attorneys have made repeated efforts to weaponize the HIPAA QPO

process to gain advantages in litigation. While various flavors of notice provisions (requiring defense counsel to disclose the occurrence of an ex-parte meeting to plaintiff counsel before or after the meeting) are by far the most common, there are other more noxious and equally impermissible terms plaintiff counsel have attempted to insert into QPOs. Some outright attempt to prevent ex-parte meetings altogether, demanding that plaintiff's counsel be allowed to attend the meeting.[38] Some request that a statement, written by the patient themselves (read: written by plaintiff's counsel) be provided or read to the physician prior to the meeting. Some attorneys have circulated letters to their clients' physicians asking them not to meet with defense counsel. Some have even requested that the meeting be recorded, and that the recording—or defense counsel's notes—be provided to opposing counsel.

Outside of a showing of "good cause" (discussed in detail below), these additional conditions are improper, outside of any reasonable interpretation of statutes, regulations, or case law, and arguably amount to a refusal to permit discovery of medical information.

Accordingly, unless they feel "good cause" can be shown against them, defense attorneys should not stipulate to these additional conditions and should actively argue against their imposition. Stipulation to such impermissible QPO conditions—even conditions seemingly as innocuous as pre or post-meeting notice—are not only unnecessary but actively aid plaintiff counsel's attempts to convert HIPAA from a reasonable shield to an offensive sword. If a stipulation cannot be reached without these additional impermissible restrictions, a motion for entry of QPO should be filed. As part of that motion, alternative relief seeking to strike plaintiff's damages pursuant to MCR 2.314(b)(2) should be requested, given that counsel's refusal to allow access to at-issue medical information constitutes prevention of discovery of that critical medical information.

The latitude that our court rules confer on trial courts extends to the entry of traditional protective orders. Generally, trial courts in Michigan are afforded discretion in issuing protective orders under MCR 2.302(C) so long as there is "good cause shown."[39] HIPAA QPOs, because they are operations of regulation, are not traditional protective orders under MCR 2.302(c), however. With HIPAA QPOs, good cause is not required to achieve the order; that is provided by operation of regulation. Instead, the "good cause" requirement of MCR 2.302(C) comes into play only when a plaintiff attorney seeks the imposition of additional non-HIPAA related conditions on ex-parte interviews with a plaintiff's treating physicians.[40]

Because HIPAA is designed to protect PHI and was never intended to provide a party an advantage in litigation, trial courts abuse their discretion when they impose conditions in QPOs unrelated to HIPAA and its purpose. The Michigan Court of Appeals in *Szpak v Inyang*[41] held that if a trial court imposes additional conditions beyond the requirements of HIPAA, each additional condition must be justified in its own right.[42] Specifically, a plaintiff must show the good cause contemplated by MCR 2.302(C) as a foundation for the imposition of a non-HIPAA related condition or other limitation. This protection is designed to protect the open, equal, free, full, and fair access to evidence contemplated by our system of justice and the efficiency expressly required by our court rules.[43] This protection is so strong that a mere "generalized" fear of intimidation is insufficient;[44] in order to justify the imposition of non-HIPAA related requirements, plaintiff's counsel must demonstrate to the court specific and particularized behaviors that the proposed QPO condition would appropriately address. Absent this showing, it is an abuse of discretion for a trial court to impose any additional term unrelated to HIPAA and its purpose into a HIPAA QPO.

Simply put, QPO conditions are either related to the purposes underlying HIPAA (security of PHI) or they are not. Frankly, absent a specific, clear, and present concern for intimidation of a physician by defense counsel, plaintiff counsel should be stipulating to standard HIPAA QPOs at this point; the jurisprudence is clear and the equities are compelling. However, should plaintiff's counsel request that the Court impose a non-HIPAA related condition into a requested QPO, and not make a specific and particularized showing of a fear of intimidation in their initial response, defense counsel should consider drawing the Court's attention to MCR 2.314(b)(2) and asking that the plaintiff's damages be struck for failure to provide or permit access to at-issue medical information.

HIPAA QPOs are solely a mechanism for effectuating ex-parte meetings within the framework provided by the HIPAA privacy rule. Absent a particularized, real, clear, and present concern for intimidation by defense counsel, the only legitimate reason a plaintiff attorney would seek the imposition of non-HIPAA related conditions in a QPO is to gain an advantage in litigation. A HIPAA QPO is not the appropriate tool for doing anything other than ensuring that a patient's PHI is protected from disclosure.

IV. Recent Appellate Success in the QPO Battle: Denial of a Notice Provision

In a current medical-malpractice case, plaintiff attempted to gain an advantage in litigation by requesting that the trial court insert a non-HIPAA related notice provision into a QPO. At the trial court level, our firm, Foley, Baron, Metzger & Juip, PLLC, pushed against this, arguing that imposition of this (and other) non-HIPAA related conditions constituted an abuse of discretion. The trial court disagreed, entering a HIPAA QPO with a 14-day post-meeting notice provision. (among others). Working with appellate counsel at Collins Einhorn Farrell PC, the Court of Appeals examined this attempt and ruled in our favor.

In *Sampson v Shorepointe,*[45] the Court of Appeals vacated the QPO entered by the trial court, noting that plaintiff "simply has not shown why justice requires the 14-day post-meeting notice provision set by the circuit court"[46] and

that additional QPO conditions requiring notice had no bearing on the disclosure of PHI.[47] The plaintiff in that case did not make any particularized or specific showing of a clear and present concern for intimidation or any other showing of good cause; instead plaintiff contended that notice provisions are necessary to avoid the burden and expense of discovering ex-parte interviews through traditional discovery mechanisms, such as interrogatories. The court disagreed with the plaintiff's argument, holding that the plaintiff failed to make a showing that justice required the notice provision.[48] Instead, the court categorized the plaintiff's rationale as merely "an argument for convenience," holding that it "could not agree that an ordinary discovery request, and the assertion of a privilege in response to that request, is an undue burden on [the] plaintiffs in this, or any other, case."[49] On May 19, 2021, the Michigan Supreme Court issued an order denying the plaintiff's application for leave to appeal the decision on this issue, preserving the Court of Appeals' opinion below.

The *Sampson* case is but one example of the widespread use—or attempted use—of QPOs by plaintiffs as tools to achieve an advantage in litigation. While additional conditions may be imposed in a QPO on a showing of good cause, the imposition of a notice requirement purportedly operates to alleviate concerns for "unfair surprises" at trial has been held, repeatedly, to be insufficient justification. This makes much sense when considering the overall purposes of HIPAA: such provisions have nothing to do with the protection of health information, nor do they advance the causes of justice under MCR 2.302(C).

The opinion in *Sampson* reinforces the fundamental concept that HIPAA QPOs are not an appropriate forum for addressing discovery concerns. The sole function of HIPAA is the protection of health information.

V. Evaluation of HIPAA QPOs and the Imposition of Additional Conditions.

As discussed above, the first step in securing a necessary and required QPO is to make a phone call—or send an email—to opposing counsel. Absent a specific, clear, and present concern for intimidation of a physician by defense counsel, opposing counsel should readily stipulate to the entry of a HIPAA QPO with the standard terms; the jurisprudence is clear, and the equities are compelling.

Because HIPAA itself imposes only two conditions on the entry of a QPO, the order itself should be very straightforward and must (1) prohibit the parties from disclosing PHI and (2) provide that the parties must return (or destroy) the PHI and the conclusion of the litigation.[50] Outside of these two regulatory-based QPO terms, some QPOs include a few other terms: that counsel shall notify the physician for the purposes of the meeting, that the physicians are not required to agree to the meeting, that the physician may have their own counsel present, and that the physicians receive a copy of the QPO. Importantly, these non-HIPAA related conditions are voluntary and have come to be common not because of imposition of law, but by way of tradition.

Should opposing counsel seek to impose their own additional conditions on the QPO, you must assess not only the nature of the condition, but the "good cause" basis for it as well. The first inquiry should be to determine if the additional term is related to the purposes of HIPAA's Privacy Rule—protection of a patient's PHI. Chances are that this is not the case because all reasonable HIPAA-related concerns are addressed in the two requirements (above) expressly required by HIPAA QPOs. If the additional requirement sought by plaintiff's counsel is not HIPAA or PHI related, plaintiff's counsel must make a clear, particularized, and specific showing of fear of intimidation by defense counsel. This showing must be specific to the case at issue and specific the defense counsel involved; a generalized concern about "defense attorneys in general" or even "other members of the firm" is not sufficient to justify additional QPO conditions. Absent this specific and particularized showing of "good cause," a trial court's imposition of additional terms is an abuse of discretion.

Failing this, plaintiff's counsel will often raise arguments of convenience, avoiding unfair surprise, fairness to all parties, and efficiency in discovery as a basis for the imposition of additional conditions—often notice provisions—in the HIPAA QPO. While the Court may order—in some other manner—that counsel provide information about ex parte meetings, this provision has nothing to do with HIPAA's goals of protecting the disclosure of PHI and should properly be dealt with elsewhere. Consider that if these goals—convenience, avoiding surprise, fairness, and efficiency—were so important to plaintiff counsel, why were they raised only as a negotiating tool when defense counsel sought a QPO? Why were they not contemplated by the court rules? Why are they not a standard part of discovery disclosures?

Should a motion for entry of a HIPAA-compliant QPO be required due to plaintiff's failure to stipulate, defense counsel should strongly consider whether or not this failure to stipulate is founded in a good faith concern for intimidation or is a discovery tactic. If the plaintiff's failure to stipulate amounts to a denial of your ability to conduct discovery, consideration should be given to striking plaintiff's damages pursuant to MCR 2.314(b)(2). More directly, it is important for your motion to remind the Court of the limited conditions that HIPAA actually requires be included in a QPO. Defense counsel should delineate the applicable legal authority—illustrated above—and emphasize that pursuant to the MCR 2.302(C) and *Szpak*, it is an abuse of discretion to impose the requested condition unless the plaintiff shows that justice requires the same. Note to the court that plaintiff has the burden of showing good cause by way of a demonstration of specific and particularized fear of intimidation by defense counsel. Because Michigan does not permit the filing of reply briefs absent statutory authority or leave to do so, this issue should be addressed directly in your main brief.

