Michigan Defense QUARTERLY

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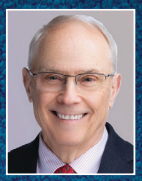
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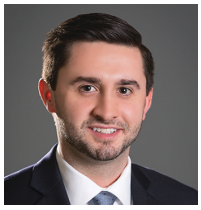

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Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

Past President's Corner

By: John Mucha, Dawda, Mann, Mulcahy & Sadler, PLC
jmucha@dmms.com

In case you haven't noticed, the MDTC has been enjoying one success after another. Last fall, our annual Golf Outing and our Meet the Judges events were extremely well-attended, and they were followed by an equally successful Winter Meeting and Conference in Novi. Our Legal Excellence Awards ceremony at the Gem Theater in March recognized several leaders in the defense bar, and it received high marks from the large gathering that attended. In between all those events, the MDTC hosted several excellent webinars on a variety of interesting topics, and these were also very well-received. In addition, by the time you read this, we will be holding (or close to holding) our Summer Conference and Annual Meeting at Treetops Resort. That event is always first-rate, and it will feature several excellent speakers again this year.

All these events were followed by the inaugural "Battle of the Bars" on August 11th, which pit the MDTC against the MAJ in a fun but competitive softball game at The Corner Ballpark in Detroit. Think about it -- lawyers with bats -- what could go wrong?

This event was a fundraiser for PAL (the Police Athletic League), which does so many great things for the local community. The excitement is building, and I hope to see you there!

None of these events and programs happen on their own. They take hard work, time, and dedication on the part of many people. Not the least of these is the MDTC administrative staff, led by our Executive Director, Madelyne Lawry, and ably assisted by several others on her team, most notably Tara Christensen and Matt Hinkle. The MDTC Executive Committee, the MDTC Board, and all who serve on the many MDTC Committees and Sections have also been incredible.

Check out the lengthy list of Committees and Sections in this edition of the Defense Quarterly and the many MDTC members who contribute their time and talent to make those Committees and Sections serve our broader membership throughout the year. It is a very impressive list. Heartfelt thanks goes out to them all, but I especially want to give a shout-out to Mike Cook, who works tirelessly in assembling the Defense Quarterly, Terry Durkin, who makes the Golf Outing such a success each September, and Lindsey Peck, who coordinates our Amicus Committee and gives voice to the defense bar's point of view when requested by the courts to do so.

If you or your firm are not listed, but want to be, please contact Madelyne Lawry or any of the named leaders to volunteer. It is a great way to enhance your practice and build your network in the defense bar community.

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.

As MDTC President, I have the honor of presenting special awards, given annually, to three additional MDTC members who have "stepped up" during the past twelve months.

This year these three special recipients are: Sarah E. Cherry, recipient of the Anita L. Comorski Volunteer of the Year Award; Dale A. Robinson, recipient of the Distinguished Service Award; and Frederick V. Livingston, recipient of the President's Special Recognition Award.

Each of these award recipients has demonstrated a deep commitment to the goals of the MDTC, and each has worked above and beyond the ordinary call of duty to advance those goals. Their contributions have been outstanding, and they are very deserving of these honors.

Being surrounded by so many generous and dedicated colleagues has made the task of guiding the MDTC this past year a real pleasure. Thank you, everyone, for your hard work, friendship, encouragement, and support.

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.

President's Corner

By: Mike Jolet
mjolet@vanhewpc.com

I would like to introduce myself to you as the new President of the Michigan Defense Trial Counsel. First, I would like to take this opportunity to say that I am very excited to have the privilege of serving in this position for the next 12 months. I look forward to collaborating with all of you in an effort to explore new opportunities for growth and to increase membership value.

I have proudly been working in insurance defense since 2004. Since that time, there have been many twists and turns in the law, and even in our everyday lives, that have made this an interesting and satisfying career choice. I believe that our efforts to stay ahead of the curve in an ever-changing legal environment will help ensure that our members derive value from their MDTC membership. Our mission is to provide networking and advocacy that accelerates our members' opportunities to thrive, both personally and professionally. I am very excited to be a part of the process of building on our successes, while also continuously on the lookout for new opportunities for growth.

I have personally met many of you, however, for those of you who I have not yet had the pleasure of meeting, I would like to share with you some of my background and experiences. In addition to my new role at the MDTC, I am also the current President of Hewson & Van Hellemont, PC. I have spent my entire career practicing in the State of Michigan in both state and federal courts. Over the years, I have had the opportunity to talk with many clients, partners, directors, employees, and members. These conversations have only increased my enthusiasm for the defense profession and the vital role MDTC plays in the defense bar.

I would also like to encourage others who also have an interest in leadership to reach out and become involved in the many opportunities that MDTC has available. As President, I want to engage with you and work collaboratively to grow the association and increase awareness of the value of MDTC's work. We have a great opportunity to support the professional development of our individual members and our partnering firms. Success requires that we consistently work towards achieving our goals through integrated initiatives that place a high priority on moving us forward simultaneously on multiple fronts across the legal landscape.

The membership of MDTC is incredibly diverse with small and large firms from a multitude of practice areas throughout the State of Michigan. We will continue to encourage firms and their leaders to engage with us and realize the value MDTC has to offer to you, your firm, and our community as a

Michael J. Jolet is a Co-Managing Partner and President at Hewson & Van Hellemont, P.C. Mr. Jolet graduated from Wayne State University with a B.A. in 2001. He attended law school at The University of Detroit Mercy School of Law and graduated cum laude with a Juris Doctor in 2004. Mr. Jolet was admitted to the State Bar of Michigan in 2004.

Michael specializes in insurance defense and has handled thousands of cases involving a variety of complex issues in first party, uninsured motorist and third party civil cases.

Michael joined Hewson & Van Hellemont, P.C. in May 2011. Prior to joining HVH, he was a Partner at an insurance defense law firm in Michigan.

Mr. Jolet's passion and involvement in all of his files has earned him the trust of his clients, and his aggressive and no-nonsense approach allows him to effectively litigate each case for his clients.

whole. Recently, our inaugural softball game against the Michigan Association for Justice took place on August 11, 2023. The event was a great success and exemplifies the new and exciting networking opportunities, as well as benefitting a great cause. The event raised money for The Detroit Police Athletic League (P.A.L.). We look forward to continuing to offer more of these events in the future to foster collegiality amongst our members and with our colleagues in the Plaintiff bar.

I would like to express my profound appreciation and gratitude to Madelyne Lawry, Tara Christensen, Matt Henkle, Owen Curtis, Adam Legal, and Madison Ashley for all you have done for not only this association, but for all of us. Thank you for helping us all navigate all of the big events and daily tasks we need to accomplish. I would like to also acknowledge and thank our 2022-2023 Board, John Mucha, III, President, John C. W. Hohmeier, Treasurer, and Frederick V. Livingston, Secretary.

Your contributions, knowledge, and stewardship have been essential to furthering the mission of MDTC. Congratulations to our newly elected 2023-2024 Board John C. W. Hohmeier, Frederick V. Livingston, Treasurer and Richard J. Joppich. To all the past and present Board of Directors and Regional Chairpersons, I too have appreciated all of you and what you bring to this association. I am very proud to call each and every one of you my colleague.

I am honored to serve as the President of MDTC. Our strong commitment to MDTC will allow us to identify important challenges and opportunities in litigation, help us make better informed, strategic decisions within our practice areas, and allocate resources to our initiatives accordingly. I believe that open engagement is a key part of our overall success, and I look forward to being your President and working with all of you.

MDTC **Schedule of Events**

2023

Friday, November 3	8AM - 5PM	Winter Meeting | Sheraton Detroit Novi Hotel

2024

Thursday, March 23	6PM - 9PM	LEA | The Gem Theater
Monday, April 1	6PM - 8PM	Past Presidents Reception | Detroit Golf Club
Thursday, June 13	8AM - 12PM	Annual Meeting & Summer Conference | H Hotel, Midland
Friday, June 14	1PM - 5PM	
Thursday, October 10	6PM - 8PM	MTJ | Detroit Golf Club

2025

Thursday, June 19	8AM - 12PM	Annual Meeting & Summer Conference | Soaring Eagle Cascino
Friday, June 20	1PM - 5PM	




Celebrating a Legacy of Excellence: **Michael Cook, Editor of the Michigan Defense Quarterly**

There are certain individuals who leave an indelible mark on their profession through their dedication, innovation, and commitment to advancing their field. Michael Cook, a distinguished lawyer and editor, has proven himself to be one of those exceptional individuals. For the past eight years, Mike has served as Editor of the Michigan Defense Quarterly, shaping the publication into a beacon of knowledge and insight for legal practitioners across the state.

Throughout his tenure, Mike has demonstrated both expertise and leadership, overseeing the creation and editing of an impressive 31 issues, spanning over seven comprehensive volumes. Under his leadership, the Quarterly has elevated its status as an invaluable resource, tackling complex legal issues and providing important updates on case law and legislative developments.

One of Mike's notable achievements was streamlining the editorial process and attracting top talent to assist him in his work. He recognized the importance of a strong team and diligently recruited multiple associate editors. These associate editors worked with him to ensure that the Quarterly consistently maintained the highest standards of quality.

Mike also has a passion for excellence. He demonstrated that as Editor of the Quarterly through his creation of the Best Article contest. This annual award not only acknowledges the efforts of talented authors but also serves as an incentive for contributors to deliver their best work. Through this contest, Mike has demonstrated his – and the MDTC's – commitment to and appreciation for superior legal writing.

Mike's practice focuses on appellate and post-verdict litigation. After clerking for Michigan Supreme Court Justice Robert P. Young, Jr., Mike worked in the commercial-litigation department of a large Detroit-area law firm before joining Collins Einhorn's appellate department.

The majority of Mike's practice involves briefing and oral advocacy in state and federal appeals. But his practice reaches beyond appellate courts. He has been retained to work with trial counsel to minimize risk exposure and posture a case for appeal through dispositive and other pre-trial motions.

His post-trial work commonly includes addressing thorny entry-of-judgment issues, prevailing-party costs, and post-judgment motion practice aimed at framing issues for appeal.

Celebrating a Legacy of Excellence, cont.

In 2019, Mike exhibited great vision when he proposed allowing the publication of opinions in the Quarterly. His idea was a catalyst for insightful debates and an enriching exchange of perspectives among legal professionals. This policy change marked a pivotal moment in the publication's history, elevating its status as an authoritative platform for legal discourse.

In addition to broadening the scope of the Quarterly, Mike introduced the innovative Affiliate Bar feature section. This fantastic addition to the Quarterly provided a dedicated space for attorneys and legal practitioners from various backgrounds to contribute their insights and expertise, promoting more diverse and inclusive dialogue.

Keeping up with the digital era, Mike also materially transformed the reach of the Quarterly by moving the publication to an accessible online platform in 2023. He ensured that the valuable content produced in the Quarterly reached a broader audience, providing access to legal professionals and scholars worldwide.

Mike's legacy as Editor of the Michigan Defense Quarterly is a testament to his unwavering commitment to advancing the field of law. Through his visionary leadership, dedication to excellence, and forward-thinking initiatives, he has left an indelible mark on the legal community.

As we celebrate his remarkable achievements over the past eight years, it is with deep admiration and gratitude that we extend our heartfelt appreciation and gratitude to Mike for his tireless efforts on behalf of the MDTC – and by extension, the Michigan legal community.

Congratulations and thank you, Mike, for your extraordinarily impactful tenure as Editor of the Michigan Defense Quarterly!

Hilary Ballentine

Past Presidents Society Co-Chair
Hilary Ballentine
President 2016-2017

L Khachaturian

Past Presidents Society Co-Chair
Lee Khachaturian
President 2015-2016

Affinity Bar Spotlight

Interview with Benjamin Wu, Vice-President

When did you join the Michigan Asian Pacific American Bar Association?

I joined the Michigan Asian Pacific American Bar Association ("MAPABA") in 2018, when I was in my first year of law school at Wayne State University.

What compelled you to get involved with the Michigan Asian Pacific American Bar Association?

When I started law school, I quickly realized that there were very few Asian law students. In my class, there was one other, and I don't think there were more than 5 total at Wayne Law during my 1L year. I also didn't know any Asian lawyers growing up. When I found out that there was a local bar association that catered towards attorneys and law students of Asian and Pacific Islander heritage, I knew I wanted to get involved in that community.

What is the mission statement of the Michigan Asian Pacific American Bar Association?

MAPABA's mission is to promote improvements in the administration of justice, to advance relations between the legal profession and the public, to secure equality of Asian Pacific Americans in society, to advocate for the interests of Asian Pacific Americans in the legal profession, and to promote equality and social justice for all people.

What are the criteria for membership?

Although MAPABA is largely targeted towards attorneys and law students of Asian and Pacific Islander descent or background, MAPABA welcomes all attorneys, law students, other legal professionals, and even community members who are interested in and passionate about MAPABA's mission.

How does membership with the Michigan Asian Pacific American Bar Association benefit legal professionals?

MAPABA offers its membership a variety of programming, including membership in the National Asian Pacific American Bar Association, as well as networking and professional development opportunities. More importantly, it provides Asian and Pacific American attorneys and legal professionals with an opportunity to interact with others of similar racial and cultural backgrounds.

