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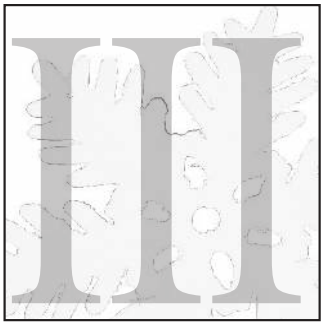

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President's Corner

By: John Mucha, *Dawda, Mann, Mulcahy & Sadler, PLC*
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John Mucha III, is a Member of Dawda, Mann, Mulcahy & Sadler, PLC. He concentrates his practice in the areas of land use planning and general civil litigation, including commercial, construction, real property, tort and non-compete matters.

Mr. Mucha has considerable experience representing businesses and property owners in a broad range of general business litigation, including breach of contract disputes and claims involving the sale and leasing of real property. He has also litigated and successfully resolved land contamination matters as well as cases involving personal injury, property damage and other torts. Mr. Mucha has assisted both employers and executives with confidentiality and non-compete issues including the drafting of agreements and the resolution of disputes. His expertise encompasses all phases of the litigation process from initial pleading and discovery stages to trials, appeals and the negotiation of settlements.

With respect to land use, zoning and planning matters, Mr. Mucha has successfully guided owners, developers and retailers through the applicable governmental approval processes. He has also successfully litigated land use disputes in both administrative hearings and in court.

Mr. Mucha has also successfully argued cases before the Michigan Court of Appeals and is admitted to practice in all state and federal courts in Michigan. Mr. Mucha has served as the Chair of the State Bar of Michigan Litigation Section, which has over 1,900 members, and he currently serves as an elected representative to the State Bar of Michigan Representative Assembly. He is a member of the State Bar of Michigan, the Oakland County Bar Association and the American Bar Association, and has been recognized as a top Michigan lawyer by both DBusiness magazine and SuperLawyers.

Mr. Mucha earned his JD from the University of Michigan in 1987, where he received an award for writing and advocacy and was Contributing Editor to the Michigan Journal of Law Reform. He also earned a Masters of Public Policy degree in 1979 and a B.A., with distinction, in 1977 from the University of Michigan. Mr. Mucha is a frequent contributor to legal journals and publications and is also an active member of Rotary International, having served as the President of the Birmingham (Michigan) Rotary Club.

I am extremely honored to begin my tenure as the president of the Michigan Defense Trial Counsel, and look forward to a productive and energetic year working with all of you. Despite the singular effects that COVID-19 has had on the practice of law, our basic principles, focus, and goals remain unchanged, and perhaps they have been brought into sharper focus and clarity due to the pandemic. Let's take stock of what we have, what draws us together, and what makes MDTC such a great organization to belong to.

First and foremost, the MDTC is committed to improving the practice of civil litigation through learning and an open exchange of ideas and knowledge. Through the tremendous contributions of dozens of members serving in leadership positions and numerous committees, the MDTC has remained an important resource for its members and an important voice for the defense bar in Michigan. We strive for the participation of defense attorneys from across the entire state and from all backgrounds, and we are mindful of the need for strengthening inclusivity and diversity in MDTC membership. We are stronger together. The MDTC has remained steadfast in its pursuit of these objectives.

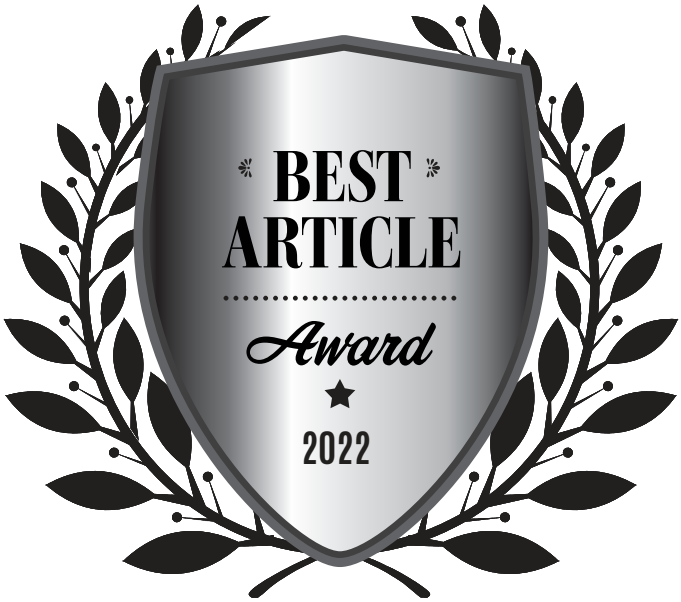
The need for the exchange of ideas is probably best exemplified by the widespread use of MDTC's listserv service, in which MDTC members obtain advice and recommendations from other MDTC members on subjects such as experts, mediators and arbitrators, and are also able to exchange briefs and legal insights. Over the past two years, MDTC has also experienced a proliferation of on-line programs focused on a wide variety of topics, and these have been popular and well attended. They will continue as we return to live events and meetings. We are blessed to have many excellent speakers, and many loyal sponsors, including many vendors, who support such learning events and share their expertise with the membership at large. In addition, the *Michigan Defense Quarterly* continues to be a very valuable publication for our members, as it continues to track and analyze legal issues relevant to MDTC members.

The MDTC enjoys tremendous respect in the legal community. Each year we are blessed to have the enthusiastic participation of numerous judges from many different Michigan courts and regions of the state at our "Meet the Judges" events, programs, conferences, and meetings. The Michigan Supreme Court especially recognizes the value of the MDTC by regularly asking the MDTC to submit amicus briefs on important pending cases. The Supreme Court knows that the MDTC is deeply committed to upholding the rule of law, promoting civility and engendering respect for our legal system, all of which underpin everything that we do as lawyers. Amicus briefs prepared by MDTC members have been insightful and of stellar quality. Building and maintaining strong relationships with the judiciary is an important objective of the MDTC. In addition, each year the Michigan Association of Justice (MAJ) selects a member of the MDTC for its Respected Advocate Award, given to the defense attorney best displaying integrity, professionalism, civility and judgment (and the MDTC reciprocates with an award to a respected member of the plaintiffs' bar.) The success of our annual Legal Excellence Awards event (held the past two years at the Gem Theater in Detroit) is a reflection of our common commitment to excellence and civility.

But let's not overlook the need for a little fun. The MDTC golf outing held each September (again this year at the Mystic Creek course) draws large numbers of attorneys and is a very enjoyable way to network with judges and colleagues. Also quite fun are the regional networking events that MDTC's regional chairs have been working hard to organize, which bring members together on a more frequent and causal basis. Look for other social initiatives in the future too, including, perhaps, a softball event.

Although my term is just getting started, the MDTC has an ambitious agenda ahead, with plenty of great history to build on. Looking forward, I believe members will see an increase in regional events aimed at networking and learning, an increased number of joint events co-sponsored with various bar associations, greater outreach to a broader and more diverse cross-section of defense attorneys, and a date of community service to "pay it forward." The MDTC will continue to be a valuable resource and strong voice for the defense bar in Michigan.

In conclusion, allow me to say thank you to everyone who has done so much to keep the MDTC strong. Members, judges, sponsors, vendors, volunteers, leadership, and staff, THANK YOU! The success of this organization depends on you, and all of you have been extraordinary. Here's to another great year!



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

Vol. 38 No. 3
By: Trent Collier and Michael Cook
Wrongful-Death Damages in the Denney Era

Revision of case evaluation rules takes the offer of judgment rule from the grave and puts it on a procedural merry-go-round

By: Daniel G. Beyer, *Kerr, Russell and Weber, PLC*

On December 2, 2021 the Michigan Supreme Court dramatically changed case evaluation with an administrative order. ADM File No. 2020 – 06. The changes in MCR 2.403 came along with vigorous dissents from two of the seven Supreme Court justices. The text of the rule changes, effective January 1, 2022, and comments by the justices can be found at:

https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-06_2021-12-02_formattedorder_amendtofmcr2.403.pdf

The Supreme Court order and rule changes included supportive commentary by Justice Megan Cavanagh. Justices Viviano and Zahra dissented vigorously, citing conflicts with MCL 600.4921 and MCL 600.4969. This article will not comment on that analysis. Political affiliations aside, the two justices who vigorously opposed the rule changes both served as Circuit Court trial judges earlier in their judicial careers. But none of the justices provided significant comment on some of the substantive changes of the offer of judgment rule, MCR 2.405, and how the changes in case evaluation will affect the use of offers of judgment.

As modified, MCR 2.403 eliminates case evaluation as a mandatory procedure. The parties may stipulate to a different ADR process, including mediation, arbitration, or facilitative mediation. Under MCR 2.403(A)(1), case evaluation is thus left as a "default" if one of these processes is not agreed upon by the parties. The other major change that brought out the dissent from Justices Viviano and Zahra was the elimination of case evaluation sanctions under MCR 2.403(O).

The other amendments or changes were administrative and practical, including shortening the time period to file summaries from 14 to 7 days before case evaluation, an additional $150 penalty for filing supplemental filings, and an additional $150 fine for filing materials within 24 hours of case evaluation. The case-evaluation panel must also issue an award within 7 days, which would appear to be an issue associated with panels in counties outside the Detroit metropolitan area.

Having served as a defense case evaluator in both Oakland and Wayne Counties for a number of years, the "submission" changes make sense. It was not necessary to require the summaries to be filed within 14 days because the case evaluators do not start reading the summaries until about a week or less before the case evaluation hearing, and activities in the case may occur shortly before case evaluation that are not fully vetted in the summaries. These would include recent depositions and disclosures in additional medical records. And it has always been frustrating for me to track down attorneys who file late summaries and only worry about a $150 fee.

Daniel G. Beyer, focuses his practice on personal injury matters related to medical malpractice, motor vehicle claims and general negligence; lender's and owner's title claims; insurance coverage; physician licensing and administrative complaints; commercial matters and consumer claims; and general liability.

Dan has appeared before the Michigan Court of Appeals, the Michigan Supreme Court and the Sixth Circuit Court of Appeals. He is also a Certified Mediator.

Dan lectures before professional and trade associations, and publishes on the subjects of healthcare issues, property taxation and civil litigation matters. On February 26, 2019, he gave a presentation to Fidelity National Title Michigan Claims Group in Omaha, Nebraska. He is listed in "Who's Who in American Law" and was named a "Top Lawyer" by DBusiness Magazine.

Dan enjoys tennis and cycling, is a member of the United States Tennis Association, and regularly competes in both singles and doubles tennis matches.

There are also refinements in the selection of neutral case evaluators. We have all experienced circumstances where the "neutral" has had a plaintiff or defense bias (more so in personal-injury cases and medical-malpractice cases). In Wayne County, retired circuit court judges often serve as neutral case evaluators.

MCR 2.404 (4) further defines a neutral case evaluator as someone who is "not identifiable as representing primarily plaintiffs or defendants" to a person who may be selected on the basis of the applicant's representing both plaintiffs and defendants or having served as a neutral ADR provider for up to 15 years before application. If well-known and experienced facilitators/mediators are interested, this provides an avenue for them to be appointed as neutrals on case-evaluation panels around the state.

While the changes to the case-evaluation rule will get the most attention, the impact of these changes could potentially alter practice patterns by use of the offer-of-judgment rule. This rule, MCR 2.405, goes back to the arrival of the Michigan Court Rules amended in 1985, long before many current practitioners were admitted. As will be discussed below, a 1989 amendment to the offer-of-judgment rule, 32 years ago, addressing the relationship between offer of judgment and case evaluation effectively gutted the use of offers of judgment. Thus, persons admitted to the bar in 1989 or later have not given this court rule a second look.

That will change now.

Those of us admitted before 1985 recall the new version of the court rules that renumbered the "Michigan General Court Rules" and added new provisions including MCR 2.405, the offer-of-judgment rule. The rule as originally drafted created opportunities for lawyers to submit low offers of judgment after the date of case evaluation. For example, confident defense counsel could submit a one-dollar offer of judgment after case evaluation and if that the case was tried to a jury verdict for the defense, seek cost sanctions. Many defense lawyers submitted one-dollar offers following case evaluation on a routine basis. The rule was drafted so that the sanctions provisions were tied to the later rejection vis-a-vis case evaluation and an offer of judgment.

