MICHIGAN DEFENSE
QUARTERLY

Volume 39, No. 3 - 2023

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2023 ROSTER

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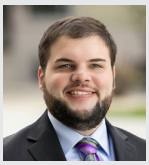

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MICHIGAN DEFENSE
QUARTERLY

Volume 39, No. 3 - 2023

Cite this publication as 39-3 Mich Defense Quarterly

Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

President's Corner

By: John Mucha, III, *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.

WHAT I LEARNED AT THE LEGAL EXCELLENCE AWARDS

On March 16, 2023, the MDTC held its annual Legal Excellence Awards ceremony and celebration at the magnificent Gem Theater in downtown Detroit. The event was very well attended (over 120 attendees, including many judges from a variety of courts in Michigan) and was very entertaining, in no small part due to the quick wit and humor of our Master of Ceremonies, Charlie Langton, of local TV and radio fame. It was indeed an honor for me to hand the awards to this year's recipients, who included John Eads (Excellence in Defense Award), James Gross (Excellence in Defense Award), Nicole Joseph-Windecker (Young Lawyers Golden Gavel Award), Kyle Kamidoi (Young Lawyers Golden Gavel Award) and Hon. Kwame Rowe (Judicial Award of Excellence). Congratulations to all!

What really impressed me about this group of award recipients was their depth of commitment to the practice of law and their universal intensity in expressing their gratitude. This was not merely a casual thank you for the award, but more often than not was an expression of a deeply-felt gratitude for the people in their lives who were instrumental in instilling in them the drive and passion to be the best. Listening to the remarks of these recipients, I could not help but be awed by their comments about the persons that made the greatest difference in their professional lives.

Some spoke of the essential parental nurturing they received early on and the confidence it gave them to strive. Others spoke of the support they received from a spouse or other loved one, sometimes financial, always emotional, to get through law school, and then to stay strong as a young attorney trying to make it.

But most interesting of all were the comments of appreciation directed toward the mentors of the award recipients and the fortuitous circumstances they found themselves in, being lucky enough to have been paired with a person who taught and guided them. We have all heard the phrase "all it takes is one", and how true it is. For each of these award recipients, all it took was one person to take the time and to make the effort to show the way and teach the keys to being an effective advocate. When a mistake was made, it became a learning experience, not an event that permanently stained the young attorney. More often than not, that encouragement and a chance for a second opportunity could be found in the culture of the mentor's office as a whole. Several of the award recipients commented on how grateful they were to be surrounded by supportive colleagues, and how the feeling of belonging to a team pulling for each other and having each other's back was so important and rewarding.

Of course, these award recipients all had in common a strong desire to be part of the fabric of the legal community. They circulated, maintained healthy social relationships, and valued both the camaraderie and opportunities that came with it. These award recipients deepened my belief that in order to be effectively mentored, you have to be physically around the mentor, and have to be receptive to being mentored. If you are not, you risk being "out of sight, out of mind," and you put yourself out of reach of the learning opportunities and friendships that you did not even know were possible. I have yet to see a recipe for success in the legal profession based on isolation.

Let me close by saying **congratulations** again to all of this year's Legal Excellence Award winners, and by saying **thank you** for the insight and inspiration your comments and achievements have provided.

The Small Print Taketh Away! Considerations for Settling Your Next Michigan No-Fault Auto Claim

By: Matthew LaBeau, *Collins Einhorn Farrell PC*

Introduction

A large majority of civil lawsuits settle before trial. While some statistics reflect that 95% of cases settle, the percentage is likely higher. This is especially applicable to first-party no-fault personal injury protection (PIP) cases in Michigan. Penalty interest and attorney fee provisions[1] provide a bad-faith type component to these claims that creates a huge incentive for insurance carriers to resolve them. In addition, it is not unusual for plaintiff attorneys to have concerns over the causation of injuries, the reasonableness of claimed benefits, or other components of the claim. Therefore, these claims frequently head down the path to settlement.

Given the likelihood that any given PIP claim will settle before trial, it is important to have solid understanding of the benefits available and whether there is an opportunity to obtain a release of some, or all, future benefits. It is also important to be aware of the various pitfalls on settlements that appear to resolve the claim, only have to additional exposures arise. This article discusses important considerations when attempting to settle your next PIP case.

Matt focuses his practice on defense litigation in first party No-Fault claims, uninsured and underinsured motorist claims, automobile negligence, premises liability, general liability, and contractual disputes. He has also successfully defended numerous corporations against product liability and construction defect claims. Matt has extensive experience in defending catastrophic injury claims, including claims for attendant care, home modifications, and vehicle modifications, as well as consulting insurers regarding catastrophic claims prior to litigation. He has vast experience in all aspects of the litigation process from the discovery process through trial and routinely achieves successful results for his clients. Matt has been a leading authority on the reform of Michigan's No-Fault Act and has numerous presentations and publications on the impacts of the new legislation.

Matt completed ICLE's extensive 40-Hour General Civil Mediation Training, equipping him with specialized negotiation methods to mediate complex civil matters. He can be reached at matthew.labeau@ceflawyers.com or 248-663-7724

The Standard First-Party No-Fault Settlement

In the instance of a Michigan PIP claim, an insurer is liable for benefits without regard to the fault of the parties involved in the accident.[2] An insurer is liable to pay benefits for "accidental bodily injury arising out of the ownership, operation, and use of a motor vehicle as a motor vehicle.[3]"

The default position on Michigan no-fault claims is that PIP benefits are payable as the loss accrues.[4] In addition, benefits must be incurred to be payable.[5] Theoretically, if a matter were to proceed to trial with a result favorable to the plaintiff, it would only include no-fault benefits that had accrued/been incurred at that time, and would not include future benefits.[6] Therefore, unless stated otherwise, a Michigan PIP settlement generally includes benefits to present, only.

There are four main categories of benefits available to a claimant:

1) **Allowable expenses.**[7] These benefits are defined as "reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, and rehabilitation." While this broad definition includes medical testing and treatment, it also includes medically related expenses such as attendant/nursing care, medical transportation/mileage, prescriptions, home and vehicle modifications, and guardianship/conservator fees. Allowable expenses may be available for a lifetime, or subject to limited coverage levels of $50,000,[8] $250,000, or $500,000 chosen by the policy holder. In addition, treatment or testing provided after July 1, 2021 may be subject to a fee schedule that caps the amount of reimbursement.[9]

2) **Work loss.**[10] This benefit is defined as "loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." This also includes individuals who were temporarily unemployed at the time of the accident.[11] This is subject to a monthly cap and is only available for three years from the date of loss. It should be noted that this is not loss of earning capacity, actual loss of wages must be shown.[12]

3) **Household replacement services.**[13] These benefits are defined as "expenses not exceeding $20 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injury person would have performed for himself, herself, or his/her dependents." These are "ordinary and necessary" services, such as taking out the trash, cleaning the house, or making the beds. This is contrasted from attendant care, an allowable expense, which consists of services required for a person's medical condition. This benefit is only available for three years from the date of loss.

4) **Survivor loss benefits.**[14] When a person entitled to coverage dies, after the time of death, dependents may claim two categories of benefits. The first is contributions of tangible things of economic value, not including services, that the dependents would have received for support. The second is expenses, not exceeding $20 per day, reasonably incurred by the dependents in obtaining ordinary and necessary services that the deceased would have performed for their benefit. This benefit is only available for three years from the date of loss.

If benefits are found to be overdue,[15] an insurer is responsible for penalty interest in the amount of 12% simple interest per annum. In addition, an insurer is responsible for penalty attorney fees if benefits are found to be unreasonably delayed or denied.[16]

> A good-faith payment by a carrier to the person it believes is entitled to the benefits discharges the carrier from liability to the extent of the payment. However, that is not the case if the carrier receives notice in writing of a claim by some other person.

As with any settlement, it is essential to obtain a release of liability from the claimant. The release should specify which of the above benefits are released, and the date through which they are released. With regards to allowable expenses, the settlement may specify which providers are part of, or excluded from the resolution, or the release may broadly refer to allowable expenses. The release should contain an agreement by the claimant to use the settlement proceeds to pay for the outstanding medicals claims as well as any liens. Ideally, there is an indemnity clause as to outstanding medical expenses and other liens, but the release should at least contain a hold harmless provision. Any settlement should include a release or waiver of any claims for interest and attorney fees as well as the above referenced benefits.

Settlement of Future First-Party No Fault Benefits

It may be in the best interest for both the claimant and the carrier to negotiate a settlement of some or all future benefits. The carrier may be interested in closing out the claim completely, and the claimant may be interested in receiving additional consideration to increase the settlement amount. A claimant is allowed to release future benefits.[17] Frequently, the decision of whether to release futures hinges on the claimant weighing whether they will need benefits against the value of cashing in the claim early. Just like any deal, there must be value for both parties. The insurer and the claimant must be satisfied that the settlement amount justifies the terms.

A settlement can include **all** future benefits, or some future benefits. If the claim is within the first three years of the accident, a claimant will often agree to a release of work loss and household replacement services benefits through three-year anniversary. A claimant is less likely to waive allowable expenses, especially if there is a significant injury, lifetime coverage available, or a large portion of available limits remain. That being said, an opportunity to obtain a release of future allowable expenses is sometimes available when damages are minimal, the person has healed from their injuries or has completed treatment, or simply the settlement funds being offered are sufficient.

Even if a claimant will not settle all future allowable expenses, there are opportunities to close out various exposures. For example, a claimant may agree to release future attendant care benefits, prescription co-pays, or medical mileage. A claimant may agree to release all future allowable expenses except for "medical treatment." Also, a claimant may agree to release all future benefits related to certain injuries, but not others. For example, the claimant could release future benefits related to the neck, but not the knee.

Michigan Catastrophic Claims Association ("MCCA")

The MCCA is an unincorporated, non-profit association with mandatory membership of all insurance carriers that write automobile insurance in Michigan. It is funded by premiums from those carriers and an assessment to policyholders with unlimited allowable expenses coverage. It acts as an indemnitor of Michigan PIP insurance carriers for benefits in excess of a statutory threshold based on the year of policy issuance or renewal for the subject date of loss.

Insurance carriers must report a claim initially to the MCCA when it involves certain injuries, such as traumatic brain injury, spinal cord injuries resulting in quadriplegia or paraplegia, severe burns, or amputation. In addition, a claim must be reported when the outstanding loss reserve and payments exceed $300,000.[18]

Once a claim is reported, there are various ongoing reporting requirements. In addition, insurance carriers must seek pre-approval from the MCCA for certain claims actions, including any proposed settlement agreement, the amounts to be paid for attendant care and residential care, attendant-care contracts, and agreements to modify a residence or vehicle. This pre-approval extends to agreements to arbitrate, or any other binding alternative-dispute-resolution agreement. A failure to seek pre-approval or report as required can result in the MCCA's refusal to provide reimbursement for some or all benefits paid.[19]

Other Insurance and Medicare

Policyholders are permitted to coordinate their no-fault policies, making health insurance and other accident insurance primary to pay benefits.[20] However, if the no-fault policy is not coordinated, or if the health insurance has a motor-vehicle exclusion, then no-fault insurance will pay benefits on a primary basis. In those instances, health insurance will assert a lien. Regardless of coordination, Medicare and Medicaid are always primary to PIP benefits.[21] Therefore, if Medicare or Medicaid pays any allowable expenses, they will assert a lien.

As for release of future allowable expenses, there is no specific Medicare set aside provision relating to no-fault insurance. There is a set aside for workers-compensation benefits under 42 CFR 411.46 which is instructive. In that provision, set asides are not mandatory. Furthermore, the general rule is that medical expenses incurred after the date of a settlement are payable under Medicare, unless the settlement allocates certain amounts for specific future medical services. This same rationale extends to liability cases in that Medicare will not assert a lien on future medical expenses in a liability case unless there is a specific allocation for future medical expenses. Thus, one could argue that the same rationale would extend to a case involving no-fault insurance.

> Theoretically, if a matter were to proceed to trial with a result favorable to the plaintiff, it would only include no-fault benefits that had accrued/been incurred at that time, and would not include future benefits.

The takeaway - a settlement agreement should not make a specific allocation for future medical expenses. It is also important to note that the penalty for non-compliance would be that the claimant is precluded in whole or in part from seeking further Medicare benefits. So the risk is entirely on the claimant. While there is no reason to go against a Medicare set aside if a claimant wants to do one, there is also no reason for a no-fault carrier to insist on one as part of a settlement.

In general, the best practice is to have a release that requires the claimant to satisfy any and all liens out of the proceeds of the settlement. In the instance of a case with a release of future allowable expenses, it is common practice to require the claimant to defend, indemnify, and hold harmless the carriers as to any liens.

Certain other governmental benefits can be set off by the PIP carrier, and should be considered when evaluating potential settlement of a claim. Benefits provided or required to be provided under the laws of any state or the federal government must be subtracted from the PIP benefits otherwise payable for the injury.[22] The governmental benefits may only be set off against like kind no-fault benefits.[23] This set off applies to benefits such as Social Security disability, workers compensation, and unemployment benefits.

Providers and Assignments

PIP benefits are payable to the injured person.[24] However, a healthcare provider can separately claim and assert a direct cause of action for overdue and outstanding benefits. A good-faith payment by a carrier to the person it believes is entitled to the benefits discharges the carrier from liability to the extent of the payment. However, that is not the case if the carrier receives notice in writing of a claim by some other person. There are provisions for petitioning a court if there is a dispute as to who should receive payment.

These provisions can create issues when settling medical expenses with claimants. Frequently, in settlement negotiations with a claimant, the claimant provides a list of outstanding medical expenses as part of the settlement demand. If not already paid, a carrier may settle that claim with the expectation that the claimant will turn around and satisfy those charges. It has become common practice by healthcare providers to request that their patients execute an assignment of their right to pursue payment of the charges. If a carrier receives notice of that assignment, but subsequently pays or settles that charge with the claimant, there is a risk that payment will not discharge the claim. A similar situation occurs if a carrier pays or settles an expense after service of a lawsuit by the healthcare provider.

Therefore, when settling with a claimant, we require them to acknowledge that they have not executed any assignments, and to indemnify, defend, and hold harmless to the extent any claims have assignments. If the claimant knows of any assignments, they will generally insist those providers and their charges be excluded from the settlement. This language, coupled with a stated obligation that the claimant is responsible for paying medical expenses out of the proceeds helps create avenues to defer liability should an assignment come up later.

Conclusion

Michigan PIP claims present a variety of issues that need to be evaluated on a case-by-case basis. In certain cases, the parties achieve a settlement that includes all future benefits. Other matters only include a resolution of benefits through the present because the claimant, the insurance carrier, or both did not deem it appropriate. When evaluating a possible settlement amount and proposed terms, the parties must consider the impact of priority of coverage, possible setoffs and the possible separate claims of medical providers. In addition, it's important to consider MCCA involvement, and the necessary steps for reimbursement must be taken. With this foundational knowledge, you can bring your next PIP case to a successful resolution.