Courts generally want to follow the law and get to the right result. It is important to remind the Court that the "right result" here—when dealing with HIPAA—is not the convenience of parties or allowing one party an advantage in litigation, but the protection of a patient's PHI (an issue that the HIPAA regulations aptly address already). It is important to cite past Court of Appeals opinions where the Court vacated conditions in QPOs unrelated to HIPAA and its purpose imposed by the trial court. These opinions and orders can and should be attached as exhibits to your motion – and there are a lot of them!

Conclusion

As practicing attorneys, we have multiple important responsibilities to our clients, to ourselves, and to the system of justice that we are charged with protecting and serving. While all attorneys are charged with advocating for their clients, this advocacy must be fair and within the bounds of the law. Advocacy that seeks to disrupt balance or to prevent full, fair, and open access to facts and evidence important to both sides is inappropriate.

Michigan attorneys have long interviewed witnesses—in addition to gathering documentary evidence—as part of their responsibilities. In cases where the mental or physical health of a party is at issue, full access to this important evidence, including ex parte interviews of physicians, has long been allowed and even championed as a tool of fairness and efficiency.

While HIPAA's goals of protecting a person's PHI is laudable, attempts by plaintiff counsel to prevent discovery of medical information by reforging HIPAA's shield into a sword are considerably less laudable. The purpose of HIPAA is to protect, and the purpose of a HIPAA QPO is to provide access to health information within a protective scheme; it is not and has never been to allow an unfair advantage to one side in litigation.

Despite clear jurisprudence, and a long history of open and equal access to medical information in personal-injury litigation, some members of Michigan's plaintiff's bar misuse HIPAA QPOs, attempting to game the system and gain an advantage in litigation from a regulatory scheme designed solely to protect patient health information. Defense attorneys should recognize and push back against this continued abuse of HIPAA. Conceding for the sake of convenience and stipulating to the addition of conditions in HIPAA QPOs unrelated to its intended purpose is not only counterproductive, but wrong. Defense counsel should remain focused on ensuring full, fair, and equal access to medical information for their clients **and** on protecting PHI from inappropriate disclosure by using the tools afforded to us by HIPAA itself.

Endnotes

1 M Civ JI 4.06 *"Witness Who Has Been Interviewed by an Attorney."*

2 MCR 2.314(b)(2).

3 *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991).

4 *Id.*

5 42 USC 1320d-1320d-8.

6 Alliteration intended.

7 *Holman v Rasak,* 486 Mich 429, 446-447; 785 NW2d 98 (2010) (delineating that "[w]hile HIPAA is obviously concerned with protecting the privacy of individuals' health information, it does not enforce that goal to the exclusion of all other interests. Rather, it balances the protection of individual privacy with the need for disclosure in some situations.").

8 *Id.* at 438-439.

9 45 CFR 164.508.

10 45 CFR 164.512(e).

11 *Holman, supra* at 440 (citing 45 CFR 164.512(e)(1)(ii)(B).

12 45 CFR 164.512(e)(1)(i).

13 45 CFR 164.512(e)(1)(v); see also *Holman*, *supra* at 440.

14 M Civ JI 4.06 - *not only what they know about the case, but what their testimony may be at the time of trial.*

15 MCR 2.314.

16 MRE 701.

17 MRE 702.

18 MCR 2.314(b)(1).

19 MCR 2.116. See also *Gibson v Bronson Methodist Hosp.,* 445 Mich 331; 517 NW2d 736 (1994).

20 MCR 2.516.

21 *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997); *Locke v Pachtman*, 446 Mich 216; 521 NW2d 786 (1994).

22 438 Mich 347; 475 NW2d 30 (1991) (addressing the question of whether the physician-patient privilege was violated in a medical malpractice case when defense counsel conducted an ex parte interview with the plaintiff's treating physician.).

23 *Id.* at 360-361.

24 *Id.* at 361. (internal quotation marks omitted).

25 *Id.*

26 MCR 1.105.

27 In exploring Michigan's longstanding tradition and history of permitting ex parte communications, the *Domako* Court cited to a variety of sources. One such source was the Michigan Court Rules, which the Court explained "were intended to further liberalize Michigan's already open discovery process." *Id.* at 359 (citing *Domako v Rowe*, 184 Mich App 137,148-149; 457 NW2d 107 (1990)). Another source was MI SJI2d 2.06 (currently M Civ JI 4.06) for the proposition expounded upon above that it is routine practice to speak with each witness before trial to learn what the witness knows and his or her expected testimony. *Id.* at 360.

28 *Holman v Rasak,* 486 Mich 429, 446-447; 785 NW2d 98 (2010).

29 *Id.* at 442, quoting *Arons v Jutkowitz*, 9 NY3d 393, 415, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007).

30 *Id.* at 433. ("It is reasoned that the relevant HIPAA regulation, 45 CFR 164.512(e)(1)(ii), does not exclude oral communication from the regulations governing disclosure of protected health information…Moreover, 45 CFR 160.103 specifically provides that HIPAA applies to both oral and written information.") (internal citations omitted).

31 *See Davis v Dow Corning Corp*, 209 Mich App 287; 530 NW2d 178 (1995) (This product liability case in which the Court of Appeals noted that the defendants were entitled to an order from the trial court allowing ex parte interviews once the physician-patient privilege was waived. The Court noted that the plaintiff's counsel could not interfere with such meetings.).

32 MCR 2.314(A)(1).

33 MCL 600.2912b.

34 *Domako*, *supra* at 352, n 1 (citing MCR 2.314(B)(2)). Asserting the physician-patient privilege in personal injury cases would foreclose on the entire case, as personal injury cases cannot proceed without evidence of the physical or mental condition of the plaintiff. *Id.* at 361.

35 *Holman*, *supra* at 442.

36 45 CFR 164.512(e)(1)(v); *Holman*, *supra* at 440. The authors would also note, however, most standard QPOs contain additional litigation-appropriate terms: that counsel shall notify the physician for the purposes of the meeting, that the physicians are not required to agree to the meeting, that the physician may have their own counsel present, and that the physicians receive a copy of the QPO. Importantly, these non-HIPAA related terms are not required by HIPAA itself, but by tradition and negotiation.

37 See, generally, *Szpak v Inyang,* 290 Mich App 711, 803 NW2d 904 (2010).

38 *Id.*

39 MCR 2.302(C) provides in pertinent part, "on reasonable notice and good cause shown, the court…may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

40 *Holman*, *supra* note 2 at 447-448.

41 290 Mich App 711; 803 NW2d 904 (2010).

42 *Id.* at 715.

43 MCR 1.105.

44 *Id.* at 715-16.

45 *Sampson v Shorepointe Nursing Center*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2020 (Docket No 346927); 2020 WL 4036512.

46 *Id*. at n 2.

47 *Id.* at *2.

48 *Id.* at *3 (Specifically, the plaintiff argued that she would be burdened in finding out about ex parte meetings through traditional discovery mechanisms "given the likelihood that defendants will assert the work product privilege in denying the requested information.").

49 *Id.* at *7.

50 45 CFR 164.512(e)(1)(v); *Holman, supra note 2* at 440.

The Op-Ed(ish) Column

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

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

Overrulings

You've likely heard about (or read) the U.S. Supreme Court opinion overruling *Roe v Wade*. You also may have heard about (or read) the orders from the Michigan Supreme Court questioning whether several of its prior cases were correctly decided. (If not, check out the amicus report in this issue). No matter what side you're on, overruling *Roe* is a big deal. So is overruling Michigan Supreme Court precedent. Overruling any Supreme Court precedent is a big deal because it changes the rules that we rely on. So, why does it look like overrulings are about to become en vogue? Short answer: judges can't help themselves.

Overruling precedent comes in a couple different forms. It might come from a higher court overruling a lower court's precedent. That isn't very remarkable. It might come from a court recognizing that the basis for its prior holding has been eliminated, e.g., the Legislature repealed the statute. That's isn't dubious business either. But overruling *Roe* and the cases flagged in the Michigan Supreme Court's orders don't involve those forms of overruling. No, they involve a very different form; one that should raise the hairs on the back of a civics teacher's neck.

The Supreme Court isn't the Legislature. I think we can all agree on that. Courts and legislatures have different functions. Legislatures enact the laws that establish public policy. Courts apply those laws to sets of facts (the common law is different, but, stay with me). This is basic civics stuff. The Supreme Court Justices (U.S. and Michigan) understand basic civics. No doubt. So, let's assume that they aren't simply enacting their policy preferences; they aren't acting like legislators.

Given that assumption, what are Supreme Court Justices doing when they overrule their precedent? Too often, they're just claiming intellectual superiority. Judges disagreeing isn't remarkable; they're lawyers, after all. But overruling precedent requires more than mere disagreement, doesn't it? It must. It's doubtlessly difficult to **not** overrule a decision that you believe is wrong when you have the authority to do so. But the role that courts play in our democracy demands that Justices exercise that restraint.

If judges simply vote their conscience with no regard for their predecessors' decision, the divide between courts and legislatures dissolves. Consider a 4-3 decision by the Michigan Supreme Court. If a member of the majority is replaced by a new Justice a year later and the new Justice agrees with the dissent's analysis, is the prior decision a dead letter? If it is, the Court is just another legislature, changing public policy for the state based on its composition.

Of course, supreme courts aren't legislatures. So, overruling requires more than just disagreement. The current court must decide that a previous majority of intelligent people who were elected or appointed to the highest court got it wrong so badly that the current majority has to fix their gaffe. That's a stunning concept and, honestly, it's more than a little far-fetched. Its occurrence should be pretty damn rare (pardon my French).

Overrulings aren't all bad (good riddance, *Plessey v Ferguson*). They're a necessary evil. I just think they should be a lot rarer than current events suggest they'll be.

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.