The Supreme Court responded to this gamesmanship and in 1989 amended MCR 2.405 to state that offer-of-judgment sanctions may not be awarded in a case that had been submitted to case evaluation unless the case evaluation was not unanimous. Because almost all cases went to case evaluation and almost all of the case-evaluation awards were unanimous, this effectively eliminated practical use of offers of judgment, and it was left as a vestigial procedural device with limited utility. Even where there were non-unanimous case evaluations, most practitioners did not try to take advantage of the rule.

MCR 2.405 describes a process by which parties can submit offers and counteroffers and cost sanctions. Resolution of the case by this method would require a judgment in a sum certain.

The 2021 amendments to MCR 2.405 did not change the definition of an offer and counteroffer or that resolution of the case by this method would require a judgment in the sum certain. There are circumstances in which a party may not want to have a judgment. A dismissal with the release would be preferred. Practitioners can consider an agreement that any resolution under this rule could be done without a judgment being entered, or some other creative method by which a party would not be subject to a judgment as a matter of record. Plaintiff counsel may well desire a judgment, expediting a method by which collection by execution may be made.

An offer may be rejected if it is either specifically rejected in writing or there is no response within 21 days of the offer. A counteroffer must be submitted within 21 days of the offer. The rule is silent as to whether the offer or counteroffer must be a court pleading or filing. There is no requirement in the rule that it should be, and most counsel would not want the public record to include what are in effect settlement discussions.

If a counteroffer is made, it must be submitted within 21 days of the offer. If no response is made within 21 days, the offer is deemed rejected. The term "average offer" is defined as the average between the offer and the counteroffer or, if no counteroffer is made, the offer itself.

The cost provisions are unchanged. They are based on the comparison between the average offer (either the average of an offer and counteroffer or any offer that does not have a counteroffer) and the adjusted verdict. The adjusted verdict is the verdict plus interest and costs from the filing of the complaint to the date of the offer. There is no "10% improvement rule" as in the case-evaluation rule and, if the adjusted verdict is more favorable to the offeror, the actual costs include attorney fees.

Costs may not be assessed under this rule unless the offer is made more than 42 days before the trial. There are strategic issues with this date. For example, a party could submit an offer 43 days before the trial date and a responsive counteroffer would thus be less than 42 days and arguably not considered as a figure to create an "average offer." It won't take long for practitioners to start to look at dates, figures, and strategies.

Covid and uncertain trial dates add another layer of analysis and strategy.

When I used this rule in my practice many years ago, I interpreted that an offer by plaintiff and an offer by defendant that are more than 21 days apart to mean that there are two independent offers on which costs can be assessed without a division by two to create an average offer.

Practitioners should be aware of these changes and how they can be exploited or used for the benefit of their respective clients. There are important issues concerning timing of offers and counteroffers in the context of the trial date. With the elimination of case-evaluation sanctions and with case evaluation no longer mandatory, MCR 2.405 must be revisited as a practice tool.

Since the amendment of the offer of

judgment rule in 1989 that effectively eliminated the offer of judgment as an effective device in unanimous case evaluations, the advent of facilitative mediation has become an integral part of the practice. If this ADR process is the substitute for case evaluation in any given case, the offer-of-judgment rule provides an avenue for parties to use those negotiations to make offers and counteroffers in efforts to resolve the case with the prospect of cost sanctions that may be assessed by the court.

One of the changes in MCR 2.405 to put the brakes on gamesmanship is the expansion of the "interests of justice" exception to awarding attorney fees. The offer-of-judgment rule has always had an exception to the assessment of costs in the interests of justice. Costs and attorney fees may be incurred under MCR 2.405(D) but an offer that is "token or de minimis in the context of the case" will not be considered a legitimate offer for the purposes of imposing costs. The other exceptions include cases involving an issue of first impression or an issue of public interest, which makes sense but may have little impact on the day-to-day practice. The same would apply to class actions. See MCR 2.405(D)(3)(i) and (ii).

The date of accrual for actual costs, including costs and fees, starts from the rejection of the prevailing party's last offer or counteroffer. MCR 2.405 (A)(6). Thus, the timing of offers and counteroffers becomes part of the strategy. A confident defendant may make a non de minimis, low offer early in the case. But the tables could be turned by a plaintiff counteroffer creating a higher figure for an "average offer" thereby putting the defense at risk for sanctions starting early in the case.

Here's an example: let us say that a given case has jury potential of $250,000.00. The defense could submit an offer of judgment for $25,000.00. Within 21 days the plaintiff, concerned about a no cause or summary disposition ruling, submits a counteroffer of $225,000.00. The average offer is $125,000.00, and now both sides are at risk for sanctions if that "bogey" is not bettered at the conclusion of the case.

If either side is more disposed to settle the case or employ this rule closer to trial, a new offer can be made but that separate offer will advance the accrual date in terms of assessment of costs and attorney fees.

How will these changes impact current practice? I foresee it as a potential tool in the context of ADR that now envelops most personal-injury litigation. Numbers will be exchanged at mediations. The gap may be closed. If the parties are "getting close" a plaintiff or defendant may submit an offer (presumably in good faith as it was part of the mediation process) that would impose cost sanctions. Parties may be more willing to close that gap. Was this an unintended benefit of these rule changes?

It is possible that the facilitator/mediator may be called upon to give testimony or provide an affidavit concerning the good-faith offers made at facilitation if there is an issue of whether an offer is "de minimis in the context of the case."

I will conclude with this thought: In considering offers and counteroffers, are you more concerned about imposing sanctions against the opposing side, or avoiding sanctions against your client? If both parties are not focused on sanctions, the changes in the case-evaluation rule "solves" this problem and this rule can be left alone. Any party starting the process with an offer under MCR 2.405 must be prepared to get on the merry-go-round and address how the litigation process coupled with multiple offers and counteroffers, and their timing, will affect the management of the case.

Endnotes

1 A version of this article was originally published in the *Detroit Lawyer* (March 2022).

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright, PLLC* and Trent B. Collier, *Collins Einhorn Farrell PC*

Effect of Post-Judgment Motions on the Time to Appeal

There are a number of reasons why parties in a civil case might consider filing a post-judgment motion before appealing an adverse decision. In fact, sometimes, a post-judgment motion is required to preserve an issue for appeal. For example, in both Michigan and federal courts, a party must file a motion for judgment notwithstanding the verdict (renewed motion for judgment as a matter of law in federal parlance) if it wishes to challenge the sufficiency of the evidence supporting a jury verdict. It is essential to know how such motions impact the applicable appeal deadline.

State Court

As a general matter, an appeal of right in a civil case must be filed within 21 days of the entry of judgment in a Michigan court. MCR 7.204(A)(1)(a). That deadline, however, is tolled by the timely filing of a "motion for new trial, rehearing, reconsideration, or other relief from the order or judgment appealed." MCR 7.204(A)(1)(d). If one of these motions is filed, the 21-day appeal period begins to run "from the entry of" an order "deciding" it. *Id.*

A couple of notes: First, the post-judgment motion must be **timely**, meaning that it must be filed "within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period." *Id.* Second, not every post-judgment motion will toll the time to appeal. It must be a motion seeking "relief from the order or judgment appealed."

Federal Court

The Federal Rules of Appellate Procedure similarly provide for tolling of the usual 30-day appeal period in civil cases upon the filing of certain post-judgment motions. FR App P 4(a)(1)(A). Rule 4(A)(4) identifies six such motions:

- Motions "for judgment under Rule 50(b)" (i.e., renewed motion for judgment as a matter of law following a jury trial);
- Motions "to amend or make additional factual findings under Rule 52(b)" (for cases tried by the court; can be combined with a Rule 59 motion for new trial);
- Motions "for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58";
- Motions "to alter or amend the judgment under Rule 59" (often used to seek reconsideration of a decision made on summary judgment or after a bench trial);
- Motions "for a new trial under Rule 59"; and
- Motions "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered."

Premature appeal filings

Although filing a timely post-judgment motion will serve to toll the deadline for appealing, it does not preclude a party from filing an appeal anyway—whether in state or federal court.

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 Michigan Court of Appeals had previously concluded that it lacked jurisdiction to hear an appeal in a case where a post-judgment motion remained pending. See *Krywy v State Farm Mutual Automobile Insurance Co*, unpublished per curiam opinion of the Court of Appeals, issued April 24, 2008(Docket Nos. 274663, 277313); 2008 WL 1836385, *1 ("The record reflects that defendant filed its claim of appeal on the same day that plaintiff moved for reconsideration. If defendant filed first, then plaintiff's motion for reconsideration was not properly before the trial court, **but if plaintiff filed first, then defendant's claim of appeal was premature**.") (emphasis added). But in *Nordstrom v Auto-Owners Insurance Co*, 486 Mich 962; 782 NW2d 779 (2010), the Supreme Court clarified that a pending post-judgment does **not** "operate to divest the Court of Appeals of jurisdiction." That said, the filing of an appeal would appear to deprive the trial court of jurisdiction to actually decide the post-judgment motion, in accordance with MCR 7.208(A): "After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order . . . ."

The federal rules specifically address premature notices of appeal. Federal Rule of Appellate Procedure 4(a)(4)(B)(i) provides that "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." In other words, the appeal is suspended until such time as the post-judgment motion is resolved.

Conclusion

Aside from being essential for issue-preservation purposes, post-judgment motions can serve strategic goals, such as providing leverage in settlement discussions or offering a trial court the opportunity to take a "second look" at a decision entered under a summary judgment or a summary disposition. Practitioners just need to keep in mind how these motions will affect the time to appeal.

Endnotes

1 See *Napier v Jacobs*, 429 Mich 222, 230; 414 NW2d 862 (1987) (holding that a party cannot challenge a jury verdict on sufficiency-of-the-evidence grounds for the first time on appeal); *Yazdianpour v Safeblood Techs, Inc*, 779 F3d 530, 538 (CA 8, 2015) (refusing to review sufficiency-of-the-evidence argument because the defendants did not renew their motions for judgment as a matter of law after trial).

2 This article focuses on appeals in state court from the circuit court to the Michigan Court of Appeals and in federal court from the district court to the United States Courts of Appeals. Appeals to a Michigan circuit court from an administrative agency, for example, are governed by different rules.

Amicus Report

By: Lindsey Peck, *Collins Einhorn Farrell PC*
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Premises Liability

As reported in the last update, the Supreme Court intends to reexamine and appears likely to decide the fate of the open-and-obvious doctrine in the wake of the adoption of the comparative-negligence framework in Michigan. Briefing is underway in *Kandil-Elsayed v F&E Oil*, a premises-liability action in which the Supreme Court granted MOAA and asked the parties to address:

(1) whether *Lugo v Ameritech Corp.* "is consistent with Michigan's comparative negligence framework" and, if not,

(2) which approach the Supreme Court "should adopt for analyzing premises liability cases under a comparative negligence framework."

Since the last update, MDTC voted in favor of filing an amicus brief in *Pinsky v Kroger Co.*, a premises-liability action in which the Supreme Court granted MOAA and asked the parties to address similar but not identical issues, including (1) whether under *Lugo v Ameritech Corp.* and *Livings v Sage's Inv Grp.*, as well as the Restatement (Second) of Torts (1965), "the open-and-obvious doctrine does not preclude relief where a land possessor should anticipate the harm," and (2) whether "liability should be precluded in Michigan even if the danger posed by a condition on land is open and obvious without special aspects" or whether "the open and obvious nature of a condition should be a consideration for the jury in assessing the comparative fault of the parties" as set forth in the Restatement (Third) of Torts (2012).

Nathan Sherbarth of Zausmer volunteered to write MDTC's amicus briefs in *Kandil-Elsayed* and *Pinsky*, which the Court will hear together next term.