Endnotes

1 MCL 500.3142; MCL 500.3148.

2 MCL 500.3105(2).

3 MCL 500.3105(1).

4 MCL 500.3142(1).

5 MCL 500.3107.

6 This is subject to collateral estoppel and res judicata issues that may prevent the re-litigation of certain issues.

7 MCL 500.3107(1)(a).

8 Only for Medicaid eligible individuals.

9 MCL 500.3157. *Andary v USAA*, __ Mich App __; __ NW2d __; 2022 WL 3692767 (2022), lv gtd, __ Mich __; 979 NW2d 823 (2022) found that claims with accidents occurring prior to June 11, 2019 are not subject to the fee schedule. The Michigan Supreme Court granted the defendants' application for leave to appeal and heard argument in March 2023. In addition, the Department of Insurance and Financial Services (DIFS) issued Bulletin 2021-38-INS, which excludes certain categories of allowable expenses from the fee schedule.

10 MCL 500.3107(1)(b).

11 MCL 500.3107a.

12 *Nawrocki v Hawkeye Security Ins Co*, 83 Mich App 135; 268 NW2d 317 (1978).

13 MCL 500.3107(1)(C).

14 MCL 500.3108.

15 No-fault benefits are overdue if not paid within 30 days of the receipt of proof of the fact and of the amount of loss sustained. MCL 500.3142.

16 MCL 500.3148.

17 *Lewis v Aetna Casualty Co,* 109 Mich App 136; 311 NW2d 317 (1981).

18 See MCCA Plan of Operation, Article 10.

19 See MCCA Plan of Operation, Article 10.

20 MCL 500.3109a.

21 *Varacalli v State Farm,* 763 F Supp 205 (ED Mich, 1990); *Workman v DAIIE,* 404 Mich 477; 274 NW2d 373 (1979).

22 MCL 500.3109.

23 *Jarosz v ACIA*, 418 Mich 565; 345 NW2d 563 (1984).

24 MCL 500.3112.

Green Lighting Solicitation: *the Masks We Wear…or Don't*

By: John Hohmeier, *Scarfone & Geen*

Hark ye yet again—the little lower layer. All visible objects, man, are but as pasteboard masks. But in each event—in the living act, the undoubted deed – there, some unknown but still reasoning thing puts forth the mouldings of its features from behind the unreasoning mask. If man will strike, strike through the mask! How can the prisoner reach outside except by thrusting through the wall?[1]

"What is he talking about? Oh, here we go again…" Yes, for sure, here we go again. To be fair: this dithyramb birthed from the proper side of common sense and reason has been percolating for a while now … sometimes, things just aren't fair, are they? Everyone feels that way from time to time, even when doing the right thing feels wrong. Certainly I felt that way when the Court of Appeals released the decision in *Richardson v Allstate Ins Co*,[2] which essentially green lit the age-old practice of soliciting auto-accident victims. Others were sickened, tool.

Word spread of some sabre rattling; the lowly serfs were making a rumble. So I have no shame in saying that it took the passion and verve of a notable Wayne County Circuit Judge to force my pen to this paper. Judge David Allen recently "followed" the law in disgust, but in doing so he also accurately criticized the law he was obligated to follow.[3] Again, and for those of you who are not familiar, there was **clear** and acknowledged solicitation in *Richardson*, but the Court of Appeals chose to ignore it.

Judge Allen said this about it:

> **Those of us in the No Fault trenches** day in and day out with thousand case no fault dockets **know all too well the** often **incestuous relationship between those that improperly solicit and direct care and the medical providers that benefit by criminally solicitous ambulance chasers**. To say or imply, as the *Richardson* decision does, that certain no fault "medical" providers are innocent bystanders, is naïve at best and disingenuous at worst.[4]

Indeed: straight facts, but let's step back a few decades for some context. The initial "ambulance chasing" statute, MCL 750.410, is very old and was in place about 40 years before the enactment of the no-fault act.[5] Traditionally, the statute was directed at attorneys and outlined clear repercussions for attorneys directly soliciting personal-injury victims for the purpose of representing them and claiming a contingency fee.

The pertinent portion of MCL 750.410 states:

> A person, firm, copartnership, association, or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, copartnership, association, or organization of any kind, either incorporated or unincorporated, or of any division, bureau, or committee of that association or organization, either incorporated or

John Hohmeier joined Scarfone & Geen, P.C. in 2012. Since joining the firm, Mr. Hohmeier has focused his practice on first- and third-party No Fault litigation. He was both Trial and Appellate Counsel in Dawoud v State Farm Mut Auto Ins, where the Court of Appeals issued a published opinion further clarifying the derivative nature of medical provider's rights in the No Fault arena. Mr. Hohmeier's current focus remains on the recent explosion of medical provider litigation against insurance carriers.

Mr. Hohmeier is also a recipient of the Golden Gavel Award given out by the Michigan Defense Trial Counsel in recognition of significant achievement within his area of practice, the community, and the advancement of young attorneys. Mr. Hohmeier obtained his Juris Doctorate from Thomas M. Cooley Law School. While at Thomas M. Cooley Law School, Mr. Hohmeier's commentary on the interaction of emotion and brain chemistry with a person's ability to recall veridical memories was published in the Thomas M. Cooley Law Review. He can be reached at jhohmeier@scarfone-geen.com or 248-291-6184

> unincorporated, who shall directly or indirectly, individually or by agent, servant, employee, or member, solicit a person injured as the result of an accident, his administrator, executor, heirs, or assigns, his or her guardian, or members of the family of the injured person, for the purpose of representing that person in making a claim for damages or prosecuting an action or causes of action arising out of a **personal injury claim** against any other person, firm, or corporation, or to employ counsel for the purpose of that solicitation, is guilty of a misdemeanor, and shall upon conviction thereof, if a natural person, be punished by a fine not to exceed or by imprisonment for 6 months, or both. The same penalties apply upon conviction to a member of a copartnership, or an officer or agent of a corporation, association, or other organization, or an officer or agent, who shall consent to, participate in, or aid or abet a violation of this section upon the part of the copartnership of which he is a member, or of the corporation, association, or organization of which he or she is such an officer or agent. **A contract entered into as a result of such solicitation is void.**[6]

Now decades after solicitation became a crime in Michigan, the *Richardson* decision completely disregarded this last line of the statute. Consequently, Judge Allen is correct when he declared in his opinion that "the *Richardson* panel failed to recognize the civil remedy included in MCL 750.410 which provides that any contract entered into 'as a result of such solicitation' is void." Of course – just look at the last line of the statute that specifically voids contracts that are entered into as the result of solicitation.

It is important to note that there is no distinction within the statute regarding actual or implied contracts, and the statute does not directly specify that it is limited to contracts between attorneys and potential plaintiffs.[7] In fact, the entire purpose of the statute was to take away the financial incentive of a lawyer to solicit a personal-injury victim for financial gain. It should go without saying that the statute was put in place long before medical providers began suing insurance carriers directly, like they do now dozens of times every single day.

In case you were curious, yes: the statute applies to a medical provider who solicits an auto-accident.[8] Again, the key language in the statute that applies to medical providers is the language that prohibits the solicitation of a potential patient "for the purpose of…prosecuting an action or causes of action arising out of a personal injury.…**A contract entered into as a result of such solicitation is void**."[9] This analysis is altogether absent from the *Richardson* opinion.

> It is utter nonsense to say that the criminal solicitation of an auto-accident victim and then direction to a medical provider is not related to the medical treatment that necessarily follows the solicitation.

So let's look at *Richardson*. In *Richardson*, the plaintiff was improperly solicited by her prior attorney.[10] As a result, Allstate essentially argued that the improper solicitation rendered all of the medical treatment that followed unlawful.[11] While the trial court granted Allstate summary disposition and dismissed the entire case, the Court of Appeals overturned the dismissal and reinstated the case.[12] In doing so, the Court of Appeals essentially said that Allstate did not present any persuasive argument that a criminal statute like MCL 750.410 could be used in a civil matter.

> The Court in *Richardson* indicated that:
>
> MCL 750.410 is a criminal statute, and provides no civil remedy or cause of action for its enforcement. That precludes the use of any public policy reasoning underlying the statute as a vehicle to extend the statute beyond its limits to provide relief in this civil matter. It is well settled that criminal statutes are to be strictly construed, **absent a legislative statement to the contrary**.[13]

In addition to the statute explicitly stating "personal injury claim," the court completely missed that **there is a civil remedy specifically articulated in the very last sentence of the pertinent part of MCL 750.410**, i.e., "[a] contract entered into as a result of such solicitation is void." What is going on here? There is a clear civil remedy written right into the statute. In defending these claims, however, this is not the only distinction that can be made between the *Richardson* decision and matters where a provider may have directly solicited the patient.[14]

In reversing the trial court, and stating the obvious, the court in *Richardson* went further than needed when it declared that, under the statute, "the only prohibited solicitation is that which is substantially motivated by pecuniary gain."[15] So, apparently there was no such motivation in *Richardson*? In the court's own words:

> In defining solicitation in this manner, the statute could best prevent those aspects of solicitation that involve fraud, undue influence, intimidation, and overreaching. This is because there is a greater likelihood of harm to the client as a result of solicitation of personal injury claims:
>
> Personal injury claims, in contrast with general civil litigation and personal injury defense, are almost universally handled on a contingent fee basis and there is no fixed dollar value for the claimant's injuries. The combination of these factors creates opportunities for taking advantage of the client.
>
> Defendant fails to provide authority for the proposition that

> criminal solicitation may form the basis for recovery on a motion for summary disposition, and thereby bar a plaintiff's claims for no-fault benefits….**the trial court failed to provide its reasoning for holding plaintiff to the standard of the criminal statutes, and thereby dismissing her claims**.[16]

In addition to the statute explicitly stating "personal injury claim," the court completely missed that there is a civil remedy specifically articulated in the very last sentence of the pertinent part of MCL 750.410, i.e., "[a] contract entered into as a result of such solicitation is void."

The bolded comment is unadulterated gibberish because while the "plaintiff" in *Richardson* was the injured person, there is nothing in MCL 750.410 indicating that it is the "plaintiff" who needs to commit the criminal act.[17] In any potential lawsuit involving bills for providers, it is likely that the provider is directly seeking payment of bills. If so, the wrongful-conduct rule certainly can be used against medical providers when they file suit, obviously. This further distinguishes some provider cases from *Richardson*.

> In fact, the *Richardson* Court noted this:
>
> [T]he wrongful-conduct rule has no application to these proceedings because that rule only applies when a **plaintiff engages in wrongful conduct.** In this case, there is no suggestion that plaintiff engaged in unlawful solicitation, and to the extent her initial counsel may have, he is not a plaintiff. How plaintiff contracted with her attorney is irrelevant to her claim for no-fault benefits.[18]

But…"how plaintiff contracted with her attorney is irrelevant"? Seriously? The court's reasoning in *Richardson* was that because the solicitation by the attorney was unrelated to plaintiff's medical treatment, the treatment could not be considered unlawful. What? It is utter nonsense to say that the criminal solicitation of an auto-accident victim and then direction to a medical provider is **not** related to the medical treatment that necessarily follows the solicitation. If that's true, then what's the point of soliciting? Hogwash. Masks off.

Conclusion

We all wear masks, and the time comes when we cannot remove them without removing some of our own skin.[19]

We all wear masks … even us lowly grunts spelunking through the no-fault trenches riddled with bodied cases born of the incestuous act of solicitation. The statute is there for a reason, but nobody uses it, why? Is it because an entire facet of the legal industry is sustained by this improper practice? Maybe. Is it because nobody wants to bite the hand that feeds them? Could be. Either way, the Court of Appeals got it wrong in *Richardson* because, if nothing else, they did not even comment on the **obvious** criminal solicitation that set the claim in motion.

If the governing bodies are going to wear masks of ignorance and turn a blind eye on the rampant solicitation that permeates Michigan's no-fault docket, then at least give us serfs and grunts — the ones on the front line — the tools we need to defend the Michigan consumer who already pays too much for no-fault insurance. Rest assured, it is the Michigan consumer who ultimately pays for these illegitimately solicited cases, regardless whether you choose to ignore the practice altogether. So, if there is no enforceable law against solicitation in the civil arena, as the *Richardson* Court suggests, isn't that a problem we should recognize?

Endnotes

1 Herman Melville, *Moby Dick* (New York: Dodd, Mead and Company, 1922) (as stated by Captain Ahab).

2 *Richardson v Allstate Ins Co*, 328 Mich App 468; 938 NW2d 749 (2019).

3 Judge David Allen deservers the highest respect for his opinion and commentary on solicitation: not only did he express his outrage at the common practice of solicitation that plagues his docket, but he actually denied a motion he obviously wanted to grant and did no because of the law handed down by the *Richardson* Court.

4 *Detroit Metro RX, et al v Progressive* (Judge Allen), unpublished opinion of the Wayne County Circuit Court (Case No. 2020-016029-NF).

5 See, e.g., *Hightower v Detroit Edison Co*, 262 Mich 1, 8-9; 247 NW 97 (1933) (ruling that even indirect solicitation of a personal-injury victim voided the contract for services, i.e, the fee agreement between the lawyer and the plaintiff – the Court ruled that "[t]he act applies, and the contract between Mrs. Powell and Donohue was void").

6 Emphasis added. The simple fact that the statute contains the words "personal injury claim" is indicative of the *Richardson* Court's complete disregard for key words in the statute.

7 In the least, there is an implied contract between medical providers and their patients (i.e. for payment), but such an analysis would outstrip this article.

8 "Person" is defined in MCL 750.10, part of the Penal Code, as follows:

The words "person", "accused", and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations.

9 MCL 750.410.

10 *Richardson*, 328 Mich App at 470.

11 *Id*. at 471.

12 *Id*. at 479.

13 *Id*. at 473 (quotations and citations omitted) (emphasis added).

14 Which we see weekly.

15 *Id*. at 474.

16 *Richardson*, 238 Mich App at 474-75. (citations omitted).

17 This author could be persuaded that it is **only** the medical claims resulting from the solicitation of an auto-accident victim that should be dismissed from any particular no-fault case.

18 Richardson, 238 Mich App at 475 (internal citations omitted), citing *Orzel v Scott Drug Co*, 449 Mich 550, 559; 537 NW2d 208 (1995), and *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005). The court also speculated that "the relationship between plaintiff and Quartz is unrelated to Plaintiff's medical treatment," which is absurdl for reasons well known to anyone still reading the footnotes in this article.

19 André Berthiaume. You do not need to Google him: this is his best quotable.

Affinity Bar Spotlight: Women Lawyers Association of Michigan

Erin Klug, WLAM President

There is much work to be done to improve diversity, equity, and inclusion in the legal profession. One important step is to elevate diverse voices and provide a more inclusive environment. In this issue, the MDTC is honored to use its platform to promote the mission of the Women Lawyers Association of Michigan through a question and answer with its president—Erin Klug:

When did you join the Women Lawyers Association of Michigan?

2009, right after I was admitted as a new attorney.

What compelled you to get involved with the Women Lawyers Association of Michigan?

I was compelled to get involved because of the mission of increasing minority representation in the legal profession. I served in the United States Navy, attended Morehouse College, a Historically Black post-secondary institution, and call Detroit, arguably one of the nation's Blackest cities, my home. Though minorities have been breaking barriers and earning their seat at the table, there is still much work to be done, and I would like to be a part of that the time I joined WLAM, I was practicing at an intellectual property boutique where I was the only female patent attorney. At my first WLAM meeting, it was apparent that these WLAM women were like minded and driven. They were working together towards a common goal, and I wanted to be a part of that change. WLAM members continuously impress and inspire everyone around them. They are leaders in their fields, partners, presidents of organizations, hold positions on countless boards, judges, contribute to volunteer organizations, win awards, and start scholarships. WLAM is a truly inspiring group of people doing great things, and I wanted to help further the mission.