Are there special events, volunteer opportunities, committee groups, or community relationships that the Michigan Asian Pacific American

Benjamin D. Wu is an associate in the Detroit, Michigan, office of Jackson Lewis P.C. His practice focuses on representing employers in workplace law matters, including preventive advice and counseling.

While in law school, Ben was a two-time regional champion and national finalist in the American Bar Association's National Appellate Advocacy Competition. Both years, his teams won fourth-best brief in the nation, out of over 190 teams from over 90 law schools.

Passionate about diversity and inclusion, Ben serves as the vice-president of the Michigan Asian Pacific American Bar Association.

In his spare time, Ben is an assistant coach at the Plymouth/ Ann Arbor Fencing Academy, teaching youth fencing classes.

MAPABA
MICHIGAN ASIAN PACIFIC AMERICAN BAR ASSOCIATION

Interview with Benjamin Wu, cont.

Bar Association is particularly proud of?

Every year, MAPABA hosts its annual Lunar New Year Dinner to celebrate the diversity of the Michigan bar. The event has enjoyed the attendance of the President of the State Bar of Michigan, members of the Michigan state legislature, community organizers and activists, and of course APA attorneys and legal professionals from all over the state.

What inspired the establishment of the Michigan Asian Pacific American Bar Association?

MAPABA started as an idea among the volunteer attorneys of the American Citizens for Justice (ACJ), the group that led the fight for justice following the racially motivated killing of Vincent Chin in 1982. The ACJ attorneys decided to form a new bar association of Asian American lawyers and worked with the State Bar of Michigan to establish MAPABA.

As a leader of the Michigan Asian Pacific American Bar Association, how do you define "diversity, equity, and inclusion"?

To me, diversity, equity, and inclusion (DEI) is the concept of ensuring that every individual, regardless of their race, ethnicity, age, gender, sexuality, or other characteristics feels welcome and included in society. This includes in the workplace, especially in leadership positions, as well as in larger society (e.g., participation in the arts, politics, sports and entertainment, etc.).

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")?

In my experience, inclusion flows naturally from creating genuine human connections. The more we get to know another person, the more we are able to understand and empathize with that person's lived experiences, which in turn affects the unconscious biases that we all hold. To that end, law firms and legal employers can facilitate dialogue among employees, such as through webinars, for people to share their lived experiences with one another.

How can individuals support the Michigan Asian Pacific American Bar Association, its mission, and its members?

I strongly believe that the greatest, yet simple service an individual can contribute to the mission of DEI is participation and visibility. Not everyone has the ability or desire for things like community organizing, volunteering, or financial contributions. But I am always encouraged in my personal mission to further DEI when I simply see the many diverse members of the Michigan bar at networking or family/community events. Participation in affinity bar organizations such as MAPABA helps strengthen our bar organizations, which in turn allows us to serve our membership through increased visibility.

What else would you like the Michigan Defense Quarterly readers to know about the Michigan Asian Pacific American Bar Association?

MAPABA is one of many cultural and affinity bar associations in the State of Michigan. According to the State Bar website (https://www.michbar.org/resources/local-special-bar#culturalbars), there are currently 35 such bar associations. For readers who may not relate to the experiences of Asian and Pacific Americans, but who share a similar mission of furthering diversity, equity, and inclusion in the legal profession, your time and energy in any of these bar associations is encouraged and welcome!

How can Michigan Defense Quarterly readers reach out if they are interested in joining or learning more about the Michigan Asian Pacific American Bar Association?

Readers can contact the President, Jacqueline August, at jaugust@bodmanlaw.com, or the Vice-President, Benjamin Wu, at benjamin.wu@jacksonlewis.com.

Affinity Bar Spotlight

Wolverine Bar Association

Much work must to be done to improve diversity, equity, and inclusion in the legal profession. One crucial 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 Wolverine Bar Association through a question and answer with its president—Allen W. Venable:

When did you join the Wolverine Bar Association?

2003.

What compelled you to get involved with the Wolverine Bar Association?

My law firm at the time, Bodman LLP, hosted the WBA's monthly meetings. So, I was able to attend WBA monthly meetings at my workplace, with the encouragement of my employer.

What is the mission statement of the Wolverine Bar Association?

Its mission is to assist African American attorneys in (a) exerting greater influence in the legal profession and community; (b) improving relations with other bar associations; (c) inspiring confidence in its members; (d) promoting fellowship among its members; (e) promoting the administration of justice and reform in the law; and (f) providing information to indigent members of the African American community.

What are the criteria for membership?

There are several membership categories, inclusive of law students, legal assistants, law graduates, judges, attorneys, etc. There are no requirements or criteria related to race, gender, sex, ethnicity, etc.

How does membership with the Wolverine Bar Association benefit legal professionals?

Membership facilitates the uplift of African American attorneys in the legal profession. Every member is presented with an opportunity to engage in outreach programs, fellowship, resource sharing, educational programs, career development, community outreach, networking, mentoring, and advocacy focused on that goal. Membership is also a requirement for inclusion in our email communication network.

Allen W. Venable is the owner of Venable Law, PLLC. His practice areas are Business, Employment, and Tax Law, Real Estate and Construction Law, Estate Planning and Probate Law, and Personal Injury Law.

Prior to Venable Law, Mr. Venable worked six years as a business, construction, and real estate litigator for a large Detroit law firm. He also worked as a clerk for the Honorable Judge Mary A. Gooden Terrell, Superior Court, Washington, D.C.; for the Michigan Department of Career Development in the Bureau of Labor Statistics; and for the Secretariat of the Commission for Labor Cooperation under NAFTA as a legal writer on Mexican, Canadian, and United States labor and employment law.

Mr. Venable has served on the board of directors of several nonprofit organizations, including the Detroit Urban League and National Bar Association. He also conducts presentations and workshops on a variety of legal topics. He has presented as a panelist and led workshops for Miller Brewing Company's Urban Entrepreneur Series, the Booker T. Washington Business Association Keys to Business Success Conference, the International Detroit Black Expo, Inc., and the Detroit Entrepreneurship Institute, Inc. He currently conducts workshops on business ethics, commercial agreements, and business basic for entrepreneurs and non-legal professionals.

Interview with Allen Venable, cont

or community relationships that the Wolverine Bar Association is particularly proud of?

Our pipeline programs assist students (from high school through law school) with legal mentoring, LSAT scholarships, law school tuition scholarships, summer law clerkships, judicial law externships, and bar exam preparation. Our judicial ratings and judicial appointments committees, respectively, educate on the quality of judicial candidates seeking elected office and facilitate the increase of African Americans on the bench. Our judicare and legal education programs assist the public with attorney referrals and legal information. The 2023 Barristers Ball "Paradise Valley," set for April 29, 2023, is our largest charity fundraiser with over 1500 attendees annually

What inspired the establishment of the Wolverine Bar Association?

African American attorneys needed an organization that supported their success. At the WBA's initial founding in 1919, African American attorneys were barred from the American Bar Association due to race, and we faced both racial hatred and racial segregation that limited our ability to conduct a viable legal practice.

As a leader of the Wolverine Bar Association, how do you define "diversity, equity, and inclusion"?

As an African American, I view those words as terms of art meant to describe certain outcomes related to bringing historically excluded groups into full citizenship through the elimination of civil, economic, and social barriers in the workplace and beyond.

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")?

Focus on "bringing historically excluded groups into full citizenship through the elimination of civil, economic, and social barriers" in your workplace and the legal profession. Reserve an intern/extern slot for a WBA student in your summer class or law department. Encourage your workers to satisfy their yearly pro bono commitment by volunteering with the WBA judicare program. Secure a membership (a corporate membership) in the WBA. Sponsor a student tuition scholarship, our law student reception, Barristers Ball, LSAT scholarship, bar exam program, and/or other programs. These actions, in combination over time, reshape your culture and foster a climate conducive to recruiting and retaining African American attorneys.

How can individuals support the Wolverine Bar Association, its mission, and its members?

Engage in the same actions outlined in the response to #9 above.

What else would you like the Michigan Defense Quarterly readers to know about the Wolverine Bar Association?

We partner with many organizations to accomplish our work, and we welcome an opportunity to partner with your organization.

How can Michigan Defense Quarterly readers reach out if they are interested in joining or learning more about the Wolverine Bar Association?

My telephone number is (313) 623-2024 and my email is president@wolverinebar.org and avenable@venablelawpllc.com. Our website is www.wolverinebar.org.

E-Discovery **Report**

By: B. Jay Yelton, III, *Warner Norcross + Judd LLP*
jyelton@wnj.com

Counsel Sanctioned for Disingenuous, Improper, and Invalid Discovery Responses

In *re Homeadvisor, Inc. Litigation,* 2023 WL 196414 (D. Colo. Jan. 16, 2023)

This case concerns a putative class action brought by home services providers (HSPs) against an online marketplace (Homeadvisor, Inc) that purportedly matched HSPs with homeowners actively seeking home services. While the service is free to consumers, HSPs pay for a membership and any leads generated. The HSPs alleged that the defendant's services were "bogus" because the defendant had failed to verify the leads as coming from homeowners who were "project ready."

During the case, a discovery dispute arose concerning the defendant's request for the HSPs to turn over their communications with the Federal Trade Commission (FTC). At the same time, the FTC was conducting a non-public investigation into the defendant's business practices. The defendant contended that the HSPs learned of the FTC investigation through discovery and improperly used materials limited to use in the litigation under the applicable protective order to steer the FTC's investigation. The HSPs claimed they had already produced all nonprivileged materials and had turned over all communications with the FTC not covered by various asserted privileges, including work product and common interest privilege.

Special Master Maura Grossman reviewed the HSPs' objections and found them to be meritless. However, the plaintiffs' litigation strategy had been unnecessarily caustic and belligerent at times, and they had shown no remorse or made any apology for their discovery failures, repeated violations of the protective order, and/or for misleading both the defendants and the Master.

The Master laid out several bases for sanctions against the HSPs and their counsel, including Rule 16, Rule 37(b)(2)(A), Rule 37(c)(1), 28 U.S.C. § 1927, and the court's inherent authority to impose a sanction for the abuse of the judicial process. The Master also noted that any sanctions imposed "must be in the interests of justice and proportional to the specific violation of the rules."

The defendant's sanction requests included a full accounting of the HSPs'

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.

communications with the FTC, an order holding the HSPs' counsel in contempt, precluding the HSPs from citing or otherwise relying on any FTC-related discovery, and requiring HSP and/or its counsel to pay defendant's legal fees and costs and to pay all of the Master's fees. The Master found that some of the defendant's requested sanctions were unjustified. For example, the Master found that a full accounting of the HSPs' communications with the FTC was unwarranted, given that discovery had closed 18 months earlier and the requested discovery was neither "relevant to any party's claim or defense nor proportional to the needs of the case." As for the request to hold the HSPs in contempt and award the court $100,000.00 in sanctions, the Master noted that she did not have the power under her appointment to hold a litigant in contempt. She found that the likely benefit to the defendants did not outweigh the burden of a satellite contempt proceeding.

However, the plaintiffs' litigation strategy had been unnecessarily caustic and belligerent at times, and they had shown no remorse or made any apology for their discovery failures, repeated violations of the protective order, and/or for misleading both the defendants and the Master.

However, the Master did grant the defendant's request for attorney fees and costs, as well as for an apportionment of all of the Master's fees associated with the defendant's motion. The Master imposed these sanctions solely against the HSPs' counsel, sparing the HSPs themselves.

PRACTICE TIP: The lesson is straightforward. Honor your obligations in discovery, whether arising under rule, order, or agreement. You are an officer of the court. Anything less impugns both your integrity and the integrity of the legal system.

Party Failed to Establish that Foreign Privacy Law Bars Requested Discovery

OL Private Counsel, LLC v. Olson, 2022 WL 17475381 (D. Utah Dec. 6, 2022)

In this case, a law firm brought a claim against its former employee for allegedly accessing confidential documents after leaving the firm. During discovery, the defendant requested the identity of any individuals or entities that had access to the law firm's servers or the servers of two of its clients, as well as the timeframe of such access. The law firm argued that the requested information was irrelevant, unduly burdensome, and that a Thai privacy law prohibited the disclosure of the names of Thai employees who had access to the servers. Magistrate Judge Oberg found that the requested information was relevant and proportional to the needs of the case, as the law firm's claims relied on allegations that the defendant misappropriated confidential documents. The judge also noted that because the number of individuals who had access to the servers during the relevant timeframe was not prohibitive, any burden in responding did not outweigh the likely benefit.

The judge also addressed whether Thai privacy laws protected the requested information. The judge explained that a party relying on a foreign law to avoid discovery has the burden of showing that such law bars the discovery sought and requires application of a multifactor balancing test to evaluate the interests of the United States and the party seeking the discovery against the foreign state's interests. Relevant factors include:

1) the importance to the . . . litigation of the documents or other information requested;

2) the degree of specificity of the request;

3) whether the information originated in the United States;

4) the availability of alternative means of securing the information; and

5) the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine important interests of the state where the information is located.