Appellate Practice Report

By: Phillip J. DeRosier and Trent B. Collier

Appellate Costs in the Michigan Court of Appeals

Under the Michigan Court Rules, the prevailing party—meaning a party that prevails on all issues in a civil appeal—may be entitled to tax costs against the non-prevailing party.[1] A prevailing party has this right automatically and without any specific order from the Court of Appeals. But the Court of Appeals may eliminate that right if it chooses by stating in an opinion that costs are not recoverable.[2] For example, the Court has stated that costs are not taxable if an appeal "presents an issue of significant public importance[.]"[3]

To obtain costs in the Court of Appeals, the prevailing party must file a certified or verified bill of costs "[w]ithin 28 days after the dispositive order, opinion, or order denying reconsideration is mailed."[4] The objecting party may file a response within 7 days after service of the bill of costs.[5] The clerk must "promptly" verify the prevailing party's costs and tax as appropriate.[6]

If either party wants to challenge the clerk's action, they may file a motion "within 7 days from the date of taxation."[7] The Court's review, however, is limited to "those affidavits or objections which were previously filed with the clerk...."[8]

What costs are taxable? Under the Michigan Court Rules, the prevailing party may collect only "reasonable costs incurred in the Court of Appeals."[9] These include the cost of (1) printing briefs, (2) an appeal or stay bond, (3) transcripts, (4) documents necessary for the appeal record, and (5) fees paid to court clerks.[10] If the prevailing party wishes to tax any additional costs, it must connect the right to do so to an applicable statute or court rule.[11]

This list of taxable costs isn't long. In many appeals—particularly those in which the prevailing party incurred no expenses related to a bond—there's a strong possibility that the expenses necessary to prepare a costs application will exceed the recoverable costs. That's especially true if collecting those costs might require some effort. Nevertheless, the costs in some appeals may be large enough to justify their pursuit.

When you receive an order allowing a client to tax costs incurred in an appeal, it's best to give your client a realistic picture of the likely expense of pursuing costs along with the likely recovery. Engaging in these calculations upfront allows a client to make an informed judgment about whether pursuing costs is worthwhile.

An application for costs may look something like the following (with apologies to *Arrested Development* for supplying names):

STATE OF MICHIGAN
IN THE COURT OF APPEALS

STAN SITWELL *Plaintiff/Appellee*, v.	Court of Appeals No. 12345 Oakland County Circuit Court No. 2022-12345-AV
THE BLUTH COMPANY, *Defendant/Appellant.*	

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.

The Bluth Company's Verified Bill of Costs

Appellant The Bluth Company was the prevailing party in this appeal. It submits the following verified bill of costs under MCR 7.219 for the Clerk of the Court to tax.

Bill of Costs

Filing Fees:	Entry Fee for Application for Leave	$375.00	
Briefs:	Appellant's Brief on Appeal	29 original pages @ $1.00/page	$29.00
		85 exhibit pages @ $.10/page	$8.50
	Appellant's Reply Brief on Appeal		
	16 original pages @ $1.00/page		$16.00
Transcript			
	August 1, 2018		$85
Misc			
	Cost Because Matter Was a Calendar Case		$50
Total Taxable Costs			**$563.50**

Verification

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Bob Loblaw, being first duly sworn, states as follows:

1. He is appellate counsel for appellant The Bluth Company in this cause of action.
2. He has read the preceding bill of costs, and each item of costs is correct and necessarily incurred.

_____

Robert Loblaw (P54321)
Subscribed and sworn to before me this 6th day of March 2022.

_____

NOTARY PUBLIC
Wayne County, Michigan (Acting in Oakland County, Michigan)
My commission expires: 2/10/2020
The Law Offices of Bob Loblaw
By: /*s/ Bob Loblaw*
ROBERT LOBLAW (P54321)
1234 Tobias Road, Detroit, MI 42222
(248) 222-2222 • Bob@loblawlaw.com
Appellate Counsel for Appellant
Dated: March 6, 2022

Scope of Cross-Appeals in the Michigan Court of Appeals

In the Michigan Court of Appeals, when a party files an appeal as of right (or the Court of Appeals grants leave to appeal), the appellee is entitled to file a cross-appeal. MCR 7.207(A)(1) ("When an appeal of right is filed or the court grants leave to appeal any appellee may file a cross appeal."). But what is the proper scope of a cross-appeal? Is it limited to the judgment or order being appealed? Can a cross-appeal raise issues involving parties unaffected by the original claim of appeal?

In *Costa v Community Emergency Medical Services, Inc*, 263 Mich App 572; 699 NW2d 712 (2004), aff'd 475 Mich 403 (2006), the Court of Appeals confirmed that "[t]he language of MCR 7.207 does not restrict a cross-appellant from challenging whatever legal rulings or other perceived improprieties occurred during the trial court proceedings." *Id.* at 583-584. In *Costa*, the defendants appealed as of right from the trial court's order denying their motion for summary disposition based on governmental immunity. The plaintiffs cross-appealed from the same order, which had also denied the plaintiffs' motion for summary disposition. The defendants argued that the Court of Appeals did not have jurisdiction to consider the plaintiffs' cross-appeal because the portion of the order denying the plaintiffs' motion for summary disposition was not appealable as of right (whereas the denial of governmental immunity was appealable as of right under MCR 7.202(6)).

In rejecting the defendants' argument, the Court in *Costa* acknowledged that the defendants' initial appeal was limited to the governmental immunity issue per MCR 7.203(A)(1), which "explicitly prescribes the scope of an appellant's appeal as of right from a final order under MCR 7.202(6)(a)(iii)-(v), such as an order denying summary disposition on the issue of governmental immunity, and limits an appellant's right to appeal under these circumstances 'to the portion of the order with respect to which there is an appeal as of right.'" *Id.* at 583. The Court observed, however, that MCR 7.207(A)(1) does not "similarly restrict the scope of cross-appeals":

> [T]he court rule governing cross-appeals to this Court, MCR 7.207, does not contain any language of limitation. Instead, the clear and unambiguous terms of MCR 7.207(A)(1) authorize any appellee

> to file a cross-appeal whenever an appellant has either filed an appeal as of right, or when this Court has granted an appellant's application for leave to appeal. The language of MCR 7.207 does not restrict a cross-appellant from challenging whatever legal rulings or other perceived improprieties occurred during the trial court proceedings. Indeed, MCR 7.207(D) states that even "[i]f the appellant abandons the initial appeal or the court dismisses it, the cross appeal may nevertheless be prosecuted to its conclusion." See *In re MCI*, 255 Mich App 361, 364-365; 661 NW2d 611 (2003). [*Costa*, 263 Mich App at 583].

The Court of Appeals recently reaffirmed *Costa's* analysis in *123.net, Inc v Serra*, unpublished opinion per curiam of the Court of Appeals, issued Dec 2, 2021; 2021 WL 5750626 (Docket No. 353075), concluding that a cross-appeal provides the Court "jurisdiction to hear . . . challenges to matters falling outside the scope of the final order appealed." *Id.*, 2021 WL 5750626, *10.

Although *Costa* and *123.net* happened to involve cross-appeals filed in response to a claim of appeal as of right, MCR 7.207(A) also applies to cross-appeals filed after the Court of Appeals has granted leave to appeal. See *Bancorp Group, Inc v Meister*, 459 Mich 944; 590 NW2d 65 (1999) (holding that the was "no basis" for limiting a cross-appeal to issues relating to the specific order appealed by the appellant by leave granted).

Finally, it does not matter whether the cross-appeal involves parties that were not affected by the original claim of appeal. MCR 7.207(A)(2) provides that "[i]f there is more than 1 party plaintiff or defendant in a civil action and 1 party appeals, any other party, whether on the same or opposite side as the party first appealing, may file a cross appeal against all or any of the other parties to the case." As explained in the Michigan Appellate Handbook, § 4.45 (ICLE 3d ed, 2013), this gives rise to important strategic considerations when deciding whether to file an appeal in the first instance:

> The filing of a cross-appeal entitles the filing appellee (who becomes a cross-appellant) to seek relief against not only the appellant, but also any other appellee, including one who was unaffected by the original claim of appeal. MCR 7.207(A)(2). There is no requirement that a cross-appeal be limited in scope as a result of, or that it address the same issues as, the direct appeal . . . . This is an important strategic nuance that every party must consider when analyzing the pros and cons of claiming an appeal (or filing an application for leave to appeal): the appeal automatically entitles all other parties in the case to file a cross-appeal. Even a defendant who has deliberately forgone an appeal of right can reconsider that decision, and change its mind, if the plaintiff claims an appeal.

Endnotes

1 MCR 7.219. See also MCR 7.318 (Michigan Supreme Court); *Bowman v Walker,* ___ Mich App ___; __ NW2d ____ (Case No. 355561, Feb. 10, 2022).

2 MCR 7.219(A).

3 *Gavrilides Mgmt Co, LLC v Michigan Ins Co,* __ Mich ___; ___ NW2d __ (Case No. 354418, Feb. 1, 2022).

4 MCR 7.219(B).

5 MCR 7.219(C).

6 MCR 7.219(D).

7 MCR 7.219(E).

8 *Id.*

9 MCR 7.19(F).

10 *Id.*

11 *See* MCR 7.219(F)(6)-(7).

MDTC Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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***Skanska USA Building Inc v Amerisure Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2021 (Docket No. 340871).**

The most notable insurance coverage decision of 2020 was likely the Michigan Supreme Court's decision in *Skanska.* I have discussed the *Skanska* saga previously in this column: see Vol. 36, No. 1, and Vol. 37, No. 2. *Skanska* dealt with whether an "occurrence" can "include damages for the insured's own faulty workmanship" in the context of commercial general liability ("CGL") coverage. The Michigan Court of Appeals had, for many years, generally said "no" on the authority of *Hawkeye-Security Ins Co v Vector Construction Co,* 185 Mich App 369; 460 NW2d 329 (1990), despite changes to the standard CGL form's definition of "occurrence." But on June 29, 2020, the Michigan Supreme Court "cabined" *Hawkeye* "to cases involving pre-1986 comprehensive general liability insurance policies." *Skanska USA Bldg Inc v MAP Mech Contractors, Inc,* 505 Mich 368, 372; 952 NW2d 402 (2020). However, the Court's answer to this question did not resolve the case. Rather, the case was remanded to the Court of Appeals "for consideration of any remaining issues," including the potential application of the policy's "your work" exclusion. *Id.* at 390.

Late last year, the Court of Appeals determined that it was also unable to dispose of the case, instead remanding to the trial court "for consideration in light of the Michigan Supreme Court's opinion in *Skanska*." *Skanska,* unpub op at 2**.** On remand from the Supreme Court, Amerisure raised a number of issues, all of which this panel found to be "either premature or irrelevant." *Skanska,* unpub op at 4. First, Amerisure argued that "there is a distinction between whether the faulty work was performed by a named insured or an additional insured," and that "the policy must be limited to the subcontractor's (i.e., MAP's) perspective." *Id.* Amerisure urged the Court of Appeals to "follow the majority approach and hold that, while faulty subcontractor work that damages an insured contractor's work product may be an 'accident' per the Supreme Court's Opinion, an insured's own faulty workmanship that damages only its own work product, requiring the product to be repaired or replaced is not." *Id.* However, the panel determined that this argument was not raised in the trial court where it first needed to be considered because it required "further factual development" and consideration of how the Supreme Court's holding applies to those facts. *Skanska,* unpub op at 5.