What is the mission statement of the Women Lawyers Association of Michigan?

"Striving to secure the full and equal participation of women in the legal profession in furtherance of a just society." https://womenlawyers.org/.

What are the criteria for membership?

WLAM has several membership options. Attorney members must be in good standing of the State Bar of Michigan or in good standing of the Bar of any other state or country or graduates from an accredited law school. Student members must be full or part-time students at an accredited law school. Paralegals or legal workers must be employed in a business entity, the staff of which must include attorneys who are members in good standing of the State Bar of Michigan, that has as its primary purpose the provision of legal services. We also have opportunities for retired members. A person does not have to identify as female to be a member of WLAM, all are welcome.

How does membership with the Women Lawyers Association of Michigan benefit legal professionals?

Membership with WLAM is beneficial in so many ways. As advocates, we recognize that there is strength in numbers. Whether we are in a court room or on the steps of the Michigan State Capitol, WLAM's voice is louder when we join together. We

have a membership wide referral network allowing us to connect with attorneys across the state. We put on diverse programming, educational, social, and networking based. Through our Candidate Rating and Endorsement Committee, we help fellow lawyers by providing ratings and endorsements when seeing judicial positions.

Are there special events, volunteer opportunities, committee groups, or community relationships that the Women Lawyers Association of Michigan is particularly proud of?

We are proud of so many of our events and programs, but here are a few highlights:

1. Our Leadership Class is an annual program for current law students focused on the development of future female leaders.
2. WLAM helped develop a model policy for creating lactation accommodation spaces in courthouses.
3. WLAM has advocated for eliminating the period tax.
4. WLAM recently supported an attorney's adjournment for a pregnancy accommodation request, which was granted.
5. Our WLAMom committee focuses on providing resources and advocacy for WLAM's members with families, no matter what stage of parenthood they are in. WLAMom strives to be an open and nurturing environment, one in which its members can come together to navigate and balance parenting and lawyering.
6. Our Diversity & Inclusion Committee promotes awareness on the importance of diversity and inclusion within our organization and in those areas that align with our mission statement.
7. Our Candidate Rating & Endorsement (CREC) Committee is dedicated to reviewing, rating, and endorsing regarding candidates and/or potential appointees for judicial, quasi-judicial, and in some cases non-partisan appointive positions.
8. Our 104th Annual Meeting was an amazing success with almost 300 in attendance!

What inspired the establishment of the Women Lawyers Association in Michigan?

On March 24, 1919, "five ardent Portias of Detroit" who sought to bond with others who spoke their language and could get their viewpoint founded the Women Lawyers Association of Michigan.

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

Diversity, equity, and inclusion efforts are a cornerstone of WLAM. We often lump the three terms together, but each word has its own meaning that deserves focus. Diversity is where all people are invited to the party. Inclusion means that everyone gets to contribute. Equity means that everyone has the opportunity to participate. While each term is different, they are all equally important and should be considered as a whole.

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

Women, especially women of color and black women, continue to be significantly underrepresented in the law. Law firms are overwhelming white and male. In the US, there is no shortage of women entering the legal industry, with about half being women. However, as you progress up the ladder of seniority, the scales start to tip, with only one-third of law firm partners being women. Many leave the industry altogether, often around the time they start a family. The benefits of having a diverse team are well documented, so it's clear that if law firms could maintain gender diversity at a senior level they could realize significant business benefits. Focusing on hiring diverse individuals is an action that law firms should be taking. While WLAM remains committed to seeing more women stay in this profession, it is often the responsibility of employers to create a space that women and minorities want to stay. They can do so by providing flexible work schedules, reviewing their pay gap, and talking to women and minorities about what they need (don't speculate). Our hope is that employers continue to support women and minorities not just at the start of their career but also as they continue to rise through the ranks and break glass ceilings.

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

In addition to attending events and becoming actively involved, individuals can monetarily support the WLAM Foundation. The Women Lawyers Association of Michigan Foundation's primary mission is to support the education of women who show leadership in advancing the position of women in society. Founded in 1983, the WLAMF reorganized in 1997 around this mission, realized annually through scholarship awards to outstanding women law students attending Michigan law schools. Since 1997, the WLAM Foundation has awarded over $610,500 to 252 women law students. Donation link: https://womenlawyers.org/wlam-foundation/donate/.

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

If you'd like to become involved, please reach out to us. We'd love to hear from you and welcome you into our circle.

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

To join WLAM, please visit https://womenlawyers.org/join-wlam.

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright, PLLC*
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Decisions That Have Been Reversed or Vacated "On Other Grounds": Do They Still Have Precedential Value?

Many of us have at one time or another found ourselves citing a decision that had been either reversed or vacated "on other grounds." But are those decisions precedential? Does it matter whether the decision was "reversed" or "vacated"? Although Michigan and federal courts agree that a decision that has been vacated lacks precedential effect, even if on other grounds or without addressing the merits of the decision being vacated, it can be trickier when it comes to decisions that have been reversed—at least in Michigan.

Vacated Decisions Never Have Precedential Value, Even if Vacated "On Other Grounds"

Federal courts have often said that "[a] decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever." *Durning v Citibank, N A,* 950 F2d 1419, 1424 n 2 (CA 9, 1991), citing *O'Connor v Donaldso*n, 422 US 563, 578 n 12; 45 L Ed 2d 396; 95 S Ct 2486 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.").

This is also the general rule in Michigan. As the Michigan Court of Appeals has explained: "'[A] Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding.'" *People v Mungo*, 295 Mich App 537, 554; 813 NW2d 792 (2012). See also *Miller v Farm Bureau Ins Co*, 218 Mich App 221, 232 n 3; 553 NW2d 371 (1996) ("To the extent that the *Mattson* panel relied on *Miller I*, its holding has no precedential value because that decision was ultimately vacated by the Supreme Court.").

Of course, this is not to say that courts always practice what they preach. Both the Michigan Supreme Court and Court of Appeals have treated decisions as having precedential value notwithstanding the fact that they had been "vacated on other grounds." For example, in *People v Hendrickson*, 459 Mich 229; 586 NW2d 906 (1998), the Supreme Court relied on the Eighth Circuit's decision in *United States v Hawkins,* 59 F3d 723, 730 (CA 8, 1995), vacated on other grounds 516 US 1168 (1996), in deciding whether a crime victim's statement that she had just been beaten was sufficiently contemporaneous to warrant admission under the present sense impression exception to the hearsay rule. *Id.* at 237. Similarly, in *Bennett v Mackinac Bridge Auth*, 289 Mich App 616; 808 NW2d 471 (2010), the Court of Appeals relied in part on *Juncaj v C & H Industries*, 161 Mich App 724, 734; 411 NW2d 839 (1987), vacated on other grounds 432 Mich 1219, 434 NW2d 644 (1989), to hold that the doctrine of res judicata "must not be applied when its application would subvert the intent of the Legislature." *Id.* at 630. The Sixth Circuit Court of Appeals has likewise relied on vacated decisions as precedential. See, e.g., *Talley v Family Dollar Stores of Ohio, Inc*, 542 F3d 1099, 1110 (CA 6, 2008) (relying on a decision that had been "vacated on other grounds").

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Decisions That Have Merely Been Reversed "On Other Grounds" May Be Precedential, and Then Again Maybe Not

So, what about decisions that have been reversed "on other grounds"? Such decisions are commonly cited and relied upon by parties and courts alike, but Michigan courts have suggested that this may not always be appropriate. In *Maurer v Oakland Co Parks & Recreation (On Remand)*, 201 Mich App 223; 506 NW2d 261 (1993), rev'd 449 Mich 606 (1995), the Court of Appeals held that steps leading to a restroom at a park had to be viewed as part "of" the building for purposes of the public building exception to governmental immunity because the steps were "intimately associated, or connected, with the building itself, because it is impossible to enter or leave the building without going up or down them." *Id*. at 230. In reaching that decision, the *Maurer* Court also rejected application of the open-and-obvious doctrine. *Id*. at 227.

According to Horace and Taylor, if a decision is reversed in its entirety on a dispositive issue such that the rest of the lower court's decision has been rendered irrelevant, then the decision is not precedential and may only be considered as persuasive authority. The only potential exception appears to be, as suggested in Michigan Millers and Stein, that a decision reversed on other grounds may retain precedential value if the reversal contains some statement suggesting that it did not necessarily affect the lower court's discussion of other issues, such as if the reversal was only "in part."

Addressing the precedential value of *Maurer* in *Horace v City of Pontiac*, 456 Mich 744; 575 NW2d 762 (1998), the Michigan Supreme Court observed that *Maurer* was subsequently reversed, with the Supreme Court "finding that the claim was barred by the open and obvious doctrine" and reinstating the trial court's grant of summary disposition to the defendant on that basis. *Horace*, 456 Mich at 754. In light of that holding, the Supreme Court in *Maurer* "specifically did not address the governmental immunity issue." *Id*. According to the *Horace* Court, "under such circumstances, no rule of law remained from the Court of Appeals opinion." *Id*. The *Horace* Court explained that "[t]he Court of Appeals statements regarding the building exception became no more than dictum upon this Court's reversal under the open and obvious danger doctrine. Whether the area where the fall occurred came within the building exception became irrelevant when this Court found the claim barred by the open and obvious danger doctrine." *Id*. at 754-755.

In *Taylor v Kurapati*, 236 Mich App 315; 600 NW2d 670 (1999), the Court of Appeals reached a similar conclusion regarding its prior decision in *Blair v Hutzel Hospital*, 217 Mich App 502; 552 NW2d 507 (1996), rev'd on other grounds 456 Mich 877 (1997). In *Blair*, the Court of Appeals recognized the viability of "wrongful birth claims" and held that the plaintiff should be permitted to have a jury consider her claim "that she was deprived of a substantial opportunity to learn of the defective condition of her fetus when her physician negligently failed to provide MSAFP screening." *Id*. at 512. The Supreme Court reversed and reinstated the trial court's grant of summary disposition to Hutzel Hospital on the basis of its decision in *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997), in which the Court declined to recognize a claim for the loss of an opportunity to avoid physical harm less than death.

Although the Supreme Court in *Blair* did not address the *Blair* panel's discussion of the continuing viability of "wrongful birth claims," the *Taylor* panel concluded that because the *Blair* panel's decision had been reversed "in its entirety . . . under the plain language of MCR 7.215([J])(1), nothing in the *Blair* panel's opinion is binding precedent under that subrule." *Taylor*, 236 Mich App at 346 n 42. The *Taylor* panel observed "that MCR 7.215([J])(1) establishes a bright-line test and that such a test cannot be maintained if every opinion is to be parsed into its smallest components." *Id*.

However, there are also cases going the other way and giving precedential effect to a decision reversed on other grounds. In *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 197 Mich App 482; 496 NW2d 373 (1992), overruled in part on other grounds in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003), the Court of Appeals found a prior decision to have "precedential value" even though it had been reversed. In the view of the *Michigan Millers* panel, this was because the Supreme Court had "expressly declined" to address the part that was dispositive of the issue at hand:

> The next question is whether this Court's decision in *Polkow* [*v Citizens Ins Co of America*, 180 Mich App 651; 447 NW2d 853 (1989), rev'd on other grounds 438 Mich 174 (1991)] remains good law. *Polkow* was later reversed by our Supreme Court. *Polkow*, 438 Mich 174 (1991). The Supreme Court did not, however, address the merits of this Court's holding that the administrative mechanisms that had come into play amounted to a "suit" that triggered a duty to defend, but rather expressly declined from review of the issue and reversed the decision on other grounds. See *Polkow*, 438 Mich at 177, n 2. We reject the insurers' argument, made in a supplemental brief, that the Supreme Court's reversal of this Court's opinion in *Polkow* renders the opinion complete[ly] without precedential value. [*Id*. at 490.]

The *Michigan Millers* panel reasoned that "'[j]ust as the discovery of one rotten apple in a bushel is no reason to throw out the bushel, one overruled proposition in a case is no reason to ignore all other holdings appearing in that decision.'" *Id*.

at 491, quoting *Rouch v Enquirer & News of Battle Creek, Michigan*, 137 Mich App 39, 54, n 10; 357 NW2d 794 (1984), aff'd 427 Mich 157 (1986). In *Straman v Lewis*, 220 Mich App 448; 559 NW2d 405 (1996), the Court of Appeals cited *Michigan Millers* for the proposition that "holdings of this Court not addressed on the merits by the Supreme Court remain binding despite reversal on other grounds." *Id*. at 451. See also *Holland Home v City of Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996) ("When the Supreme Court reversed *Retirement Homes I* on other grounds, it left intact this Court's conclusion in *Retirement Homes I* that the correct burden of proof for showing that a party is a class member is by a preponderance of the evidence.").

> "'[A] Court of Appeals opinion that has been vacated by the majority of the Supreme Court without an expression of approval or disapproval of this Court's reasoning is not precedentially binding.'"

Since *Taylor* and *Horace*, the Court of Appeals has sought to clarify the precedential value of decisions reversed on other grounds, with mixed results. In *Dunn v DAIIE*, 254 Mich App 256; 657 NW2d 153 (2002), the Court of Appeals addressed the interplay of *Taylor*, *Horace*, and *Michigan Millers*. The Court read *Taylor* and *Horace* as meaning that if the Supreme Court reverses a Court of Appeals decision on "a dispositive issue," then the Supreme Court has "entirely reversed the Court of Appeals and rendered any discussion by the Court of Appeals [as to any remaining issues] to be without precedential value." *Dunn*, 254 Mich App at 266. The *Dunn* Court noted *Michigan Millers*, but distinguished it in light of *Michigan Miller*'s observation that "because the Supreme Court *explicitly* declined to review the issue that had been before the Court of Appeals, the entire decision was not without precedential value." *Id.* at 264.

> So, what about decisions that have been reversed "on other grounds"? Such decisions are commonly cited and relied upon by parties and courts alike, but Michigan courts have suggested that this may not always be appropriate.

More recently, in *Stein v Home-Owners Ins Co*, 303 Mich App 382; 843 NW2d 780 (2013), the Court of Appeals explained that if the Supreme Court reverses a Court of Appeals decision only "in part," this leaves the decision's discussion of other issues "intact." *Id*. at 389. In reaching that determination, *Stein* reasoned that *Horace* and *Dunn* are only pertinent to situations in which the Court of Appeal's decision has been "reversed in [its] entirety – not partially reversed." *Id*. But see *Tyrrell v Univ of Mich*, 335 Mich App 254, 260; 966 NW2d 219 (2020) ("Though the Supreme Court did not expressly overrule the *Progress I* Court's holding that a failure to comply with MCL 600.6431(1) implicates governmental immunity, its reasoning effectively mooted the question and rendered this Court's discussion of whether MCL 600.6431 implicated governmental immunity to be without precedential value.").