These factors are not exhaustive, and courts have also considered "the extent and the nature of the hardship that inconsistent enforcement would impose upon the person" ordered to produce discovery, among other factors.

The judge found that the law firm had not met its burden to show that Thai law prohibited the discovery sought in the interrogatory at issue. The

judge noted that the law firm had not provided evidence that the information responsive to the interrogatory related to individuals protected under the Thai statute and that the law firm had not demonstrated that the statutory exception for legal proceedings was inapplicable. Moreover, the judge found that the balancing test favored compelling disclosure.

The judge found that the information requested was important because it directly related to the relevant issue of confidentiality and that the request was sufficiently specific. The judge also concluded that plaintiff had not demonstrated that alternative means of obtaining the information were available.

The judge found that the "balance of national interests favors disclosure," as the law firm is a Utah entity that chose to bring the suit in Utah and, therefore, could not hide behind foreign privacy laws to avoid its discovery obligations. Ultimately, the court granted the defendant's motion to compel the law firm's response to the interrogatory seeking the identity of individuals or entities that had access to the servers where the confidential documents were stored.

PRACTICE TIP: Foreign privacy laws can present a burden in the discovery process. It is essential for both parties to carefully evaluate the impact of potentially applicable foreign laws and be prepared to demonstrate how those laws affect the parties' discovery obligations, if at all.

Spoliation Motion Denied Where Requested Data Likely Deleted by a Hacker

Carty v. Steem Monsters Corp., 2022 WL 17083645 (E.D. Pa. Nov. 18, 2022)

This case involves allegations of spoliation by the defendants in violation of a preservation notice. The plaintiff, who brought claims of breach of contract, fraud, and related matters relating to the digital card game Splinterlands, claimed that the defendants had removed messages and data from a Discord channel in violation of the preservation notice.

The defendants argued that the missing information was due to hacking and content moderation, but they had preserved other relevant information.

The plaintiff sought sanctions against the defendants, including an adverse inference. However, the court found that the plaintiff had not demonstrated that spoliation had occurred. The defendants had produced over 17,000 pages of relevant Discord messages, and the plaintiff had not identified what relevant information would have been on the missing thread or why the preservation notice applied to it.

Additionally, the plaintiff had not presented any evidence that it attempted to retrieve the missing information from Discord, which may have retained it. The magistrate also rejected plaintiff's attempts to aver that production of the ESI in a PDF format subjects it to alteration making it "lost" for spoliation purposes.

Of particular significance to the magistrate's ruling was the deposition testimony of defendant Jesse Reich. Reich testified that there were three instances where an unknown party or parties hacked into the Discord channel and deleted three threads from the channel.

The plaintiff had not demonstrated prejudice or an intent to deprive, which are required under Federal Rule of Civil Procedure 37(e) to impose sanctions for failure to preserve evidence.

Reich explained that some deletions were made by a content moderation team to remove messages that were designed to financially scam readers, while others were done by the hacker to avoid detection once information about the scam was posted on the threads. According to Reich, the deleted information constituted "roughly five percent or less of the entire Discord server and the messages contained within," and it was data from "a year after you filed your lawsuit and after we had preserved any meaningful amount of Discord messages."

The magistrate also noted that the plaintiff had not demonstrated prejudice or an intent to deprive, which are required under Federal Rule of Civil Procedure 37(e) to impose sanctions for

failure to preserve evidence.

The court found that the missing information did not have any relevance to the plaintiff's claim, and that there was no evidence that the defendants intentionally caused any loss or deletion.

PRACTICE TIP: Rule 37(e) provides the framework for proof of allegations of spoliation. The requested ESI must first be relevant to a claim or defense, and it must be "lost," i.e. otherwise irreplaceable. A failure to demonstrate either of these necessary requirements will doom a Rule 37(e) motion.

Motion to Compel Denied Where Party Serving Rule 45 Subpoena Failed to Take Reasonable Steps to Avoid Imposing Undue Burden or Expense

Ozark Interest v. Arch Insurance Company, Inc., 2023 WL 2264462 (E.D. Mich. Feb. 28, 2023)

In this case, plaintiff sued the defendants, Arch Insurance Company and Camp Assure, LLC, in the Southern District of Texas in relation to Arch's decision to rescind plaintiff's bulk purchase of Deluxe Plan insurance with "cancel for any reason" (CFAR) coverage during the COVID-19 pandemic. CampDoc, a non-party in the Texas action, maintained a website on which campers could opt into the Deluxe Plan, is alleged to have colluded with Ozark and CampAssure to market the Deluxe Plan as free insurance, leading to campers opting into the plan en masse within the three-day period before CampDoc removed the plan from the website.

During discovery, Arch served CampDoc with two subpoenas under Federal Rule of Civil Procedure 45 that became the subject of a motion to compel before the court. The subpoenas included a total of 45 requests for production of documents. Arch argued that CampDoc made improper objections to the discovery requests.

The court agreed, noting that CampDoc did make boilerplate and "without waiving" objections that did not specify whether documents were withheld based on the objections, but the court further noted that Arch failed to explain how its document requests were relevant, nor did it address the Rule 26(b) proportionality factors incorporated into the subpoena provisions of Rule 45.

The scope of discovery for a subpoena under Rule 45 is the same as under Federal Rule of Civil Procedure 26(b)(1).

Under Rule 26(b), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," except that the Court must consider proportionality factors, including "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Rule 26(b)(2)(C)(i) requires a court to limit proposed discovery that is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

The court determined that CampDoc had the right to resist producing documents that Arch could have obtained from the parties in the Texas action. But CampDoc produced documents responsive to most of Arch's requests, though it did object to producing the full scope of some document requests. CampDoc's "without waiving" objections were improperly stated, but many of Arch's "any and all" document requests were facially overly broad.

Arch attempted to justify its non-party subpoenas by pointing to its answer to Ozark's complaint, where Arch described the alleged scheme between CampDoc, Ozark, and CampAssure. In its amended complaint, Ozark also claimed that CampDoc acted as Arch's agent. The court found that while CampDoc's actions were relevant to the Texas action, Arch had a duty to reduce the burden its subpoenas would impose on the non-party.

The court found that, in dereliction of that duty, Arch requested that CampDoc produce a wide swath of documents that were obtainable from

the other parties in the Texas action. Moreover, Arch had also sued CampDoc directly over the same allegations in New York, serving discovery requests replicating its subpoena requests. CampDoc represented to the court that it had already produced ample discovery in the New York action, and Arch agreed.

The court explained that by failing to reduce the burden of its subpoenas, Arch ignored the central principle of the 2015 amendments to the discovery rules, which emphasized the need to rein in the exorbitant costs, protracted time, and contention that have strained the civil justice system.

The court noted that the Sixth Circuit had emphasized that the 2015 amendments aimed to crystalize the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality. In light of the discovery already provided to Arch, requiring CampDoc to produce more documents would be disproportionate to the needs of the Texas action.

PRACTICE TIP: Gamesmanship in discovery should be avoided, especially when the burden falls on a non-party. Rule 26 mandates that discovery be proportional to the needs of the case. Rule 45 mandates that a party issuing a subpoena refrain from imposing undue burdens on non-parties. Combined, these Rules form as scissors that courts can use to pare down unreasonable discovery requests aimed at non-parties.

Court Upholds Work Product Protection Regarding Interrogatory Seeking an Opinion

Securities and Exchange Commission v. Volkswagen AG, 2023 WL 1793870 (N.D. Cal. Feb. 7, 2023)

In this civil action by the SEC against Volkswagen, the court examined an interrogatory from the Securities and Exchange Commission (SEC) to Volkswagen requesting (a) the identification of each individual whom the defendants believe knew about the conduct at issue and (b) a response in meaningful detail regarding the basis for the defendants' belief as to each individual identified. Defendant Volkswagen objected to the interrogatory claiming it sought work product-protected information.

Magistrate Judge Alex G. Tse stated that a party's lawyers may gather information to respond to an interrogatory or conduct an investigation to answer it. Still, neither of these types of responses would automatically protect the information uncovered as attorney work product. Courts have held that work product protections do not apply to facts learned by an adverse party's lawyer.

However, Judge Tse explained that the SEC's interrogatory is different. "It doesn't ask for facts" – e.g. the names of people who knew about the conduct at issue. Instead, "it asks for an opinion" – whom do the defendants believe knew.

The SEC could not force Volkswagen to form and share opinions about facts that did not relate directly to Volkswagen's theories or defenses.

In other words, Volkswagen's response would involve evaluating and forming opinions about information, which would require the lawyers' impressions and opinions to answer the interrogatory. Consequently, Volkswagen's work product objection had merit due to the need for lawyers' involvement in forming an opinion or conclusion.

The court rejected the SEC's argument that the interrogatory was a permissible contention interrogatory, stating that the SEC needed to obtain information through traditional discovery means, such as document discovery or depositions, rather than compel Volkswagen to form and share opinions about facts that did not directly relate to Volkswagen's theories or defenses.

Judge Tse concluded that the work product rule applied to the SEC's interrogatory and served its primary purpose of preventing the exploitation of a party's efforts in preparing for litigation.

E-Discovery Report, cont

The SEC could not force Volkswagen to form and share opinions about facts that did not relate directly to Volkswagen's theories or defenses.

PRACTICE TIP: The work product privilege typically does not protect the disclosure of facts, whether or not gathered by counsel during the course of an investigation or litigation.

However, where a discovery request seeks to require counsel to disclose her mental impressions or analyses, it conflicts with the protection afforded to opinion work product. Be sure to examine any discovery request for possible infringement of work production protection.

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Insurance Coverage **Report**

By: Drew W. Broaddus, *Secrest Wardle*
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Bridging Communities, Inc v Hartford Cas Ins Co, __ Mich App __; __ NW2d __ (2023) (Docket No. 355955).

In *Bridging Communities*, the panel unanimously held – in a published opinion – that Hartford had no duty to defend or indemnify its insureds from class-action litigation brought under the "unsolicited facsimile (fax) advertisements in violation of the Telephone Consumer Protection Act (TCPA)…." *Id*., slip op at 1.

The TCPA generally prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement …." 47 USC 227(b)(1)(C). The TCPA established a private right of action to recover actual monetary loss or statutory damages of $500 for each violation, as well as treble damages in the event of a knowing or willful violation. 47 USC 227(b)(3). "The TCPA has engendered a considerable body of caselaw in state and federal courts addressing whether an insurer has a duty to defend or indemnify an insured for the transmission of unsolicited fax advertisements. *Bridging Communities*, slip op at 6.

But until recently, "no published Michigan appellate decision" had addressed "whether a violation of the TCPA is covered as property damage or personal and advertising injury." *Id.* In *Bridging Communities*, the panel addressed these questions and answered both no.

In March 2006, Top Flite, a provider of residential mortgage loans, hired a broadcasting service to conduct a fax advertising campaign. *Id*., slip op at 2. The broadcasting service did not contact recipients to seek permission before sending Top Flite's advertisement, which 4,271 unique fax numbers received, including those belonging to the plaintiffs. *Id*. The plaintiffs filed a class action against Top Flite, alleging violations of the TCPA for sending unsolicited fax advertisements in violation of 47 USC 227(b)(1)(C). *Bridging Communities*, slip op at 6. The plaintiffs and Top Flite eventually agreed to a settlement of the class action. *Id.,* slip op at 2. In May 2019, the federal district court entered judgment against Top Flite for fax transmissions successfully sent in March 2006. *Id*.

Top Flite created a settlement fund to pay a portion of the judgment, and the remaining portion was to be satisfied through the proceeds of Top

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Flite's insurance policies. *Id*. Additionally, as part of the judgment, the district court found that Top Flite "had no intent to injure anyone in this case including the recipients of the fax advertisements" sent in March 2006.

Hartford insured Top Flite under a series of commercial policies. The policy at issue here provided business liability coverage to Top Flite for "property damage" caused by an "occurrence" during the policy period. The policy also provided coverage for "personal and advertising injury" caused by "an offense arising out of [the insured's] business" during the policy period. *Id*., slip op at 2.

"Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. The policy excluded coverage for property damage "expected or intended from the standpoint of the insured." *Id*. The policy also included a "statutory right to privacy exclusion," which precluded coverage for personal and advertising injury "[a]rising out of the violation of a person's right of privacy created by any state or federal act." *Id.* However, the statutory right to privacy exclusion did not exclude coverage for "liability for damages that the insured would have in the absence of such state or federal act." *Id*. As part of the settlement in the underlying class action, Top Flite assigned its "right to seek indemnification from" Hartford to the plaintiffs, allowing them to "stand in the shoes" of the insured (Top Flite) and litigate coverage in this action. *Id*., slip op at 3 n 2.

Hartford, which had twice denied Top Flight's tender, moved for summary disposition. The trial court found no property damage coverage because the exclusion for expected or intended injury applied – as the faxes were not sent accidentally. *Id*., slip op at 3. The trial court also found that personal and advertising injury coverage did not apply. Although "Top Flite's unsolicited transmission of fax advertisements constituted an advertising injury, as defined in the policy," the claim fell squarely within the "statutory right of privacy" exclusion. *Id*.