MDTC submitted an amicus brief in *Walker v Hela Mgmt.*, a premises-liability case involving the applicability of MCL 554.139 to a resident who is not a party to the lease agreement. The Supreme Court granted a MOAA and directed the parties to address, among other things, (1) the definition of "licensee" under MCL 554.139 and (2) whether *Mullen v Zerfas* and *Allison v AEW Cap Mgmt* require the licensee to enter into a contract with the licensor under MCL 554.139.

MDTC argued that a resident must have a contractual relationship with a landlord to qualify as a "licensee" under MCL 554.139. MDTC maintained that the definition of "licensee" under MCL 554.139 is informed by how contract law defines the term rather than the way premises-liability law defines it. MDTC pointed out that the context of MCL 554.139 is a clear indication that the term requires a meeting of the minds, if not a written contract:

> First, MCL 554.139(2) allows the parties to modify "the obligations imposed by this section where" the "license has a current term of at least 1 year." Such an agreement is not only contractual, but has to be in writing under Michigan's Statute of Frauds. MCL 566.132(1) ("An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement…."). Second, MCL 554.139(3) refers to "the privilege of a prospective…licensee to inspect the premises before concluding a…license…." This implies a meeting of the minds, since a "prospective" licensee would otherwise be trespasser, unless they were invited onto the premises for the purposes of inspecting and "concluding" a license.
>
> Indeed, the very mention of "licensees" in § 139 reflects a concern that property owners or possessors might use contract law to "side-step the onerous requirements of residential leasing laws by having tenants sign license

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

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

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

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

> agreements." Put another way, it is the very nature of licenses—as creatures of contract—that prompted the Legislature to treat them the same as leases in § 139.

MDTC argued that *Mullen* and *Allison,* too, compel the conclusion that a resident must have a contractual relationship with a landlord to qualify as a "licensee" under MCL 554.139. Based on precedent and contextual analysis of MCL 554.139, MDTC took the position that a non-party to a lease agreement isn't a "licensee" within the meaning of MCL 554.139.

Drew Broaddus of Secrest Wardle authored MDTC's amicus brief in *Walker*.

Medical Malpractice

As noted in the last update, MDTC filed amicus briefs in *Estate of Jomaa v Prime Healthcare Servs* and *Estate of Vasquez v Nugent*, both medical-malpractice cases under the wrongful-death act. The Court of Appeals granted leave in *Jomaa* and *Vazquez* to address whether the estate of the minor decedent can recover future earning-capacity damages (and to resolve the apparent conflict between the Supreme Court's 1948 decision in *Baker v Slack* and the Court of Appeals' 2016 decision in *Denney v Kent County Road Comm'n*).

Since the last update, the Court of Appeals granted leave in a third case involving the same issue, *Choudhary v Generations OB-GYN Ctr.* MDTC voted in favor of filing an amicus brief in *Choudhary,* as well, but the case settled and the appeal was dismissed.

Michael Cook of Collins Einhorn Farrell authored MDTC's amicus briefs in *Jomaa* and *Vasquez*.

MDTC submitted an amicus brief in *Ottgen v Katranji*, a medical-malpractice action involving the affidavit-of-merit requirement. The Supreme Court granted leave to address (1) whether *Scarsella v Pollack*, a case in which the Supreme Court held that a complaint filed without an affidavit of merit doesn't toll the statute of limitations, was correctly decided, and (2) whether the complaint, filed without an affidavit of merit contrary to MCL 600.2912d(1), was subject to dismissal without prejudice.

Whether right or wrong, MDTC urged the Supreme Court to uphold *Scarsella* and honor the doctrine of *stare decisis,* which is always important but particularly important in the context of statutory construction. MDTC pointed out that *Scarsella* is a clear and straightforward rule that promotes certainty and predictability rather than a confusing or burdensome rule that defies practical workability.

MDTC argued that a resident must have a contractual relationship with a landlord to qualify as a "licensee" under MCL 554.139. MDTC maintained that the definition of "licensee" under MCL 554.139 is informed by how contract law defines the term rather than the way premises-liability law defines it.

Stare decisis aside, MDTC argued that the interpretation of MCL 600.2912d in *Scarsella* stayed faithful to the language and legislative intent of MCL 600.2912d, as well as the principles of statutory construction. MDTC noted that since the publication of *Scarsella* over two decades ago, the Legislature has amended the tolling statute to clarify that a timely but defective notice of intent tolls the statute of limitations. But the Legislature hasn't amended the tolling statute to clarify that a complaint unaccompanied by an affidavit of merit tolls the statute of limitations. The Legislature hasn't taken any other legislative action, either, to counteract or undo *Scarsella*.

MDTC highlighted the dramatic erosion of the significance of the affidavit-of-merit requirement over the years through appellate decisions and court-rule amendments. MDTC characterized *Scarsella* as one of the "lone remaining protections"—without which there will be little incentive for compliance and no meaningful consequence for non-compliance with the affidavit-of-merit requirement.

J.R. Poll of Rhoades McKee authored MDTC's amicus brief in *Ottgen*.

No-Fault

Lastly, MDTC voted in favor of filing amicus briefs in several cases involving significant no-fault issues.

In *Mercyland Health Servs. v Meemic Ins. Co.*, the Supreme Court granted leave to address whether an insurance company has statutory standing to contest that the members and managers of a healthcare provider incorporated as a PLLC are properly licensed under MCL 450.4904(2). For context, no-fault carriers have long tried—usually without success—to raise defects in health-care providers' corporate formation as a defense under MCL 500.3157(1), which requires that healthcare services be "lawfully rendered." *Mercyland* is somewhat different because the corporate-formation issue is tied to whether the healthcare provider's members had proper professional licenses.

John Hohmeier of Scarfone & Geen volunteered to write the amicus brief in *Mercyland*.

In *Wilmore-Moody v Zakir,* the Supreme Court granted MOAA and asked the parties to brief whether rescission of a no-fault policy bars recovery of non-economic damages under MCL 500.3135(2)(c) on the basis that the claimant "did not have in effect . . . the security required" by MCL 500.3101(1) at the time the injury occurred.

Eric Conn of Jacobs & Diemer volunteered to write the amicus brief in *Wilmore-Moody*.

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*
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PROPOSED AMENDMENTS

2002-37/2017-28 – Protection of personal identifying information submitted to courts

Rules affected: MCR 1.109 and MCR 8.119

Issued: May 11, 2022

Comment Period: September 1, 2022

This proposed amendment will prohibit making a filed document available to the public if it contains protected personal identifying information until the protected information is redacted.

2002-37 – Amends the mandatory electronic service of court notices

Rule affected: MCR 1.109

Issued: April 13, 2022

Comment Period: August 1, 2022

MCR 1.109(G)(3)(e) currently requires a court to electronically serve any notice, order, opinion, or other document issued by the court upon a party or attorney registered as an authorized user in the electronic filing system. The proposed amendment provides that a court "may" electronically serve these documents to a registered user. The staff comments provide that this amendment would allow the court to determine the most appropriate means of sending such documents.

2021-17 – Rescission of Administrative Order No. 1998-1 and amendment of MCR 2.227

Rule affected: MCR 2.227

Issued: April 13, 2022

Comment Period: August 1, 2022

This amendment proposes incorporating Administrative Order No. 1998-1 into MCR 2.227. Administrative Order No. 1998-1 provides that a court may not transfer a case from circuit court to district court unless the parties stipulate to an amount in controversy not greater than the district court jurisdictional limit or where, based on the allegations in the complaint, it appears to a legal certainty that the amount in controversy is less than the district court jurisdictional limit.

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Discovery Update

By: B. Jay Yelton, III, *Warner Norcross + Judd LLP*
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Attorneys must be Competent and Cooperative in eDiscovery or Partner with Someone with eDiscovery Experience

Waskul v Washtenaw Co Comm Mental Health, 569 F Supp 3d 626 (ED Mich, 2021)

This case involves claims by four developmentally disabled adults alleging that the county mental health authority's budgeting methodology violates several federal and state statutes. With respect to competing discovery motions, the defendant relied on a "proportionality analysis." This included arguments that the defendant lacked the budget to purchase the "prohibitively expensive" software necessary to comply with the plaintiffs' discovery requests, that the availability of staff was constrained by COVID-19 protocols, that only one employee had access to the email system, and that conducting the test searches would be difficult and time-intensive. Magistrate Judge Elizabeth A. Stafford rejected the defendant's proportionality argument as unsupported by Rule 26(b)(1), reasoning that the defendant had a duty to cooperate in search term testing. The court also noted that under Rule 26, a party objecting that a request for production of documents is burdensome must submit affidavits or other evidence as substantiation and that "bald generalizations or a conclusory assertion" as to the burden does not sustain an objection.

Although the court acknowledged that the defendant's claim that it had not budgeted for litigation was credible, "accepting this argument would suggest that public governmental entities are exempt from normal discovery obligations." The court stated that parties are expected to bear the expense of producing documents from their active email files. Moreover, the defendant explored no avenues for producing discovery other than using a single individual employed by Washtenaw County with other duties. The court stated that the "failure to pursue better methods to produce the discovery is inexcusable and borne out of a fundamental lack of experience in electronic discovery practices and rules." The court agreed with the plaintiffs' counsel that "in 2021, Defendant should not be permitted to evade its obligations to Plaintiffs and the Court by pretending that e-discovery is just too hard." The court stated that Washtenaw County was one of the largest counties in Michigan and had the state's third-highest median income. While the defendant was a separate legal entity from the county, it used the county's email network system and a county employee to collect the emails at issue. The court therefore rejected the defendant's argument that it lacked the resources to engage in e-discovery. The judge also acknowledged that e-discovery can be difficult for inexperienced attorneys but stressed that inexperienced attorneys have an "ethical duty to become competent, associate themselves with attorneys who are, or to decline the representation." The court pointed to a Model Order Relating to the Discovery of Electronically Stored Information, adopted by the Eastern District of Michigan in 2013, providing that in the event of a dispute regarding production of ESI, each party had to designate an e-discovery liaison. This liaison could be an attorney, a third-party consultant, or an employee of the party and must "be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology."

Finally, the Court warned defendant and its counsel that "any violation of this order or more violations of the rules of discovery may result in sanctions under Rule 37 or the Court's inherent authority and that the sanctions could include the imposition of more monetary sanctions or a default judgment against it."

Practice Tip: Courts are no longer accepting a party's or an attorney's lack of funding and/or lack of experience to handle eDiscovery tasks. eDiscovery resources and

B. Jay Yelton, III, after 30+ years as a litigator and manager of eDiscovery teams, Jay now serves as a mediator and discovery special master where he assists parties to (a) solve disputes quickly, cost-effectively and confidentially and/or (b) design proportional discovery plans and resolve discovery disputes. Jay regularly conducts training seminars, and he speaks to several classes each year at Michigan State University College of Law on topics related to data management and eDiscovery. He is a respected author and has written for and been quoted extensively by state and national publications. Jay is recognized by Best Lawyers in America for both eDiscovery and Litigation, and he serves as Chairperson for the Detroit Chapter of BarBri's Association of Certified eDiscovery Specialists, as a member of and project leader for E.D.R.M. Global Advisory Council and as a member of and team leader for the Sedona Conference.

training have been available for parties and attorneys for well over 10 years. See e.g. https://www.aceds.org, https://edrm.net, and https://thesedonaconference.org.

Court Demands That Parties Cooperate and Narrow Scope of Discovery Disputes Before Seeking Court's Involvement

Deal Genius, LLC v. 02 Cool, LLC, unpublished memorandum opinion and order of the District Court for the Northern District of Illinois, issued Mar. 24, 2022 (Docket No. 21 C 2046); 2022 WL 874690

In this patent dispute case involving plastic, battery-operated fans made by both parties, the court summarized the lack of discovery cooperation between the parties as follows:

> Rather than take the opportunity of settling their email dispute at or before the hearing, the parties chose to file briefs on the matter …. Plaintiff's counsel spent two-thirds of its brief complaining about defendant's counsel's performance in the parties' Rule 37.2 conference and the pointless exchanges of angry emails, which, unfortunately in all too many cases, have come to typify the otiose exchanges between adversaries …. Defendant's counsel spent half its brief complaining about plaintiff's counsel's performance at the same Rule 37.2 conferences and the same exchanges of angry emails …. The attorneys even disagreed over what happened between them at certain points in their months-long squabble. It is the attorney version of the children's taunt, 'I know you are but what am I?' Unfortunately, it is all too common – and unnecessary …. And seems to be even more common in discovery disputes like this one. As such, a tedious summary of counsels' competing versions of what occurred is unnecessary – and unhelpful.