Lesson: Use Caution When Citing Decisions That Have Been Vacated or Reversed, Even if "On Other Grounds"

So, what does this all mean? Practitioners should certainly be careful about citing any decision that has been vacated, even if on other grounds, recognizing that it is not precedential even if the higher court did not address the merits of the decision at all. At the same time, such decisions may still have persuasive value. See, e.g., *Jackson v Georgia Dep't of Transp*, 16 F3d 1573, 1578 n 7 (CA 11, 1994) (noting that although an opinion from another circuit had been "vacated on unrelated grounds . . . its reasoning does have persuasive value").

As for decisions that have been reversed, it appears to be more complicated, at least when it comes to decisions from the Michigan Court of Appeals. To be sure, one cannot necessarily assume that a decision reversed "on other grounds" is binding precedent simply because a particular ruling on an issue of law was not specifically addressed in the reversal. According to *Horace* and *Taylor*, if a decision is reversed in its entirety on a dispositive issue such that the rest of the lower court's decision has been rendered irrelevant, then the decision is not precedential and may only be considered as persuasive authority. The only potential exception appears to be, as suggested in *Michigan Millers* and *Stein*, that a decision reversed on other grounds may retain precedential value if the reversal contains some statement suggesting that it did not necessarily affect the lower court's discussion of other issues, such as if the reversal was only "in part."

Amicus Committee Report

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New Amicus Opportunities

Since the last update from the Amicus Committee, MDTC voted in favor of providing amicus support in a case involving joint and several liability for sanctions.

In *Bradley v. Frye-Chaiken*, the Supreme Court ordered MOAA and requested supplemental briefing on whether the Court of Appeals correctly held that an attorney hired to contest the propriety or amount of sanctions against another attorney is jointly and severally liable for costs and attorney fees incurred prior to his appearance or unrelated to his representation. The Supreme Court asked the parties to specifically address (1) whether, under MCR 1.109 or MCL 600.2591, all attorneys who represent a client during any portion of a case in which a claim or defense is frivolous must be held jointly and severally liable for costs and attorney fees, and (2) if not, how a court should determine which attorneys should be held jointly and severally liable for costs and attorney fees.

MDTC plans to collaborate with other interest groups, including MAJ. The search for an author is underway, so contact Lindsey Peck if you're interested.

Recent Briefs

MDTC recently filed an amicus brief in a case involving statutory construction.

In *Estate of Robinson v Robinson*, a twelve-year-old girl died as a result of an off-road vehicle accident on property owned by her grandfather. Her estate sued her grandfather for negligence and sought relief under MCL 257.401, a liability-imposing provision in the Motor Vehicle Code. Her grandfather, on the other hand, sought dismissal under MCL 324.73301, a liability-limiting provision in the Recreational Land Use Act.

The Supreme Court ordered a MOAA and requested supplemental briefing on the interplay between MCL 257.401 and MCL 324.73301—namely, (1) whether the former irreconcilably conflicts with the latter, (2) if so, whether resolution of the conflict requires determination of which is more specific, and (3) if so, the appropriate framework for determination of which is more specific.

MDTC took a deep dive into the canons of statutory construction and urged the Supreme Court to adopt the following sequential framework for analytical clarity:

1. Prioritize linguistic canons. Linguistic canons are based on the words themselves, contextual underpinnings, and other semantical precepts (e.g., every word and phrase in a statute must be given effect, defined in accordance with the plain and ordinary meaning, and considered in the context of the statute as a whole).
2. Look to substantive canons as needed. Substantive canons are based on assumptions about the legislative process that provide predictability and stability to a body of laws enacted by fallible drafters (e.g., the Legislature does not intend to derogate the common law or violate the constitution when enacting a statute).
3. Resort to tie-breaking canons only if all the other conventional interpretive tools fail to produce a fair and plausible meaning. Tie-breaking canons are based on public policies (e.g., ambiguous language must be construed against the drafter responsible for the ambiguity).

Applying such framework, MDTC continued, compels the conclusion that MCL 324.73301 takes priority over MCL 257.401.

MDTC relied on linguistic canons to show that MCL 324.73301 and MCL 257.401 both apply. MDTC also relied on linguistic canons to show that MCL 324.73301 and MCL 257.401 conflict with one another. MDTC relied on substantive canons to show

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

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

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

that the conflict is not irreconcilable. MDTC explained that a liability-limiting provision presupposes the existence of a liability-imposing provision. So as a practical matter, MDTC went on, a liability-imposing provision such as MCL 257.401 operates as a general rule and a liability-limiting provision such as MCL 324.73301 operates as a specific exception. Turning to the question posed by the Supreme Court, MDTC advocated in favor of applying the substantive canon that aims to resolve conflict between statutes on the same subject matter by giving priority to the more specific statute. MDTC urged the Supreme Court to find that MCL 324.73301, the more specific statute, controls.

David Porter of Kienbaum Hardy Viviano Pelton & Forrest PLC authored the amicus brief on behalf of MDTC.

MDTC also filed an amicus brief in a case involving the status of a co-owner and the duty of a condominium association relative to the condition of a common element.

In *Dauod v London Townhouses Condominium Association*, a co-owner fell in a common area of a condominium development and sued a condominium association under a theory of premises liability. The Supreme Court ordered MOAA and requested supplemental briefing on whether the Court of Appeals correctly decided *Francescutti v. Fox Chase Condominium Association*. There, the Court of Appeals held that a condominium association did not owe a co-owner a duty to maintain a common element of a condominium development. The Court of Appeals reasoned that a co-owner is neither an invitee nor a licensee in a common element.

MDTC championed the reaffirmance of *Francescutti* and affirmance of the judgment of the Court of Appeals. MDTC began the analysis with an elementary but fundamental principle of premises-liability law—the duty of the landowner depends on the status of the *visitor*. MDTC maintained that a co-*owner* of a condominium development is not a *visitor* in a common area. Entitlement to enter and make use of a common area, MDTC explained, is based on an *ownership* interest rather than a license or an invitation. MDTC argued that the Michigan Condominium Act resolves any doubt—the provisions and the cases interpreting the provisions establish that a co-owner has an undivided (albeit unexclusive) interest in a common element. MDTC concluded that plaintiffs, as co-owners, "were essentially suing themselves."

Drew Broaddus of Secrest Wardle authored the amicus brief on behalf of MDTC.

Recent Arguments

Since the new term started in the fall of last year, the Supreme Court has held oral argument in a handful of cases in which MDTC submitted amicus briefs.

The Supreme Court kicked off the new term with oral argument in two cases that threaten to disturb defense-favorable precedent and cause upheaval in the area of medical malpractice.

Ottgen v Katranji involves the affidavit-of-merit requirement. The Supreme Court ordered a MOAA and requested supplemental briefing on whether *Scarcella v Pollack* correctly held that a complaint must be accompanied by an affidavit of merit to toll the statute of limitations. J.R. Poll of Rhoades McKee authored the amicus brief for MDTC.

The defense fought the good fight. But suffice it to say that oral argument solidified the belief that many have held since Justice Viviano and Chief Justice McCormack penned their concurring opinions in *Castro v Goulet* and *Progress Michigan v Attorney General*—the days of *Scarcella* are probably numbered.

Danhoff v Fahim involves expert testimony. The Supreme Court ordered a MOAA and requested supplemental briefing on whether *Edry v Adelman* and *Elher v Misra* correctly described the role of peer-reviewed literature in determining the admissibility of expert testimony on the standard of care. Jonathan Koch of Smith Haughey Rice & Roegge authored the amicus brief for MDTC.

During oral argument, Chief Justice McCormack inquired about the proposed amendment to MRE 702. For context, FRE 702—the federal counterpart to MRE 702—was in the amendment process at the time of oral argument. The principal objectives of the proposed amendment to FRE 702 consisted of (1) clarifying and emphasizing the applicability of the preponderance-of-the-evidence standard to the determination of admissibility, and (2) clarifying and emphasizing the significance, scope, and strength of the gatekeeper role of the trial court. The proposed amendment was years in the making due to erroneous interpretation and disparate application of FRE 702. Some courts incorrectly held that FRE 702 created a presumption of admissibility. Many courts conflated admissibility with weight and improperly delegated the gatekeeper role to the jury.

Opponents deemed the proposed amendment a solution in search of a problem. But the proposed amendment received the stamp of approval from the Judicial Conference Advisory Committee on Evidence Rules, the Judicial Conference Standing Committee on Rules of Practice and Procedure, and the Judicial Conference of the United States (the national policy-making body for the federal judiciary). Unless the United States Supreme Court rejects the proposal or Congress intervenes, the proposed amendment will take effect at the end of the year.

In the wake of the proposed amendment to FRE 702, the State Bar of Michigan queried whether MRE 702 should be amended to conform to FRE 702. The State Bar of Michigan Standing Committee on Civil Procedure and Courts created the Michigan Rule of Evidence 702 Workgroup, which ultimately recommended that that the Supreme Court amend MRE 702 to conform to FRE 702. To date, the Supreme Court has not acted on the recommendation.

By broaching the topic during oral argument, Chief Justice McCormack implied that the proposed amendment to FRE 702 may have some bearing on the outcome. The Supreme Court would probably consider the proposed amendment to FRE 702 when interpreting and applying MRE 702, even if the Supreme Court ultimately declined to adopt the proposed amendment to MRE 702. The proposed amendment to FRE 702 aims to clarify, rather than modify, the law. Because MRE 702 is modeled after FRE 702, the proposed amendment to FRE 702 is relevant to the proper interpretation of MRE 702. Indeed, when the Workgroup recommended the proposed amendment

to MRE 702 to the Supreme Court, the Workgroup acknowledged that "the intent to capture" the amendment to FRE 702 "can also be conveyed in a comment" to MRE 702. The Workgroup reasoned that the goal of the proposed amendment to FRE 702 was not to alter the standard for an FRE 702 admissibility determination, but "to correct judicial misapplications and clarify how . . . decisions [requiring an FRE 702 admissibility determination] should be made."

In light of the recency and unfamiliarity with the proposed amendment to FRE 702 and MRE 702 at the time of oral argument, there wasn't much discussion about the proposed amendment after Chief Justice McCormack broached the topic.

Chief Justice McCormack moved on to the pressing question before the Supreme Court, which she framed as whether *Edry* and *Ehler* gave peer-reviewed literature an "oversized role" in determining the admissibility of expert testimony on the standard of care. *Edry*, recall, involved causation. In *Ehler*, which involved standard of care, the Court of Appeals drew a distinction between causation and standard of care in the context of discussing the importance of peer-reviewed literature. Unlike causation, the Court of Appeals reasoned, standard of care generally isn't "tested, analyzed, investigated, or studied" in peer-reviewed literature. The Supreme Court found the distinction unmeaningful and applied *Edry* in *Ehler*.

Chief Justice McCormack seemed to believe that the Supreme Court has indeed given peer-reviewed literature an "oversized role" in determining the admissibility of expert testimony on the standard of care. To illustrate the point, she used an example of a surgeon leaving Cheetos in a patient during a surgery. There probably isn't peer-reviewed literature saying "don't put Cheetos in the patient," she observed, but does the absence of peer-reviewed literature preclude the patient from establishing a breach of the standard of care?

On the other side of the debate, Justice Zahra queried whether a court must accept the testimony of an expert who relies only on her experience or "ipse dixit." If consulting peer-reviewed literature for support isn't the basic first step in determining the admissibility of expert testimony on the standard of care, he postulated, then what is?

In the next couple sessions, the Supreme Court entertained oral argument in two significant no-fault cases.

Wilmore-Moody v Zakir involves the interplay between rescission and non-economic damages. The insurer rescinded the policy after investigation of the accident revealed that the insured failed to disclose several household residents on the application for insurance. The insured sued the insurer and the at-fault driver. The insurer asserted a counter-claim for rescission of the policy. After the trial court found that the insurer was entitled to rescind the policy based on pre-procurement fraud, the at-fault driver sought summary disposition based on MCL 500.3135, which precludes a party from recovering non-economic damages if the party did not have in effect the required no-fault insurance at the time of the accident. The at-fault drive argued that the policy never existed by virtue of rescission. The Court of Appeals disagreed, holding that rescission is a legal fiction intended to provide a contractual remedy, not to alter the past.

The Supreme Court ordered MOAA and requested supplemental briefing on whether rescission of a policy bars recovery of non-economic damages under MCL 500.3135 on the basis that the claimant "did not have in effect . . . the security required" by MCL 500.3101 at the time the injury occurred. Eric Conn of Jacobs & Diemer authored the amicus brief for MDTC.

Justice Zahra asked whether any published caselaw supported the idea that the at-fault driver could benefit from rescission of the policy between the insured and the insurer. The parties agreed that there's no published caselaw on point.

Extrapolating from *Bazzi v Sentinel Insurance Company* and the innocent third-party concept, Justice Cavanagh questioned whether equitable considerations play any role in the analysis since the at-fault driver didn't play any role in the fraudulent representations. The parties appeared to agree that equitable considerations undoubtedly play a role because rescission is, at bottom, an equitable remedy.

Looking beyond the case, Justice Cavanagh also questioned the propriety of allowing rescission to bar non-economic damages since the insurer has discretion to rescind the policy. If the insurer declined to rescind the policy, she posited, would the insured have a basis to argue that the insurer should have rescinded the policy?

Mercyland Health Services v Meemic Insurance Company involves standing to challenge licensure. The Supreme Court granted leave and ordered supplemental briefing on whether an insurer has statutory standing to contest the professional licensure of members and managers of a health-care provider incorporated as a PLLC under MCL 450.4904. John Hohmeier of Scarfone & Geen authored the amicus brief for MDTC.

At oral argument, Justice Zahra inquired how a reversal—a win for the insurer—would impact the insured. For example, he asked how the insured is supposed to ascertain whether the treatment is being "lawfully rendered" within the meaning of MCL 500.3157. Inquiring about licensure is one thing, he commented, but getting into corporate formation is quite another. He also presented a hypothetical scenario in which a doctor possesses an active license at the inception but allows the license to lapse amid ongoing treatment. *Is the insured obligated to continuously inquire about licensure?*, he queried.

Justice Cavanagh expressed some concerns about stare decisis because, as the defense acknowledged, a reversal would likely require an overruling of *Sterling Heights Pain Management v Farm Bureau General Insurance Company of Michigan*, which held that an insurer lacks standing to challenge whether a health-care provider is properly organized or incorporated.

Other topics of discussion included the absence of any penalty of provision for restitution in the Michigan Limited Liability Act, the idea that defects in corporate formation are the province of the Attorney General, and the propriety of holding or dispensing with an evidentiary hearing.

As noted in our last update, drastic changes to the existing landscape of premises-liability law may be on the horizon. After the latest session of the

Supreme Court, the fate of the open-and-obvious doctrine in general and the special-aspect exception in particular hang in the balance.

In *Kandil-Elsayed v F&E Oil* and *Pinsky v Kroger*, the Supreme Court ordered supplemental briefing on whether the open-and-obvious doctrine articulated in *Lugo v. Ameritech Corporation* is compatible with the comparative-negligence system adopted in *Placek v. Sterling Heights* and later codified in the Revised Judicature Act. Nathan Scherbarth of Zausmer authored the amicus brief for MDTC.