Amerisure also asked the panel to give "prospective only" effect to the Supreme Court's July 2020 holding. *Id.* The panel suggested that this argument was not properly preserved but ultimately rejected on its merits because the "Supreme Court did not overrule *Hawkeye*; it determined that *Hawkeye* was not applicable to the facts of this case…." *Skanska,* unpub op at 5. For this reason, the panel found that "the issue of prospective or retrospective application of *Skanska*" was irrelevant; "[t]he trial court's task is to determine whether there is coverage (i.e., whether there was an "occurrence") for the damage alleged in the complaint under the language in the CGL policy and, if so, the scope of such coverage." *Skanska,* unpub op at 5.

Finally, the panel declined Amerisure's request to consider whether "coverage was properly denied on the basis of the 'Your Work' exclusion contained within the CGL policy." *Id.* The panel found that "[r]esolution of this issue is premature at this stage" in light of what the trial court had, and had not, considered when it initially decided the motions back in 2017. *Id.*

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.

Gavrilides Mgt Co v Michigan Ins Co, __ Mich App __; __ NW2d __ (2022)

(Docket No. 354418).

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 governments' responses to it, on the world of insurance coverage. In particular, we have looked at business interruption suits relating to the pandemic. *Gavrilides* was one of the earliest COVID-19 related business interruption decisions in the United States, and the trial court's reasoning has been cited by many courts in support of granting insurers' motions to dismiss. Now, the Court of Appeals has unanimously affirmed the dismissal of that suit in a published opinion.

Of particular importance is the *Gavrilides* panel's treatment of direct physical loss (or the lack thereof). This is because "direct physical loss" is the trigger for business interruption coverage under various policy types. The panel found that this requirement was not met here:

> …[T]he word "physical" necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises. Plaintiffs also argue that any such loss or damage can include contamination to the environment within a building, such as the air, even in the absence of any detectable alteration to the structure or other property.…
>
> In particular, the allegations in the complaint indicate that plaintiffs' restaurants were not contaminated with the SARS-CoV-2 virus. The complaint asserts that nothing happened to the premises beyond partial or complete closure due to two Executive Orders that had statewide applicability. Furthermore, EO 2020-21 and 2020-42 unambiguously indicate that their primary purpose is to curtail person-to-person transmission of the virus. … We do not think mandating a more rigorous cleaning regimen constitutes damage or loss, and the complaint explicitly alleges that there were no positive COVID-19 cases at plaintiffs' establishments. Importantly, the Executive Orders applied to all businesses without regard to whether a single viral particle could be found within. Plaintiffs' restaurants were unambiguously closed by impersonal operation of a general law, not because anything about or inside the particular premises at issue had physically changed. [*Gavrilides,* Mich App at __; slip op at 7 (citations omitted).]

The panel further explained:

> In *Sandy Point,* the panel held that three business – a dentist's office, a hotel, and a corporation that owned two restaurants – did not have claims for business interruption coverage after they "were required to close or dramatically scale back [their] operations in response to a series of executive orders issued by Illinois Governor J. B. Pritzker in an effort to curb the spread of the virus in the state."

> …[T]he business income loss provision applies "during the 'period of restoration." The "period of restoration" ends, by definition, either "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "when business is resumed at a new permanent location." … The Executive Orders applied statewide and without regard to actual contamination of premises. Consequently, moving to a new location would not have permitted plaintiffs' restaurants to reopen. Likewise, no repair, reconstruction, or replacement of the premises would have permitted plaintiffs' restaurants to reopen. The clear and unambiguous import of the definition of "period of restoration" is that the contract expects the loss or damage to be amenable to some kind of physical remediation—either by making tangible alterations or repairs to the premises, or by replacing the premises altogether. No alteration to, or replacement of, plaintiffs' premises would have permitted the restaurants to reopen. [*Gavrilides,* __ Mich App at __; slip op at 8 (citations omitted).]

The panel also rejected the insured's reliance on Civil Authority coverage because:

> …the provision unambiguously requires damage to nearby property, and none is alleged. To the extent access to any neighboring properties was prohibited, that prohibition was a result of a health crisis and the specter of person-to-person transmission of a dangerous virus, irrespective of whether those properties were altered. Furthermore, the provision clearly expects a defined area to be cordoned off. The Executive Orders did not do so: any person who was excepted from the stay-at-home provision of the Executive Orders could, at least in principle, have driven or walked past plaintiffs' restaurants. Finally, this provision anticipates a response by a civil authority to some discrete damage or threat of damage. …[T]he civil authority action cannot be both the cause of the damage and the response to it. Again, the gravamen of the complaint is that plaintiffs' losses occurred due to the closure of their restaurants by the Executive Orders. [*Gavrilides,* __ Mich App at __; slip op at 9 (citations omitted).]

In summary, the panel found that Michigan Insurance "properly denied coverage to plaintiffs because the Executive Orders did not result in direct physical loss of or damage to property." *Id.* "Plaintiffs have also failed to establish that an action of civil authority prohibited access to the described premises within the meaning of the policy." *Id.* (cleaned up).

The panel went on to explain that, even if there had been a covered loss, the policy's virus exclusion would have applied. That exclusion – based on a common "ISO" form – states in relevant part: "We will not pay for 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." *Id.* at __; slip op at 4. The panel noted that it was addressing this exclusion only as it related to the insured's request to amend their complaint; the claim as pled was not covered so there was no reason to consider exclusions. *Id.* at __: slip op at 9 n 6. The panel rejected the insured's arguments that the exclusion was vague or contrary to public policy.

Gavrilides is the first Michigan appellate decision to consider these issues. As a published decision of the Michigan Court of Appeals, *Gavrilides* is precedentially binding under MCR 7.215(C)(2) & (J)(1). However, multiple federal appellate courts have reached the same result. The most recent of those are discussed below.

10012 Holdings, Inc v Sentinel Ins Co, Ltd, 21 F4th 216 (CA 2, 2021).

We have previously discussed decisions from the U.S. Courts of Appeals for the 6th, 8th, 9th, and 11th Circuits. All four of those found that government shut-down orders and/or capacity restrictions, intended to slow the spread of COVID-19, do not trigger business interruption coverage, because such claims do not arise out of any direct physical loss. In the months since, four more federal appellate circuits – the 2nd, 5th, 7th, and 10th – have joined that list.

In *10012 Holdings,* the insured owned and operated a fine arts gallery and dealership in New York City and sought coverage for losses it incurred when it suspended its operations per government restrictions on non-essential businesses during the COVID-19 pandemic. When Sentinel denied coverage, the insured filed suit in the Southern District of New York; the district court granted the insurer's motion to dismiss.

The Second Circuit affirmed, finding that under New York law, the insured's loss of use of its art gallery, due to government orders, did not constitute "direct physical loss" or "physical damage," as was needed for there to be business income and extra expense coverage. The panel, therefore, held that the insured could not recover because it alleged "only that it lost access to its property as a result of COVID-19 and the governmental shutdown orders, and not that it suspended operations because of physical damage to its property[.]" *Id.* at __; slip op at 15.

The panel further held that "Civil Authority" coverage was unavailable because,

> …the executive orders were the result of the COVID-19 pandemic and the harm it posed to human beings, not, as "risk of direct physical loss" entails, risk of physical damage to property. Shuttering a gallery because of possible human infection does not qualify as a "risk of direct physical loss." Second, even assuming that COVID-19 itself posed a "risk of direct physical loss," coverage under the Civil Authority provision contemplates that the executive orders prohibiting access to the insured's premises were prompted by risk of harm to neighboring premises…. [*10012 Holdings*, __ F4th at __; slip op at 15-16.]

While the insured urged the Second Circuit to certify these questions to New York's state appellate courts, this panel was confident enough in its "*Erie* guess" that it declined this request and proceeded to decide the case.

Terry Black's Barbecue, LLC v State Auto Mut Ins Co, 22 F4th 450 (CA 5, 2022) (Docket No. 21-50078)

In *Terry Black's,* the insured was a restaurant that could not offer dine-in services per government orders. The Fifth Circuit held that under Texas law, the insured's "suspension of dine-in services does not qualify as a direct physical loss of property under the" business income and extra expense provisions, because such "coverage requires [the insured] to allege it suffered a direct physical loss of property at its restaurants." *Terry Black's,* __ F4th at __; slip op at 6. This flowed from the commonly understood meanings of the words "physical" and "loss." *Id.* at __; slip op at pp 7-8. This was also supported by "[t]he context of the provision," including the fact that it provided coverage only for a "period of restoration," and that the policy as a whole was "tied to the commercial property that is insured." *Id.* at __; slip op at 8.

In this case, to trigger business income and extra expense coverage, the policy required that the suspension of operations "must be caused by direct physical loss of or damage to property at the premises." The policy's definition of "period of restoration" was the period that begins at the time of loss or damage and ends when the property is "repaired, rebuilt or replaced" or when operations resume at a new location. Further, the policy contained a restaurant extension endorsement providing civil authority coverage "resulting from the actual or alleged … exposure of the described premises to a contagious or infectious disease."

Gavrilides was one of the earliest COVID-19 related business interruption decisions in the United States, and the trial court's reasoning has been cited by many courts in support of granting insurers' motions to dismiss. Now, the Court of Appeals has unanimously affirmed the dismissal of that suit in a published opinion.

