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President's Corner

By: Michael Jolet, *Hewson & Van Hellemont, PC*
mjolet@vanhewpc.com

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.

Dear Members,

It was great to see all of you at our Regional Meet & Greet in Grand Rapids in January. It was a great time and an excellent opportunity for networking and fellowship. As indicated in our last quarterly, one of my main goals this year is to enhance the experience of our new members. We enrolled 49 new members in the last quarterly. 49 new members! Robust recruitment of potential new members is essential to the continued growth of MDTC and enriches the membership experience by providing a forum for the sharing of new strategies and ideas as well as greater networking opportunity, which will not only strengthen our organization, but all of us within our own practices.

I am excited and proud of our organization's resiliency over the years and what we have achieved, individually and collectively. The past few years have been challenging but we have never stopped serving our clients, our firms, and our communities to the best of our abilities. Despite hard times, not just in legal community, we remain steadfast in our support of each other.

I would like to remind you of our upcoming Legal Excellences Awards at the beautiful, historic Gem Theater in Detroit on March 21, 2024. We will celebrate some amazing individuals we are honored to have with us. Please mark your calendars for these upcoming events. We also have our 2024 Annual Meeting & Conference at The H Hotel in Midland, Michigan. If you have not done so, you may want to consider booking your rooms now. Additionally, we have our second annual MDTC & MAJ softball game with all of the proceeds benefiting Detroit P.A.L. on August 22, 2024 at The Corner Ballpark in Detroit. We are looking forward to bringing that trophy home this year, so we are starting practicing now! Last year, we raised over $10,000 for P.A.L. and we are hopeful that we can double that amount this year. I know that I am not the only one excited to say the word "golf" or think about golfing, so please save the date for our 28th Annual Golf Outing at Mystic Creek Golf Course in Milford, Michigan on September 13, 2024.

As we move forward, I know that our organization will be instrumental in achieving our collective goals of improving our firms, meeting the needs of our clients, and honing our professional skills. I have complete trust that our commitment to our organization, our members and our legal community will bring future success to each and every one of us. We are all driven by a desire to help our members and our firms reach their highest potential. I look forward to collaborating and networking with our new members.

As always, thank you for your continued trust, dedication and support.

Michael J. Jolet,

President

Amicus Report

Lindsey A. Peck, *Dickie McCamey & Chilcote, PC*
lpeck@dmclaw.com

Recent Arguments and Upcoming Decisions

Since the beginning of the year, the Supreme Court held oral argument in two calendar cases for which MDTC provided amicus support—*Carter v DTN Management* and *Jumaa v Prime Healthcare Services*.

Carter involves the legality of the administrative orders in which the Supreme Court tolled statutes of limitations and other case-initiation deadlines during the emergency period of the COVID-19 pandemic. Jonathan Koch of Smith Haughey Rice & Roegge authored the amicus brief on behalf of MDTC.

Jumaa involves the recoverability of future earning-capacity damages in wrongful-death actions filed on behalf of minor decedents and, relatedly, the apparent conflict between the Supreme Court's 1948 decision in *Baker v Slack* and the Court of Appeals' 2016 decision in *Denney v Kent County Road Commision*. Jesse DePauw of Tanoury Nauts McKinney & Dwaihy authored the amicus brief on behalf of MDTC.

The Supreme Court also held MOAA in four cases for which MDTC provided amicus support—*El-Jamaly v Kirco Manix Construction*, *Bradley v Frye-Chaiken, St. Clair v XPO Logistics,* and *Cleveland Stegall v Resource Technology Corporation.*

El-Jamaly involves the duty of an electric utility with respect to an unforeseeable event involving a power line, as well as the liability of a general contractor under the common work area doctrine. Brandon Schumacher of Foster Swift Collins authored the amicus brief on behalf of MDTC.

Bradley involves the propriety of holding an attorney, who was hired to contest sanctions levied against another attorney, jointly and severally liable for costs and attorney fees incurred prior to his appearance or unrelated to his representation. Specifically, the Supreme Court asked the parties to brief and questioned the parties on (1) whether, under MCR 1.109 or MCL 600.2591, all attorneys who represent a client during any portion of a case in which a claim or defense is frivolous must be held jointly and severally liable for costs and attorney fees, and (2) if not, how a court should determine which attorneys should be held jointly and severally liable for costs and attorney fees. MDTC collaborated with two other interest groups, Appellate Practice Section of State Bar of Michigan and Michigan Association for Justice. David Porter of Kienbaum Hardy Viviano Pelton & Forrest co-authored the amicus brief on behalf of MDTC.

Lindsey A. Peck

Lindsey A. Peck is a principal of Dickie McCamey & Chilcote who specializes in appellate practice. She has extensive experience handling appeals and critical motions, preparing amicus curiae briefs, and monitoring high-exposure trials in state and federal courts across the country. Ms. Peck is well-versed in a wide array of substantive practice areas, including automobile negligence and bodily injury litigation, commercial litigation, complex and toxic tort liability, construction law, employment law, municipal liability, premises liability, product liability, professional liability, and trucking and transportation law.

Prior to joining Dickie McCamey, Ms. Peck practiced at other national firms with offices in the metro Detroit area.

St. Clair involves the relation-back provision in the non-party-at-fault statute and the misuse defense in the product-liability statute. Regina Berlin of Garan Lucow Miller authored the amicus brief on behalf of MDTC.

Stegall involves the continued vitality of public-policy claims for retaliation based on statutes with anti-retaliation provisions, as well as statutory preemption of public-policy claims. Adam Ratliff of Warner Norcross + Judd authored the amicus brief on behalf of MDTC.