The doctrine has been around for the better part of a century, at least in some form, and become entrenched in the fabric of our premises-liability jurisprudence. Until now, the Supreme Court has never revisited *Lugo*. So whether the doctrine is compatible with comparative negligence may seem like an issue of first impression. But the Supreme Court confronted the issue over thirty years ago in *Riddle v McLouth Steel Products Corporation* and concluded that the doctrine operates in comfortable harmony with comparative negligence.

So why is the Supreme Court revisiting *Lugo*, rather than *Riddle*? According to some Supreme Court justices (as well as some Court of Appeals judges), perhaps the problem is the exception to the doctrine, rather than the doctrine itself. They believe that until *Lugo*, Michigan adhered to the exception catalogued by the American Law Institute in the Restatement (Second) of Torts, which rests on foreseeability. More pointedly, they scoff at the notion that the doctrine speaks to the *duty of care* and presents a *question of law* for a court to resolve. In their view, the doctrine speaks to the *standard of care* and presents a *question of fact* for a jury to resolve.

The exception was, indeed, the focal point at oral argument. The justices appeared aligned in their belief that the exception, at a minimum, needs clarification. Even some of the more conservative justices expressed the belief that the exception has been the source of considerable confusion and inconsistent decision-making.

There didn't appear to be any real consensus on the solution to the perceived problem, however.

In briefing, the plaintiffs' counsel advocated for return to the Restatement (Second) of Torts. At oral argument, however, the plaintiffs' counsel deemed the Restatement (Second) of Torts too ambiguous to function as a practical, workable solution and instead advocated for adoption of the Restatement (Third) of Torts.

The proposal to adopt the Restatement (Third) of Torts was met with skepticism. Justice Viviano expressed the belief that adoption of the Restatement (Third) of Torts would be a major destabilizing shift in our premises-liability law. To say that he hit the nail on the head would be an understatement. The Restatement (Third) of Torts has been widely criticized for restructuring, rewriting, and reshaping—rather than restating—the law.

> MDTC advocated in favor of applying the substantive canon that aims to resolve conflict between statutes on the same subject matter by giving priority to the more specific statute. MDTC urged the Supreme Court to find that MCL 324.73301, the more specific statute, controls.

Justice Cavanagh picked up on one notable example. She pointed out that the Restatement (Third) of Torts requires the exercise of reasonable care for *any* risk of harm (not just an *unreasonable* risk of harm). Justice Welch, too, struggled with the notion that a case involving an ordinary step with no defect, which arguably always presents a risk of harm but never presents an unreasonable risk of harm, would get full discovery and survive summary disposition.

The Restatement (Third) of Torts includes other drastic changes, too. The Restatement (Third) of Torts eliminates status-based distinctions among entrants (trespassers, licensees, and invitees), establishes a universal duty owed to all (including trespassers but perhaps not "flagrant" trespassers), upends and removes the concept of foreseeability from the duty analysis, and completely does away with the doctrine in any form.

Justice Viviano touched on an issue discussed in some of the amicus briefing. Though the Restatement (Third) of Torts eliminates the doctrine articulated in the Restatement (Second) of Torts and establishes a duty of reasonable care any time a condition presents a risk of harm, the Restatement (Third) of Torts also carves out an exception "when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases," in which case a court may decide that a landowner owes no duty of care.

The doctrine is based on social policy and capable of fitting in the exception. Construing the exception as something that a court must determine on a case-by-case basis, Justice Viviano questioned whether the exception would be a workable solution. If a court may or may not carve out an exception based on social policy, he queried, how is the insurance industry supposed to allocate risk? How is the landowner supposed to determine the existence or scope of her obligation?

Oral argument signaled that the Supreme Court is poised to do *something* with the doctrine. Whether that something will be clarification, modification, or abrogation is anyone's guess at this juncture.

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

eDiscovery Update

By: B. Jay Yelton, III, *Warner Norcross + Judd LLP*
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A recent survey of judges determined that "too many attorneys pay too little heed to both the spirit and the letter of procedural rules addressing e-discovery." For those attorneys that do not possess adequate eDiscovery skills, there is an increasing likelihood that they will be sanctioned. See, e.g., *DR Distributors, LLC v 21 Century Smoking, Inc*, 513 F Supp 3d 839, 946-47 (ND Ill, 2021) (because counsel fundamentally failed to implement reasonable and established processes to identify, preserve, collect, and produce ESI, the court ordered counsel to personally pay 50% of opposing party's attorneys' fees which were estimated to "exceed seven figures" and to take at least 8 hours of CLE on ESI).

We are also observing more Michigan courts sanctioning or criticizing counsel for not adequately handling eDiscovery tasks. *Effyis, Inc v Kelly*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Aug. 21, 2020 (Docket No. 18-13391); 2020 WL 4915559 (court granted motion for monetary sanctions finding that counsel's "requests for production of documents were exceptionally broad"); *Genesee Intermediate School Dist v City of Flint School Dist,* unpublished per curiam opinion of the Court of Appeals, issued Aug. 20, 2020 (Docket No. 345395); 2020 WL 4915430 (court commented that counsel would have been well advised to take more active steps to ensure that a litigation hold got implemented from the outset of the case); *GD & RD obo GD Utica Community Schools*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Oct. 7, 2021 (Docket No. 20-12864); 2021 WL 4621847 (court criticized counsel for relying on "a scope of discovery that has been obsolete for almost six years"); *Webasto Thermo & Comfort North America, Inc v BesTop, Inc*, 323 F Supp 3d 935 (ED Mich, 2018) (court found that counsel was reckless in submitting an incomplete version of a key document and ordered counsel to pay opposing party's legal fees); *Wesley Corporation v Zoom TV Products, LLC*, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Jan. 11, 2018 (Docket No. 17-10021); 2018 WL 372700 (court took counsel to task for use of boilerplate objections and granted opposing party's request for attorney fees).

Consequently, staying on top of eDiscovery caselaw in Michigan has become increasingly important. Hopefully, these case summaries will be helpful in that regard.

Ability to Restore Deleted Data is Key to Spoliation Motion

Int'l Unions, SPFPA v Maritas, unpublished report and recommendation of the United States District Court for the Eastern District of Michigan, issued Sept. 22, 2022 (Docket No. 2:19-cv-10743); 2022 WL 17828378

The plaintiff filed defamation and tortious interference claims against defendants based on defendants' alleged year- long campaign of publishing defamatory statements about plaintiff on the internet. In discovery, the plaintiff requested "Documents and Correspondence, including, but not limited to blogposts, articles, videos, emails, text messages, and letters, created/written/published/disseminated/sent by any Defendant to any third-party which reference Plaintiffs in any way." Defendant Maritas admitted during deposition that he was the only party with access to delete/add content to the website where the alleged defamatory statements appeared. He also admitted that, during the course of the litigation, he continued his regular practice of deleting content from the website, as well as deleting his personal emails and text messages. The plaintiff moved for default judgment under Rule 37(e)(2) against the defendants or for the lesser sanction of an adverse inference jury instruction.

The defendants objected, arguing that the bulk of the deletions occurred before the

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 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.

filing of litigation and before the duty to preserve had attached. Additionally, the defendants objected that the plaintiff had not shown prejudice from any post-litigation spoliation because the plaintiff had failed to identify the deletion of any relevant evidence, and, even assuming relevant evidence had been deleted, the evidence could be restored.

Addressing the defendants' arguments, the court first noted,

> To the extent [plaintiff] may now find it difficult or impossible to prove precisely what was deleted or its relevance, that is only because Defendants have handicapped their ability to do so by deleting such evidence. Defendants' argument, if accepted to excuse their deletion of ESI, would reward them for the very same conduct the spoliation rules seek to deter (and indeed, sanction).

Id. at *4.

The passage of time alone, rather than any nefarious purpose, could account for any deleted ESI.

However, the plaintiff did not show the permanent loss of any relevant evidence. And despite the earlier stance that Maritas' permanently deleted the information, defendants asserted "unequivocally" that the deleted information could be restored. Given these circumstances, the court could not justify the imposition of case terminating sanctions. It denied the plaintiff's motion without prejudice and ordered a forensic examination by a neutral expert at the defendants' expense to determine if the deleted information could be restored.

PRACTICE TIP: Rule 37(e) sanctions are only available when electronically stored information has been lost and cannot be replaced or restored using reasonable measures. It is in the interest of both parties to explore the possibility of replacement/restoration before engaging in motion practice.

Work Product Privilege Applies to Non-Parties

Cotton v Hughes, unpublished order of the United States District Court for the Eastern District of Michigan, issued Nov. 7, 2022 (Docket No. 22-10037); 2022 WL 16744388

The plaintiffs filed a civil-rights action against the defendants for violation of their due process rights, alleging their conviction in a criminal action resulted from the defendant's fabrication of evidence and failure to disclose exculpatory evidence. While the plaintiffs were incarcerated and seeking post-conviction relief, the Wayne County Prosecutor Office's Conviction Integrity Unit ("CIO") investigated their conviction. During the course of that investigation, the CIO drafted CIO memoranda regarding the prosecutor's stance on each plaintiff's request for post-conviction relief. The conclusions drawn in the memoranda led to an agreement between the prosecutor's office and the plaintiffs to have their convictions set aside, which the state court later ordered.

In the civil litigation, the defendants subpoenaed the prosecutor's office for a copy of the CIO memoranda. The prosecutor's office turned over a redacted copy of the memoranda claiming that the memoranda contained information protected by the work-product privilege. The defendants moved to compel the prosecutor's office to produce an unredacted copy of the memoranda. They argued that the prosecutor's office could not have foreseen civil litigation at the time the memoranda were drafted, that they had made a showing of "substantial need," and that the prosecutor's office waived privilege regarding its CIO memoranda because, in other cases, it had voluntarily produced them in unredacted form. The court rejected each of defendants' arguments.

First, the court noted that Rule 26(b)(3) only applies to parties to the litigation. Notwithstanding, the court concluded that while the rule "textually does not encompass a non-party does not compel the conclusion that a non-party has no work product shield" otherwise it "could lead to absurd access to the litigation files of non-parties, even in ongoing litigation." The court also recognized that "Rule 45, which applies to non-party subpoenas, expressly envisions a non-party making the claim that information sought is protected trial preparation material."

As for the defendants' specific arguments, the prosecutor need not have foreseen the current civil litigation because the CIO memoranda were prepared in response to plaintiffs' motions for post-conviction relief. "The work product doctrine applies with much vitality in the criminal law context." As for defendants' claim of "substantial need," the court found the argument misplaced. "[W]hile a party may be entitled to 'fact work product' upon the demonstration of a 'substantial need,' 'opinion work product' – the only form of information the [prosecutor] has redacted – is 'virtually undiscoverable.'" Finally, the court rejected the defendants' waiver theory because the prosecutor had not waived privilege protection in the current litigation, and whatever it may have done in other cases involving other CIO memoranda was irrelevant.

PRACTICE TIP: Work-product privilege applies in civil litigation regardless of party status. Work-product protection may arise from unrelated prior litigation regardless of the foreseeability of the underlying civil action. A showing of "substantial need" does not entitle a party to see opinion work product, which is almost absolutely privileged.

Gaps in Opponent's Production May Not be Sufficient Evidence of "Intent to Deprive" to Justify Rule 37(e)(2) Sanctions

Lear Corp v NHK Seating of America Inc, unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Nov. 23, 2022 (Docket No. 13-12937); 2022 WL 17176836

Lear sued the NHK defendants for violating its '357 patent concerning an active headrest restraint for vehicle seats. Lear filed its '357 patent in October 2006. The defendants moved for summary judgment because more than one year before filing the patent, Lear offered the restraint system for sale to two different parties, which constitutes an "on-sale bar" to an infringement action. The court denied the defendants' motion finding that they had produced insufficient evidence to allow a reasonable jury at trial to find "clear and convincing evidence" supporting its on-sale bar defense. The defendants later moved under Rule 37(e)

(2) for an adverse inference instruction against Lear, contending that its inability to produce "clear and convincing evidence" on summary judgment was due to Lear's spoliation of relevant emails and other documents. The court denied the defendants' spoliation motion.

Overarching the court's denial of the defendants' spoliation motion is the timeframe involved in this case. The emails and documents allegedly spoliated by Lear were created in the 2004-2005 period. Lear filed the '357 patent in October 2006. Lear did not allege infringement by defendants until 2009 and did not file suit against defendants until 2013. Even if a duty to preserve evidence had been triggered in 2009, four to five years had elapsed since the alleged sales offerings in 2004 and 2005. The passage of time alone, rather than any nefarious purpose, could account for any deleted ESI. As the court explained,

> Given that most of the on-sale-bar evidence would have been created in 2004 or 2005, there is a very good chance that the evidence was long gone before this suit was filed in 2013. And, obviously, it was not until this suit was filed that Lear answered discovery requests about when the invention of the '357 patent was reduced to practice. In other words, by the time Lear made the alleged misrepresentations, the documents that the NHK Companies seek may have already been long gone.

Id. at *6.

Work-product privilege applies in civil litigation regardless of party status. Work-product protection may arise from unrelated prior litigation regardless of the foreseeability of the underlying civil action.

Even Lear's violation of its own internal document retention policy was not sufficient by itself to change the court's conclusion. The court resolved that even if some emails or other documents were deleted, negligence rather than intent to deprive was the more reasonable cause.

PRACTICE TIP: Examine evidence of spoliation objectively before filing a motion for sanctions, particularly when seeking case-terminating sanctions. Even holes in the other side's production do not, by themselves, amount to sufficient evidence of "intent to deprive," to justify sanctions under Rule 37(e)(2)—especially where the alleged spoliation occurs several years before a party's duty to preserve arises.

Sanction Order Barring Use of Newly Produced Documents Has Major Implications

DR Distributors, LLC v 21 Century Smoking, Inc, unpublished opinion of the United States District Court for the Northern District of Illinois, issued Jan. 12, 2023 (Docket No. 12 CV 50324); 2023 WL 167517

This is a trademark case concerning the e-cigarette market, with supplemental state-law claims and counterclaims, including a counterclaim based on defamation. The plaintiff filed a motion to compel production in 2015, which eventually resulted in sanctions against the defendants for various and sundry discovery violations. The facts and legal analysis surrounding the sanctions are set forth in the court's 256-page Memorandum Order and Opinion issued on January 19, 2021. The Court imposed sanctions based on its conclusion that defendants and their former counsel failed to take reasonable steps to preserve ESI (electronically stored information); failed to conduct a reasonable investigation for relevant ESI; failed to make timely disclosures concerning ESI under 26(g); and unlawfully deleted thousands of emails and chat messages. One of the sanctions imposed precluded defendants

> from using any information not disclosed to Plaintiff by June 1, 2015, which is the date discovery supplements were due, Dkt. 116; Fed. R. Civ. P. 37(c), and are barred from using any documents not produced under this Court's June 11, 2015, order, Dkt. 132; Fed. R. Civ. P. 37(b)(2). This bar also precludes Defendants' expert witnesses from testifying that their opinions would not change had they considered the documents and information not disclosed before June 1, 2015. Fed. Rs. Civ. P. 37(b)(2), 37(c).

DR Distributors, LLC v 21 Century Smoking, Inc, 513 F Supp 3d 839, 863 (ND Ill, 2021).

Rule 37(e) sanctions are only available when electronically stored information has been lost and cannot be replaced or restored using reasonable measures. It is in the interest of both parties to explore the possibility of replacement/restoration before engaging in motion practice.