The Court of Appeals affirmed. As to property damage coverage, the panel agreed that the expected or intended injury exclusion applied. *Id.* at __; slip op at 10. However, this coverage was unavailable for a more fundamental reason: the absence of an "occurrence." Citing *Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002) and *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105 6; 595 NW2d 832 (1999), the panel held that the insured's "intent is a primary consideration." *Bridging Communities*, __ Mich App at__; slip op at 10.

"The parties do not dispute that Top Flite intended the transmission of fax advertisements." *Id.* "The natural consequence of such intentional act, obviously, is the use of the recipients' fax machine and supplies." *Id*. "The intentional acts in this case cannot be construed as accidental, and therefore, do not constitute occurrences covered under the policy." *Id*.

The decision underscores that, although the duty to defend is broader than the duty to indemnify, "[t]he duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy."

As to personal and advertising injury coverage, the panel agreed with the trial court's determination that "[t]he statutory right to privacy exclusion is not ambiguous." *Id*., slip op at 10. Although the policy contained an exception to this exclusion – for "liability for damages that the insured would have in the absence of such state or federal act," *id*., slip op at 5 – the plaintiffs were unable "to establish that the exception to the statutory right to privacy exclusion applied…," *Id*., slip op at 10. This was because in the underlying suit, the plaintiffs "only claimed violations under the TCPA," so "Top Flite would not have been liable in the absence of the TCPA." *Id*.

The decision underscores that, although the duty to defend is broader than the duty to indemnify, "[t]he duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy."

American Bumper & Mfg Co v Hartford Fire Ins Co, 452 Mich 440, 450; 550 NW2d 475 (1996). "If the policy does not apply, there is no duty to defend." *Id*. The decision also underscores that "clear and specific exclusions will be enforced as written so that the insurance company is not held liable for a risk it did not assume." *Bridging Communities*, slip op at 5 (citation omitted).

Insurance Coverage Report, cont

Hajjaj v Hartford Accident and Indem Co, __ **Mich App __; __ NW2d __ (2023) (Docket No. 359291).**

Although I usually leave automobile insurance cases for the No-Fault Report, this decision deals with issues relevant to the insurance industry as a whole. Here, the panel reiterated the longstanding common-law rule that when "an insurance policy is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *Id.*, slip op at 4.

The decision also confirmed that a 2018 amendment to MCL 500.1201 did not alter this common-law rule. Rather, the amendment addressed "a narrow, specific" situation: "where the consumer (insured) and insurance company (insurer) each have their own agent, and these two agents in turn have a written contractual relationship with each other." Al-Hajjaj, slip op at 7.

In *Al-Hajjaj*, Hartford1 sought to rescind the plaintiff's policy based on a material misrepresentation in the insurance application. See *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018). There was no dispute that the plaintiff's application for insurance "incorrectly indicated that [his] company was a physical-therapy office that did not transport patients, when in fact the company provided medical-transportation services for patients." *Al-Hajjaj*, slip op at 2. There was also no dispute that this misrepresentation was material; Hartford "would not have issued the policy if it had known" the true nature of the business. *Id.* With nowhere else to turn, the plaintiff blamed everything on the agent who sold him the policy – and whose actions, according to the plaintiff, were imputed to Hartford. *Id.*

Hartford moved for summary disposition, arguing that the plaintiff's argument was contrary to the common-law rule, stated in *Genesee Food Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649; 760 NW2d 259 (2008), that "[w]hen an insurance policy is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *Al-Hajjaj*, slip op at 4.

The plaintiff argued that this rule was abrogated by a 2018 amendment to Chapter 12 of the Insurance Code, which created new definitions for the terms "agent of the insured" and "agent of the insurer." *Al-Hajjaj*, slip op at 3. The plaintiff also argued that Hartford's contract with this particular agent was fundamentally different from the one at issue in *Genesee Food*. The trial court accepted this argument, denying Hartford's motion because "the contractual relationship between Hartford and [the agent] meant that the latter was the agent of the former," while "not reaching the alternative statutory argument." *Id.* slip op at 3. Hartford applied for leave to appeal; the Court of Appeals granted leave and later reversed in a published opinion.

The Court of Appeals first took up the plaintiff's statutory argument, noting that the long-standing common law rule "makes sense in the context of an independent-insurance agent, who can offer a single customer an array of options from any of the insurers with which the agent has contracted." *Id.*, slip op at 4. "A customer can approach an independent-insurance agent and expect to comparison shop between all the available insurers, unlike when a customer goes to a captive-insurance agent, who has but one insurer to offer." *Id.*

The new definitions, added to MCL 500.1201 in 2018, did not "clearly indicate" an intent to modify the Genesee Food line of cases because the amendment "specifically limited the reach of these definitions to Chapter 12 of the Insurance Code."

"An independent-insurance agent who had to balance fiduciary duties of loyalty between competing insurers would effectively be frozen into inaction by a web of crossing and conflicting duties and interests." *Id.* "Instead, in recognition of the materially different circumstances faced by a customer who deals with an independent-insurance agent versus a captive-insurance agent, our courts have concluded that an independent-insurance agent owes its primary fiduciary of loyalty to the customer." *Id.*

The panel explained that it "does not lightly infer that our Legislature intended to abrogate or

modify the common law." *Al-Hajjaj*, slip op at 5. "Rather, this Court presumes that the common law remains intact, even when the Legislature enacts a statute on the same or a similar subject." *Id.* Our Legislature must "clearly indicate" the intent to abrogate or modify the common law. *Id.*

The new definitions, added to MCL 500.1201 in 2018, did not "clearly indicate" an intent to modify the Genesee Food line of cases because the amendment "specifically limited the reach of these definitions to Chapter 12 of the Insurance Code."

Al-Hajjaj, slip op at 6. "Had our Legislature intended to abrogate *in toto* the common-law principle with respect to independent agents, one would have expected it to apply the new definitions to the entire Insurance Code, not just a single chapter." *Id.* "Moreover, these new definitions are best read as our Legislature's creation of two statutory 'terms of art' applicable to a specific factual context" – "namely, where the consumer (insured) and insurance company (insurer) each have their own agent, and these two agents in turn have a written contractual relationship with each other." *Id.*, slip op at 6, 7.

"This arrangement is common in the wholesale-insurance sector, but the pre-2018 version of Chapter 12 made such agent-to-agent negotiations arguably unlawful." *Id.*, slip op at 7. So, the changes brought about by this amendment were "narrow" and did not apply "to the circumstance here," where the plaintiff sought an insurance policy through an independent insurance agent, "and not through an agent-to-agent transaction." *Id.*

With the statute out of the way, the panel had little trouble disposing of the plaintiff's argument under the contract. The panel simply did not read Hartford's contract with the agent "as modifying the common-law principle …." *Id.*, slip op at 8. The panel found that the contract was "materially indistinguishable from the one described in" *Genesee Food*. *Al-Hajjaj*, slip op at 8. The agent here, like the agent in *Genesee Food*, "owed its primary fiduciary duty of loyalty to" the insured, "rather than to Hartford as one of the ten insurers for which it placed policies." *Al-Hajjaj*, slip op at 8.

"[A] standard contract between an insurance company and an independent-insurance agent" does not mean that an agency owes its "primary fiduciary duty" to the carrier. *Id.*, slip op at 7-8. In this case, the agency's contract with Harford authorized it to "solicit, quote and bind insurance" on behalf of Hartford, but the contract also "materially limited [the agency's] authority," while recognizing that the agency "had the right to select and place insurance policies with other insurers." *Id.*, slip op at 8.

***Gavrilides Mgt Co, LLC v Michigan Ins Co*, 981 NW2d 725, 726 (Mich, 2022) and *Gourmet Deli Ren Cen, Inc v Farm Bureau Gen Ins Co* of Michigan, 981 NW2d 730 (Mich, 2022).**

Several times throughout the pandemic (see Vol. 37 No. 1, Vol. 37 No. 3, and Vol. 37 No. 4), this report has focused on the effects of COVID-19 and various governments' responses to it on the world of insurance coverage. In particular, we have looked at business interruption suits relating to the pandemic. Those suits overwhelmingly favored insurers, including the Michigan Court of Appeals' published holding in *Gavrilides Mgt Co v Michigan Ins Co*, 340 Mich App 306; 985 NW2d 919 (2022). This sad saga has seemingly come to an end – at least in Michigan – with the Supreme Court denying leave late last year in *Gavrilides Mgt Co, LLC v Michigan Ins Co*, 981 NW2d 725, 726 (Mich, 2022) and *Gourmet Deli Ren Cen, Inc v Farm Bureau Gen Ins Co* of Michigan, 981 NW2d 730 (Mich, 2022). Both leave denials were unanimous.

With the Supreme Court denying leave, the Gavrilides panel's treatment of direct physical loss (or the lack thereof) will remain the law of the land for the foreseeable future. See MCR 7.215(C)(2) & (J)(1). To recap, "direct physical loss" is the trigger for business interruption coverage under a variety of policy types. The *Gavrilides* panel found that this requirement was not met:

…[T]he word "physical" necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises. Plaintiffs also argue that any such loss or damage can include contamination to the environment within a building, such as the air, even in the absence of any detectable alteration to the structure or other property.…

Insurance Coverage Report, cont

In particular, the allegations in the complaint indicate that plaintiffs' restaurants were not contaminated with the SARS-CoV-2 virus. The complaint asserts that nothing happened to the premises beyond partial or complete closure due to two Executive Orders that had statewide applicability.

Furthermore, EO 2020-21 and 2020-42 unambiguously indicate that their primary purpose is to curtail person-to-person transmission of the virus. … We do not think mandating a more rigorous cleaning regimen constitutes damage or loss, and the complaint explicitly alleges that there were no positive COVID-19 cases at plaintiffs' establishments. Importantly, the Executive Orders applied to all businesses without regard to whether a single viral particle could be found within. Plaintiffs' restaurants were unambiguously closed by impersonal operation of a general law, not because anything about or inside the particular premises at issue had physically changed. [*Gavrilides*, 340 Mich App at 318-319 (citations omitted).]

The panel further explained: …[T]he business income loss provision applies "during the 'period of restoration." The "period of restoration" ends, by definition, either "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "when business is resumed at a new permanent location." … The Executive Orders applied statewide and without regard to actual contamination of premises. Consequently, moving to a new location would not have permitted plaintiffs' restaurants to reopen.

Likewise, no repair, reconstruction, or replacement of the premises would have permitted plaintiffs' restaurants to reopen. The clear and unambiguous import of the definition of "period of restoration" is that the contract expects the loss or damage to be amenable to some kind of physical remediation—either by making tangible alterations or repairs to the premises or by replacing the premises altogether. No alteration to, or replacement of, plaintiffs' premises would have permitted the restaurants to reopen. [*Gavrilides*, 340 Mich App at 321 (citations omitted).]

The panel also rejected the insured's reliance on Civil Authority coverage because "the provision unambiguously requires damage to nearby property, and none is alleged." *Gavrilides*, 340 Mich App at 322. "[T]he civil authority action cannot be both the cause of the damage and the response to it." *Id.* (citations omitted).

In summary, the panel found that Michigan Insurance2 "properly denied coverage to plaintiffs because the Executive Orders did not result in direct physical loss of or damage to property." *Id.* at 323. "Plaintiffs have also failed to establish that an action of civil authority prohibited access to the described premises within the meaning of the policy." *Id.* (cleaned up).

The panel explained that the policy's virus exclusion would have applied even if there had been a covered loss. That exclusion – which is based on a common "ISO" form – states in relevant part: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at 313. The panel noted that it was addressing this exclusion only as it related to the insured's request to amend their complaint; the claim as pled was not covered, so there was no reason to consider exclusions. *Id.* at 323 n 6.

In *Gourmet Deli Ren Cen v Farm Bureau Gen Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2022 (Docket No. 357386),3 the insured was a delicatessen and restaurant located in the General Motors Renaissance Center ("GMRC"), an office complex consisting of seven connected skyscrapers in downtown Detroit. Gourmet's customer base consisted primarily of others working in the GMRC. *Gourmet Deli*, unpub op at 1.

In March 2020, after the insured ceased operations per state and local health orders, GMRC's leasing agent informed tenants that an employee of a building vendor tested positive for COVID-19. *Id.*, unpub op at 3. The contact tracing did not show a COVID-19 exposure at the insured's location. *Id.* None of the insured's employees or managers tested positive for COVID-19 prior to the insured's decision to cease operations. *Id.* There was never a specific order that required the insured to stop

operating. *Id.* In June 2020, the insured tried to reopen, but quickly determined reopening was not financially feasible and decided to close to mitigate its damages. *Id.* Shortly after that, it sued Farm Bureau for business interruption coverage.

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

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

The new definitions, added to MCL 500.1201 in 2018, did not "clearly indicate" an intent to modify the Genesee Food line of cases because the amendment "specifically limited the reach of these definitions to Chapter 12 of the Insurance Code."