The panel rejected the policyholder's arguments that the policy only required that it be deprived of a "physical space" and that loss of "use" of the dining rooms for their intended purposes amounted to a physical loss. *Terry Black's,* __ F4th at __; slip op at 10-11. The panel noted that the phrase "physical space" is not present in the policy. *Id.* Further, the policyholder was never deprived of the physical space and the "limitation on the kind of services permitted to be offered at the restaurants is just not a deprivation of the physical space under any reading under the policy." *Id.* Regarding loss of "use," the panel

determined that a loss of "use" was not loss of property. *Id.* at __; slip op at 10. In any event, the policyholder could "use" its property other than for dine-in purposes. It did not matter that the "intended" use of the restaurant could not be achieved:

> A "physical loss of property" cannot mean something as broad as the "loss of use of property for its intended purpose." None of those words fall within the plain meaning of physical, loss, or property. And that phrase has an entirely different meaning from the language in the BI/EE provision. "Physical loss of property" is not synonymous with "loss of use of property for its intended purpose." [*Terry Black's,* __ F4th at __; slip op at 11.]

Turning to the restaurant extension endorsement ("REE"), the Fifth Circuit found that, because the civil authority orders did not "result from" the policyholder's exposure to COVID-19, the endorsement did not provide coverage either. *Terry Black's,* __ F4th at __; slip op at 12-13. "The REE provision provides coverage for the suspension of business operations due to a civil authority order 'resulting from the actual or alleged exposure of the described premises to a contagious or infectious disease.'" *Id.* at __; slip op at 12. "The REE provision requires a causal connection between [the insured's] restaurants' exposure to a contagious disease and the civil authorities suspending its operations." *Id.* at __; slip op at 13. The insured "failed to allege that causal connection." *Id.*

Sandy Point Dental, PC v Cincinnati Ins Co, 20 F4th 327 (CA 7, 2021).

In *Sandy Point,* the panel held that three business – a dentist's office, a hotel, and a corporation that owned two restaurants – did not have claims for business interruption coverage after they "were required to close or dramatically scale back [their] operations in response to a series of executive orders issued by Illinois Governor J. B. Pritzker in an effort to curb the spread of the virus in the state." *Sandy Point,* 20 F4th at __; slip op at 3. The panel affirmed the district courts' holdings – in all three cases – that the insureds could not, under Illinois law, allege "either the virus that causes COVID-19, SARS-CoV-2, or the resulting closure orders caused 'direct physical loss' to property." *Id.*

The insureds in this case "were covered for income losses resulting from direct physical loss or direct physical damage to property." *Id.* at __; slip op at 2. The panel rejected the insureds' assertion that the phrase "direct physical loss" requires an expansive interpretation that encompasses not only physical alterations to property, but also loss of use. *Id.* at __; slip op at 3. Noting that the phrase "direct physical" clearly modifies the word "loss," and that any other interpretation would remove from the analysis the term "physical," the Seventh Circuit held that "[w]hatever 'loss' means, it must be physical in nature." *Id.*

Skanska dealt with whether an "occurrence" can "include damages for the insured's own faulty workmanship" in the context of commercial general liability ("CGL") coverage.

The panel found that textual clues "reinforce the conclusion that 'direct physical loss' requires a physical alteration to property," including the policy's coverage for losses sustained during a "period of restoration," which incorporates the date by which the property "should be repaired, rebuilt, or replaced." *Id.* at __; slip op at 2. There would be nothing to repair, rebuild, or replace without physical alteration to the property. *Id.* It was the insureds' preferred use of the premises – that is, as a fully operating business concern – that was effected, not its property as such, when operations were reduced to partial operations, and limited uses remained possible. The partial loss of use does not constitute a "direct physical loss." *Id.* at __; slip op at 5–6. The relevant policy provisions provided coverage for losses to plaintiffs' physical property, not for reductions in the ideal or preferred use of that property. In reaching this conclusion, the Seventh Circuit rejected other district court decisions representing a minority view that turned on plaintiffs' loss-of-use theory. *Sandy Point,* 20 F4th at __; slip op at 4–6.

The *Sandy Point* insureds argued "that the use of the disjunctive in the phrase 'direct physical loss *or* damage' suggests that 'loss' must mean something different from "damage," lest the policy language be redundant." *Id.* at __; slip op at 8 (emphasis in original). However, the *Sandy Point* panel adopted "a reading that better accounts for both the disjunctive and the word 'physical': the word 'loss' may refer to complete destruction while 'damage' connotes lesser harm that may be repaired." *Id.* at __; slip op at 9. Where the insureds' "properties were neither destroyed nor damaged in a way that called for repairs," coverage is not triggered even under a "disjunctive" reading of this phrase. Id. The panel further noted that this reading of the phrase "direct physical loss or damage" puts to rest any "loss-of-use theory." *Id.* at __; slip op at 11. The panel also rejected arguments that the virus (as opposed to the Governor's Orders) "physically altered [the] property…." *Sandy Point,* __ F4th at __; slip op at 14-18.

Goodwill Indus of Cent Oklahoma, Inc v Philadelphia Indem Ins Co, 21 F4th 704 (CA 10, 2021).

The Tenth Circuit applied similar reasoning in *Goodwill Indus,* finding no direct physical loss – and in turn, no business interruption coverage – under Oklahoma law, where the insured's retail stores were deemed "non-essential" in March of 2020. Goodwill sued its insurer, seeking business interruption coverage for the resulting financial losses. The policy's business income provision said that the insurer would pay for income lost when the insured must suspend its operations due to a "direct physical loss of or damage to" covered property. The insurer's argument that no such direct physical loss or damage was alleged. The district court agreed and dismissed the suit.

The Tenth Circuit affirmed, finding that although the policy did not define "direct physical loss," dictionary definitions confirmed that the phrase refers to only tangible deprivation or destruction of property. *Goodwill Indus,* __ F4th at __; slip op at 7-8. While the pandemic-related orders temporarily restricted Goodwill's use of its property, but they did not deprive Goodwill of the property itself or its merchandise, nor was

Goodwill's property destroyed. *Id.* This conclusion was buttressed by the policy's "period of restoration" clause, which gave Goodwill a claim for losses incurred while its property was being repaired, rebuilt, or replaced. *Id.* at __; slip op at 9. Goodwill had no need to repair, rebuild, or replace its premises before resuming operations after the Covid restrictions were limited, the court said. *Id.* at __; slip op at 10.

Alternatively, the policy contained a virus exclusion that was "valid, enforceable, and barred coverage both under its plain language and under the efficient proximate cause doctrine." *Id.* at __; slip op at 11. Based on that doctrine and the policy's terms, the panel rejected the insured's argument that "the Virus Exclusion did not bar its claim because the provision only applied when a virus was physically present at a covered property, which was not the case here." *Id.* at __; slip op at 14. The Tenth Circuit's treatment of the virus exclusion is consistent with the limited Michigan authority on this point. See *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).

Estes v Cincinnati Ins Co, 23 F4th 695 (CA 6, 2022).

Estes is the second published decision from the Sixth Circuit finding no direct physical loss for government-ordered business closures. *Santo's,* 15 F4th at 398 reached that result under Ohio law; in the more recent *Estes* decision, the panel found *Santo's* to be persuasive in its interpretation of Kentucky law.

Estes involved a dentist whose practice lost income when the state prohibited routine visits six weeks at the start of the pandemic. The district court found that the insured could not recover business losses under the policy's "direct physical loss" provision because an average person would not consider business losses to be the same as the loss of tangible property. The Sixth Circuit, making an "*Erie* guess" as to how Kentucky's Supreme Court would handle the question, affirmed.

Not unlike the policies discussed above, the policy interpreted in *Estes* insured the dental office against "Covered Causes of Loss." and the policy paid for "direct 'loss'" of the insured's "Covered Property." "Covered Causes of Loss" were defined in the policy as any "direct loss" except losses originating from expressly excluded sources, such as earthquakes or government seizures. Further, the policy defined "loss" to mean "accidental physical loss or accidental physical damage."

Both parties agreed on the relevant law and the relevant policy language, namely that Kentucky contract law controlled, and that the dispute centered on the meaning of the phrase "direct" "physical loss." The dental practice argued that an average person might understand that the pandemic-related orders caused a "direct" "physical loss" to the offices because the dentist could not use them for nonemergency care. The insurer asserted that the "direct" "physical loss" phrase unambiguously required a physical alteration or deprivation of the property.

In the absence of Kentucky precedent applying this common insurance language in the COVID-19 context, the Sixth Circuit court predicted that the high court would agree with the insurer. The panel explained that an "average person" would read the "physical loss" phrase to mean that the property owner was tangibly deprived of the property or that the property was tangibly destroyed. The dental offices were not destroyed by COVID-19, nor did the government orders dispossess the dentist from use of the offices, especially as the dentist was permitted to use them for emergency care. Effectively, the impact of COVID-19 and the government orders were "economic" or "business" losses, which were bolstered by the amount of coverage sought by the dentist. The insured did not seek to recover for property loss but rather, for the income and expenses lost because of the government orders. The panel pointed out the distinction by stating that the dentist "bought a *property* insurance policy, not a *profit* insurance policy." *Estes,* 23 F4th at __; slip op at 6 (emphasis in the original).

The panel further explained that the dictionary definitions of "direct," "physical," and "loss" support this result. When reading the policy as a whole, the coverage provisions would not make sense if the required "loss" was not tangible. In affirming, the panel also noted the "broad circuit consensus" reflected in the decisions discussed above. *Estes,* 23 F4th at __; slip op at 7.

Endnotes

1 This author's firm represented Michigan Insurance in the trial court and was co-counsel on appeal.

2 *Santo's Italian Cafe LLC v Acuity Ins Co,* 15 F4th 398 (CA 6, 2021); *Oral Surgeons, PC v Cincinnati Ins Co,* 2 F 4th 1141 (CA 8, 2021); *Mudpie, Inc v Travelers Cas Ins Co of Am,* 15 F4th 885 (CA 9, 2021) – as well as *Gilreath Fam & Cosm Dentistry, Inc v Cincinnati Ins Co,* unpublished opinion of the U.S. Court of Appeals for the 11th Circuit, issued August 31, 2021 (Docket No. 21-11046).

3 See *Terry Black's,* __ F4th at __; slip op at 5.

Legal Malpractice Update

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

***Global Equipment Group, LLC v Attorney Defendants*, unpublished per curiam opinion of the Court of Appeals, issued January 20, 2022 (Docket No. 355629); 2022 WL 188273.[1]**

Facts

In this legal-malpractice case, the defendant attorneys had a longstanding relationship with their client, a used-machinery broker. The plaintiff was sued for breach of contract in New Mexico in July 2016. The defendant attorneys found local counsel to assist in the New Mexico lawsuit. Local counsel filed a motion to dismiss, which the court denied. Local counsel informed the defendant attorneys of the denial, who in turn advised plaintiff of the ruling and suggested plaintiff work directly with local counsel to keep costs down. But communications between counsel and the plaintiff sputtered, apparently due to a variety of circumstances.