Shortly after the imposition of this sanction, the defendants "suddenly identified 20 bankers' boxes of documents" not subject to the order resulting in plaintiff filing a second sanctions motion. Amongst the various filings in what the court described as "[s]atellite litigation of satellite litigation," defendants filed an expert report relying on documents disclosed after January 1, 2015, in which the expert stated his opinion had not changed based on any documents disclosed to plaintiffs after January 1, 2015. The plaintiff filed a motion to strike the expert report, in which, the court noted, "Plaintiff understandably blew a gasket" because the report violated the court's January 2019 order. In response, the defendants claimed that the expert's report did not violate the order because the order only concerned expert reports used to advance the merits of the case, not one used to dispute the basis for a sanctions motion. The court disagreed.

To begin, the court observed that the defendants' expert report "plainly violates this Court's January 19, 2021, order. Any attempt to argue the contrary is simply gaslighting." As for its order being limited to expert reports used to advance the merits of the case, the court deemed the argument

> patently meritless and sanctionable. The order is clear. This argument would read an exception into the order and would have the January 19, 2021, sanctions order

include the following additional provision: "Defendants are barred from using on the merits of the case any information not disclosed to Plaintiff by June 1, 2015." But, like statutes, court orders are not interpreted to incorporate exceptions.

DR Distributors, LLC, 2023 WL 167517, at *3.

Because defendants' "frivolous filing in violation of a clear court order," the court imposed sanctions upon defendants and their counsel of $6,000, payable directly to the court to reimburse it for the time spent reviewing and addressing defendant's arguments.

PRACTICE TIP: Gamesmanship over court orders, whether or not 256 pages in length, is not recommended. Any doubt about the scope of a court order should first be addressed by seeking clarification. Credibility before the court, once lost, may never be regained.

Bench Book: "Using Special Masters & Discovery Mediators to Avoid and Resolve Discovery Disputes"

A team of 23 judges and attorneys from around the country, including several federal and state judges from Michigan (ED Michigan District Judge Stephen Murphy, ED Michigan Magistrate Judge Michael Hluchaniuk, Wayne County Circuit Judge Patricia Fresard, and Sixth Circuit Judge David McKeague), created a Bench Book entitled "Using Special Masters and Discovery Mediators to Avoid and Resolve Discovery Disputes." The Bench Book provides explanations and support for the various ways that Masters and Mediators can be valuable resources for you, including but not limited to situations where opposing counsel is:

- Unwilling to work with you to develop an adequate joint discovery plan;
- Refusing to conduct a meaningful meet and confer;
- Failing to understand or apply principles of the proper scope of discovery, including privilege and/or confidentiality;
- Not understanding how proportionality limits the scope of discovery;
- Lacking an understanding of relevant eDiscovery tools and strategies;
- Being uncooperative and/or refusing to provide details regarding discovery compliance efforts.

A copy of the Bench Book and a link to a webinar recording on this topic, can be found at edrm.net. Webinar presenters include:

- Jay Yelton, Of Counsel, Warner Norcross + Judd
- Dr. Maura R. Grossman, Professor and Special Master, University of Waterloo
- Hon. Kristen Mix, US Magistrate Judge, D. Colorado
- Hon. Andrew Peck (ret.), Senior Counsel, DLA Piper
- Hon. Iain D. Johnston, US District Judge - Northern District of Illinois

MDTC Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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***Safety Specialty Ins Co v Genesee County Bd of Commissioners*, 53 F4th 1014 (CA 6, 2022)**

This quarter, the duty to defend was addressed in several opinions, both from the Michigan Court of Appeals, and from federal courts applying Michigan law. Among them was this published opinion from the Sixth Circuit.

This declaratory-judgment action arose out of two class-action lawsuits against Michigan counties that retained surplus proceeds from the tax-foreclosure sales of private property. Genesee County was named as a defendant in the lawsuits and claimed coverage under two policies issued by Safety National Casualty Company and Safety Specialty Insurance Company (collectively referred to in the opinion as "Safety"). One of those policies was a Public Officials and Employment Practices Liability ("PO & EPL") policy. The other was a more standard Commercial General Liability ("CGL Policy"). Safety denied the claim and filed this suit against the County and the underlying class representatives. The district court agreed with Safety that it had no duty to defend or indemnify the County from the lawsuits but dismissed Safety's case against the underlying class representatives for lack of federal jurisdiction. *Safety Specialty Ins Co v Genesee County Bd of Commissioners*, 584 F Supp 3d 430 (ED Mich, 2022).

The Sixth Circuit affirmed both of these rulings. The opinion began with a lengthy discussion of the "Article III Case or Controversy" requirement, which related only to the underlying class representatives and is not particularly relevant here. As to the substantive coverage issue, the panel assumed "that the PO & EPL Policy would otherwise cover" the underlying lawsuits, but "at least one exclusion negates coverage." *Safety Specialty Ins,* 53 F4th at 1024. The panel focused on "Exclusion 9B," which excluded claims "arising out of ... tax collection, or the improper administration of taxes or loss that reflects any tax obligation." *Id.* at 1025. The panel noted that under Michigan precedent, the phrase "arising out of" means something that "springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the underlying event." *Id.*[1] "The language demands more than a but-for causal connection, but does not require direct or proximate causation." *Id.* After a brief discussion of Michigan's General Property Tax Act ("GPTA"), the panel had little trouble finding that the underlying suits "arose out of tax collection," and were therefore excluded. *Id.* at 1025-1026.

Genesee County argued that the process of "collection" could "reasonably be understood as not including "the post-foreclosure decision to retain funds previously collected." *Id.* at 1026. The County characterized the underlying case as involving "what happens after the taxation process is completed." *Id.* The panel disagreed, finding that the "post-foreclosure retention of funds previously collected cannot reasonably be understood as a separate decision that counties or their treasurers make." *Id.* "[T]he GPTA contains an 'exhaustive' reimbursement scheme that dictates where delinquent-tax property-sale proceeds must go." *Id.,* citing *Rafaeli, LLC v Oakland County,* 505 Mich 429; 952 NW2d 434 (2020). "The retention of surplus proceeds is part of the multi-step process that is 'tax collection,' as established by the GPTA, rather than a separate and independent decision." *Safety Specialty Ins,* 53 F4th at 1026. Moreover, "[c]onstruing 'tax collection' narrowly to refer only to the gathering of taxes owed does not affect the exclusion's 'arising out of' language, which sweeps in the complained-of activity." *Id.* "Whether or not surplus proceeds amount to tax revenue, their retention directly resulted from –and was part of – the tax-collection process outlined by the GPTA." *Id.*

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Genesee County also argued that, even if Exclusion 9B precluded claims arising out of tax collection, it did not apply to other damages claims asserted in the underlying lawsuits. *Id.* According to the County, the underlying claimants asserted "two kinds of damages: those arising from the retention of the excess funds and those arising from the claimed due process violations." *Id.* The latter claims did not, according to the County, arise out of "tax collection" to which the exclusion would apply. *Id*. Again, the panel rejected the County's argument, finding that "the causal link between the excluded conduct – tax collection – and the subsequent claims" was sufficiently "direct" to fall within the exclusion's "arising out of" language. *Id.* at 1026-1027. "[A]ll 11 counts across both [underlying] complaints rely on the same allegation: that county governments seized tax delinquent property, sold it at auction, and kept the surplus proceeds." *Id*. at 1027. "[T]he alleged tax-collection process directly caused the injuries underlying each of" the underlying plaintiff's claims. *Id*.

The Sixth Circuit's opinion did not address coverage under Safety's CGL Policy. The district court's opinion noted that the underlying complaints did not allege an "occurrence," and that the County "all but conceded that the CGL Policy" did not apply. *Safety Specialty Ins,* 584 F Supp 3d at 446. Presumably, the County abandoned this issue on appeal.

***Kinaya v Hanover Ins Co & Massachusetts Bay Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued November 17, 2022 (Docket No. 358879).**

Kinaya involved very different facts than *Safety Specialty Ins,* but the result was the same: no duty to defend. In this case, Kinaya sought coverage from Massachusetts Bay for an assault claim. Kinaya was an employee of a market and allegedly assaulted a customer during an argument about the cleanliness of the store. Although accounts of the confrontation differed, the customer sued, claiming physical injury.

Kinaya sought a defense under his employer's CGL policy with Massachusetts Bay. That policy contained standard language limiting liability coverage to "occurrences," as well as an "expected or intended injury" exclusion.[2]

Kinaya filed this declaratory judgment action, and the parties filed competing motions for summary disposition. The trial court granted Kinaya's motion for summary disposition, finding coverage without real explanation, and the insurers appealed. The Court of Appeals had little trouble reversing, finding that the underlying suit was not based on any alleged "occurrence." None of the actions attributed to Kinaya in the underlying complaint could be construed as "accidental." *Kinaya,* unpub op at 4-5.

> The district court agreed with Safety that it had no duty to defend or indemnify the County from the lawsuits but dismissed Safety's case against the underlying class representatives for lack of federal jurisdiction.

The panel reiterated that "[i] nterpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." *Id.,* unpub op at 4, citing *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997). The panel was persuaded by the insurers' argument that "the trial court skipped the first step articulated in *Harrington,*" and proceeded to consider whether the "expected or intended injury" exclusion applied "without first determining the threshold issue whether plaintiff was covered under the policies." *Kinaya,* unpub op at 4. The panel found that there was no coverage as a threshold matter because "[c]onsidering the incident from the standpoint of plaintiff as the insured, the incident was not accidental, even though the consequences of the customer's injury may not have been intentional." *Id.,* unpub op at 5-6. Kinaya testified he did not intend to harm the customer but only intended to knock the phone out of the customer's hand to prevent him from filming the encounter because Kinaya did not want a video to reflect poorly on the store or its reputation. A recorded video of the incident "clearly showed" that Kinaya "intended his actions" and that Kinaya "should have reasonably expected the direct risk of harm resulting from the consequences of his actions." *Id.,* unpub op at 6. Because this video eliminated any questions of fact, the panel held that there was no duty to defend as a matter of law. *Id.* Because of its finding of no coverage, the panel did not address the "expected or intended injury" exclusion.

***Great Am Fid Ins Co v Stout Risius Ross, Inc*, __ F Supp 3d __ (ED Mich, Nov. 1, 2022) ; 2022 WL 16571316 (Docket No. 19-11294)**

This opinion addresses what happens when an insurer defends under a reservation of rights but later prevails in a declaratory judgment action. Judge Laurie Michelson found that Michigan law allows the insurer to recover its defense costs from the insured, in certain situations, under an implied contract theory.

The insured in this case, Stout, was a financial advisory firm, and it was sued for its appraisal of a particular stock.[3] Stout's insurer, Great American, agreed to defend and indemnify Stout in that litigation, subject to a full reservation of rights. Great American maintained that certain exclusions applied and – while still providing Stout with a defense – pursued this declaratory-judgment action. Great American ultimately prevailed on a motion for summary disposition, securing a definitive ruling that it had no duty to defend or indemnify Stout in the underlying litigation.[4] However, this ruling came after about two years of litigation in the underlying case.

Judge Michelson cited *Continental Casualty Company v Indian Head Industries, Inc*, 666 F Appx 456, 568 (CA 6, 2016) for the proposition that an insurer is entitled to reimbursement under an implied-in-fact contract where the insurer: (1) timely and explicitly reserves its rights to reimbursement and (2) provides sufficient notice of the specific possibility of reimbursement.

Here, Great American explicitly reserved its right to reimbursement and notified Stout of the "specific possibility of reimbursement." In its reservation of rights letter, Great American wrote that its reservation included "the right to seek reimbursement from the Stout defendants, or any of them, if it should

be determined that Great American had no obligation…." Judge Michelson found that such notice was timely, where the letter was sent March 6, 2019, and Great American asked for reimbursement of costs after September 25, 2020, the date of the amended complaint in the underlying litigation. Great American sought reimbursement for claims brought well after its reservation of rights, and Stout did not argue or present evidence that it rejected or objected to the terms of Great American's offer to tender a defense. This, the district court found, gave rise to an implied-in-fact contract between the parties for reimbursement of defense costs in the event that Great American did not have a duty to defend (which it ultimately did not).

***Meemic Ins Co v Ritchie*, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2022 (Docket No. 358929); 2022 WL 12102845**

"This case arose out of an unfortunate encounter between two strangers, whose stories of the incident vastly differ." *Ritchie,* unpub op at 1. The resulting appeal dealt with whether Ritchie was entitled to liability coverage under his homeowners' policy for an alleged assault. According to the alleged victim, while making a home visit in rural Coldwater as part of her job as a social worker, she became lost and erroneously drove to Ritchie's house. She pulled her car into Ritchie's driveway and approached the home.

Then, according to the social worker, Ritchie came out of his house, approached her, and aggressively confronted her while pointing a gun directly at her at close range. He questioned her regarding why she was on his property and told her to leave. Fearing for her life, the social worker returned to her car and drove away. For his part, Ritchie initially denied that the encounter happened at all before eventually admitting that it did. He testified that he carried his pistol during the encounte but denied ever pointing it at the social worker. He testified in his deposition that he approached the alleged victim cautiously, helped her locate the proper address, and kept his handgun on his side and pointing toward the ground at all times, with his finger off of the trigger. According to Ritchie, there was no confrontation at all.

The social worker brought a tort claim against Ritchie, alleging assault. She also claimed that Ritchie was negligent. She sought damages for the emotional distress and injury she supposedly sustained as a result of Ritchie's conduct. At the time of the incident, Ritchie was insured under a homeowner's policy issued by Meemic. Meemic brought a declaratory-judgment action and later prevailed on a motion for summary disposition. The trial court was persuaded that Ritchie's act was not an "occurrence" as defined by the policy and, alternatively, that the policy's intentional-act exclusion precluded coverage. The underlying tort claimant appealed. The Court of Appeals unanimously affirmed.

> The district court found no coverage for this suit because, under the Allstate policy, liability coverage only applied to "damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy."

The panel began its analysis by noting that Meemic was obligated to provide coverage for, and defend against, the underlying lawsuit only if an "occurrence" took place. *Ritchie,* unpub op at 3, citing *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112; 595 NW2d 832 (1999). The Meemic policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, resulting in bodily injury, personal injury, or property damage during the term of the policy." *Ritchie,* unpub op at 3. So, coverage turned on "whether Ritchie's act of pointing a gun at" the underlying plaintiff and "aggressively confronting her" could constitute an "accident." *Id.* The panel noted that "an insured need not act unintentionally in order for the act" to constitute an "accident" and in turn, be an "occurrence." *Id.*, citing *Masters,* 460 Mich at 115-116. "However, where an insured does act intentionally, a problem arises in attempting to distinguish between intentional acts that can be classified as accidents and those that cannot." *Ritchie,* unpub op at 3. "In such cases, a determination must be made whether the consequences of the insured's intentional act either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions." *Id.* "[W]hen an insured's intentional actions create a direct risk of harm, there can be no liability coverage for any resulting damage or injury, despite the lack of an actual intent to damage or injure." *Id.*, citing *Masters,* 460 Mich at 115-116.