In addressing the dispute, the court stated: "It should go without saying that months of arguing over five search terms, and then involving a court in that dispute in any event, would be out of proportion to the needs of many cases. But there can be no dispute that what has gone on thus far in this particular case is out of proportion with the needs of this particular case and the commands of good sense …. The attorneys in this case are, essentially, at square one. They have not whittled their dispute down far enough for meaningful court intervention." Noting that selecting search terms that might assist in locating pertinent documents "is counsels' job, not the court's." As a consequence, the Court denied the motion to compel.

The Court also stated in a footnote: "The parties should be aware that, when the numbers of documents to be reviewed by a court in discovery disputes move into the hundreds, courts in this Circuit find it appropriate and far more efficient to engage a special master under Fed.R.Civ.P. 53(a)(1)(C) … given the issues at stake in this case, it is likely more fair to have the parties bear the costs of their discovery dispute, rather than as a tax-payer subsidized matter …. Review of thousands or even hundreds of documents would monopolize the court's attentions and be patently unfair to the other litigants waiting in the queue, most of whom have honed their discovery disputes through the meet-and-confer process to far more manageable levels long before discovery closed."

Practice Tip: This is one of many recent cases where a court expresses great frustration with the parties for failing to have cooperated in a good-faith manner to narrow the scope of discovery disputes before filing a discovery motion. In addition to the possibility of retaining a Special Master to assist in this process, the Michigan Court Rules were recently amended to provide parties the opportunity to retain a Discovery Mediator to assist with discovery disputes prior to or instead of seeking the court's involvement. See MCR 2.411.

Sanctions Awarded for Failing to Preserve Video

Darren Hollis v. CEVA Logistics U.S., Inc., __ F Supp 3d __; 2022 WL 1591731 (ND Ill, May 19, 2022)

In this case involving claims of discrimination and wrongful termination of the plaintiff, an incident happened between the plaintiff and a co-worker in which two sets of witnesses had differing accounts, with three witnesses (who were white) claiming the plaintiff put his hands on the co-worker, and three other witnesses (who were African American) claiming he didn't. The defendant ultimately chose to believe the three white witnesses and fired the plaintiff.

Three security cameras were aimed at the area of the incident. The day after his termination, the plaintiff verbally requested the general manager to review the video recordings, and about a week later in a document complaining about race discrimination, twice requested a review of the video recordings that he asserted would clear him of wrongdoing. Nevertheless, the defendant presented no evidence that any of its employees ever attempted to view, preserve, or recover the footage before the plaintiff's termination, nor was it preserved to address his EEOC complaint or eventual lawsuit.

In response to the plaintiff's motion for sanctions, District Court Judge Iain Johnston evaluated Rule 37(e)'s five threshold requirements as follows:

1. The information must be ESI: the court rejected the defendant's claim that the burden of proof that the video existed resided with the plaintiff, stating: "Under CEVA's theory, as a practical matter, the spoliation itself prevents a claim of spoliation." He also stated in finding that the first requirement had been met: "the inference that video recordings of the incident between Mr. Hollis and Mr. Bayer existed is bolstered, if not proven, by CEVA's previous use of video recordings in a similar incident in the same warehouse."
2. There is a Duty to Preserve the ESI: the court rejected the defendant's argument that the duty to preserve didn't begin until months later when the plaintiff filed an EEOC complaint. Instead, the plaintiff's "formal letter of complaint against CEVA Logistics for workplace race discrimination" sent the day after his determination satisfied this requirement.
3. The ESI was Relevant: Referencing Defendant's claims that, based on the statements of the three white witnesses, the video wouldn't have helped the plaintiff, the court stated, in finding the third requirement

met: "this argument establishes the evidence's relevance. Indeed, even under Fed. R. Evid. 401, the relevance of evidence does not turn on whether it supports its proponent's position, but rather it is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence.'"

4. The ESI was Lost Because the Party Failed to Take Reasonable Steps: in finding this requirement was met, the court stated: "nothing before the Court even hints that CEVA ever intervened to stop its security system from proceeding as designed and discarding any video recordings after thirty to ninety days. Even after Mr. Hollis' December 5, 2018, letter alerted CEVA to the relevance and potential importance of any footage that had been recorded, CEVA did nothing."
5. The Lost ESI is Unable to be Restored or Replaced: the court stated, in finding the final requirement was met: "nothing in the record establishes that the video recordings can be restored or replaced."

The court also found the plaintiff was prejudiced by the lost ESI, stating: "despite Mr. Hollis alerting CEVA to the importance of the video recording, CEVA took no steps to view, let alone preserve, the video. As a result, the video is lost and unavailable. Because Mr. Hollis is left unable to obtain the video of the incident he needed for his case, the loss of ESI has prejudiced him as that term is used under Rule 37(e)."

Regarding whether there was intent to deprive, the court stated: "plenty of evidence exists in the record that could lead a reasonable person to conclude that CEVA acted with intent", referencing how the defendant just months earlier had pulled and reviewed video for an unrelated incident. However, the court also noted: "a competent counsel who is willing to argue that her client is not inculpatory but is instead incompetent could make a reasonable argument that the failure to pull, preserve, and peruse the video recordings was not intentional. Granted, a jury may not credit this argument, but that should not prevent [the defendant] from attempting to sell that pitch under these facts." As a result, the court decided to leave the intent to deprive decision to the jury and provided (as an appendix) the factual findings and instruction that will be provided to the jury.

Practice Tip: Organizations must have written data preservation plans in place so when litigation and/or a government investigation becomes reasonably likely to occur, steps will be taken to identify and preserve relevant data sources. This is especially important for data sources such as video recordings, which often have auto delete functions that occur within a few days or weeks.

Production of Entire Email Box Content Held "Reasonably Proportional" Under Circumstances of the Case

Edwards v. PJ OPS Idaho, unpublished memorandum decision and order of the United States District Court for the District of Idaho, issued March 16, 2022 (Docket No. 1:17-cv-00283-DCN); 2022 WL 797599

In this class action against Papa John's franchisees for violation of the minimum-wage provisions of the Fair Labor Standards Act, delivery drivers sought discovery to identify their "employer" as defined by the act. Individual defendants Wylie and Allen had managerial and/or ownership interests in the franchises under suit. The drivers requested production of Wylie and Allen's entire email box contents. Drivers also requested production of search term hits from twelve other custodians of interest using seven broad search terms. The defendants produced over 4,800 emails from Wylie and Allen's email boxes using their own search terms. The defendants also proposed more narrowly drawn search terms to run over the other twelve custodian's individual email boxes. The plaintiffs moved to compel production under their proposals.

In responding to the motion, the defendants did not argue that the discovery sought by the plaintiffs was irrelevant, but that the scope was disproportionate to the needs of the case. The defendants explained that production of the entire email box contents for Wylie and Allen would result in the production of an additional 225,000 emails, and entail an enormous amount of time and expense to review. As to the other custodians, the defendant proposed using the plaintiff's search terms, but in combination other terms that together would more likely lead to finding relevant information. The use of the combined search terms would also result in a reduction from approximately 60,000 emails for review and production to under 10,000. In each instance, the court rejected the defendants' narrower proposal in favor of the plaintiffs' broader proposal.

The court stressed the "criticality of determining who is an employer," and the important role email would play in making that determination. The court found that with regard to Wylie and Allen, the drivers could not narrow their requests by using any particular set of search terms "without hampering their ability to demonstrate that Wylie and Allen were in positions of authority over the Drivers." The court then turned to discovery into the other twelve custodians email boxes. The court found that "[a]lthough there are a significant amount of document results, it stands to reason that a complex case such as this that spans multiple states and multiple corporate entities will lead to more documents in discovery." The court concluded that "the search terms are appropriately narrowed, the amount of documents that will be examined here is proportionate to the large and complex nature of the case."

The court acknowledged its concern "with how much irrelevant material will be brought in" under the plaintiff's proposal. "However, no party offered a viable way to limit irrelevant material, either temporally or subjectively, and so the Court has chosen to err on the side of allowing access to more information than less."

Practice Tip: Be prepared to educate the court on viable alternatives to costly, burdensome discovery requests. In large, complex cases, consider the use of technology-assisted review, phased discovery, keyword searching and other eDiscovery technologies, alone or in combination, to reduce burden and cost. In addition, it pays to remind the court that no party is entitled to perfection in discovery. Parties are only required to make reasonable efforts to identify potentially relevant information.

MDTC Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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Duty to Defend:

***Farm Bureau Gen Ins Co of Michigan v Jones*, unpublished opinion per curiam of the Court of Appeals, issued May 12, 2022 (Docket No. 356901).**

The insureds sought a defense under their homeowners' policies that covered several rental properties owned by the couple. The United States filed suit against the Joneses, alleging that Mr. Jones violated federal housing law by subjecting "multiple female tenants" to discrimination based on sex by "making unwelcome sexual comments ... [and] unwelcome sexual advances," asking for nude photographs, and "[t]ouching female tenants on their buttocks, breasts, and other parts of their bodies without their consent." He also offered reduced rent and repair services for sex acts, "[t]aking adverse housing actions, such as eviction or refusing to make repairs ... against female tenants who objected to and/or refused sexual advances," and exhibiting a preference for renting to single females. *Jones,* unpub op at 2.

Farm Bureau declined to defend the Jones because the "policies do not provide coverage or a duty to provide a defense when the insured is sued for causing 'bodily injury' through acts of 'sexual molestation' or for causing 'bodily injury' or 'property damage' through intentional acts where the injury was a natural result." *Jones,* unpub op at 1. Rather than defending under a reservation of rights and litigating the exclusion at the end of the federal litigation – *Kirschner v Process Design Assoc, Inc,* 459 Mich 587, 589; 592 NW2d 707 (1999) would have allowed Farm Bureau to do – Farm Bureau filed this declaratory judgment action.

Farm Bureau then moved for summary disposition based on the absence of a covered occurrence and the policy exclusions noted above. In response, the insureds argued that the duty to defend is broader than the duty to indemnify, and the federal complaint was not specific enough to allow for adjudication of coverage. *Jones,* unpub op at 2. The insureds "further insisted that the allegations at least arguably fell within the definition of a covered occurrence because even if [Mr. Jones'] actions were intentional, there was no allegation" that Mr. Jones "intended to cause the harm or injuries to his tenants." *Id.* The trial court rejected the insured's argument and granted Farm Bureau's motion. The Court of Appeals unanimously affirmed.

The panel found that the federal court allegations "clearly indicate that any physical injury the victims may have suffered arose out of [Mr. Jones'] sexual molestation and therefore did not amount to 'bodily injury' as required to find an occurrence." *Jones,* unpub op at 5. And, "[e]ven if the allegations in the federal complaint arguably raised a claim of 'property damage,' they still could not create even an arguable claim that an 'occurrence' existed." *Id.* The policies defined an "occurrence" as "an accident … which results, during the policy period, in 'bodily injury' or 'property damage.'" *Id.* Although the word "accident" was not defined in the policies, the panel found "abundant caselaw" defining an "accident" as "an undefined contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." *Id.*, citing *Skanska v M A P Mech Contractors, Inc,* 505 Mich 368, 378; 952 NW2d 402 (2020). Mr. Jones "did not accidentally harass, molest, or discriminate against his female tenants. The allegations describe a purposeful course of conduct that took place over a decade." *Jones,* unpub op at 5.