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

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

The panel then turned to the policy's "Civil Authority" coverage, finding that it did not apply because, although this coverage "does not require damage to Gourmet's property, it does require damage to surrounding property…." *Id.*, unpub op at 8. Quoting *Gavrilides*, 340 Mich App at 322, the panel observed:

…[T]he provision unambiguously requires damage to nearby property, and none is alleged. To the extent access to any neighboring properties was prohibited, that prohibition was a result of a health crisis and the specter of person-to-person transmission of a dangerous virus, irrespective of whether those properties were altered. Furthermore, the provision clearly expects a defined area to be cordoned off. The Executive Orders did not do so: any person who was excepted from the stay-at-home provision of the Executive Orders could, at least in principle, have driven or walked past plaintiffs' restaurants. Finally, this provision anticipates a response by a civil authority to some discrete damage or threat

Insurance Coverage Report, cont

of damage. ...[T]he civil authority action cannot be both the cause of the damage and the response to it. [Gourmet Deli, unpub op at 8-9 (cleaned up).]

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

1 This author's firm represented Hartford in the trial court and on appeal.

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

3 This author's firm represented Farm Bureau in the trial court and on appeal

MDTC **Golf Tournament Winners**

2023 Winning Team
Hon. Richard Caretti
Hon. David Groner
John Hohmeier
Stephen Madej

Men Longest Drive – Sutton Richmond
Women Longest Drive – Genna Lee
Men Closest to Pin – Cody Ellwanger
Women Closest to Pin – Kristen Pollice

Skins Winners – Hon. David Groner, Michael Gilmore, Hon. David Groner, Hon. David Groner *$85 each*

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Vendor Profile: **Nate Kadau, LCS**

Nate Kadau, Regional Account Manager

3280 N. Evergreen Drive N.E.
Grand Rapids, MI 49525

(877) 949-1119

nkadau@teamlcs.com

Where are you originally from?

Grand Rapids, Michigan

What was your motivation for your profession?

To provide personalized, innovative, and cost-effective record retrieval services geared toward legal, medical, and insurance communities.

What is your educational background?

Bachelors of Business Administration, Western Michigan University

How long have you been with your current company and what is the nature of your business?

I have been with LCS Record Retrieval (LCS) for fourteen years. We offer nationwide record retrieval with personalized service to our clients.

What are some of the greatest challenges/rewards in your business?

The most rewarding aspect of our business is the ability to provide services customized to meet the needs of each client. Providing these personalized services, as well as being able to deliver the information requested promptly, is truly gratifying.

One of the biggest challenges we face involves working with non-responsive facilities when following up on record requests. We rely on relationships that we have built with the various healthcare providers to resolve these situations when they occur and to keep these occurrences to a minimum.

Describe some of the most significant accomplishments of your career:

I have been fortunate enough to be a part of LCS for an extended period. Throughout my career with LCS, I have worked in almost every department. This time has also allowed me to build a thorough understanding of the record retrieval industry. I wanted to utilize my knowledge and experience in more impactful ways for the growth and excellence of LCS. This resulted in my transition to Account Manager, the goal for my career with my ideal company.

Interview with Nate Kadau, cont

How did you become involved with the MDTC?

LCS Record Retrieval has been a partner with the MDTC for many years. As my role grew within LCS, I became the liaison who would represent our company at the different MDTC outings and functions.

What do you feel the MDTC provides to Michigan lawyers?

The MDTC is an exceptional organization for attorneys to network and share best practices. It also provides numerous educational opportunities for its members to stay up to date on current events within the industry.

What do you feel the greatest benefit has been to you in becoming involved with the MDTC?

The most significant benefit to me has been the relationships that I have been able to build with our clients and other vendors within the industry. Partnering with these prestigious groups allows me additional opportunities to learn how LCS can continue to grow and excel in our services.

Why would you encourage others to become involved with MDTC?

Being involved with the MDTC is an excellent opportunity to connect with others within the legal community and learn the newest information litigating within the State of Michigan.

What are some of your hobbies and interests outside of work?

I enjoy spending time with my family. When the weather allows it, I enjoy golfing, fishing, and being outdoors. I am also a big sports fan and follow all the major Detroit teams each season.

Legal Malpractice **Update**

By: David Anderson and James J. Hunter, *Collins Einhorn Farrell PC*
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Allegedly inadequate child support attributed to plaintiff's failure to pursue modification of child support award, not attorney malpractice.

Mati v Defendant Attorneys, unpublished per curiam opinion of the Court of Appeals, issued March 9, 2023 (Docket No. 360754); 2023 WL 2441726.

Facts

The plaintiff retained defendant attorney and his law firm to represent her in divorce proceedings. The plaintiff and her then-husband, Mati, had two minor children. They also jointly owned a tobacco business and marital home.

At the initial hearing, defendant attorney informed the trial court that the plaintiff and Mati had reached a settlement and asked to state the settlement terms on the record. Mati's counsel objected, in part, because Mati wasn't present. But the trial court allowed the defendant attorney to proceed, subject to later confirmation by the parties. Under the stated terms, the plaintiff was to be awarded the tobacco business, the marital home, under the condition that she sell it and pay Mati $300,000 from the proceeds and $500 per month in child support.

A second hearing was held for the purpose of entering the judgment of divorce. Mati's counsel moved to withdraw, which the trial court allowed. The defendant attorney submitted the written judgment of divorce for entry. The defendant attorney, the plaintiff, and Mati each signed the judgment. It provided that the plaintiff would receive the business and the marital home under the condition that she sell it and pay Mati $300,000 from the proceeds, but did not include child support.

The plaintiff filed a legal malpractice action against the defendant attorney and his law firm, alleging that he was negligent because the judgment of divorce contained provisions that conflicted with the agreement stated on the record. The plaintiff asserted that the provision requiring her to pay a portion of the proceeds from the home sale should not be enforced if Mati wasn't required to pay child support. In sum, the plaintiff's theory was that she didn't receive a fair distribution of the marital assets due to the defendant attorney's negligence.

David C. Anderson is a share- holder of Collins Einhorn Far- rell PC, and has over 20 years of litigation experience. He has successfully defended a wide variety of professional liability claims, ranging from legal malpractice to claims against accountants, insurance agents, architects and engineers, real estate/title agents and even fine art ap- praisers.

He has also successfully defended numerous corporations against product liability claims, including death cases. Over those years, David has gained con- siderable jury trial and arbitration experience.

Legal Malpractice Update, cont

The defendants filed a summary-disposition motion contending that the plaintiff failed to establish proximate causation because she voluntarily entered into the settlement agreement. The defendants also argued that the terms of the divorce judgment didn't conflict, and the plaintiff was free to seek modification of the child support award.

The Court explained that under Michigan law it is presumed that a person who signs a written agreement understands its contents

The trial court granted summary disposition in favor of the defendants. It found no evidence that the defendant attorneys misrepresented the terms of the divorce judgment, no evidence of coercion, and held that the plaintiff was presumptively aware of and assented to the terms of the divorce judgment. Further, it found that the terms placed on the record during the initial hearing weren't binding because there had been no mutual assent, and the provisions regarding the marital home and child support did not conflict. The trial court concluded that the plaintiff's alleged injuries were attributable to her failure to seek child support after entry of the divorce judgment, not the defendant attorney's alleged negligence. The plaintiff appealed.

Ruling

The appellate court affirmed. The Court explained that under Michigan law it is presumed that a person who signs a written agreement understands its contents. So, the plaintiff was presumed to have understood the contents of the divorce judgment when she signed it. The Court further observed that child support agreements in divorce actions always remain modifiable, depending on changes in circumstances. Thus, the plaintiff's alleged injuries were attributable to her failure to seek modification of the child support award, not the defendant attorney's alleged negligence.

The Court also found that the judgment of divorce provision requiring the plaintiff to pay Mati a portion of the proceeds from the sale of the marital home didn't conflict with the provision stating that Mati wasn't required to pay child support. It reasoned that the divorce judgment contained other provisions that may have reasonably induced the plaintiff to waive child support, such as the provision awarding the plaintiff the tobacco business. Lastly, the Court held that summary disposition wasn't premature because the plaintiff speculated about evidence that could be uncovered in the future if she were permitted to question the defendant attorney about the alleged discrepancies between the terms placed on the record and the judgment of divorce, but didn't provide any evidence to support her contentions.

Practice Note

Attorneys can mitigate the risk of a legal malpractice claim arising out of an underlying divorce by placing the terms of the divorce settlement on the record, explaining the reasoning for the distribution of marital assets, and eliciting testimony from their client, providing that they both understand and agree to the stated terms.

James J. Hunter is a member of Collins Einhorn Farrell PC's Professional Liability, Commer- cial Litigation, and Trucking & Transportation Liability prac- tice groups. He has substantial experience defending complex claims in both practice areas.

As a member of the Professional Liability practice group, Jim has successfully defended claims against attorneys, architects, real estate professionals, and others. Before joining Collins Einhorn, Jim worked on complex litigation and Federal white-collar criminal defense. He also served as an Assistant Prosecuting Attorney in Wayne County, Michigan.

Legal Malpractice Update, cont

Broad release proves fatal to legal malpractice claim.

Hoek v Defendant Attorneys, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2022 (Docket No. 358807); 2022 WL 358807.

Facts

The defendant attorney provided advice to the plaintiff regarding the sale of his company's assets. The assets were sold to a newly-formed company where the plaintiff purchased a 20% equity interest. Another company, Hilco, owned the remaining 80% equity interest. The defendant attorney provided advice, negotiated on the plaintiff's behalf, and helped prepare the operating agreement for the newly-formed company.

The operating agreement provided that management investors could sell their interest at any time. During the company's first three fiscal years, the value of the interest would be calculated based on the company's fair market value and a mutually agreed on multiplier. After the company's first three fiscal years, the value of the interest would be calculated based on the company's average net operating income over the preceding three years.

The plaintiff alleged that he told the defendant attorney that he intended to sell his interest in the newly-formed company during its first three fiscal years, and that defendant attorney gave him inaccurate advice regarding how his interest would be valued. The plaintiff did not sell his interest during the company's first three fiscal years and was terminated for cause shortly thereafter. The plaintiff's interest was ultimately valued based on the company's net operating income over the preceding three years, which was negative. Thus, the redemption value of his interest was zero.

The plaintiff entered into settlement negotiations with Hilco. Hilco representatives objected to the defendant attorneys' participation in settlement talks because they represented Hilco in real estate and other matters. The plaintiff retained a new attorney and entered into a settlement agreement with Hilco that contained a release covering all of Hilco's current and former attorneys.

The plaintiff then filed a legal-malpractice claim against the defendant attorney and his law firm, claiming that he lost nearly $1 million due to their bad advice. The defendant attorney and his law firm moved for summary disposition arguing that the malpractice claim was barred by the release covering all of Hilco's current and former attorneys. The plaintiff opposed the motion, arguing in part that the parties did not intend to release any legal-malpractice claim against the defendant attorney or his law firm. The trial court granted the motion, and the plaintiff appealed.

Ruling

On appeal, the plaintiff argued that the trial court erred in granting summary disposition in favor of the defendant attorney and his law firm premised on the release. The Court disagreed. It found that the plain language of the release was clear: the plaintiff fully and unconditionally released Hilco's current *and former* attorneys from any and all liability claims.

A broad release will be interpreted broadly. And evidence that a plaintiff had knowledge of a claim against a party included in a release will not outweigh the plain language of the release in determining the intent of the parties.

The Court also noted that the plaintiff was aware of the terms of the release and its application to the defendant attorney and his law firm before execution. The plaintiff testified that he read and understood the settlement agreement before he signed it. The plaintiff was also aware of a potential legal-malpractice claim because he complained about the defendant attorney's advice and met with him to discuss a potential waiver of attorney fees. And the plaintiff was aware that the defendant attorney and his law firm previously represented Hilco.

Lastly, the Court disagreed with the plaintiff's argument that the attorney who drafted the release did not intend for it to include the defendant attorney and his firm. The Court reasoned that Hilco had an incentive to include actors indirectly involved the dispute because doing so would achieve the goal of resolving the litigation. Both Hilco's attorney and the plaintiff's attorney presumably considered the number of

individuals governed by the release in relation to the settlement award.

Practice Note

The scope of a release is governed by the intent of the parties, as expressed in the plain language of the release. A broad release will be interpreted broadly. And evidence that a plaintiff had knowledge of a claim against a party included in a release will not outweigh the plain language of the release in determining the intent of the parties.

Appellate Court reaffirms principle that plaintiffs must plead wrongful conduct beyond negligence to state a claim for attorney fees under the prior litigation exception to the American rule.

Hark Orchids LP v Defendant Attorneys, unpublished per curiam opinion of the Court of Appeals, issued May 4, 2023 (Docket No. 361175).

Facts

The plaintiff retained the defendant attorney and his law firm to represent it in a workers' compensation claim brought by a former employee. During negotiations, the employee informed the defendant attorney of her belief that she had additional meritorious claims against plaintiff and would settle those claims in a global settlement of $125,000. The defendant attorney never informed plaintiff of the additional claims or global settlement offer and settled the workers' compensation claim for $35,000.

The Court explained that Michigan follows the American rule with respect to the payment of attorney fees and costs. Under the rule, attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary.