Several months later, local counsel e-mailed plaintiff stating that the defendant attorneys hired him to serve as local counsel for the New Mexico lawsuit, and the deadline for court-ordered mediation was approaching. The plaintiff didn't respond to the local attorney, instead asking the defendant attorneys to provide clarification about the situation. After not receiving a response, local counsel notified the plaintiff that he was withdrawing as counsel because the plaintiff failed to sign an engagement letter, failed to make any recent payments, and failed to respond to phone calls or e-mails. The court allowed local counsel to withdraw. According to the plaintiff, the defendant attorneys failed to retain a new attorney for the New Mexico case.

Ultimately, the plaintiff retained new counsel and obtained favorable relief in the New Mexico lawsuit. However, the plaintiff allegedly incurred significant costs in reaching that result.

The plaintiff then sued its former attorneys alleging legal malpractice for failing to properly monitor and manage the New Mexico lawsuit, failing to obtain successor local counsel, failing to provide local counsel with correct information, and failing to protect the plaintiff's interests, which resulted in entry of a default judgment and damages. The defendant attorneys moved for summary disposition under MCR 2.116(C)(7), arguing that the suit was not timely under the two-year statute-of-limitations for legal-malpractice cases. The defendant attorneys argued that the limitations period began to run when they discontinued serving the plaintiff in either June of 2017 (when they last assisted the plaintiff in securing successor counsel), on June 27, 2017 (when the last billing entry pertaining to the New Mexico lawsuit was made), or on December 14, 2017 (when the appeal period for the underlying judgment expired). The trial court granted summary disposition in favor of the defendant attorneys, holding that the plaintiff's claim was barred by the legal-malpractice statute of limitations. The plaintiff appealed.

Ruling

On appeal, the plaintiff argued that its claim was not barred by the legal-malpractice statute of limitations because its claim was not contingent on the discontinuation of services, but rather, an omission of services. The Court of Appeals agreed, reversing the trial court's order dismissing the plaintiff's claim.

The court held that the plaintiff's assertions of inaction occurred over many months and could not be correlated to a specific date. Citing *Biberstine v Woodworth*, 406 Mich 275, 276; 278 NW2d 41 (1979), the court held that "when the negligence of an attorney consists of delay or inaction, a client's cause of action accrues at the time

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.

when it can be said that the attorney has had a reasonable time to act but has failed to do so." Because the parties did not address defendant attorneys' period of inaction, or at what point they had a reasonable time to act but failed to do so, the court remanded for further proceedings.

Practice Note:

Generally, a plaintiff's legal-malpractice cause of action accrues when an attorney discontinues serving the plaintiff in a professional or pseudoprofessional capacity. MCL 600.5838(1). However, when a legal-malpractice claim is premised on an attorney's delay or inaction, the plaintiff's cause of action may accrue when the attorney has had a reasonable time to act but fails to do so. Consider utilizing disengagement letters to clearly identify the end of your representation.

This case also represents one of the first instances in which the Court of Appeals discusses COVID-19 tolling for purposes of calculating the period of limitations.

Endnotes

1 The authors thank Sean Murphy, an associate in Collins Einhorn Farrell PC's professional-liability group, for his contribution to this report.

Public Policy Committee Update

By: Richard Joppich, *Kitch Drutchas Wagner Valitutti & Sherbrook*
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As many of you may know, MDTC has revamped the association's Public Policy Committee. It is now functioning as a true committee with members that have volunteered from a number of different practice areas represented in the MDTC. Although below you will see an update on some of the legislative activities that may impact your practice or knowledge as attorneys, the committee, being a "public policy" focused group, is reviewing and analyzing various present topics impacting us all. These involve the recent ABA resolution regarding non-attorney ownership of law firms and referral sources, the recent proposed state court strategic agenda, the revisions to the mediation rules and the challenges being experienced, and in general, continuing to provide education on policy matters to the organization leadership and its members.

All members are welcome to join this committee and can do so by contacting Madelyne Lawrey. We thank the inaugural members as follows: Angelo Berlasi, Deborah Brower, Irene Hathaway, John Mucha, Zachary Larsen, Sarah Cherry, Michael Watza, and Richard Joppich.

Bills of Interest

House Bill No. 5831

"Wrongful Discharge from Employment Act"

House Bill No. 5831 was introduced on February 23, 2022 and is currently in committee. This bill seeks to essentially end "at-will" employment in Michigan and provides powers for the Department of Labor and Economic Opportunity ("Department") as well as remedies for employees who prevail in litigation. The bill permits an employee to file a complaint with the Department as well as pursue litigation, or both. A complaint must be filed with the Department within one year after the date of the violation or bring an action within two years.

The bill was introduced by Rep. Yousef Rabhi (D), although it was originally drafted by the late Rep. Isaac Robinson (D). Interestingly, the bill seemingly provides legal users of marijuana some protection as it expressly excludes "an employee's legal use of a lawful product" as a legitimate business reason to terminate an employee. The bill also permits punitive damages in certain circumstances. The bill will be retroactively applied to collective bargaining agreements that are inconsistent with the bill.

By: Sarah Cherry, Ottenwess Law

This bill allows an applicant to the Michigan Bar to use a Uniform Bar Examination (UBE) score administered by the National Conference of Bar Examiners administered in another state or territory achieved within three years preceding the date such applicant would sit for the Michigan UBE.

Richard K. Joppich is a Detroit Catholic Central High School graduate, Mr. Joppich obtained a Bachelor of Arts in both Political Science and Communications from Bowling Green State University in Ohio in 1982. He obtained his Juris Doctorate from the Detroit College of Law (now Michigan State University College of Law) in 1988. He is a Principal Attorney and Marketing Director with Kitch, Drutchas, Wagner, Valitutti and Sherbrook P.C., headquartered in Detroit Michigan.

For over thirty years, he has been a trial attorney representing clients in complex malpractice and general personal injury suits throughout the State and Federal Courts in Michigan. He is admitted to practice in the U.S. District Courts for the Eastern and Western Districts of Michigan, the U.S. 6th Circuit Court of Appeals, and the United States Supreme Court.

Mr. Joppich also provides services in Medicare, Medicaid, and private health insurance law, liens, audits, and claim reporting compliance. He has assisted insurers, healthcare providers, courts, and attorneys in policy generation, negotiations, lien resolution, and settlement services. Stemming from this experience he has been instrumental in resolving and formalizing complex settlements and has been called upon to assist parties by mediating disputes. He has completed his formal training as a Michigan General Civil Mediator with additional training in Probate matters and virtual mediation.

House Bill 5870

Auto Insurance PIP Penalties

HB 5870 was introduced on March 3, 2022 and is currently before the Committee on Insurance. The bill seeks to increase the penalties in the event an insurer has acted in bad faith in not making payment on a personal protection insurance benefits claim within 30 days after the insurer receives reasonable proof of the fact and the amount of the loss sustained.

The bill would eliminate the current 12% simple interest penalty and would instead require the insurer who has acted in bad faith in delaying payment more than 30 days to pay the claimant three times the amount of the overdue payment and any reasonable attorney's fees actually incurred. Whether an insurer has acted in bad faith would be a factual determination to be made on an analysis of the totality of the evidence. However, if payment is more than 90 days overdue, there would be a rebuttable presumption that the insurer acted in bad faith.

By: John Mucha, Dawda Mann

House Bill 5541 (2021)

Uniform Bar Examinations

House Bill 5831 was introduced by Rep. Andrew Fink (R) on November 9, 2021. It has passed the House on January 25, 2022, and as of March 15 of this year has been recommended to the committee of the whole without amendments in the Senate.

This bill allows an applicant to the Michigan Bar to use a Uniform Bar Examination (UBE) score administered by the National Conference of Bar Examiners administered in another state or territory achieved within three years preceding the date such applicant would sit for the Michigan UBE. The bill further would permit Michigan to administer a state specific component to the applicant. Michigan would set the score to be achieved for passing. It would also set the fee for use of the UBE from another state, for admission to the Michigan Bar, at $400. The remainder of the examination requirements and admission requirements remain in place, including the essay portion of the examination.

By Richard Joppich, Kitch law

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).

Supreme Court Update

By: Stephanie Romeo, *Clark Hill PLC*
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Supreme Court Analyzes "Defense of Others" Theory of Defense in Concluding Defense Counsel Deficiently Failed to Request Requisite Jury Instruction

The Michigan Supreme Court began the first quarter of 2022 on a busy note issuing five opinions throughout January and February. In one of these opinions, the Court analyzed the "defense of others" theory of defense and whether a jury instruction regarding this defense would have changed the case's outcome. This opinion is particularly instructive to defense attorneys. The Court found the defendants' attorneys in this matter were ineffective because the failure of the attorneys to request the jury instruction was objectively unreasonable and counsel's deficient performance prejudiced both defendants. As we return to the courtroom on a more frequent basis as the pandemic subsides, it is essential that attorneys recognize the role and importance of proper jury instructions and their effect on a case's outcome. *People v Leffew*, __ Mich __; __ NW2d __; 2022 WL 246549 (Docket No. 161797; Jan. 26, 2022).

Facts: Jeremiah J. Leffew and his wife, Micheline N. Leffew, were convicted following a jury trial of first-degree home invasion and third-degree home invasion, respectively. The Leffews went to the home of Michael Porter with Jeremiah Leffew's mother, Donna Knezevich, to pick up Lisa Seibert, Knezevich's partner. Seibert stayed with Porter following an argument between Seibert and Knezevich, but the two had reconciled, and Seibert asked to be picked up and driven home. When the Leffews arrived at Porter's residence, Porter briefly answered the door but did not allow Seibert to leave. At trial, the Leffews testified Porter had dragged Seibert into a room in the back of the home and forcibly held her down in a chair, while Porter claimed he had picked Seibert up and put her in a chair to help her get her bearings after she had become unsteady on her feet. The Leffews testified they heard Seibert scream for help and thus entered the home without Porter's permission.

In a unanimous opinion, the Michigan Supreme Court, in lieu of granting appeal, held that defendants were prejudiced and received ineffective assistance of counsel when their attorneys failed to request a jury instruction on the defense of others and defendants were entitled to a new trial.