The panel then turned to the policies' exclusions. "Just as the policies provided that injuries caused by an insured's sexual molestation of another person do not fall within the parameters of a covered 'occurrence,' the policies excluded coverage for injuries 'arising out of sexual molestation.'" *Jones,* unpub op at 5-6. The panel reiterated that all of the acts alleged against Mr. Jones in the federal complaint fell within the

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definition of "sexual molestation." *Id.*, unpub op at 6. The policies also included a comprehensive exclusion from coverage for injuries and damages caused by the insured's intentional acts, and "[t]he federal complaint clearly allege[d] that [Mr. Jones] intended to sexually discriminate against and harass his female tenants." *Id.* "He did not accidentally spend a decade seeking out single females to rent his properties to, asking for nude photos and sexual favors, inappropriately touching his tenants, and blackmailing them for repairs and continued housing." *Id.* And, even if he "did not intend the specific injuries suffered by each victim, this exclusion applies to eliminate coverage." *Id.*

Jones is similar to another decision recently discussed in this report, *Atain Ins Co v Katalyst Fitness LLC,* unpublished opinion per curiam of the Court of Appeals, issued May 20, 2021 (Docket No. 354005), where the insurer filed a declaratory judgment action, and the panel found no duty to defend based on a "physical-sexual abuse" exclusion.

Rescission:

***Doa Doa, Inc v PrimeOne Ins Co ("Doa Doa II"),* unpublished opinion per curiam of the Court of Appeals, issued May 12, 2022 (Docket No. 356877).**

Rescission has been a hot topic in insurance coverage circles for the last few years, particularly after *Bazzi v Sentinel Ins Co,* 502 Mich 390; 919 NW2d 20 (2018). Previously in this report, I discussed *Doa Doa, Inc v PrimeOne Ins Co ("Doa Doa I"),* unpublished opinion per curiam of the Court of Appeals, issued October 31, 2019 (Docket No. 339215). The case was recently before the Court of Appeals again.

PrimeOne sought to rescind a fire policy, which it had issued to a bar, based on misrepresentations in the insurance application. On October 23, 2015, the insured bar ("Bar 153") was destroyed by a fire of "undetermined" origin. *Doa Doa I,* unpub op at 2. At the time of the fire, PrimeOne insured Doa Doa (which owned Bar 153) under a policy that Doa Doa had applied for on January 24, 2015, and PrimeOne had issued on February 6, 2015 (eight months before the fire). Another entity, Garden City Real Estate, LLC ("GCRE"), was named as an additional insured for at least some of the coverages. GCRE owned the building and real estate. "[A]t the core of this case" was Doa Doa's "response to a question in [the] insurance application seeking the number of police calls within the past year." *Doa Doa I,* unpub op at 2. Doa Doa only reported one incident. *Id.* PrimeOne's post-fire investigation revealed nine other incidents where the police had been called to Bar 153 during the relevant time period. *Doa Doa I,* unpub op at 3-4. Two of those incidents involved violence. *Id.*

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

With the case in front of it for a second time, the Court of Appeals again found that PrimeOne was entitled to rescind the policy. *Doa Doa I,* unpub op at 4. However, the panel remanded the case for the trial court to consider whether the additional insured, GCRE, may still be covered as an "innocent third-party" under *Bazzi,* 502 Mich at 401-403. The panel saw "no indication in the record that GCRE was involved in providing information to defendant in support of the application for insurance." *Doa Doa I,* unpub op at 10. Instead, there was testimony that all of the information provided in the insurance application process came from Doa Doa's president. *Id.* On remand, the trial court will also need to consider whether the policy should be reformed "to include GCRE as an insured under the property coverage portion of the policy." *Id.*, unpub op at 11.

On remand, "the trial court granted PrimeOne's renewed motion for summary disposition with respect to GCRE's reformation claim." *Doa Doa II,* unpub op at 1. But in a separate order, the trial court "denied PrimeOne's renewed motion for summary disposition on the issue of rescission with respect to GCRE and ordered that the property claim must be processed by PrimeOne and payment made to GCRE." *Id.*

With the case in front of it for a third time, the Court of Appeals again found that the trial court was partially right, and partially wrong. The panel unanimously affirmed "the trial court's order granting PrimeOne's renewed motion for summary disposition with respect to GCRE's reformation claim," but the panel reversed "the trial court's opinion and order holding PrimeOne liable for property coverage to GCRE and remand for entry of judgment in favor of PrimeOne with respect to GCRE's claim for property coverage." *Doa Doa II,* unpub op at 2.

The panel found that GCRE could not reform the policy to make it an additional insured for property coverage. *Doa Doa II,* unpub op at 6. GCRE "submitted evidence supporting a finding of a unilateral mistake on its part," including evidence that Doa Doa and the independent agent "intended that GCRE be listed as an additional insured for property coverage." *Id.* "However, there is no evidence that PrimeOne was aware of this intent." *Id.* "Moreover, the underwriter who processed the application testified that he was aware of other circumstances where a building owner would be identified as an additional insured for liability coverage, but not for property coverage, such as if a leasee was required by a lease to obtain property coverage for a building." *Id.* And, there was "no evidence that PrimeOne acted fraudulently, or was otherwise aware that GCRE was supposed to be listed as an additional insured for the property coverage and was complicit in its silence, or acted in an unfair or inequitable manner." *Id.*

The panel then turned to the question of rescission and whether CGRE was an "innocent third-party" under *Bazzi,* 502 Mich at 396. The panel found that CGRE was not entitled to "innocent third-party" protection because "GCRE was not a named insured, or an additional insured, and because, unlike in *Bazzi,* the property coverage at issue was not mandated by statute, GCRE was not in a position to make a claim for any property

loss benefits, either under the policy or pursuant to any statutory right." *Doa Doa II,* unpub op at 9. In other words, because the reformation issue was decided in a way that left GCRE with no rights that would be lost by the rescission, there was no reason to consider *Bazzi's* equitable balancing. GCRE's claim failed as a matter of contract law, and rescinding the policy certainly could not give it greater rights, so its claim failed. *Doa Doa II,* unpub op at 9.

Covid-19 Related Business Interruptions:

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. Those suits have overwhelmingly favored insurers, including the Michigan Court of Appeals' published holding in *Gavrilides Mgt Co v Michigan Ins Co,* __ Mich App __; __ NW2d __ (2022) (Docket No. 354418), which I discussed here last quarter.

Since then, the Court of Appeals has applied *Gavrilides* in two cases: *Gourmet Deli Ren Cen v Farm Bureau Gen Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2022 (Docket No. 357386), and *Massage Bliss, Inc v Farm Bureau Gen Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2022 (Docket No. 356445). In both cases, the insurer prevailed, with the panels citing *Gavrilides* in support of the proposition 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. For similar reasons, both panels rejected the insureds' arguments for "Civil Authority" coverage.

In *Gourmet Deli,* the insured was a delicatessen and restaurant located in the General Motors Renaissance Center ("GMRC"), an office complex consisting of seven connected skyscrapers in Downtown Detroit. Gourmet's customer base consisted primarily of others working in the GMRC. *Gourmet Deli,* unpub op at 1. In March 2020, after the insured ceased operations per state and local health orders, GMRC's leasing agent informed tenants that an employee of a building vendor tested positive for COVID-19. *Id.,* unpub op at 3. The contact tracing did not show a COVID-19 exposure at the insured's location. *Id.* None of the insured's employees or managers tested positive for COVID-19 before the insured decided to cease operations. *Id.* There was never a specific order that required the insured to stop operating. *Id.* In June 2020, the insured tried to reopen but quickly determined reopening was not financially feasible and decided to close to mitigate its damages. *Id.* Shortly thereafter, it sued Farm Bureau for business interruption coverage.

> Farm Bureau declined to defend the Jones because the "policies do not provide coverage or a duty to provide a defense when the insured is sued for causing 'bodily injury' through acts of 'sexual molestation' or for causing 'bodily injury' or 'property damage' through intentional acts where the injury was a natural result."

Both sides moved for summary disposition; Farm Bureau argued that the insured acknowledged it was permitted to remain open for carryout and delivery under the executive orders. *Gourmet Deli,* unpub op at 4. Moreover, subsequent executive orders permitted the insured to expand its operations further, but the insured still chose to close. *Id.* None of this, Farm Bureau argued, was the result of any physical loss; "there was no coverage because there was no physical problem with the space or nearby buildings as required under the policy." *Id.* The trial court agreed and dismissed the suit under MCR 2.116(C)(10), noting that "with COVID-19 exposure, only the area of contact with the individual is disinfected and evacuated for a few days," and this did not equate "to damaging an entire building."

The Court of Appeals unanimously affirmed the dismissal. On appeal, the insured tried a few different approaches to distinguishing *Gavrilides*. Some of those arguments called for importing definitions from the liability portions of the policy into the business income coverage, which the panel roundly rejected. *Gourmet Deli,* unpub op at 5. The panel similarly rejected the insured's suggestion that the Farm Bureau policy's lack of a virus exclusion "implies that viral outbreaks cause physical damage." *Id.*, unpub op at 6. This argument, the panel noted, was contrary to multiple established canons of insurance policy interpretation. *Id.*

"Instead, the relevant inquiry" according to this panel was whether the "loss of business income" was brought about "by the perils insured against damaging or destroying … building(s)…." *Gourmet Deli,* unpub op at 6. The words "damaging" and "destroying" had to be read alongside the policy's period of restoration language, which limited business income losses to "such length of time as would be required to resume normal business operations, but not exceeding such length of time as would be required to rebuild, repair, or replace, as promptly as possible, such part of the described property as has been damaged or destroyed as a direct result of an insured peril." *Id.* This language compelled the panel to reject the insured's "loss of use" argument. *Id.* An insured "cannot repair, rebuild, or replace a property that remains in the same physical condition it was in before, regardless of any alleged damage from loss of use." *Id.*, unpub op at 7.

The insured also argued that "there is actual physical loss to the property because the COVID-19 virus particles attach to surfaces" – something that was not argued in *Gavrilides* – "causing harm to humans." *Id.* This argument failed because the policy explicitly required the damage or destruction be to "building(s) or business personal property … at the premises…." *Id.* "There is no mention of damage to people interacting with the premises." *Id.* And, "[e]ven if the Court were to agree that COVID-19 does damage property by harming humans, Gourmet acknowledged that there were no reported COVID-19 incidents traced to its space in its complaint…." *Id.*, unpub op at 7 n 1.

The panel then turned to the policy's "Civil Authority" coverage, finding that it did not apply because, although this coverage "does not require damage

to Gourmet's property, it does require damage to surrounding property…." *Id.*, unpub op at 8. Quoting *Gavrilides,* ___ Mich App at ___; slip op at 9, the panel observed:

> [T]he 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. *Gourmet Deli,* unpub op at 8-9 (cleaned up).

In short, "[b]ecause there was no physical loss or damage to the areas surrounding Gourmet's space from COVID-19, nor was Gourmet prohibited from accessing its space by Executive Order 2020-9 and subsequent orders, it is not entitled to civil authority coverage." *Id.* at 10.

The *Massage Bliss* opinion did not go into as much detail as *Gourmet Deli* but reached the same result under what was functionally the same policy language. In *Massage Bliss,* unpub op at 1, the insured operated a spa and salon. "Its business operations were effectively shuttered, greatly restricted, or substantially diminished for a period of time pursuant to executive orders issued by the Governor in response to the COVID-19 pandemic." *Id.* The insured sued Farm Bureau "to recover losses caused by the disruption in business that resulted from the COVID-19 pandemic and the associated executive orders." *Id.* "More specifically, plaintiff contended that the disruption of business triggered the applicability of provisions regarding civil-authority coverage and business-loss coverage contained in the insurance policy." *Id.* "In relevant part, the civil-authority provision is generally implicated when there is an actual loss of business income 'due to direct physical loss of or damage to property,' other than the premises described in the declarations page, when caused by a 'peril not otherwise excluded under this policy.'" *Id.* "With respect to the business-loss provision, it essentially provides coverage for lost income and expenses resulting from a peril that causes direct physical loss or does direct damage to buildings and personal property." *Id.*

The trial court dismissed the suit under MCR 2.116(C)(8) for reasons that are now familiar to readers of this report. The Court of Appeals unanimously affirmed in a short opinion, essentially finding that all of the insured's arguments had been put to rest in *Gavrilides. Massage Bliss,* unpub op at 2-4. While the insured attempted to distinguish *Gavrilides,* the panel was unpersuaded,

> Plaintiff argues that direct physical loss of property is distinguishable from direct damage to property under the insurance policy, either of which can suffice to support a claim, and that direct physical loss of property can encompass a situation where the property owner is deprived or dispossessed of property even without physical damage to the property. To the extent that this precise issue was not addressed or subsumed by the analysis in *Gavrilides Mgt,* we do not find plaintiff's argument persuasive. Assuming the validity of the premise of plaintiff's contention, we find that there was no allegation or indication that plaintiff was actually deprived or dispossessed of the property. In fact, plaintiff, along with many Michigan businesses, were merely limited or restricted in the use of the property; there was no direct physical loss of the property. *Massage Bliss,* unpub op at 3.