The employee filed a second action against the plaintiff. The plaintiff retained another law firm to defend against the action. Ultimately, the plaintiff expended over $312,000 in attorney fees and costs defending against the action.

The plaintiff then brought an action against the defendant attorney and his law firm in an attempt to recover attorney fees expended in defense of the employee's second action. The plaintiff alleged that the defendant attorney acted negligently by failing to inform it of the employee's threat of additional litigation and global settlement offer.

The defendant attorneys filed a motion for summary disposition, arguing that attorney fees incurred in the prior case were not recoverable because the plaintiff alleged only that the defendant attorney acted negligently. The defendant attorneys contended that the prior litigation exception to the American rule required plaintiff to plead malice, fraud, or similar wrongful conduct to recover attorney fees as damages. The trial court granted the motion. The plaintiff appealed.

Ruling

The appellate court affirmed. The Court explained that Michigan follows the American rule with respect to the payment of attorney fees and costs. Under the rule, attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary.

The Court examined the prior litigation exception to the American rule, which provides that attorney fees are recoverable when a defendant's wrongful conduct has forced a party to incur legal expenses in a prior litigation with a third party. It explained that the exception is intended to be applied when a party is guilty of malicious, fraudulent, or other wrongful conduct, not simple negligence.

The plaintiff argued that the Court should apply the reasoning set forth in two appellate court opinions suggesting that negligence was the appropriate standard under the prior litigation exception. See, e.g., *Warren v McLouth Steel Corp*, 111 Mich App 496; 314 NW2d 666 (1981); *Coats v Bussard*, 94 Mich App 558; 288 NW2d 651 (1980). The Court explained that the cases were decided before 1990 and, thus, were not binding under the Michigan Court Rules. Ultimately, the Court reaffirmed its holdings in *Mieras v DeBona*, 204 Mich App 703; 516 NW2d 154 (1994), and *In re Thomas Estate*, 211 Mich App 594; 536 NW2d 579 (1995), and concluded that plaintiff was required

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to plead that defendant attorney's conduct was malicious, fraudulent, or similarly wrongful in order to state a claim for attorney fees under the prior litigation exception to the American rule.

Practice Note

The requirement that a plaintiff must plead wrongful conduct beyond negligence in order to state a claim for attorney fees under the prior litigation exception to the American rule may be subject to scrutiny in the near future.

In a concurrence to the majority opinion, one judge explained that although the Court was bound by the holding in *Mieras,* he questioned the rationale of requiring a showing of conduct beyond negligence to recover what are "plainly consequential damages" of negligence.

Such criticisms may invite action on the part of the Supreme Court, if presented with the opportunity to address the issue.

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COA Decisions on **COVID Tolling**

By: Kevin A. McQuillan, Kerr Russell & Weber PLC
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In the three years since the COVID pandemic began, many theories have emerged regarding the proper method for calculating and applying COVID tolling under the Michigan Supreme Court's Administrative Orders related to the Governor's State of Emergency.1 Earlier this year, the Michigan Court of Appeals weighed in on the correctness of these various theories. Initially, the Court held that the Administrative Orders were constitutionally valid. The Court also held that the Administrative Orders do not toll the notice of intent waiting period for medical malpractice claims. Moreover, the Court clarified the method for determining the new statute of limitations cutoff date for claims affected by the Administrative Orders.

Subsequently, however, another panel of the Court of Appeals (as well as Justice Vivano in a dissenting opinion)2 called into question the Michigan Supreme Court's constitutional authority to issue these Administrative Orders extending certain deadlines. Moreover, the Michigan Supreme Court has granted mini-oral argument on an application for leave to appeal (MOAA), granted a separate application for leave to appeal, and held a third case in abeyance while the others are decided. Thus, the Courts have clarified the issue of COVID tolling, but key disputes remain.

Before addressing the cases decided in 2023, it is worth noting the Court of Appeals' decision in *Wenkel v Farm Bureau General Ins Co of Mich*, __ Mich App __; __ NW2d __ (2022) (Docket No. 358526); 2022 WL 17364773; app den 988 NW2d 482 which involved no-fault automobile insurance benefits. The Court held that the Administrative Orders did not toll the one-year-back rule (MCL 500.3145(2)). The Court noted MCL 500.3145 "is a damages-limiting provision;" thus, it "does not act as an outright bar to the filing of a complaint, i.e., it is not a statute of limitations" and "not a limitation on whether the claim can be brought in the first place." *Id.* at *3-4. The Michigan Supreme Court subsequently denied an application for leave to appeal. 988 NW2d 482.

The Court in *Wenkel* was not addressing a situation in which the deadline for commencing an action fell after the issuance of AO 2020-3. Nonetheless, the Court stated AO 2020-3 "was 'intended *to extend all deadlines* pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters *during the state of emergency*....'" *Wenkel*, 2022 WL 17364773, at *3 (emphasis added, quoting AO 2020-3). However, AO 2020-3 also expresses an intention to impact deadlines that fell outside of the March

Kevin represents individuals, corporations, and governments in all levels of state and federal court. His municipal practice centers on law enforcement use of force, searches and seizures, free speech, due process, equal protection, and deliberate indifference claims. He also represents municipalities in land use and zoning disputes, Freedom of Information Act (FOIA) and Open Meetings Act (OMA) litigation, and employment disputes.

Kevin also defends medical providers and hospitals in medical malpractice and professional licensing matters across Michigan. He represents a wide variety of physicians, mid-level providers, nurses and other professionals in matters including allegations of delayed diagnosis of cancer, interoperative injury, failure to monitor, and wrongful death.

Kevin has been recognized as a "Rising Star" in multiple editions of Super Lawyers and named "One to Watch" by Best Lawyers® for 2024. Kevin received his Juris Doctor degree from Wayne State University Law School. At Wayne Law, Kevin was a member of the Moot Court National Team and was an intern and law clerk for Wayne County Circuit Court Judge Robert J. Colombo Jr. Prior to law school, Kevin received a Bachelor of Arts degree in political science from the University of Michigan. In his spare time, Kevin is a proud supporter of University of Michigan athletics and enjoys being up north with friends and family.

10 to June 20, 2020 State of Emergency timeframe: For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 *is not included* for purposes of MCR 1.108(1). [AO 2020-3 (emphasis added).]

Additionally, AO 2020-18 noted the intention of AO 2020-3 was to exclude "any *days* that fall during the State of Emergency," not just deadlines that fell between March 10 and June 20, 2020. AO 2020-18 (emphasis added).

Weeks after deciding *Wenkel*, on January 19, 2023, the Michigan Court of Appeals decided *Armijo v Bronson Methodist Hosp*, __ Mich App __; __ NW2d __ (2023) (Docket No. 358728); 2023 WL 324450, and held that the Notice of Intent (NOI) waiting period in a medical malpractice action is not affected by the Administrative Orders. In *Armijo*, the date of loss was March 6, 2018, thus, the two-year statute of limitations for a medical malpractice claim would ordinarily expire on March 6, 2020 – before the Governor declared a state of emergency on March 10, 2020. *Id* at *1.

The plaintiff submitted a NOI on February 19, 2020. Under MCL 600.5856(c), the plaintiff had 16 days to file the complaint after the NOI waiting period ended. Id at *5. When the NOI waiting period expired on August 19, 2020, the plaintiff had until September 4, 2020, to file the complaint. However, the complaint was not filed until December 14, 2020. Because the ordinary statute of limitations expired before the Administrative Orders came into existence, there was no COVID tolling (in other words, on both March 10, 2020, and June 20, 2020, there were 16 days remaining to file a claim by virtue of NOI tolling). Moreover, the Court held that COVID tolling does not apply to NOIs because Administrative Order 2020-3 stated the order "does it suspend or toll any time period that must elapse before the commencement of an action or proceeding." *Id* at *4.

Like *Wenkel*, the Court in *Armijo* did not address a deadline that fell between March 10 and June 20, 2020. Nonetheless, the Court stated, "The language of the initial administrative order expressed our Supreme Court's intent *to extend statutory deadlines* for filing civil matters *during the state of emergency*. In its amended order, it again stated it "... intended to *extend all deadlines* pertaining to case initiation ... *during the state of emergency* ..." [Armijo, 2023 WL 324450, at *4 (emphasis added).]" Based on these sentences from the Administrative Orders, the Court stated, "the administrative orders by their language *only applied to deadlines which took place during the state of emergency*[.]" *Id.* at *5 (emphasis added).

Days after deciding *Armijo*, the Court of Appeals decided *Carter v DTN Mgt Co*, __ Mich App __; __ NW2d __ (2023) (Docket No. 360772); 2023 WL 439760. Although *Carter* involved a slip and fall, rather than a medical malpractice action, the Court noted in a footnote the implications of *Armijo*, and the distinction between notice waiting periods and other forms of tolling. Importantly, the Court noted the statement in *Armijo* "that the AOs applied only to limitations periods that expired during the state of emergency," was "nonbinding dicta because they were not necessary to the resolution of that appeal." *Carter*, 2023 WL 439760, at *3 n3. "Indeed, because it was not necessary to the decision in that case, the *Armijo* panel did not discuss the language in AO 2020-18 establishing that the statutory limitations periods for all cases was tolled from March 10, 2020 until June 20, 2020." *Id.*

In *Carter*, the date of loss was January 10, 2018, thus, the three-year statute of limitations for bodily injury would have ordinarily expired on January 10, 2021 – well after the COVID state of emergency went into effect. This meant that the claim fell into the "first category" of cases in which the "filing period began to run before AO 2020-3 took effect[.]" Id at *3. The Court noted, "There is no language in AO 2020-18 limiting the first category to those whose filing deadline fell within the state of emergency." *Id.* The Court explained that on March 10, 2020, there were "10 months" (or, more exactly, 307 days) remaining in the statute of limitations. *Id.*

Applying the plain language of the Administrative Orders, 307 days were added to June 20, 2020, such that the complaint was timely if filed on or before April 23, 2021. *Id.* The complaint was ultimately filed on April 13, 2021, and therefore was timely. The Court of Appeals also explained that the issuance of the Administrative Orders was within the authority of the Michigan Supreme Court

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because the Administrative Orders modified the computation of days under MCR 1.108 and did not alter the substantive law regarding the statute of limitations for a claim. *Id* at *4.

The same panel of the Court of Appeals that decided *Carter* then decided *Linstrom v Trinity Health-Michigan*, __ Mich App __; __ NW2d __ (2023) (Docket No. 358487); 2023 WL 1482428 on February 2, 2023. In *Linstrom*, the date of loss was May 15, 2018, thus the ordinary two-year statute of limitations for the medical malpractice claim would expire on May 15, 2020. The plaintiff submitted a NOI on March 13, 2020, and the complaint was filed on November 25, 2020. To determine if the complaint was timely, the "first step" in the analysis required "determining the expiration date of the statute of limitations and how many days remained in the limitations period when plaintiff mailed her NOI." *Id.* at *4.

On March 10, 2020, when the COVID state of emergency went into effect, 66 days remained in the statute of limitations period. By adding 66 days to June 20, 2020, the COVID tolling moved the statute of limitations deadline to August 25, 2020. *Id.* The Court then addressed the March 13 NOI. On March 13, there were 165 days remaining in the COVID-tolled statute of limitations period.

The plaintiff then had to wait 182 days, until September 11, 2020, to file the complaint due to the NOI waiting period. Because the NOI waiting period expired after the COVID-tolled statute of limitations period deadline, NOI tolling also applied and provided plaintiff with an additional 165 days to file the complaint. The Court added 165 days to September 11, 2020, and determined the new cut-off date for the plaintiff to file a claim was February 23, 2021. *Id* at *5. Because the complaint was filed in November 2020, the complaint was timely.

The Court of Appeals then decided *Hubbard v Stier*, __ Mich App __; __ NW2d __ (2023) (Docket No. 357791); 2023 WL 2334954 on March 2, 2023. In *Hubbard*, the plaintiff's medical malpractice claim accrued on February 17, 2018, making February 17, 2020 the ordinary statute of limitations deadline. The plaintiff submitted an NOI on February 13, 2020, and NOI tolling provided the plaintiff with four additional days to file the complaint once the waiting period expired. The Court then addressed the Administrative Orders and determined that on March 10, 2020, there were four days remaining in the statute of limitations period. The Court noted that on June 20, 2020, the plaintiff still had only four days left in the statute of limitations period. *Id* at *6. When the 182-day NOI waiting period ended on August 13, 2020, the plaintiff had until August 17, 2020 (four additional days) to file a complaint. Because the plaintiff did not file the complaint until November 3, 2020, the complaint was untimely.