The panel cited the following hypothetical from *Masters,* 460 Mich at 115-116: suppose a fire had been started by a faulty electric cord on an insured's coffeemaker. Examining the insured's act for "intent," there is no doubt that he purposely plugged in the coffeemaker and turned on the switch. In that sense, the insured acted intentionally. But the fire remains an accident and the act constitutes an occurrence, because at the time of the insured's purposeful act, he had no intent to cause harm. The act of plugging in the coffeepot is not a sufficiently direct cause of the harm, and the fire in this example is an accident. *Ritchie,* unpub op at 3.

"What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident." *Id.*, citing *Allstate Ins Co v McCarn*, 466 Mich 277, 282-283; 645 NW2d 20 (2002). "On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured." *Ritchie,* unpub op at 3, citing *McCarn*, 466 Mich at 282-283.

Turning to "the substance of" the underlying complaint, the panel noted that "the injury-causing act was Ritchie's allegedly unprovoked act of aggressively confronting" the social worker "by pointing his handgun directly at [her] at close range with his hand on the trigger." *Ritchie,* unpub op at 5. Taking these allegations at face value,[5] "Ritchie's act was not accidental." *Id.* The panel saw no evidence in the record "from which it could be concluded that Ritchie accidentally

pointed his handgun at" the social worker. *Id.* Also, "Ritchie testified that he did not trip or otherwise make any movements that caused him to accidentally point his gun…"; in other words, he admitted that "if he had pointed his gun … it would have been intentional." *Id.*

Citing *Masters*, 460 Mich at 115, the panel then considered "whether the consequences of the insured's intentional act either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions." *Ritchie,* unpub op at 5. Even though there was "no direct testimony that Ritchie intended to cause the social worker fear or emotional distress," the panel noted that "if Ritchie acted as [the underlying plaintiff] alleged, he reasonably should have expected that [the underlying plaintiff] would be placed in fear and would suffer emotional injury as a result." *Id*. "Therefore, the incident was not an 'occurrence' triggering coverage, so Meemic had no duty to indemnify or defend Ritchie." *Id.*

The panel could have – like the *Kinaya* panel – stopped here. But the *Ritchie* panel went on to consider the policy's exclusion for "intended or expected injury." *Ritchie,* unpub op at 6. The panel found that "even assuming, *arguendo*, that an 'occurrence' took place, a reasonable person in Ritchie's position should have expected that such conduct would cause an unarmed, nonthreatening stranger severe emotional distress." *Id.* "Consequently, an exclusion in the policy would excuse Meemic from its duty to defend and indemnify Ritchie." *Id.*

Finally, the panel addressed the fact that the underlying plaintiff also pled a negligence claim in addition to the intentional tort claim. *Ritchie,* unpub op at 7. Citing *Auto Club Group Ins Co v Burchell,* 249 Mich App 468, 483; 642 NW2d 406 (2001), the panel found that this was "merely an attempt to trigger insurance coverage by characterizing allegations of tortious conduct as 'negligent' activity." *Ritchie,* unpub op at 7. "The duty to defend and indemnify is not based solely on the terminology used in the pleadings in the underlying action"; the "court must focus also on the cause of the injury to determine whether coverage exists." *Id.* (citations omitted). Because "the substance of" the underlying claims were decidedly "not an accidental 'occurrence,'" the attempt to plead the claim in negligence terminology had no effect on liability coverage. *Id.*

***Gunn v Gen Star Indem Co*, Inc, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued September 28, 2022 (Docket No. 21-11777); 2022 WL 4542079**

Like *Ritchie*, *Gunn* also arose out of an unfortunate encounter between strangers. Gunn claimed that he was verbally assaulted, struck, and beaten at a gas station and convenience store. Gunn further alleged that several employees of the gas station witnessed the attack but failed to intervene, render aid, or call for emergency assistance. Gunn sued the gas station, alleging "negligence/gross negligence," based on the gas station's supposed duties to provide a safe business environment and act in a safe and prudent manner. The corporations that owned the gas station sought a defense from their insurer, General Star, which denied coverage based on an "assault or battery" exclusion. *Gunn,* unpub op at 6-7. The insureds then entered into a $1,000,000 consent judgment with Gunn, who in turn filed a declaratory judgment action against General Star.

> "[W]hen an insured's intentional actions create a direct risk of harm, there can be no liability coverage for any resulting damage or injury, despite the lack of an actual intent to damage or injure."

General Star moved to dismiss the suit, arguing that the lack of coverage was clear from the pleadings. See FR Civ P 12(b)(6). Judge Denise Page Hood agreed. *Gunn,* unpub op at 11. In opposing the insurer's motion, Gunn argued that the "assault or battery" exclusion did not apply because his injuries were due to a failure to timely render aid, call for an ambulance, or request the aid of law enforcement. *Id.* According to Gunn, the exclusion was ambiguous as to whether it applied to the insureds' alleged failure to seek medical attention or – as Gunn claimed – only police intervention. *Id.* Gunn also pointed to the phrase for "the breach of any legal obligation or any duty ... to any person who was assaulted or battered," claiming that its meaning was unclear because it failed to clarify "scope, timeframe, or any other necessary condition that would prevent it from conflicting with other provisions of the Policy." *Id.* More specifically, Gunn argued that this language could be read to exclude coverage for non-assault and battery-related injuries simply because the person injured had also been assaulted or battered. *Id.* Finally, Gunn averred that the policy did not explicitly address the failure to timely render aid. *Id.*

Judge Hood was unpersuaded by these arguments, "especially as none of them are supported by any authority addressing exclusionary language in insurance contracts." *Gunn,* unpub op at 12. Judge Hood found the exclusion to be free of ambiguity, finding "numerous" Michigan decisions that had "upheld as unambiguous, valid, and enforceable exclusions to coverage for injuries and damages associated with an assault or battery, such that the insurer is entitled to deny coverage under an insurance policy." *Id.*, citing, among other decisions, *Century Surety Co v Charron,* 230 Mich App 79, 86; 583 NW2d 486 (1998) and *Ill Employers Ins v Dragovich*, 139 Mich App 502; 362 NW2d 767 (1984).

The exclusion stated that the policy did not apply "to damages ... arising out of, resulting from, caused or contributed to by ... [a]ny act of assault or battery ... or ... [t]he negligent reporting of or failure to report: (1) Any assault or battery; ... (3) Any person who assaulted or battered, or threatened to assault or batter, any other person; or (4) Any person who was assaulted or battered; or ... [t]he breach of any legal obligation or any duty: ... To any person who was assaulted or battered." *Gunn,* unpub op at 14. Under Michigan precedent, "arising out of" means "originating from," or "growing out of," or "flowing from." *Id.*[6] Judge Hood saw no doubt that "Mr. Gunn's injuries and damages originated and flowed from the assault and battery committed against him," and for coverage purposes, it did not matter "whether it was the assault and battery itself or the failure of persons to react appropriately to the assault and

battery." *Id.* "Specifically, the Court holds that the Exclusion precludes coverage for the failure of the Insureds' employees and agents to timely render aid, call for an ambulance or EMT, or even request the aid of law enforcement." *Id.* Judge Hood also emphasized that the exclusion expressly ruled out coverage for "any breaches of any legal obligation or duty to the victim of an assault or battery…." *Id.* For these reasons, General Star had no responsibility for Gunn's judgment. *Gunn,* unpub op at 17.

***Allstate Vehicle & Prop Ins Co v Donie*, __ F Supp 3d __ (ED Mich, 2022); 2022 WL 4472444 (Docket No. 21-cv-11057).**

Here, the insureds sought a defense under their homeowners' policy for a lawsuit brought by their next-door neighbor, regarding an easement. Allstate defended that suit under a reservation of rights, and filed this declaratory judgment action. Judge Shalina Kumar granted the insurer's motion for summary judgment, holding that "Allstate has no duty to defend or indemnify the Insureds in [the underlying] state court action against them." *Donie,* slip op at 12. Judge Kumar found that the underlying suit did not allege "property damage" within the meaning of the policy. *Donie,* slip op at 11.

The insureds were sued by their neighbor for obstruction and interference with her easement over their adjacent properties. The underlying plaintiff allegedly held a "right to use a sixty-six-foot-wide easement from her parcel, across the Insureds' properties, to Mack Road and that the easement is the exclusive means of ingress and egress for the" her property. *Donie,* slip op at 2-3. The Donies allegedly interfered with this easement right by placing a lock on the gate positioned at the entrance to the underlying plaintiff's property. *Id.,* slip op at 3.

The district court found no coverage for this suit because, under the Allstate policy, liability coverage only applied to "damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies, and is covered by this part of the policy." *Id.,* slip op at 9. The policy defined "property damage" as "physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction." *Id.,* slip op at 10. Judge Kumar found that the injury alleged in underlying case was the loss of use of the easement, but that loss of use did not "result from any physical injury or destruction of the land at issue." *Id.* "Policies, such as the ones at issue in this case, which define property damage as physical injury to or destruction of tangible property, do not cover loss of use of property that has not been physically damaged." *Id.* (citation omitted).

The insureds argued that the loss of the use of an easement was property damage, but the district court could not reconcile that argument with the unambiguous policy language defining "property damage" in a way that required "physical injury or destruction of tangible property including loss of use of property resulting from the physical injury or destruction." *Donie,* slip op at 10-11. Because the underlying complaint did not allege "a loss of use due to any physical injury or destruction of the land burdened by the easement," any "ultimate liability" to the underlying plaintiff "would not be for property damage…." *Id.,* slip op at 11.

While the parties also argued about whether locking the gate on the easement was an "occurrence," Judge Kumar saw no need to address that issue in light of her finding that there was no "property damage." *Id.* "Without any possibility of coverage, there can be no duty to defend, and Allstate is entitled to summary judgment." *Id.* (citation omitted).

Endnotes

1 Citing *People v Johnson,* 474 Mich 96; 712 NW2d 703 (2006) and *Pacific Employers Ins Co v* Mich Mutual Ins Co, 452 Mich 218; 549 NW2d 872 (1996).

2 Kinaya's employer also had a "follow form" umbrella policy with Citizens. *Kinaya,* unpub op at 2. The purpose of "umbrella coverage [is] to provide, at a relatively low premium, extended coverage up to high limits, over and above primary insurance coverage." *Morbark Indus, Inc v W Employers Ins Co,* 170 Mich App 603, 609; 429 NW2d 213 (1988). Under this kind of policy, "liability attaches only after a predetermined amount of primary coverage has been exhausted." *Id.* at 610. Coverage undern an umbrella policy typically rises and falls with the primary policy; such policies *do not* "provide primary insurance … in the event of" primary coverage being unavailable. *Id.* at 609.

3 The allegations in the underlying case are set forth in *Great Am Fid Ins Co v Stout Risius Ross, Inc,* 438 F Supp 3d 779, 782 (ED Mich, 2020).

4 Although not discussed in this opinion, Great American prevailed on "Exclusion F," which stated that the policy did not apply to any claim "based on or arising out of actual or alleged violation of" the Securities Acts of 1933 and 1934. *Great Am Fid Ins Co v Stout Risius Ross, Inc*, opinion of the U.S. District Court for the Eastern District of Michigan, issued August 23, 2021 (Docket No. 19-11294).

5 Complaint are accepted as true for the purposes of assessing liability coverage. See *Northland Ins Co v Stewart Title Guaranty Co,* 327 F3d 448, 456–459 (CA 6, 2003).

6 This was also discussed above in *Safety Specialty Ins,* __ F4th at __; slip op at 11.

Legal Malpractice Update

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A lawyer's duty under a limited engagement is, well … limited

Patel v Defendant Attorneys, ___ Mich App ___; ___ NW2d ___; 2022 WL 17170377 (Nov. 22, 2022) (Docket No. 357092).

Facts

The plaintiff was a party to complex legal proceedings involving himself, his family members, and their various businesses. The proceedings included a dispute related to the plaintiff's ownership interest in a pharmacy. The plaintiff entered into an agreement with the founder and original owner of the pharmacy. The agreement gave the plaintiff the option to purchase all of the pharmacy's outstanding common stock. The plaintiff exercised his option under the agreement, which resulted in the execution of a promissory note, a security agreement, and a pledge agreement. Broadly, the plaintiff agreed to make monthly payments to the founder for the purchase of the pharmacy.

The plaintiff timely paid most of the monthly payments under the promissory note. But before the final payment was due, the defendant attorneys filed a lawsuit against the founder on behalf of the plaintiff and the pharmacy. The founder filed counterclaims. The trial court dismissed the plaintiff's complaint based on the plaintiff's discovery violations. The founder's counterclaims remained at issue.

Other defendant attorneys appeared as co-counsel for the plaintiff to assist in settlement negotiations. Soon after, the founder moved for partial summary disposition, but the plaintiff did not file a response to the motion. The trial court granted summary disposition and entered a judgment in favor of the founder.

The plaintiff then filed a legal-malpractice claim against all defendant attorneys. The plaintiff alleged that the attorneys collectively failed to respond to the founder's summary-disposition motion or attend the hearing, which caused the entry of judgment in the underlying case.

The plaintiff's original attorneys moved for summary disposition on the basis that the plaintiff could not prove that their actions were the proximate cause of the adverse judgment. The later-added defendant attorneys also moved for summary disposition on the basis that they had no duty to respond to the summary-disposition motion because their representation was limited to negotiating settlement—not litigating the underlying case.

The trial court granted both summary-disposition motions. The trial court held that the later-added defendant attorneys' agreed-to role in the case was to assist in settlement negotiations and that they did not owe the plaintiff a duty to respond to the founder's summary-disposition motion. The trial court also held that the judgment in the underlying case would have been entered regardless of the attorney defendants' actions and that the plaintiff therefore could not prove that the attorneys proximately caused the adverse judgment. The plaintiff appealed.

Ruling

On appeal, the plaintiff argued that the trial court erred by concluding that the later-added defendant attorneys did not owe him a duty to respond to the founder's summary-disposition motion. The plaintiff agreed that the attorneys' representation was limited to settlement negotiations but reasoned they could not ignore a critical motion in the litigation because they too filed a general appearance.

The court disagreed, holding that where an attorney and a client expressly limit the terms of the attorney's representation, the duty imposed on the attorney for purposes of

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a legal-malpractice action is limited to the agreed-upon scope of representation. The court concluded that the other attorney defendants had no duty to respond to the founder's summary-disposition motion because the motion was unrelated to settlement negotiations and was therefore outside the agreed-on scope of representation.

The plaintiff also argued that the trial court erred by applying the case-within-a-case doctrine in holding that plaintiff was unable to prove that defendant attorneys proximately caused the adverse judgment. The plaintiff claimed that the causation standard required him to demonstrate only that the outcome was worse than it would have been but for defendants' malpractice.

The court disagreed, holding that the case-within-a-case doctrine applied. The court reasoned that the plaintiff's theory of malpractice was that the judgment would not have been entered had attorney defendants timely responded to the founder's summary-disposition motion. Under these circumstances, the causation element of the plaintiff's claim required proof that he would have been able to assert a successful defense to the founder's counterclaims. The court went on to conclude that plaintiff failed to establish a question of fact as to this issue and affirmed the trial court's order.

Practice Note

An attorney's duty is limited to the agreed-upon scope of representation with the client. It's a good practice to utilize thorough engagement agreements to guard against potential liability for services outside the agreed-upon scope.