The insured in *Massage Bliss* also argued: "that viral particles that cause COVID-19 infested the property or that asymptomatic customers carrying the virus patronized the salon and spa, and that business losses occurred because of the infestation and/or patronage, where customers stayed clear of the business in light of concerns about viral contamination of surfaces and asymptomatic carriers of the virus." *Id.* Again, this did not put the case outside the purview of *Gavrilides*,

> Stated otherwise, there were business losses regardless of the executive orders because people stayed away from the business out of fear of getting COVID-19. In our view, such a position would require allegations and evidence demonstrating that the virus was in fact present on surfaces at plaintiff's business or that customers were actually infected with the virus and that there were prospective customers that chose not to patronize the business specifically because of those infested surfaces and infected customers. With respect to this theory, we find no supporting allegations in plaintiff's complaint, and even if the allegations had been sufficiently stated, the theory would clearly be so speculative that it could not survive summary disposition. To the extent that plaintiff's position is that the virus, by sheer statistical probability, had to have been present at the salon and spa and thus there was necessarily damage to the property, we again note that plaintiff still needed to adequately allege the specific nature of the damage and that the purported contamination caused specific business losses. The allegations lack such specificity.… *Massage Bliss,* unpub op at 3.

Endnotes

1 The undersigned represented Farm Bureau in both cases.

Legal Malpractice Update

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

Statutes of limitation and repose bar legal-malpractice claims arising out of criminal matters.

Wiggins v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2022 (Docket No. 357895)

Facts

Attorney-defendant represented plaintiff in a federal criminal case, in which the plaintiff entered a plea agreement in 2014. The criminal case also involved a final judgment being entered in 2014.

Attorney-defendant had also represented the plaintiff's husband in various matters. In 2020, plaintiff sued the attorney-defendant for legal-malpractice based on her belief that the attorney-defendant had a conflict of interest during the underlying representation due to his previous representation of the plaintiff's husband. The trial court granted summary disposition, finding that the two-year malpractice statute of limitations and the statute of repose had expired.

Ruling

The Court of Appeals agreed that the statute-of-limitations had expired. The court emphasized that a legal-malpractice claim accrues when an attorney discontinues serving the plaintiff in a professional capacity *as to the matters out of which the claim for malpractice arose*. The attorney-defendant's legal services related to the criminal matter ended in 2014, and the lawsuit was not filed until 2020, so the statute of limitations had expired.

Further, the court calculated that the six-year statute of repose had also expired. Plaintiff argued that attorney-defendant sent her a letter in 2015, contending he still represented her at that time. But the letter related to licensing issues, which were separate from the criminal action from which the malpractice claim arose. Although the letter also included a copy of the final judgment from the criminal case, the court reasoned that attorney-defendant only "appeared to be tying up loose ends after his representation in the criminal matter," which did not amount to rendering legal services. Consequently, plaintiff's claim was time-barred.

Practice Note

The statute of repose bars all claims asserted more than six years after the allegedly negligent conduct occurs. That is true irrespective of when the representation ends or the plaintiff discovers, or should have discovered, that a potential claim existed.

Attorneys hired to represent plaintiff in fiduciary capacity do not have attorney-client relationship with plaintiff in individual capacity.

Muvrin v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued August 11, 2022 (Docket No. 357566)

Facts

Plaintiff's family owned a farm. After the death of one of her brothers, plaintiff became involved in the farm's financial management. Attorney defendants agreed to provide representation in probate court following the death of plaintiff's brother and petitioned to open an informal probate estate. The probate court appointed plaintiff (and siblings) as co-personal representatives of the estate.

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.

Plaintiff subsequently discovered that one of her siblings—a co-personal representative—had been commingling assets, using estate funds as his own, and maintaining inaccurate records, thereby devaluing the estate. Plaintiff sued attorney-defendants, alleging legal malpractice for filing an incorrect inventory report, failing to amend an inventory report, and failing to file annual accounts. Attorney-defendants moved for summary disposition, arguing that plaintiff did not obtain concurrence from the other co-personal representatives to file suit. The trial court granted the motion, holding that plaintiff did not establish the existence of an attorney-client relationship, as attorney-defendants only represented her in her capacity as a co-personal representative.

Ruling

On appeal, the plaintiff argued that she established the existence of an attorney-client relationship and that she brought the action in her individual capacity seeking damages she suffered personally. The Court of Appeals disagreed with plaintiff, holding that attorney-defendants represented her only in her capacity as a personal representative.

In Michigan, a personal representative may hire an attorney to perform services to assist or advise the personal representative in the performance of the personal representative's administrative duties. Further, when two or more people are appointed as personal representatives, the concurrence of all is generally required to act for the estate.

Here, the scope of attorney-defendants' responsibilities was limited to plaintiff's role as a personal representative of the estate—not to plaintiff in her individual capacity. Like prior cases in which the court has held that an attorney hired to provide legal services for a conservator represented the conservator only, an attorney hired to represent a personal representative only represents the personal representative in the context of his or her duties as a personal representative (See, e.g., *Maki v Coen*, 318 Mich App 532 (2017)).

The Court of Appeals also distinguished the plaintiff's argument from the line of cases in which Michigan courts have held that a beneficiary may bring a malpractice claim against attorneys who draft testamentary documents (See *Mieras v DeBona*, 452 Mich 278 (1996)). The court reasoned that testamentary drafting is not at issue in this case, nor is there authority for that principle in the context of an estate's beneficiary bringing a malpractice claim against the attorney hired to represent the personal representatives.

Practice Note

The law distinguishes between representing an individual in his or her personal capacity and his or her capacity as a fiduciary, such as a personal representative for an estate. That line can sometimes be blurry. Ensure your engagement agreement clearly outlines the scope of representation and properly identifies the client to avoid any confusion.

Legislative Update

By: Richard Joppich, *Kitch Drutchas Wagner Valitutti & Sherbrook, on behalf of the MDTC Public Policy Committee*
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There have been several bills in both the House and Senate that may be of interest to our membership and civil attorneys. Below, the MDTC Public Policy Committee provides brief summaries of some of the more prominent bills that caught our attention. Please be sure to read the entire bill or enactment referenced for the finer details of the legislation, as our summaries are meant to be just that, summaries giving you information on the nature and impact rather than minute details. We hope this information is useful for you and your practice:

HB 4799 and 4800 (H-2) would enact the "Michigan Uniform Assignment of Rents Act." This act would create an assignment of rents that could be recorded in the Register of Deeds and allow the assignee to enforce the assignment of rents, among other provisions. The act is scheduled for a third reading as it has passed the House and is in the Senate at the time of this writing.

HB 6146 would be a new law in the Public Health Code mandating the development and administration of fall-prevention training for unlicensed personnel working in nursing homes and that the nursing homes ensure such personnel completes such training. This bill was sent to the Health Policy Committee on June 1, 2022.

HB 6127 would repeal the Covid-19 Response and Reopening Liability Act, MCL 691.1451 – 1460. In particular, and among other provisions, it would remove the immunity for Covid-related claims, which presently states:

A person who acts in compliance with all federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the conduct or risk that allegedly caused harm is immune from liability for a COVID-19 claim. An isolated, de minimis deviation from strict compliance with such statutes, rules, regulations, executive orders, and agency orders unrelated to the plaintiff's injuries does not deny a person the immunity provided in this section.

This bill has been referred to the Committee on Government Operations as of May 24, 2022. A companion bill, HB 6128, would similarly repeal the protections in the MIOSHA, MCL 408.1085, and 408.1085a.

HB 4973 has become law on approval of the Governor on June 6, 2022, clarifying the liability of persons for three times the damage resulting from an injury to a bridge. The language of the revised statute states:

A person that injures a bridge maintained at public expense, or a public road, by drawing logs or timber on the surface of the road or bridge, or by any other act, is liable in damages to 3 times the amount of the injury, to be recovered in a civil action, brought by the governmental entity with jurisdiction over the bridge or road, to be expended in the repair of roads under the jurisdiction of the governmental entity.

HB 5713, 5714, 5715, 5716, and 5717 all address the creation of a felony criminal offense for "assisted reproduction," defined as a method of causing pregnancy other than sexual intercourse or for providing false or misleading information regarding the same. This set of bills has been reported by the Committee on Judiciary for a second reading in the House.

SB 39 and 43 amended governmental immunity statutes pertaining to roads by removing the references for county roads subject to a separate earlier statute. If passed, all roads would be addressed by MCL 224.21 (S.B. 39) and 691.1402 (S.B. 43).

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.

No-Fault Update

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IN A 2-1 DECISION, THE COURT OF APPEALS DECLARES A KEY SECTION OF THE 2019 NO-FAULT REFORM AMENDMENTS UNCONSTITUTIONAL AS APPLIED TO CLAIMS STEMMING FROM ACCIDENTS OCCURRING PRIOR TO JUNE 11, 2019

On August 25, 2022, the Court of Appeals released its long-awaited decision in *Andary v USAA Cas Ins Co,* Court of Appeals docket no. 356487. In a 2-1 decision, the Court of Appeals has declared the fee schedule/fee cap limitations set forth in MCL 500.3157(2) through (12) unconstitutional as applied to claims stemming from accidents that occurred before the effective date of the 2109 No-Fault Reform Amendments. This article will analyze the key holdings from the majority opinion, the issues raised by the dissent, and the practical implications of the court's ruling from a claims perspective.

First, some background on the judges who were assigned to the Court of Appeals' panel is in order. The majority opinion was authored by Judge Doug Shapiro. Judge Shapiro is a former Plaintiff's personal injury attorney from Ann Arbor, who was appointed to the Court of Appeals' bench in 2009 by former Democratic Governor Jennifer Granholm. Judge Shapiro was joined by Judge Sima Patel, who was just appointed to the Court of Appeals' bench earlier this year by Democratic Governor Gretchen Whitmer. Prior to being appointed to the Court of Appeals, Judge Patel was an appellate specialist with the well-known Geoffrey Fieger Law Firm. The dissent was authored by Judge Jane Markey. Judge Markey was elected to the bench in 1994 and she is one of the longest serving judges on the Michigan Court of Appeals.

The individual plaintiffs, Ellen Andary and Philip Krueger, were catastrophically injured in motor vehicle accidents occurring in 2014 and 1990 respectively. The third plaintiff is the Eisenhower Center, which is a traumatic brain injury rehabilitation facility in Ann Arbor that provided treatment to Phillip Krueger. Shortly after the No-Fault Reform Amendments were passed in 2019, the three plaintiffs filed suit in Ingham County Circuit Court, seeking a declaratory judgment that the 2019 No-Fault Reform Amendments, including the new fee schedule/fee cap limitations set forth in MCL 500.3157(2) through (12), were unconstitutional as applied to them. In lieu of filing an answer to the complaint, the two insurers, USAA Casualty Insurance Company (which insured Ms. Andary) and Citizens Insurance Company of America (which insured Mr. Krueger) filed a motion to dismiss, arguing that the 2019 No-Fault Reform Amendments were constitutional even as applied to claims stemming from accidents that occurred before June 11, 2019, the date that the No-Fault Reform Amendments became effective. Ingham Circuit Court Judge Wanda Stokes granted the motion to dismiss after extensive briefing and oral argument. Plaintiffs filed a motion for reconsideration and to amend their complaint to add a breach-of-contract claim. Judge Stokes denied these motions, noting that any such amendment to the complaint would be futile. Plaintiffs promptly filed a claim of appeal as of right with the Michigan Court of Appeals.