Micheline Leffew entered the home first after kicking the back door, and she was immediately hit over the head with a glass ashtray by Porter, causing bleeding and a seizure. After seeing his injured wife on the floor, Jeremiah Leffew entered the home and became physical with Porter. According to Jeremiah Leffew, the fight ended when he threatened Porter with a knife while pleading to let his family go. According to Porter, the fight ended when Knezevich called out to Jeremiah Leffew after Jeremiah Leffew had struck Porter with a knife and cut Porter's wrist. Defendants' attorneys

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both argued that defendants' intrusions into Porter's home were justified because of their reasonable fear that Seibert was in imminent danger. However, neither attorney requested a jury instruction on the defense of others. Defendants appealed, and the Michigan Court of Appeals consolidated their appeals.

The Court of Appeals affirmed the convictions. Defendants sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the applications for leave or take other action. The Supreme Court directed the parties to file supplemental briefs addressing whether the defense-of-others justification was applicable to defendants' charges and whether the defense attorneys were ineffective for failing to request an instruction on defense of others.

Ruling: In a unanimous opinion, the Michigan Supreme Court, in lieu of granting appeal, held that defendants were prejudiced and received ineffective assistance of counsel when their attorneys failed to request a jury instruction on the defense of others and defendants were entitled to a new trial. Specifically, the Court explained that under the defense-of-others theory, a person may use force in defense of another when they reasonably believe that the other is in immediate danger of harm and force is necessary to prevent the harm. Although the Court of Appeals expressed skepticism that defense-of-others, traditionally used to excuse assaultive conduct, was available as a defense of others to non-assaultive crimes, such as the home invasion at issue in this case, Michigan courts have recognized the application of this defense to non-assaultive crimes. See *People v Dupree*, 486 Mich 693; 788 NW2d 399 (2010) (holding self-defense was applicable to non-assaultive offense of being a felon in possession of a firearm); MCL 780.974 (preserving the common law right of an individual to use force in self-defense or defense of another person). Ultimately, the applicability of defense-of-others must be determined on the particular facts of each case rather than the charges brought by prosecution. As such, the Court found defense-of-others was available in this case to defendants.

> As we return to the courtroom on a more frequent basis as the pandemic subsides, it is essential that attorneys recognize the role and importance of proper jury instructions and their effect on a case's outcome.

Further, the Court explained that instructional errors that directly affect a defendant's theory of defense can infringe upon their constitutional right to present a defense. While a defendant has the burden of producing some evidence from which the jury could conclude that the essential elements of the defense are present, the burden is not heavy. Instruction on the theory of defense must be given even when the evidence presented by the defendant in support of the theory is weak or of doubtful credibility. Here, defendants put forward "some evidence" that they reasonably believed their entry into Porter's home was necessary to prevent harm to Seibert, and Jeremiah Leffew testified he also acted to protect his wife after she entered the home and was injured by Porter. Where defendants' trial strategy turned on a defense-of-others theory, and attorneys for both defendants presented evidence and arguments leading the jury toward an acquittal under a defense-of-others theory, the failure of the attorneys to request the instruction was objectively unreasonable. The Court explained that a defense-of-others jury instruction would have provided jurors a framework for judging the defendants' conduct, and lack of such an instruction prejudiced both defendants. Had the instruction been given, the jurors would have understood the law excused defendants' conduct if they reasonably believed that Seibert and/or Micheline Leffew was in danger and a different outcome was reasonably probable.

Practice Pointer: This case provides particularly helpful insight as it specifically addresses the shortcomings of the defense attorneys involved. While the frequency of both criminal and civil jury trials has declined overall, attorneys must not lose sight of their trial advocacy skills and understanding of trial procedure. Jury instructions are often hotly debated among each party's counsel and this case helps illustrate why that occurs. Here, defendants' attorneys' failure to provide a jury instruction was found to have likely changed the outcome of the decision and resulted in a remand. This failure not only prejudiced the attorneys' clients causing undue stress, anxiety, and delay, but also created a significant waste of time and resources. This opinion appears particularly timely as in-person court appearances and jury trials return to pre-pandemic frequency. As we return to the courtroom, we must remember to defend our clients at every stage of the litigation and recognize the importance, significance, and power of the jury and the instructions that will guide them.

The views and opinions expressed in the article represent the view of the author and not necessarily the official view of Clark Hill PLC. Nothing in this article constitutes professional legal advice nor is intended to be a substitute for professional legal advice.

Amicus Report

By: Lindsey Peck, *Collins Einhorn Farrell PC*
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Medical malpractice and premises liability are trending topics in this quarter's amicus report. Are earning-capacity damages recoverable in a medical-malpractice action under the wrongful-death act? Are there circumstances in which a medical-malpractice complaint filed without an affidavit of merit tolls the statute of limitations? Should the Supreme Court revisit the standard for admissibility of expert testimony on the standard of care in a medical-malpractice action? Does the comparative-negligence framework sound the death knell for the open-and-obvious doctrine in a premises-liability action? Does a landlord's statutory duty to keep the premises in reasonable repair, as codified in MCL 554.139, extend to a resident who isn't a party to the lease agreement?

These issues have piqued the interest of the Court of Appeals and the Supreme Court. Drastic changes to the existing landscape of medical-malpractice law and premises-liability law may be on the horizon.

Since the last update, MDTC filed an amicus brief in *Estate of Jomaa v Prime Healthcare Services*, a medical-malpractice action under the wrongful-death act. The Court of Appeals granted leave to address whether the estate of the decedent, a minor, can recover future earning-capacity damages. In *Baker v Slack*, a 1948 decision, the Supreme Court held that the wrongful-death act doesn't allow future earning-capacity damages. In *Denney v Kent County Road Commission*, a 2016 decision, the Court of Appeals reached the opposite conclusion.

The Legislature amended the wrongful-death act twice between *Baker* and *Denney*, first in 1971 and later in 1985. So MDTC framed the issue as one of legislative intent: Did the Legislature intend for the amendments to repudiate *Baker* and allow future earning-capacity damages?

MDTC drew attention to the historical underpinnings of Michigan's legislative scheme. Before 1939, Michigan had a survival statute and a separate death statute. MDTC pointed out the critical difference between the survival statute and the death statute—the former provided for earning-capacity damages, whereas the latter provided for financial-support damages. Michigan has always permitted one or the other but never both, MDTC observed. Since the loss of financial support is a subset of future earning capacity, permitting both would amount to an impermissible double recovery.

Since 1939, Michigan has had a hybrid statute that melds the survival statute with the death statute. For injuries resulting in death, however, the current survival statute says that the wrongful-death act applies. The wrongful-death act doesn't mention earning capacity. Per the 1985 amendment, the wrongful-death act permits damages for "loss of financial support."

"The Legislature didn't write and amend Michigan's wrongful-death act in a vacuum," MDTC stated. The choice between earning-capacity damages and financial-support damages dates back over a century. By virtue of the 1985 amendment, the Legislature couldn't have been more direct or express on the choice. MDTC argued that the absence of any provision on how to distribute earning-capacity damages also compels the conclusion that the Legislature didn't intend to allow earning-capacity damages.

The Estate urged the Court of Appeals to place more weight on the 1971 amendment, which removed the requirement of "pecuniary injury" and provided for the recovery of loss of society and companionship. In the Estate's view, the 1971 amendment superseded *Baker*.

MDTC disagreed. MDTC highlighted proposed language that the Legislature considered but rejected—the damages recoverable for wrongful death "shall not be

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.

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limited…." MDTC argued that the rejection of such broad language showed that the Legislature enacted the 1971 amendment simply to allow recovery for the loss of society and companionship, which in turn required removal of the requirement of "pecuniary injury." Given that lost earning capacity is a pecuniary injury, MDTC took the Estate to task and queried how removing the requirement of "pecuniary injury" could change the type of pecuniary loss that's recoverable.

Michael Cook of **Collins Einhorn Farrell PC** authored MDTC's amicus brief. He also volunteered to author MDTC's amicus brief in *Estate of Vasquez v Nugent*, a medical-malpractice action in which the Court of Appeals granted leave to address the same issue.

MDTC argued that the absence of any provision on how to distribute earning-capacity damages also compels the conclusion that the Legislature didn't intend to allow earning-capacity damages.

MDTC voted in favor of accepting the Supreme Court's invitation to file an amicus brief in *Ottgen v Katranji*, a medical-malpractice action involving the affidavit-of-merit requirement. There, the patient filed a medical-malpractice complaint in which she raised two claims based on two different surgeries. The complaint was timely but unaccompanied by an affidavit of merit. After the statute of limitations expired on the claim regarding the first surgery, the surgeon filed a motion for summary disposition. In response, the patient filed an amended complaint with an affidavit of merit and an emergency motion to file a late affidavit of merit. She noted that the affidavit of merit was executed before the expiration of the statute of limitations but, due to a clerical error, not filed with the original complaint. She took the position that the amended complaint related back to the original complaint. Not so, said the surgeon. He relied on *Scarsella v Pollack*, a case where the Supreme Court held that a complaint filed without an affidavit of merit doesn't toll the statute of limitations.

The trial court denied summary disposition. The trial court distinguished *Scarsella* because an affidavit of merit existed when the patient filed the original complaint. The Court of Appeals affirmed in part and reversed in part. The Court of Appeals held that the statute of limitations barred the claim regarding the first surgery but not the claim regarding the second surgery. The Court of Appeals treated the amended complaint, accompanied by an affidavit of merit, as the original complaint.

The Supreme Court granted leave and directed the parties to address whether *Scarsella* was correctly decided and whether the complaint, filed without an affidavit of merit contrary to MCL 600.2912d(1), was subject to dismissal without prejudice. **J.R. Poll** of **Rhoades McKee** volunteered to author MDTC's amicus brief.

MDTC voted in favor of seeking leave to file an amicus brief in *Danhoff v Fahim*, a medical-malpractice action involving the admissibility of expert testimony on the standard of care in a medical-malpractice action. The Supreme Court granted MOAA to address, among other things, whether *Edry v Adelman* and *Elher v Misra* correctly describe the role of supporting literature in determining the admissibility of expert testimony on the standard of care and, if not, the showing required to support expert testimony on the standard of care. **Jonathan Koch** of **Smith Haughey Rice & Roegge** volunteered to author MDTC's amicus brief.