Despite these cases, on June 1, 2023, a different panel of the Court of Appeals decided *Compagner v Burch*, __ Mich App __; __ NW2d __ (2023) (Docket No. 359699); 2023 WL 3766734. There, the date of loss was November 3, 2014 (when the defendant radiologist allegedly failed to note the presence of a chest abnormality on a CT angiogram) but the claim was not discovered until June 30, 2020 (when a cancerous tumor was found on a chest x-ray). *Id.* at *1-2. The ordinary two-year statute of limitations would have lapsed on November 3, 2016, but the 6-month discovery rule gave plaintiff until December 30, 2020 to file a claim. MCL 600.5838a(2). Moreover, the six-year statute of repose would ordinarily expire November 3, 2020. *Id.*

The plaintiff submitted a NOI on December 4, 2020, and filed the complaint on June 9, 2021. *Compagner*, 2023 WL 3766734 at *2. The defendant sought summary disposition, arguing the statute of repose barred the claim, which the trial court denied (and denied reconsideration). *Id.* On appeal, the defendant argued (in part) that the complaint was untimely and that the Michigan Supreme Court lacked authority to issue the Administrative Orders.

The Court of Appeals agreed the Michigan Supreme Court lacked the necessary authority but affirmed the trial court's denial of summary disposition because it was bound by the prior decisions. *Id.* at *8. The majority also requested a special conflict panel. *Id.* at *1.

On March 10, 2020, the plaintiff in *Compagner* had not yet discovered the claim against the defendant radiologist. Thus, the 6-month discovery period was not tolled by the COVID Administrative Orders. However, there were 239 days remaining under the 6-year statute of repose for a medical

malpractice claim. Adding 239 days to June 20, 2020, following AO 2020-18, yields a new statute of repose deadline of February 14, 2021.

The December 4, 2020 NOI would thus toll both the 6-month discovery period deadline as well as the statute of repose deadline. MCL 600.5856(c). There were 27 days left in the 6-month discovery period and 72 days left before the COVID-tolled statute of repose would expire. Because the complaint was filed four days after the 182-day NOI waiting period ended, the action was timely under both the NOI-tolled 6-month discovery period and the NOI-and-COVID-tolled 6-year statute of repose.

The majority in *Compagner* would have granted summary disposition based on their disagreement with *Carter*. *Compagner*, 2023 WL 3766734 at *2. The majority quoted *Wenkel* and Armijo regarding the "during the state of emergency" language found in AO 2020-3. *Id.* *5-6. The majority then cast doubt on the correctness of *Carter* for failing to follow *Wenkel* and Armijo. *Id.* at *6 n17. After acknowledging the controlling nature of *Carter*, the majority then addressed the constitutionality of the Administrative Orders because it felt compelled to do so. *Id.* at *10.

The Court noted the Michigan Supreme Court's constitutional authority to create court rules of practice and procedure, but also noted the Legislature's task of creating substantive law including the establishment of a statute of limitations and repose for claims. *Id.* at *10-11. The majority then determined AO 2020-3 and AO 2020-18 had the effect of changing the statute of limitations and statute of repose for claims – it was not merely a minor adjustment to the counting of days under MCR 1.108. *Id.* at *13-15.

The minor, procedural effects of MCR 1.108(1) are minimal in nature, insignificant in temporal duration, designed purely to ensure that filings are not due when the courts are closed, and can properly be characterized as falling within the "practice and procedure" bailiwick of the Supreme Court. Const. 1963, art. 6, § 5. The effects of AO 2020-3, by contrast, are vast, indefinite in duration, purporting to apply throughout the entirety of a state of emergency period that was itself wholly undefined, potentially limitless, repeatedly extended, and bounded by nothing beyond the Governor's sole discretion (at least until such time as the Supreme Court itself declared her authority to be invalid and unconstitutional and her EOs to be without any basis in law).

AO 2020-3 was of an entirely different scope and nature than is MCR 1.108(1), had the effect of drastically altering the legislatively-enacted statutes of limitation and repose (and related tolling provisions), and it accordingly impermissibly and unconstitutionally intruded on the Legislature's sole and exclusive authority to determine the substantive law of the state of Michigan. Compagner, 2023 WL 3766734, at *15. The Court subsequently ordered it would not convene a special panel. See Order dated June 21, 2023 (Docket No. 359699).

Following these decisions, the Michigan Supreme Court gave notice of its intention to review most of them. On June 30, 2023, the Court issued an order granting the plaintiff-appellant's application for leave to appeal in *Carter*. 991 NW2d 586. "The parties shall address whether this Court possessed the authority to issue Administrative Order Nos. 2020-3 and 2020-18." *Id.* That same day, the Court ordered a mini-oral argument on the application for leave to appeal (MOAA) in *Armijo* to occur at the same session as the *Carter* oral argument. 991 NW2d 593.

The Court directed the parties to address "whether: (1) under Administrative Order 2020-3 and Administrative Order 2020-18, the pre-suit notice period described in MCL 600.2912b continued to run from March 10, 2020 to June 20, 2020; and (2) whether the Court of Appeals correctly held that the plaintiff's complaint was not timely filed." *Id.* Additionally, the Michigan Supreme Court held the Linstrom defendant-appellant's application for leave to appeal in abeyance pending resolution of *Armijo* and *Carter*. Order dated June 30, 2023 (COA Docket No. 358487, SC Docket No. 165454)

Taken together, the Court of Appeals brought some clarity to the issue of calculating COVID tolling, but the Michigan Supreme Court is yet to weigh in. While the "during the state of emergency" debate and the debate as to whether AO 2020-3 and AO 2020-18 are constitutional will continue to

Medical Malpractice Report, cont

impact certain cases (like medical malpractice actions involving children), the number of cases affected by COVID tolling in general should steadily diminish now that three years have passed since the Governor declared the COVID State of Emergency. *Carter* is the controlling authority for now, but the Michigan Supreme Court will have the final say.

1 See EO 2020-4 (issued March 10, 2020), AO 2020-3 (issued March 23, 2020), Amended AO 2020-3 (issued May 1, 2020), and AO 2020-18 (issued June 12, 2020).

2 See Browning v Buko, __ Mich __, __; 979 NW2d 196, 197, 201 (2022) (Viviano, J., dissenting) (questioning whether the Michigan Supreme Court's Administrative Orders were "invalid because they were an unconstitutional exercise of legislative power.")

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Is there a policy for that?

Artificial intelligence in the workplace presents another reason to review and update employee handbooks

By: *Nemeth Bonnette Brouwer PC*

As if the working world hasn't experienced enough change throughout the pandemic, employers now have to navigate the use of artificial intelligence. Some organizations may fully embrace the next generation technology while others are cautious.

Whatever the stance, Deborah Brouwer, managing partner of Detroit-based management-side labor and employment law firm Nemeth Bonnette Brouwer, encourages employers to get ahead of ChatGPT and other artificial intelligence options while they still can.

"AI products like Chat GPT can bring opportunity to the workplace, but they also present new complications for employers managing their use," Brouwer notes. "It would be prudent for employers to create policy guidelines for AI usage as it pertains to the company overall, but also drilling down to individual departments and jobs."

When looking in particular at ChatGPT and its many capabilities, it should be understood that the technology also carries the risk of providing incorrect information, harmful and/or biased content, and limited knowledge beyond 2021. Taking these factors into consideration when creating AI usage policies is as important as the following:

- Because it is a third-party software, there is no guarantee that any confidential information inputted into ChatGPT will be protected. A number of financial services companies have blocked use of ChatGPT's website due to concerns about the security of company and client data.
- While ChatGPT is intelligent, so are humans. Recipients of ChatGPT writing may deduce that the written product they're receiving was crafted by a non-human. Further, it's still important to review anything produced by ChatGPT for accuracy and readability.
- Use of the software may present the risk of client mistrust or loss of reputation if clients learn that software was used rather than the individual or team they are paying to do the work.
- As companies enable ChatGPT for use, employees may question the

Celebrating more than 30 years, Nemeth Bonnette Brouwer specializes in employment litigation, traditional labor law, workplace investigations, and management consultation and training for private and public sector employers.

The firm also provides arbitration and mediation services. Woman-owned and led since its founding, Nemeth Bonnette Brouwer exclusively represents management in the prevention, resolution, and litigation of labor and employment disputes.

Artificial Intelligence, cont

viability of their position, and employers may notice a lapse in employee quality of work and/or company loyalty.

- If a company doesn't create or own the content, are copyright laws being appropriately followed?
- If an AI policy is implemented, what are the ramifications of non-compliance? How will the policy be monitored and enforced? Will there be a grace period for employees to understand both the actual guidelines and the spirit of the policy?
- Might the creations of ChatGPT contain biases or discrimination? The product should be carefully reviewed to ensure that it does not.

Brouwer acknowledges that artificial intelligence usage policies may prove to be among the most difficult personnel policies to write, but creating a policy now can mitigate or eliminate challenges down the road.

"It's important to understand that employee handbook policies exist to address a particular issue as it currently stands, but policies are dynamic and can always be changed," Brouwer reminds employers.

"As ChatGPT and other artificial intelligence products emerge and evolve, it's easier to update an existing policy rather than start from scratch after the negatives of not having a policy come to light. And employers probably can plan on having to update AI use policies often, given how rapidly the technology changes."

Appellate Practice **Report**

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

Michigan Court of Appeals Clarifies Application of the "Plain Error" Rule

One of Michigan's more well-established appellate doctrines is that a claim of error generally won't be considered on appeal unless it is preserved in the trial court. That isn't necessarily the case in criminal appeals, where the "plain error" rule provides the opportunity for relief under certain circumstances. Until recently, there was some confusion about whether the "plain error" rule applies in civil cases. But the Michigan Court of Appeals has now clarified that it does not.

General Rule of Issue Preservation in Civil Cases

As the Michigan Supreme Court explained in *Walters v Nadell*, 481 Mich 377; 751 NW2d 431 (2008), "a litigant must preserve an issue for appellate review by raising it in the trial court," such that "a failure to timely raise an issue waives review of that issue on appeal." Id. at 386. See also *In re Forfeiture of Certain Personal Property*, 441 Mich 77, 84; 490 NW2d 322 (1992) ("Issues and arguments raised for the first time on appeal are not subject to review."); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149; 792 NW2d 749 (2010) (explaining that to preserve an issue for appeal, a party must specifically raise it before the trial court).

Although the Court of Appeals does have discretion to consider unpreserved issues in civil cases, the Court "exercises its discretion sparingly and only when exceptional circumstances warrant review." *In re Conservatorship of Murray*, 336 Mich App 234, 241; 970 NW2d 372 (2021). The Court may review an unpreserved issue in a civil case only "'if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019).

The "Plain Error" Rule in Criminal Cases

By contrast, the "plain error" rule applies in criminal cases. Under the plain error rule, appellate courts have an obligation to review unpreserved errors (both constitutional and nonconstitutional) if the defendant can show "(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected [the] defendant's substantial rights." *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011), citing *People v Carines*, 460 Mich 750, 753; 597 NW2d 130 (1999). The third requirement "generally requires a

showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 753. If these requirements are met, reversal is warranted "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

The Plain Error Does Not Apply in Civil Cases

Ever since the Supreme Court in Carines adopted the plain error rule for both constitutional and nonconstitutional errors in criminal cases, there has been confusion about whether it also applies in civil cases. For example, in *Henderson v Dep't of Treasury*, 307 Mich App 1; 858 NW2d 733 (2014), the Court of Appeals applied the plain error rule in reviewing whether the Michigan Tax Tribunal's refusal to allow the petitioner to conduct discovery deprived it of procedural due process, an issue that the petitioner failed to preserve before the Tax Tribunal. *Id*. at 9.

Several decisions subsequently relied on *Henderson* in applying the plain error rule to unpreserved claims of error in civil cases. See, e.g., *Charter Twp of Canton v 44650, Inc*, ___ Mich App ___; ___ NW2d ___; 2023 WL 2938991, at *6 (2023); *Mr Sunshine v Delta College Bd of Trustees*, ___ Mich App ___; ___ NW2d ___; 2022 WL 12073432, at *1 (2022); *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018).

As the Court of Appeals' decision in *Tolas Oil* now makes clear, the "plain error" rule does not apply in civil cases. Instead, parties in a civil case are bound by the longstanding "raise or waive" rule, under which appellate review is wholly discretionary and granted sparingly.

The Court of Appeals recently clarified, however, that the plain error rule does not apply to civil cases. In T*olas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___; ___ NW2d ___; 2023 WL 4034786 (2023), the Court of Appeals observed that the Supreme Court had long distinguished between civil and criminal cases. The Court cited *Napier v Jacobs*, 429 Mich 222; 414 NW2d 862 (1987), in which the Supreme Court reaffirmed that failure to preserve an issue in the trial court waived any claim of error on appeal. *Id*. at 227-228. In doing so, the *Napier* Court noted that the situation is different in a criminal case, where the defendant is "faced with imprisonment" such that "appellate review might well be the only remedy" because "[a] malpractice claim based upon ineffective assistance of counsel, for example, could hardly compensate a wrongfully convicted person for undeserved imprisonment in a state prison." *Id*. at 233 and n 2.

The Court of Appeals in *Tolas Oil* also pointed to the Supreme Court's continued application of the "raise or waive" rule in *Walters*, 481 Mich 377, in which the Court declined to consider a statute of limitations-tolling issue because it was not raised in the trial court. Id. at 389. Given *Napiers* and *Walters*, the *Tolas Oil* Court held that the waive or raise rule must be applied in civil cases, not the plain error rule of *Carines*. *Tolas Oil*, ___ Mich App ___; 2023 WL 4034786, *3.