Issue I – Retroactivity

Generally speaking, statutes are presumed to operative prospectively. *Davis v State Employees' Retirement Board,* 272 Mich App 151, 155; 725 NW2d 56 (2006). In order to give a statute retroactive effect, the Legislature must clearly manifest an intent to do so. *Johnson v Pastoriza,* 491 Mich 417, 429; 818 NW2d 279 (2012). In this regard, the insurers pointed to two sections – one found in the No-Fault Act itself (Chapter 31) and one found in Chapter 21 of the Insurance Code (dealing with

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insurance rates). MCL 500.3157(14) makes it clear that the fee schedule/fee cap limitations apply to all "treatment" (defined in MCL 500.3157(15)(k) as including "products, services, and accommodations") for all claims for expenses incurred after July 1, 2021, without regard to whether the accident giving rise to the claim occurred before or after June 11, 2019. The majority does not discuss this new statutory provision in any way, shape or form.

The second statute, relied upon by the defendants to demonstrate that the Legislature intended the statute to apply retroactively, is MCL 500.2111f(8), which, like the fee schedule/ fee cap limitations, were part of the two bills that make up the 2019 No-Fault Reform Amendments, 2019 PA 21 and 2019 PA 22. This particular amendment has a rather interesting history. In the first No-Fault Insurance Reform Act, 2019 PA 21, the new statutory provision read as follows:

> An insurer shall pass on, in filings to which the section applies, savings realized from the application of section 3157(2) to (12) to treatment, products, services, accommodations, or training rendered to individuals who suffered accidental bodily injury from motor vehicle accidents that occurred *before the effective date of the amendatory act* that added this section. (Emphasis added)

The second bill, 2019 PA 22, amended this section to its present form:

> An insurer shall pass on, in savings to which this section applies, savings realized from the application of section 3157(2) to (12) to treatment, products, services, accommodations or training rendered to individuals who suffered accidental bodily injury from *motor vehicle accidents that occurred before July 2, 2021*. An insurer shall provide the director with all documents and information requested by the director that the director determines are necessary to allow the director to evaluate the insurer's compliance with this subsection. After July 1, 2022, the director shall review all rate filings to which this section applies for compliance with this subsection. (Emphasis added)

In her dissent, Judge Markey noted the significance of the changes in MCL 500.2111f(8), brought about by 2019 PA 22, as follows:

> It is clear that the change made to MCL 500.2111f(8) in 2019 PA 22 was to capture realized savings in regard to accidental bodily injuries occurring not only before June 11, 2019, but also those arising before July 2, 2021. [*Andary*, slip op, p. 6 n. 4 (Markey, J., dissenting).]

Nonetheless, Judge Shapiro's majority opinion dismisses the import of MCL 500.2111f (8) by noting:

> But this rate-setting provision does not mandate that the limits on benefits provided in MCL 500.3157 shall be applied to persons injured before its effective date. And the claim that it does so by implication is very weak. The statute merely provides that if there are such savings, they must be used to reduce future rates. Whether such savings will occur is not defined by this statute. For these reasons, we conclude that MCL 500.2111f does not 'clearly, directly and unequivocally' demonstrate an intent to apply the new limits retroactively. [*Andary*, slip op, pp. 5-6.]

Because there was nothing specifically in Chapter 31 of the Insurance Code (the No-Fault Insurance Act) that indicated that the fee schedule was to apply to those individuals injured in motor-vehicle accidents occurring before June 11, 2019, the majority concluded that the statute could not apply "retroactively."

Judge Markey was highly critical of the majority's dismissal of the import of MCL 500.2111f(8):

> I find this logic in rejecting the plain and unambiguous language of MCL 500.2111f(8) to be 'very weak.' In fact, the reasoning escapes me. To the extent that we are truly dealing with retroactive application, MCL 500.2111f(8) clearly, directly, and unequivocally demonstrates legislative intent to reach accidents and injuries occurring before June 11, 2019. [Citation omitted] The majority indicates that if there are "such savings" by an insurer under MCL 500.2111f(8), the insurer must reduce future rates. This argument appears to suggest or accept that insurers can indeed reap savings by making PIP payments consistent with MCL 500.3157 in relation to accidents occurring before July 2, 2021, which necessarily includes dates before June 11, 2019. And the majority's concern regarding '[w]hether such savings will occur' entirely misses the point that under MCL 500.2111f(8) the Legislature was effectively directing no-fault insurers to apply the fee schedules and limitations in MCL 500.3157 to existing PIP cases in order to realize savings. Finally, the majority dismisses MCL 500.2111f(8) because it is in a different chapter of the Insurance Code of 1956, MCL 500.100 et seq., then MCL 500.3157. This contention ignores the fact that MCL 500.2111f(8) incorporates MCL 500.3157 by direct reference and that the statutes were both part of the overhaul of the No-Fault Act under 2019 PA 21 and 2019 PA 22. [*Andary,* slip op, p. 6 (Markey, J., dissenting).]

The author will leave it up to the reader to decide which side has the better argument.

At this point, the reader may be wondering whether the Legislature could quickly correct this defect by enacting a simple, one statute amendment to MCL 500.3157, which reads something like this:

The provisions of MCL 500.3157(2) through (12) apply to all claims for benefits incurred after July 1, 2021, regardless of the date of loss giving rise to the claims for benefits.

Any such amendments, though, would be futile because the majority went on to note that even if the statute was properly retroactive, it still violated the Contracts

Clause in the Michigan Constitution, as it substantially impaired the obligations of the parties under the contracts that were in effect at the time of the accident—the insurance policy itself. It is to this topic that we now turn.

Issue II – Contracts Clause Violation

Article 1, Section 10 of the Michigan Constitution contains the following provision:

> No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

The majority acknowledges that statutes are presumed to be constitutional, and that the statute must be interpreted as being constitutional unless its unconstitutionality is "clearly apparent." The majority noted that in order for there to be a violation of the Contracts Clause of the Michigan Constitution, three factors must be considered:

(1) Whether a change in state law has resulted in a substantial impairment of a contractual relationship;

(2) Whether the legislative disruption of contract expectancies is necessary to the public good; and,

(3) Whether the means chosen by the Legislature to address the public need are reasonable.

With regard to the first factor, the majority concluded that application of the fee schedule/fee limitations to accidents that predated June 11, 2019, resulted in a "substantial impairment of the injured plaintiffs' rights under the policies." *Andary*, slip op, p. 12. The majority went on to note that before the no-fault reform measures, providers were paid without regard to fee schedules, and there was no cap on how many hours of attendant care could be provided by the injured person's family. However, under the new fee schedule limitations, providers of services not payable under Medicare would have their charges reduced by 45 percent from what they had been charging on January 1, 2019. As a result of these reductions, the majority recognized that, "The practical effect is that many providers will no longer be able to offer these services." (*Id.*). The majority summed up its analysis of this issue as follows:

> In sum, the impairments are more than substantial; they wholly remove numerous duties to be performed by one party to the contract after the other party has fully performed their duties under the contract. Accordingly, we conclude that the impairment of contract is severe. [*Id.*]

With regard to the second prong, the majority did not quarrel with the insurers' contention that the provisions of 2019 PA 21 and 2019 PA 22 concerned a legitimate public purpose of lowering no-fault insurance premiums. Nonetheless, the majority brushed aside these concerns by noting that:

> Defendants do not explain what significant and legitimate public purpose justifies applying the amendments to those injured before the effective date. Nor do they explain how applying the amendments retroactively is 'reasonably related' to the public purpose of lowering no-fault insurance rates. As discussed, the fee schedules and attendant care cap drastically reduce the previously unlimited PIP benefits, and there has been no demonstration that the rest of 2019 PA 21 would be affected if the amendments are applied prospectively only. The goal of lowering insurance rates is contingent on the lowering of benefits, but because the lowering of premiums is only prospective, it would severely limit the benefits promised in the policies when higher premium rates, reflective of the greater benefits, were charged and paid for. And since the insurers have already been paid for the benefits promised under those policies, retroactive application would permit insurers to retain all the premiums paid prior to the 2019 amendments while allowing them to provide only a fraction of the benefits set out in those policies. Giving a windfall to insurance companies who received premiums for unlimited benefits is not a legitimate public purpose, nor a reasonable means to reform the system. [*Id.* at 13.]

Accordingly, the majority concluded that even if there was a manifest intent to have the no-fault fee schedule/fee cap limitations apply to all accidents, regardless of when they occurred, the statute would still be unconstitutional, at least as applied to claims arising out of accidents occurring before June 11, 2019. This holding effectively precludes the Legislature from trying to legislatively "cure" the retroactivity problems identified in part 1 of the court's opinion.

Judge Markey disagreed with the majority's analysis of the constitutional issues. She noted that because the benefits are statutory in nature, they "may be revoked or modified at the will of the Legislature." *Romein v General Motors*, 436 Mich 515, 532, 462 NW2d 555 (1990). She also noted that given the well-documented concerns over the high cost of no-fault insurance in this state, the means adopted by the Legislature were "significant, reasonable, and legitimate, serving the public good" because by passing the no-fault reform measures, the Legislature required "insurance companies to pass cost savings onto insureds." *Andary,* slip op, p. 9 (Markey, J., dissenting). In short, in the eyes of Judge Markey, there was "nothing arbitrary or irrational about the Michigan Legislature taking steps to make no-fault insurance, which is mandatory for owners or registrants of motor vehicles, as affordable as possible for as many Michiganders as possible, especially where it is generally known that Michigan drivers had paid the highest auto insurance rates in the country." *Id.* at 10.

Issue III – Application of the No-Fault Fee Schedule to Claims Arising out of Accidents Occurring After June 11, 2019

Throughout the course of the *Andary* lawsuit, both sides were focused intently on the primary issue involved in that case; i.e., whether the 2019 No-Fault Reform Amendments applied to claims stemming from accidents that occurred before June 11, 2019. Lost in the arguments was the fact that the plaintiffs were not only challenging the application of the no-fault fee schedules/fee caps to losses occurring before June 11, 2019, they were also challenging the application

of the fee schedule/ fee caps to losses occurring **after** June 11, 2019, as well. In this regard, plaintiffs raised both due process and equal protection challenges. The Court of Appeals' majority agreed with the lower court that neither of the individual plaintiffs, Ms. Andary or Mr. Krueger, had standing to challenge the application of the no-fault fee schedule/ fee caps to losses occurring after June 11, 2019, given the fact that their accidents occurred in 1990 and 2014. However, the third plaintiff, Eisenhower Center, clearly had an interest in whether or not the fee schedule/fee caps were constitutional as applied to post-June 11, 2019, losses. In fact, the majority noted that "Eisenhower Center, as a provider of care and services to catastrophically injured accident victims, clearly retains a distinct and palpable injury that our decision regarding retroactive application does not resolve." Therefore, the Court of Appeals remanded the matter back to the trial court to determine whether or not the no-fault fee schedules/fee caps were unconstitutional as being in violation of the equal protection and due process clauses of the Michigan Constitution, **even as applied to post-June 11, 2019, losses.** In this regard, the Court of Appeals may have sent the proverbial "shot across the bow" that even application of the no-fault fee schedules/ fee limitations to post-June 11, 2019, losses may be unconstitutional as well.

WHERE DO WE GO FROM HERE?

The Court of Appeals' decision, while not unexpected given the makeup of the panel which heard the case, is nonetheless a bombshell to the insurance industry. To the extent that the insurance industry pinned its premium reductions, along with the recent $400.00 per vehicle refund on the assurance that the fee schedule/fee cap limitations would apply to expenses incurred after July 1, 2021, but arising out of pre-June 11, 2019, losses, those hopes have now been dashed.