MDTC voted in favor of moving for leave to file an amicus brief in *Kandil-Elsayed v F&E Oil*, a premises-liability action involving the open-and-obvious doctrine. The Supreme Court granted MOAA to address, among other things, whether the open-and-obvious doctrine articulated in *Lugo v Ameritech Corporation* is consistent with the comparative-negligence framework and, if not, which approach the Supreme Court should adopt for analyzing a premises-liability claim under a comparative-negligence framework. **Nathan Scherbarth** of **Zausmer** volunteered to author MDTC's amicus brief.

Drastic changes to the existing landscape of medical-malpractice law and premises-liability law may be on the horizon.

MDTC voted in favor of providing amicus support in *Walker v Hela Management*, a premises-liability case involving the applicability of MCL 554.149 to a resident who wasn't a party to the lease. Finding that MCL 554.139 provides a remedy only for the parties to the lease, the trial court granted summary disposition, and the Court of Appeals affirmed. The Supreme Court granted MOAA to address, among other things: (1) the definition of a licensee under MCL 554.139, and (2) whether *Mullen v Zerfas* and *Allison v AEW Capital Management* require the licensee to enter into a contract with the licensor under MCL 554.139 and, if so, the requirements of such a contract. **Drew Broaddus** of **Secrest Wardle** volunteered to author MDTC's amicus brief.

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.

Michigan Court Rules Update

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

PROPOSED AMENDMENTS

2019-16 –Appellate brief formatting

Rule affected:	MCR 7.212
Issued:	November 5, 2021
Comment Period:	March 1, 2022

The proposed amendment alters several requirements relating to briefs filed in the appellate courts. Briefs will be limited by word count (16,000) rather than pages, and a certification indicating the number of words in the brief is required. Reply briefs are limited to 3,200 words.

ADOPTED AMENDMENTS

2020-06 – Amendments to the case evaluation process

Rules affected:	MCR 2.403, 2.404, and 2.405
Issued:	March 19, 2020
Comment Period:	July 1, 2020
Public hearing:	September 23, 2020
Effective:	January 1, 2022

These amendments modify the case-evaluation process in numerous ways, including: allowing parties to stipulate to a different ADR process (with judicial approval), removing sanctions provisions, reducing the number of days case evaluation materials must be filed in advance, reducing the number of days for case evaluators to provide parties with an award, and updating the definitions of "verdict" and "actual costs," and defining interest of justice exceptions for attorney fees.

2017-28 – Protection of personal identifying information submitted to courts

Rules affected:	MCR 1.109 and MCR 8.119
Issued:	December 12, 2018
Comment Period:	April 1, 2019
Public hearing:	May 22, 2019
Effective:	April 1, 2022

These amendments require certain personal-identifying information to be redacted from documents filed with the Court, which includes: date of birth, Social Security Number (or national identification number), Driver's License Number (or state-issued personal identification number), passport number, and financial account numbers. The parties and their attorneys bear the burden of removing this information from documents filed with the court. Although this amendment was adopted in 2019, the effective date has been extended several times.

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.

June 16 - June 17

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A Defense-Specific Discussion on Adapting to an Ever-Changing Legal Landscape

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9 Essential Cybersecurity Questions to Ask When Choosing a Litigation Support Services Partner

1. IS YOUR COMPANY HIPAA COMPLIANT?

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 dictates how protected health information is stored, handled and disclosed. To ensure the confidentiality of your clients Protected Health Information (PHI), you need to work with a HIPAA compliant partner.

2. HAS A SOC 2 TYPE 2 EXAMINATION BEEN CONDUCTED?

SOC refers to "System and Organization Controls" and these are designed to measure how well an organization manages and protects client data. A successful SOC 2 Type 2 audit takes this an important step further, confirming that an independent third-party auditor has verified that best-in-class procedures, safeguards and technologies are employed across the five trust principles - security, availability, processing integrity, confidentiality and privacy.

3. HAS AN INDEPENDENT AUDITOR VERIFIED BOTH SOC 2 TYPE 2 AND HIPAA COMPLIANCE?

Without attestation from a reputable independent auditor, you cannot guarantee that systems and operational processes ensure HIPAA compliance and follow SOC 2 Type 2 guidelines. Without this third-party verification, a vendor will also be unable to corroborate its answers to the vital questions on this list, including the nature of system and operational controls employed within the company, what risks are being mitigated by these systems and the effectiveness of the controls.

4. DO YOU HAVE A SECURITY OPERATIONS CENTER (SOC)?

A Security Operations Center gathers input from the following sources to protect systems and data:

- Intrusion detection and prevention systems that continuously monitor a network for vulnerabilities
- Firewalls that are preventing malicious access to systems
- System events on servers and staff computers that could signal malicious activity
- Endpoint malware and malicious activity
- Internet protection systems reporting malicious activity

5. WHAT IS YOUR DISASTER RECOVERY PLAN AND WHAT REDUNDANCIES DO YOU HAVE IN PLACE?

As the saying goes, "if you fail to plan, you plan to fail." Disasters come in many forms. Whether hackers, electrical fires, floods or broken air conditioning units, It is imperative your partner of choice has a disaster recovery plan. Not only does this protect your data, but enables your business to continue operations in the event of an emergency or disaster.

6. HOW IS DATA PRIVACY ENFORCED AND MONITORED?

To safeguard your privacy, a partner should offer strict role-based access control, limiting who has access to your data within the organization. The enforcement of strict access control should be audited and tested in a company's SOC 2 Type 2 report.

7. WHAT IS THE INCIDENT RESPONSE PLAN?

In the event of a breach, having a complete incident response plan will reduce damage and help you recover as quickly as possible. When considering a potential partner, this is an important component that should not be overlooked. The incident response plan, and how incidents are handled within a company, will be audited and confirmed in the company's SOC 2 Type 2 report.

8. IS YOUR DATA BACKED UP AND IF SO, HOW OFTEN?

To prevent data loss, a provider should perform at minimum daily backups of all systems and data. A company should also replicate systems and data to a separate geographic location to assure that they are always available. Backup activities should be audited and confirmed in the company's SOC 2 Type 2 report.

9. ARE THIRD-PARTY PENETRATION TESTS CONDUCTED ON KEY SYSTEMS EXPOSED TO THE INTERNET TO ENSURE THEY ARE SECURE?

Penetration testing conducted by a reputable third-party firm helps ensure client data is safe when using systems exposed to the Internet. Confirmation of penetration testing should be included in a company's SOC 2 Type 2 report and a company should be able to produce a report that shows testing results.

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2022

Thursday, September 15	Board Meeting - Zoom
Thursday, October 13	MTJ, Open - Detroit Golf Club
Tuesday, October 18	EC Mtg - Zoom
Thursday, November 3	Board Meeting - Sheraton Detroit Novi

2023

Friday, January 20	Future Planning - Soaring Eagle Casino
Saturday, January 21	Board Meeting - Soaring Eagle Casino
Tuesday, February 21	EC Mtg - Zoom
Thursday, March 16	LEA - The Gem Theatre
Thursday, April 27	Past President Rec - Detroit Golf Club
Tuesday, May 16	Board Meeting - Detroit Golf Club
Tuesday, May 16	EC Mtg - Zoom
Thursday, June 15	Board Meeting - Tree Tops - Gaylord
Thursday, June 15 – 16	Annual Meeting & Conference - Tree Tops - Gaylord
Friday, November 3	Winter Meeting & Conference - Sheraton Detroit Novi

2024

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

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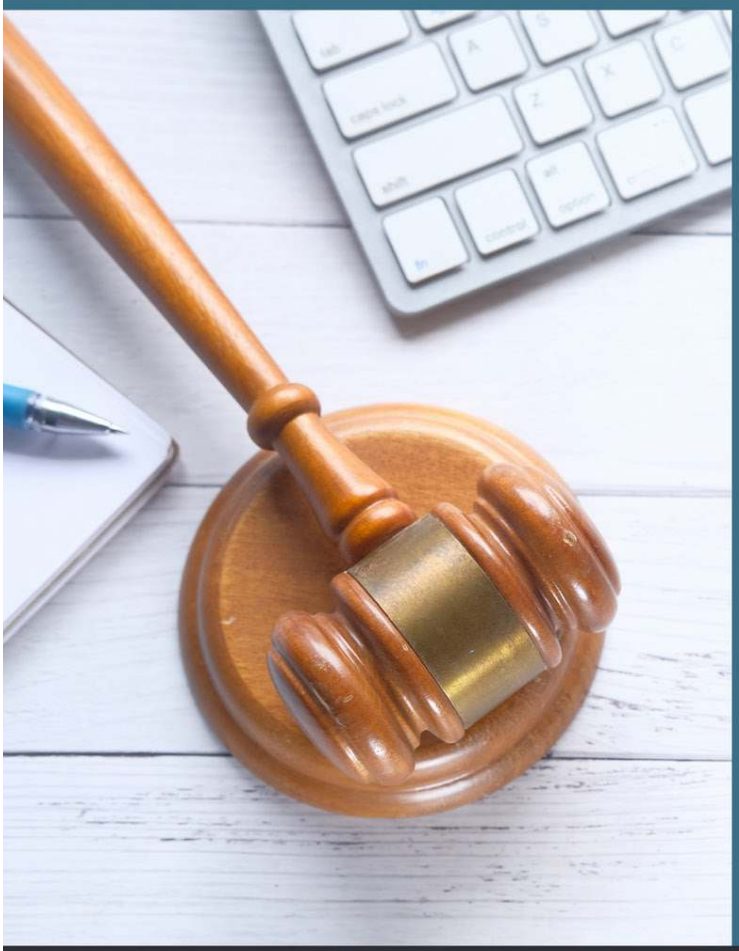

Whether you're a plaintiff attorney or defense attorney, the Negligence Law Section advocates for Michigan lawyers practicing in **all areas of negligence law.**

We create a level playing field by:

- Hosting educational events in different areas of negligence law
- Equipping our members with tools & resources to successfully represent their clients
- Assisting & influencing lawmakers & courts on key negligence issues
- Studying the procedures, rules, & statutes embodying the law of negligence to make improvements
- Mentoring & guiding young lawyers
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Photos are allowed in digital format.

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

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Publication Schedule

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

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