Conclusion

As the Court of Appeals' decision in *Tolas Oil* now makes clear, the "plain error" rule does not apply in civil cases. Instead, parties in a civil case are bound by the longstanding "raise or waive" rule, under which appellate review is wholly discretionary and granted sparingly.

In Memorium | **John Patrick Jacobs, Jacobs & Diemer**

John Patrick Jacobs passed away peacefully on Friday, September 22, 2023. A longtime pillar of Detroit's legal community, John was widely regarded as the state's finest appellate attorney, trying and arguing countless cases in front of Michigan's Court of Appeals and Supreme Court and the federal appellate court. Above all else, he was a devoted husband, father, brother and grandfather as well as a mentor and friend to many.

John's personality was as big as his heart. He was always the most gregarious, forthright, funny and commanding person in any room. People who met him never forgot him. His wit was unmatched. He was a fierce advocate for his family, his friends, his clients and the less fortunate. John was everyone's advice giver, fatherly figure, legal advisor and friend.

John was a lifelong Detroit booster and purposefully centered his legal practices in the city where he was near the courts, the restaurants and urban vibrancy he loved. He always considered himself a city boy. He grew up on Detroit's east side in the Jefferson-Chalmers neighborhood where he attended St. Martin of Tours for elementary and high school.

John attended the University of Detroit for undergraduate and law school, graduating first in his class with his Juris Doctor degree. It was in law school that John's lifelong passion and dedication to progressive causes and pro bono legal work took root. After law school, he worked as a clerk for the Chief Judge of the Michigan Court of Appeals, and then, in 1971, he was named to a Reginald Heber Smith Civil Rights Project fellowship during which he worked on civil rights cases.

When he returned to Detroit, he was hired by Plunkett Cooney where he led the firm's appellate practice division, the very first department of its kind in Michigan. He worked at Plunkett Cooney for more than 20 years, eventually leaving to establish and lead several independent law firms. He was most recently the founding partner of Jacobs and Diemer, an appellate specialty law firm that has reversed more than $3 billion in judgments.

In 2017, the Michigan Defense Trial Counsel established the John P. Jacobs Appellate Advocacy Award to honor the very best civil appellate attorneys in the state; he was the first awardee.

John is survived by his wife of 50 years, Linda (nee Grams), daughter, Christine (Neil), granddaughter, Frances, brother, James (Joyce), sister,

In Memorium, cont.

Joann (Charles), nephews, David (Laura), Brian (Angie) and Paul (Amy), nieces Carolyn (Joseph) and Leslie and sister-in-law Christine (Allan) and countless friends and colleagues in the legal community.

Euology

John Patrick Jacobs was a great lawyer, a great mentor, a great friend, a great husband, father and grandfather. He was an especially great law partner.

John was great at many things and I'll get back to these great qualities about John a little later but I want to start with something John was not great at. And actually, the opposite of great, something John was really, really bad at. Without any sense of exaggeration, John was the worst, and I mean the absolute worst driver known to man.

Many of you here know exactly what I am talking about. Many of us shared the same terror of being a passenger while John was driving. It was astressful experience no matter how the long the commute, a 5 hour drive to court in northern Michigan or 5 minutes from the office to the Detroit Athletic Club for lunch.

Granted, this is an odd way to start a eulogy of a man I loved and considered a second father but trust me, it will make sense.

John knew he was terrible at driving but would never admit it publicly. When someone would beg to let them drive instead of him, John would say no with fake umbrage, but would later admit to me in private that he knew he was a menace behind the wheel, an early sign he trusted me enough to share his weaknesses. "Lane lines are an abstraction" is what he would tell me.

And he certainly drove accordingly. A trip with John featured the car swerving back and forth, crossing the fog line on the right, an overcorrection to the left to cross over the center line, an over-correction back to the right across the fog line, back and forth over and over again.

The car traveled sideways just as much as it moved forward. John observed stop signs and red lights at a 50% clip. You had to be a back seat driver if you were going to make it out of there alive.

As much as I enjoyed talking with John and learning from him, I was terrified of these learning lessons while he was behind the wheel. Now what does this have to do with why we are here today?

Quite simply, it is a miracle that John never seriously injured himself, his passengers or other motorists. There is no logical explanation for how John could drive this dangerously for more than 50 years and come away completely unscathed, aside from the occasional mirror being knocked off the side of his car by a bright orange construction barrel with flashing lights that John somehow did not see.

No earthly force can explain it.

The only explanation is that John was such a great and charitable humanitarian that someone or something was watching over and protecting him. There's simply no other way.

As proud as John was for his accomplishments in the courtroom (and there were many), he was more proud of his service to the poor and those in need. And it was not even close. John used his professional successes to give to charity rather than serve his own vanity. John's favorite book after all was "The Holy Use of Money."

John wrote large checks and leaned on his friends and colleagues to raise even more money for countless charitable organizations. This is commendable in its own right but where his compassion for humanity, all of humanity, was most evident was the dignity and respect he showed for the less fortunate. John never walked past a panhandler on the street in downtown Detroit. Not once.

One time a beggar asked John for money but he did not have cash on him, so he wrote "good for $5 at Lafayette Coney Island" on the back of a business card and handed it to him. John knew the owner at Lafayette and called to tell him to

In Memorium, cont.

provide the guy $5 worth of food on credit that John would later pay once the business card had been redeemed.

John then started to prefer this method of giving and gave $5 business cards to anyone who asked. It helped the people in need and Lafayette was happy for the business. At the end of each month, John would walk over to Lafayette, count up the number of redeemed cards and make good on his promise to pay for their meals.

After a while, however, and hundreds of dollars of food vouchers had been given out, the owner of Lafayette called to apologize that he could no longer accept the business cards good for 5 bucks. It turned out that the homeless recipients enjoyed their meals so much they were saving up John's $5 vouchers and having banquets. John then switched to handing out coupons for free sandwiches at Subway, a restaurant too small for large gatherings.

John brought me and other young lawyers at the firm with him to work at soup kitchens. And in true John fashion, rather than serve prepackaged food that had been donated, John would cater the event. Why would they deserve anything less than what John would want for himself?

I'll also never forgot one night during my first week on the job in the summer of 2005. John and I were walking to the parking garage in the hot August air, when a despondent homeless woman in a wheelchair said she needed help getting up the hill on Shelby Street, a steep incline given her predicament. John was in a three piece suit and it was 90 degrees out but without hesitation, John immediately agreed and he proceeded to push her up the hill. The thought of not helping her like so many other men in suits had undoubtedly done never even crossed his mind. Of course he would push her up the hill.

John was this way with everybody. He did not differentiate the dignity or value of a supreme court justice from a cleaning lady. When the janitorial staff would clean out offices at 8:00 at night, John was always willing to hear whatever story of woe they might have. And in addition to listening, John would help them. There is a file at the office called "Cleaning Ladies" which catalogs all of the pro bono projects he had done for them. John was always friendly with the security guards who worked at our office buildings. He was on a first name basis with each of them. John's kindness was due to his compassionate nature but he also stood to personally benefit from treating the security guards so well. John later explained to me that if any client or insurance carrier ever doubted the amount of hours he had worked on a file, the security guards would be his star witnesses and swear that he did really work until 10:00 most nights.

When John stopped coming to the office every day, one such security guard named Karen would always ask me "how's Mr. Jacobs doing?" The last time I saw her, I let her know the sad news that John had passed away. She paused to process her grief and recounted his kindness to her. She then remarked that for the longest time she thought John and I were father and son. We might as well have been.

John certainly treated me more like a son than a business partner and he would often tell me "I love you like a son." The expressions of affection between us picked up as John become aware that his health was starting to fail him.

John was so kind to me and to my wife Molly long before I joined him as an associate. I did him a small ultimately, inconsequential favor of drafting a friend of the court brief in one of the big cases he was working on. After the brief was on file, John called to tell me that he was sending me and Molly away on an all expenses paid trip to one of his favorite resorts in Canada. That was the first trip we had taken in years because we were young, broke and saddled with debt.

When Molly and I had our first son, Henry, John gave us a "baby bonus" a substantial first payment into a college savings account. He did the same when our second son Oliver was born. John sent me, Molly and Henry to Disney World. Whenever John and I went to a Tigers game he would always buy my two boys a baseball hat or a jersey for me to bring home for them. John referred to Henry and Oliver as his "honorary grandsons" and spoiled them accordingly.

In Memorium, cont.

When Henry was in kindergarten his class studied homelessness and solicited donations for a local shelter. Henry came home from school that day appalled and saddened and said, "daddy did you know that there are people who can't afford a house? Or food to eat? And that some of them sleep on the street or under bridges?"

I told John this story. It warmed his heart to see a young child share his empathy for the less fortunate. John wanted to further nurture his concern for others with a donation, but John wanted to do it in his own memorable way. Rather than send the kindergartner to school with a check, John went to the bank and withdrew the donation in cash, all in singles, so five year old Henry could walk into school with a stack of dollar bills as big as his head.

John also welcomed me into his family and I got to know his wife Linda and his daughter Christine as well. John and Linda had a long loving marriage and were set to celebrate their 50th anniversary next week. John and Linda were yin and yang, and complimented each other perfectly. John's frenetic personality and energy were balanced by Linda's calm and cool demeanor. Linda brought order to John's haos, no easy task and one that can only be accomplished out of love because John was a handful.

John's daughter Christine was his travel partner. He told me about their trips to Alaska, Spain, Puerto Rico, London among other places the two would visit. He worked hard all of those years to treat his family well and pictures of John and Christine's trips adorned his office. John was proud of Christine for her rofessional endeavors, especially when she left a great job in the corporate sector and switched to public interest work, first at a think tank and then a charitable foundation. John quickly connected with Christine's husband Neil and was proud of his public interest work, as well. Even better, the political causes Neil lobbied on behalf of were in line with John's strongly held beliefs.

Christine's latest career move brought her and Neil back to Michigan after living out of state. John was so happy when Christine and Neil moved close to home. The timing of their move coincided with John's decision to scale back at the office and he got to spend his final years with Linda, Christine, Neil, and ultimately his granddaughter, Frances. When John and I did not talk about work or politics, he relished telling me about the latest funny thing Frankie said or did.

His favorite was when Frankie was 3 or 4 years old and her response when John denied her request for a second bowl of ice cream was: "you know I do have another grandpa." Recounting that story always made John belly laugh because her response showed she know how to wield leverage like a skilled litigator, delivered with the cuteness only a three year old grand child could pull off.

As difficult as it was to hear John had passed, there was one light moment when Linda and Christine told me the sad news and they began making funeral arrangements. Christine and Linda asked me if I thought many lawyers would attend the service. I smiled because I knew just how many hundreds of lawyers John had mentored over his 50 year career and that the legal community would come out in droves.

Each one of the lawyers here owes Linda and Christine a debt of gratitude. John had his own busy docket but was so generous with his time for others. Linda and Christine made their own sacrifices to allow all of us to get to know and benefit from John's guidance and good will.

John was the center of attention of every lawyer's event I ever attended. Everyone sought him out and had to wait their turn at cocktail parties. John was always willing to give advice and offer help to other attorneys. If all you wanted was a laugh, there was no one better for that than John either.

John was the funniest person I had ever met. And John kept his quick wit and sense of humor to the very end. Last year the law firm added a new associate Samantha McLeod at a time when John had stopped coming into the office. Sam knew who John was and what he looked like but she had never met him, spoken to him or knew his voice. One afternoon, John called the office looking for me.

Sam answered, "good afternoon Jacobs and Diemer."

John: "Can I speak with Tim please?"

Sam, "Tim is not available can I take a message."

John, "Sure let him know John called."

Sam, "John can I get your last name?"

John: "My last name is Jacobs and I can see how little esteem I am now held in at my law firm."

That comment was quintessential John. Absolutely hilarious, quick-witted and at the same time, full of humility. It is not hard to imagine how most people especially most lawyers would respond to a young attorney not knowing who he was. John's response was self deprecating and the opposite of pompous.

Even though John's health had been declining, it is still hard to believe he is gone. The fullness of this room is a testament to just how meaningful and impactful of a life he lead. John's impact will be felt long after he is gone. His contributions to the law can be found in the dozens of case law precedents he created, many of them unheard of legal concepts until John came up with them. His most proud accomplishment is a Supreme Court decision that set new and stricter standards for a lawyer's ethical obligations.

More impactful, however, is how he treated other people, most notably young lawyers. Since news of his death spread, the outpouring of condolescenes and John stories by email, text messages and phone calls has been enormous. So many of them begin with a common refrain: "When I was a young lawyer, John was kind enough to" [fill in the blank]. The tutelage John provided to so many lawyers will continue to be passed down as those young lawyers become old lawyers.

John's legacy will be felt in charitable causes as well long after he is gone. He told me that when he died he wanted to hire a Brink's truck to lead the funeral procession with a sign that said, "yes, I'm taking it with me." While a hilarious thought, John's not taking it with him and is continuing his charitable efforts through trusts and donations after his death.

Christine, Linda and the rest of John's family: I am so sorry he is gone and I am so honored to have the opportunity to know John and for the time today to speak to his greatness.

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