Broadly worded settlement agreements are, well … broad

Betts-Watkins v Defendant Attorney, unpublished per curiam opinion of the Court of Appeals, issued October 20, 2022 (Docket No. 358730); 2022 WL 12084549.

Facts

The plaintiff and her late husband were married in 2003. They executed a prenuptial agreement before their marriage. The prenuptial agreement provided for the disposition of the marital home and a portion of the husband's estate upon his death. The assets were to be transferred to the plaintiff from the husband's trust.

The defendant attorney assisted the plaintiff's husband in creating a postnuptial agreement and a new trust in 2010. The plaintiff later alleged that she signed the postnuptial agreement without explanation from the defendant attorney, and the postnuptial agreement had a negative impact on her interests in both the marital home and her husband's assets.

The plaintiff's husband died in 2015. The defendant attorney served as both trustee and attorney for the husband's trust. The defendant attorney named the plaintiff as the "Trust Protector" and advised her in this role. The plaintiff later alleged that defendant attorney did so in order to obtain her unwitting participation in the mismanagement of the trust.

The defendant attorney established an attorney-client relationship with the plaintiff in 2016 and created her estate plan. The plaintiff later alleged that defendant attorney's representation raised numerous conflicts of interest arising from his role in creating the postnuptial agreement and the 2010 trust, as well as his roles in relation to the administration of the trust.

Litigation ensued, which generally involved the defendant attorney's alleged mismanagement of the 2010 trust, conflicts of interest, legal malpractice, breach of fiduciary duty, and a petition to remove defendant attorney as trustee. The plaintiff, the defendant attorney, and purported beneficiaries of the 2010 trust were involved in the litigation.

The litigation was resolved by way of settlement agreement and mutual release, which included multiple provisions regarding the release of any and all actions or claims related to the events, transactions, or occurrences involved in the litigation.

The plaintiff initiated an action alleging legal malpractice and breach of fiduciary duty against the defendant attorney and his firm. The defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that the settlement agreement and mutual release were comprehensive and barred the plaintiff's claims. The plaintiff countered that her claims were premised on the defendant attorney's handling of her estate plan, which was independent from matters involving the 2010 trust and its administration. The trial court granted the defendants' motion, holding that the plaintiff's claims arose from the administration of the 2010 trust and could have been raised as part of the earlier litigation. The plaintiff appealed.

Ruling

On appeal, the plaintiff argued that the trial court's summary-disposition ruling was erroneous because her claims were outside the scope of the settlement agreement and mutual release. The plaintiff maintained that the settlement only pertained to matters directly involving the 2010 trust, and her claims were based solely on the defendant attorney's involvement in her individual estate plan. The Court of Appeals disagreed, affirming the trial court's order granting summary disposition in favor of the defendants.

The court explained that the settlement agreement and mutual release unambiguously provided for the broad settlement of all potential claims between the parties, both known and unknown. Although the plaintiff contended that her claims were based solely on the defendant attorney's involvement in her individual estate plan, the court reasoned that these matters were at least related to those at issue in the prior litigation given the "degree of entanglement" between the defendant attorney's work pertaining to the 2010 trust and plaintiff's individual estate plan. The court went on to hold that it was evident from the broad language of the settlement agreement and mutual release that the parties intended there to be a release of **all** potential claims, whether known or unknown, and whether or not they could have been previously asserted.

Practice Note

Settlement agreements that contain broad provisions regarding the release of all claims may operate to bar all future claims between the parties, whether they are known or unknown, whether they could have been previously asserted, and even if they are only tangentially related to the prior proceedings. The scope of the release is governed by the intent of the parties, as expressed in the language of the release.

Legislative Report

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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.

A few useful tidbits on developing law in the State of Michigan. Some serious, and some with a bit of tongue in cheek humor, but all true. See if you can choose which is which.

House Bill 4132 (2023) has been introduced to allow the implementation of automated devices to identify vehicles and drivers exceeding construction zone speed limits by 10 or more miles per hour. The bill proposes a graduated penalty from a warning for a first offense, with higher monetary civil fines for further offenses. The system will record speed, vehicle identity, and registration plates. It creates a presumption that the owner is the driver, which is rebuttable with certain procedures to be followed.

MCR 7.202 and 7.209 proposed amendments by the Michigan Supreme Court, would remove denial of governmental immunity from the right to immediate appeal and stay of proceedings. Public hearing and comments are being welcomed by the Supreme Court on these proposed amendments. In the Proposed Order of Amendment, Justice Cavanaugh concurred and issued several areas of interest for public comment to assist the Court in its decisions. The public hearing will be held via Zoom on March 22, 2023.

Senate Bill 0083 (2023) creates an action for obtaining and implementing an Extreme Risk Protection Restraining Order prohibiting possession or obtaining firearms if the individual poses a significant risk of personal injury to themselves or others by possessing a firearm. If entered, the proposed bill would permit seizure of the restrained individual's firearms and any concealed carry permit.

MDHHS Update Bulletin MMP 23-14, advises that the Federal Public Health Emergency is expected to End on May 11, 2023. "The U.S. Department of Health and Human Services is planning for the federal Public Health Emergency (PHE) for COVID-19, declared under Section 319 of the Public Health Service Act, to expire at the end of the day on May 11, 2023."

Senate Bill 0056 (2023) if passed would remove the criminal penalties for "any man or woman, not being married to each other, who lewdly and lasciviously associates and cohabits together..."

Medical Malpractice Update

By: Jeff Feikens, *Ottenwess Law*

Markel v Beaumont and unanswered questions

On December 7, 2022, the Michigan Supreme Court, in a 4-3 decision, altered the established law of hospital ostensible agency liability in *Markel v William Beaumont Hosp*, __ Mich __; 982 NW2d 151 (2022). Rather than specifically decide whether the *Markel* case facts legally lacked the proofs for ostensible agency, the Court remanded the case to the Court of Appeals, holding that the Court of Appeals had dismissed the case under the wrong legal standard. It overruled several Court of Appeals cases and severely limited (without expressly overruling) an earlier Supreme Court case, *Reeves* v *MidMichigan*, 489 Mich 908; 796 NW2d 468 (2011).

The Court directed the Court of Appeals to review the case under the following standard enunciated in 1978 in *Grewe v Mt Clemens General Hosp*, 404 Mich 240; 273 NW2d 429 (1978):

> To establish a claim of ostensible agency, a plaintiff must show:
>
> [First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence. [*Markel*, 982 NW2d at 152 (quotation marks and citation omitted; alterations in original).]

The *Markel* Court confirmed the *Grewe* requirement that "the person dealing with the agent must do so with the belief in the agent's authority and this belief must be a reasonable one," but the order decreased the plaintiff's burden of proof on this requirement.

Markel held that "when a patient presents for treatment at a hospital emergency room and is treated during their hospital stay by a doctor with whom they have no prior relationship, a belief that the doctor is the hospital's agent is reasonable unless the hospital does something to dispel that belief." *Id*. at 153.

The question remains unresolved as to what evidence the plaintiff must present to create a question of fact as to the patient looking to the hospital. It would appear that a plaintiff still must provide some evidence that the plaintiff had the belief that the doctors treating her were hospital agents. Whether that proof is plaintiff's own testimony or someone else testifying that plaintiff went to the hospital for treatment by the hospital is unclear. In *Grewe*, the patient testified that he was looking to the hospital for treatment when he presented to the hospital after first going to a clinic. *Markel* stated (without any cited authority, in what is arguably dicta) that "patient testimony is not required to establish ostensible agency under *Grewe*." But the *Markel* majority did not make the ultimate leap and state that a medical-malpractice plaintiff did not have to provide any evidence of a patient's belief to establish ostensible agency.

Further, it seems that defendants can still argue that a plaintiff who makes no decisions as to seeking treatment (such as an unconscious patient or a person for whom EMS chooses the hospital) does not meet her burden of proof.

The *Markel* order changed the burden of proof for a plaintiff on the test regarding the patient's belief of the doctor being a hospital agent and that the belief must be generated by some act or neglect of the principal. The Court concluded that: "'the act or neglect' of the hospital is operating an emergency room staffed with doctors with whom the patient, presenting themselves for treatment, has no prior relationship." *Id*. at 153. The patient's agency belief is presumptively reasonable under this new standard. It is now the hospital's burden, rather than the plaintiff's, to establish that the hospital or

Jeff Feikens joined Ottenwess Law in August 2021. He has handled hundreds of matters in civil litigation, including personal injury, medical malpractice, construction accident, legal malpractice, subrogation, and contracts. He has represented hospitals and physicians in medical malpractice cases throughout Michigan. He has also represented pharmaceutical companies, health maintenance companies, insurance companies, and other companies in state and federal court. He has tried cases to juries in Wayne, Oakland, and Livingston counties and maintains an active Michigan appellate practice.

treating doctor has "dispelled" a patient's belief or assumption regarding hospital agency.

Once again, it does appear that a hospital is still permitted to provide evidence negating this presumption through previously accepted means, such as a hospital consent form that provides notice that physicians are not hospital employees. a physician indicating she is an independent physician or preexisting patient knowledge of the doctor's independent status.

This new *Markel* standard does not provide direct answers on the question of ostensible agency in many situations. To hold that a hospital's "act or neglect" is a failure to discuss independent physicians in the context of an unconscious or incompetent patient makes little sense, although such a case may already be insufficient if a plaintiff cannot show that they looked to the hospital for treatment. In such a context, the patient is receiving treatment, and the hospital cannot provide any evidence to the patient which could give them notice that the doctors are not its agents. Thus, even if such evidence was present in a consent form, signage, or direct communication with a patient, the patient himself is unable to receive the information. To permit the unconscious plaintiff to prevail in such situations flips the entire purported reliance standard of ostensible agency on its head. In such contexts, defendant hospitals should continue to attempt to persuade the court that it should utilize the general principle stated in *Grewe*: "[g]enerally speaking, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients." *Grewe*, 404 Mich at 250.

Ultimately, while *Markel* made the burden of proof to create a question of fact easier for some plaintiffs, it did not take the step of mandating hospital ostensible agency for all emergency department presentations, and a hospital should continue to present evidence to dispute such liability.

Michigan Court Rules Update

By: Sandra Lake, *Hall Matson, PLC*
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PROPOSED AMENDMENTS

2022-03-Proposed Amendment to MCR 1.109

Rule affected:	MCR 1.109
Issued:	January 18, 2023
Comment Period:	May 1, 2023

This proposed amendment would allow parties and attorneys to identify their personal pronouns and would require courts to use those pronouns both verbally and in writing, unless doing so would result in an unclear record.

2021-50-Proposed requirement to file notice of bankruptcy

Rule affected:	New rule MCR 2.421 to be added
Issued:	October 26, 2022
Comment Period:	February 1, 2023

This proposed amendment would require parties who are or become subject to a federal bankruptcy action to file a notice of same in any pending state court action.

2021-35-Proposed amendment to the definition of "final order"

Rule affected:	MCR 7.202
Issued:	December 21, 2022
Comment Period:	April 1, 2023

This proposed amendment would eliminate certain orders relating to governmental immunity from the definition of a "final judgment" or "final order."

ADOPTED AMENDMENTS

2021-39-Amendment regarding Court of Appeals' reissuance of opinions and orders

Rule affected:	MCR 7.215
Issued:	June 15, 2022
Effective:	January 1, 2023

This amendment codifies the standard practice utilized by the Court of Appeals in reissuing an opinion and order upon a showing that the clerk or attorney failed to send a judgment or order promptly precluding a party from timely filing a motion for reconsideration or application for leave to appeal to the Supreme Court.

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

Tribute to Norton T. Gappy

Norton T. Gappy was born on February 16, 1974, was admitted to the State Bar of Michigan on November 12, 2002, and passed away in his bed on February 25, 2023. But what he accomplished in the relatively short period of time between those dates stands as an example of a life well-lived with dignity, sacrifice, and service. I will forever grieve his loss.

My name is Lincoln Herweyer, and I first met Norton on July 7, 2003 when I joined him in working for the inimitable John P. Jacobs. It was during those years (and prior) that Norton was actively involved with the MDTC and took on a number of what one might euphemistically refer to as leadership roles. In reality, his participation with the MDTC was a reflection of much of his life-- he routinely took on burdens of service. They say that many hands make light work, and when Norton Gappy was around there were always two extra hands ready to lighten the load.

Norton was the oldest of three sons born to Iraqi immigrants, Tofiq and Hanaa Gappy. I once asked him why they chose to name him Norton, to which he laughingly responded: "They wanted to give me an American name. Why did your parents name you Lincoln?" (Same reason, I think.) Norton's father can be viewed as something of a rags-to-riches story, but it was more of a hard-work-pays-off tale. So Norton grew up working in his father's stores. My guess is that the hours were long and the tasks were difficult, because later in life I never saw any quit in Norton—no matter how dissappointing a setback might be, he would utter "it is what it is" and then redouble his efforts to set things right.

Norton earned a Bachelor of Science degree from Wayne Stae University in 1998 and Juris Doctor from University of Detroit Mercy School of Law in 2002. I could list the many honors that were bestowed on him (from Michigan Lawyers Weekly, *Up and Coming Lawyers* in 2004 to Lawyers of Distinction, *Excellence in Corporate and Transactional Law* in 2020), but that would do little to describe his true character. In September 2005, Norton began a solo practice—not because appellate work was not lucrative, but because he wanted to litigate. He wanted to help his clients in their hour of greatest need, rather than sorting through the rubble after the fact.

Norton loved to champion lost causes. He often knew at the time he took on a case that the odds were long and the journey would be arduous, but if he could not obtain a complete remedy for a client in a difficult situation, he could at least

improve their circumstances. And that is the common thread that wove through his life—Norton liked to help, indeed, he was driven to help.

When I worked with Norton, and during the years we shared office space, I found myself (too often) relying on Norton for some small service or another simply because I knew he would do it without hesitation. And when I made a conscious decision to stop leaning on him so heavily, it did not change his nature. Just this last January, Norton called to check on me because he knew I was suffering from an agonizing gout attack. I told him that I would be going to the office on crutches because I needed to do some legal research on a particular subject. But when I got to the office, I found that he had already done the research and emailed it to me.

It is not that Norton eschewed fame or money, but what he really valued were

people, and friendships, and (above all) family. I never saw Norton more proud than when his 13-year-old daughter, Hanna, was recently accepted into an elite private high school and awarded a scholarship based on her academic achievement. My own daughters, who are now 26 and 23, first met Norton when they were 6 and 3—and they absolutely loved him. If I brought them to work, Norton always interupted what he was doing in order to interact with them and make them feel important.

Life can be cruel and unfair. Forty-nine years was not enough. In the end, Norton's heart let him down—a bitter irony, indeed. Short though it was, if we measure Norton's life in the terms famously described by Ralph Waldo Emerson, it was a success:

To laugh often and much; to win the respect of intelligent people and the affection of children; to earn the approbation of honest critics and endure the betrayal of false friends; to appreciate beauty; to find the best in others; to give of one's self; to leave the world a bit better, whether by a healthy child, a garden patch, or a redeemed social condition; to have played and laughed with enthusiasm and sung with exultation; to know even one life has breathed easier because you have lived - This is to have succeeded.

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