The insurers filed an application for leave to appeal with the Michigan Supreme Court, which the Court granted. They also filed a motion in the Supreme Court to stay the effect of the Court of Appeals' published opinion, which the Court denied.

Without no stay, the Court of Appeals' decision will have a dramatic impact on claims for benefits that have already been processed under the no-fault fee schedules. We will next examine how the Court of Appeals' decision affects claims in three categories – pre-June 11, 2019, losses; post-June 11, 2019, losses; and MACP claims.

Effect on Claims Stemming from Pre-June 11, 2019, Losses

Insurers that have issued insurance policies will need to contact their medical expense auditing company and have them segregate previously processed claims for expenses incurred after July 1, 2021 into two categories – one for pre-June 11, 2019, accidents and one for post-June 11, 2019, accidents. With regard to the first category, those expenses would need to be repriced, utilizing the old "reasonable and customary" standard, and to the extent that there is a difference between the "reasonable and customary" amount and the fee schedule amount, the insurer will need to issue differential payments to the medical provider. **This writer anticipates a significant increase in the number of provider suits that will be filed in the next few months, in which the provider will be attempting to secure these differential payments in the event that the Court of Appeals' decision is ultimately affirmed by the Michigan Supreme Court.**

This would be a logistical nightmare for insurance carriers in this state. No doubt but that there are perhaps hundreds of thousands of claims that have been processed under the new fee schedule/fee cap limitations, even with regard to losses that occurred prior to June 11, 2019.

It also important to understand that the scope of the Court of Appeals' decision extends well beyond the attendant care and in-patient residential care that were specifically at issue in *Andary*. Every MRI scan, every physical therapy treatment, every injection, every chiropractic adjustment and every surgical procedure that arises out of a pre-June 11, 2019 loss will need to be repriced under the old "reasonable and customary" standard, and the appropriate differential payment issued.

Post-June 11, 2019, Losses

For the time being, the fee schedule/fee cap limitations apply to claims arising out of accidents occurring after June 11, 2019. However, as noted above, there is another constitutional challenge lurking, regarding the due process and equal protection claims referenced by Eisenhower Center in the *Andary* complaint, which will need to be addressed in the future. Right now, to the extent that the insurer has already paid those claims under the fee schedule, nothing needs to be done, assuming that there are no other issues (such as application of Medicare rules, improper coding, etc.)

Michigan Assigned Claims Plan Issues

By definition, there are no insurance contracts at issue in claims that are being handled by the Michigan Automobile Insurance Placement Facility (MAIPF), which operates the Michigan Assigned Claims Plan (MACP), and its servicing insurers. The benefits paid by the MAIPF/ MACP and its servicing insurers are purely statutory in nature. Therefore, because the *Andary* majority opinion is based on the existence of contracts of insurance between the insurance companies and their insureds at the time of the accident, is the MAIPF/MACP bound by this decision?

In the author's opinion, the answer is, no. In *Andary*, the insurers had argued that no-fault benefits are purely statutory in nature, which could be modified at the will of the Legislature. Judge Shapiro, writing for the majority, rejected this argument, noting that:

> Under *LaFontaine* [*v Chrysler Group LLC*, 496 Mich 26, 852 NW2d 78 (2014)], even if defendants are correct that no-fault benefits are purely statutory, the relevant statute is the one that existed when the policies were issued. **But we reject defendants' characterization; PIP benefits are not *purely* statutory in nature.** The no-fault act sets the mandatory minimum coverage for PIP policies and is the "rule book" for disputes over that coverage, [Citation omitted], but it does not follow

> that the policies sold by insurers promising unlimited lifetime care are nullities. Indeed, suits against insurers for PIP benefits are brought as contract actions, and insurers may pursue traditional contract defenses [which] have not been abrogated by the no-fault act. [Citation omitted]. It is clear therefore that a PIP policy confers enforceable contract rights upon those entitled to benefits. [*Andary,* slip op, p. 9.]

In fact, Judge Shapiro's opinion overlooks the fact that there is an entire class of claimants out there who are receiving no-fault insurance benefits without the benefit of an insurance contract – those individuals claiming under the MACP.

Since the majority opinion is based on the existence of a contract of insurance in effect between the claimant and the injured party (or one where the injured party is in an intended third-party beneficiary of the insurance contract), the flip side should be true. If there is no contract of insurance (and there cannot be in the case of an MACP claimant), then there can be no reliance on the existence of a contract that guarantees them lifetime, unlimited benefits.

Obviously, this issue was not before the Court of Appeals, as neither Andary nor Krueger were MAIPF/ MACP claimants. Therefore, it would seem that in cases involving MAIPF/MACP claimants, their benefits are, in fact, purely statutory in nature and as such, can be modified at will be the Legislature. Therefore, it is the author's opinion that the fee schedule/fee cap limitations set forth in MCL 500.3157(2) through (12) apply to MAIPF/MACP claimants, regardless of the date of loss.

CONCLUDING REMARKS

Obviously, all interested parties will have a better idea of how this significant decision affects their claims once the Supreme Court reviews the matter on an expedited basis. As matters currently stand, there is nothing the Legislature can do with regard to the application of the fee schedule/fee cap limitations to pre-June 11, 2019 losses. Rather, it is up to the Supreme Court to weigh in on that issue.

In hindsight, wouldn't it have been better if the bills that eventually became 2019 PA 21 and 2019 PA 22 had been subject to committee hearings where no-fault experts, on both sides of the aisle, could have weighed in on the proposed reform measures, pointed out potential constitutional deficiencies (such as what has now come to fruition) and other problems with the initial draft (such as the problems with motorcyclists being bound by the motor vehicle owner's PIP choice options) in order to give the Legislature a road map to correct these problems? Maybe explicitly "grandfathering in" claims arising out of accidents occurring before June 11, 2019, in exchange for a lesser reduction in PIP premiums and foregoing the $400 per vehicle premium refund would have been a better solution. Wouldn't it have been better if those most affected by no-fault reform, including insurers, claimants, and providers, had an opportunity to weigh in on the specific provisions of the bills that affected their interests (most claims representatives I have spoken with have indicated that the fee schedule/ fee cap limitations are far too complex), in order to make sure that the reforms did what they were supposed to do, and that there would be no unintended consequences? Maybe basing the fee schedule/ fee cap limitations on Michigan's already–existing workers compensation fee schedule would have been a simpler fix. Wouldn't it have been better if the Legislature had actually read the bill before they voted on it? After all, 2019 PA 21 was 115 pages in length and it took this writer literally hours over Memorial Day weekend in 2019 to read the bill and understand its implications. Wouldn't it have been better if the Governor had likewise read the bill and understood its implications before she signed it? As matters now stand, the Court of Appeals' decision in *Andary* represents a significant blow to the insurance industry, and this writer is not quite sure that it will be, or can be, fixed down the road.

Supreme Court Update

By: Stephanie Romeo, *Clark Hill PLC*
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Supreme Court Focuses on Factual Findings in Clarifying Standard for Threatening the Security of a Penal Institution

The Michigan Supreme Court remained busy throughout the second quarter of 2022 issuing six opinions. One opinion addressing criminal sentencing provisions focused heavily on the factual findings necessary to satisfy the standard, reminding attorneys of the importance of developing a detailed factual narrative in the written briefing and oral hearings and trials. Three of the Supreme Court Justices dissented, further emphasizing the importance, yet intricacies and challenges, of developing a factual narrative. *People v. Dixon*, __ Mich __; __ NW2d __; 2022 WL 1278733 (Apr. 28, 2022; Docket No. 162221).

Facts: Defendant Hamin L. Dixon pleaded guilty in the Chippewa Circuit Court to attempted possession of a cell phone. MCL 800.283a. Defendant was serving a sentence at a state correctional facility when prison staff found him in a bathroom stall near a cell phone. Prison staff also found a cell phone charger in the defendant's shared prison cell. Accordingly, the defendant was charged with possession of a cell phone in a prison. Defendant pleaded guilty to attempted possession in exchange for dismissal of the possession charge and withdrawal of the prosecution's request for habitual-offender sentencing. The trial court assessed 25 points under Offensive Variable (OV) 19 for conduct that threatened the security of the prison. See MCL 777.49(a). The court sentenced defendant to 11 to 30 months in prison.

Defendant later moved to correct what he believed to be an invalid sentence, arguing that the court should have assessed zero points under OV 19 because there was no evidence that his conduct had threatened the prison's security. The court denied the motion and concluded that there was no set of circumstances under which possession of a cell phone would not threaten the security of a prison.

The Michigan Court of Appeals affirmed the trial court's holding and reasoned that possession of a cell phone in a prison is inherently dangerous, just like the possession of drugs in a prison. Defendant sought leave to appeal in the Supreme Court and, in lieu of granting leave to appeal, the Court ordered oral argument on the application.

Ruling: In an opinion joined by four of the seven justices, the Michigan Supreme Court held that a prisoner's possession of a cell phone justifies a 25-point score for OV 19 only if the facts establish that the defendant's conduct actually threatened the security of the prison. Here, it did not. In reaching this conclusion, the Court held that two factual findings are necessary to satisfy the standard for threatening the security of a penal institution: (1) the defendant engaged in some conduct that (2) threatened the security of the prison. The Court held that the court of appeals failed to address the lack of "conduct" by defendant. Other than being near the cell phone when it was found, there was no evidence of "conduct" by defendant. The Court of Appeals essentially found that possession alone was sufficient conduct to warrant a score of 25 points for OV 19. The Court also noted that the cases cited by the Court of Appeals were inapposite, as those cases focused on each defendant's **smuggling** of controlled substances into prison, which was beyond mere drug possession. One of these cases also involved a defendant who attacked an inmate because he believed the inmate had

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informed jail authorities of the plan to smuggle drugs.

While the mere possession of an item, such as possession of a gun, can at times threaten the security of a prison, determining whether possession of a cell phone threatens the security of a prison requires an assessment of the accused's conduct beyond possession itself as a cell phone may have non-threatening uses. The Court found that the Court of Appeals' reasoning that mere possession of a cell phone in a prison is a threat to the prison's security fails to account for the specific facts of the possession, which the statute regarding OV 19 requires. The reasoning of the Court of Appeals would only be persuasive if OV 19 instructed the court to assess 25 points for possession of a cell phone in prison, but instead, OV 19 requires the court to find that defendant's conduct threatened the security of the prison. Because the sentencing court found no acts beyond constructive possession, there was no evidence that defendant's conduct threatened the security of the prison, so OV 19 was improperly scored, and the case was reversed and remanded.

Two of the Court's dissenting justices opined that common sense and the overwhelming consensus of legal authorities indicated that prisoners in possession of a cell phone pose an obvious danger to prison staff and other inmates, regardless whether the phone has been used or is being used to commit a new crime at the moment of discovery. The other dissenting justice agreed that simple possession of a cell phone might not be enough to assess 25 points for OV 19 but disagreed that the statute regarding OV 19 imposed two independent requirements, especially where the majority acknowledged that mere possession could be considered conduct, but not sufficient conduct to score 25 points under MCL 777.49(a). This justice suggested that scoring points for OV 19 should require a finding that a defendant "intended" to threaten the security of a penal institution, which would be a simpler test than determining an item's inherent dangerousness.

Practice Pointer: This case heavily focused on the factual findings necessary to satisfy a legal standard. Whether preparing a motion for summary judgment or preparing for a jury trial, defense attorneys are reminded to distinguish inapposite cases and delve deep into the facts of the matter. Here, the Court of Appeals failed to address the lack of any evidence of "conduct" by the defendant and disregarded the specifics facts of the possession, which the Supreme Court described as a "textual shortcut." While it may seem tedious at times, we should not take our own shortcuts in developing or reviewing evidence. Such a shortcut may prove not to be a shortcut after all. This case also reminds us that even when an anticipated ruling seems obvious or "common sense," attorneys should not assume a court will view the facts in the same light without sufficient development or analysis.

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

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