New Opportunities

The Supreme Court granted MOAA in a trilogy of cases involving the one-year-back rule codified in MCL 500.3145, which now contains a tolling provision, and several other cases for which MDTC received an invitation to participate as amicus.

In *Wallace v Smart,* the Supreme Court granted MOAA to determine (1) whether a plaintiff who assigned her rights to a medical provider before filing an action but rescinded the assignment after filing the action was, at the time of filing the action, a real party in interest with standing to sue, and (2) the effect of the one-year-back rule, if any, on standing and status as the real party in interest.

In *Spine Specialists v MemberSelect* and *Encompass Healthcare v Citizens,* the Supreme Court granted MOAA to determine whether the tolling provision of the one-year-back rule applies to PIP benefits that accrued before the amendment to MCL 500.3145 took effect in June 2019. In the latter case, the Supreme Court also granted MOAA to determine whether the failure to challenge retroactive application of MCL 500.3145 amounted to waiver and whether the "formal denial" standard is correct and workable.

In *Attorney General v Eli Lilly & Company,* the Supreme Court granted MOAA to determine (1) whether *Smith v Globe Life Insurance Company* and *Liss v Lewiston-Richards* were correctly decided, and (2) if not, whether they should nonetheless remain good law under principles of stare decisis. *Smith* and *Liss* involved the exemption in the Michigan Consumer Protection Act for "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a). The Attorney General took the position

In *Malone v McRell,* the Supreme Court granted MOAA to revisit the common-law rule that "a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal." The Supreme Court asked the parties to brief whether the rule should be deemed abrogated by virtue of the amendment to MCL 600.2925d(a) or otherwise abandoned.

*If you are interested in authoring an amicus brief on behalf of MDTC in any of the above-mentioned cases, please contact the new co-chairs of the Amicus Committee, J. Scot Garrison and David Porter. For a more thorough understanding of the facts and issues, members can access MDTC's amicus briefs on MDTC's website.

The Event Data Recorder – What Is It and How Can It Help Me?

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Mr. Parker and Mr. Carpenters are consultants at Exponent, Inc. based out of their Farmington Hills, MI office. They work on Exponent's Vehicle Engineering team and have expertise covering accident reconstruction, automotive design engineering and testing, crashworthiness performance analysis, and more.

Executive Summary
The modern automotive Event Data Recorder (EDR), found in most recent and new automobiles and light trucks, can be a powerful tool in helping to understand the nature and substance of a vehicle collision. This article presents a short history of the EDR and a brief synopsis of what they can do and how they can contribute to a case.

Introduction

The automotive Event Data Recorder (EDR), often but erroneously referred to as a "black box" in the media, is defined by the National Highway Traffic Safety Administration (NHTSA) as "a device installed in a motor vehicle to record technical vehicle and occupant information for a brief period of time (seconds, not minutes) before, during, and after a crash." By contrast, the black boxes in airplanes, trains and ships are more sophisticated devices that record a much broader spectrum of data continuously throughout the operation of the vehicle, and in some cases can record sounds and conversations.

EDRs were first introduced in production in some model-year 1998 General Motors vehicles. Today, most cars and light trucks on the road have some form of an EDR.

EDR data, in conjunction with physical and testimonial evidence, can provide valuable insight in analyzing the nature and substance of a vehicular collision. It can be used to help define and quantify the collision, or in some cases whether a collision happened at all in the way claimed.

The NHTSA has estimated that approximately 99.5% of 2021 model year passenger cars and light trucks contain EDRs. Moving forward, passenger vehicle collision litigation will increasingly use information from the EDRs in the involved vehicles, and more commonly involve arguments about that data.

Historical Overview

From the earliest application of airbag supplemental restraint system technologies in 1972, the on-board computer that controls airbag deployment, or airbag control module (ACM), usually had capacity to record and retain some data about the conditions that led to a deployment command, but they did not record any pre-crash information.

General Motors was the first vehicle manufacturer to make the data retained by the ACM in their vehicles publicly accessible. They introduced that capability in various Buick, Cadillac, and Chevrolet brand models in model year 1994, and expanded over other GM brands in the following years. In 1998, GM introduced a new concept for safety research that used ACM capacity to additionally record certain pre-crash data for later download and analysis. GM called these new modules with expanded capability "Event Data Recorders" (EDRs). The term has become commonly used in the industry and by the NHTSA, although other manufacturers have used other names for their specific control modules.

Two examples of an EDR-capable ACM are shown in Figure 1. As can be seen, ACMs are relatively small devices. They are often located in or under the center console, or under one of the front seats in a vehicle.

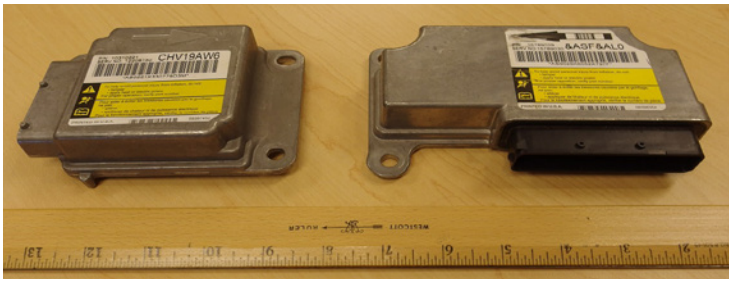

Figure 1 - EDR-capable ACMs

Ford introduced EDR capability in some of their vehicle lines in model year 2001, and Chrysler in 2005. Several other manufacturers included EDRs in their airbag control systems in the subsequent years prior to 2012.

EDRs (and also ACMs) over the years, in their various forms from different manufacturers, had little consistency in terms of what data was recorded, the conditions under which that data would be recorded, and whether it was publicly accessible. Even within a given manufacturer, there was notable inconsistency from model year to model year and from model line to model line due to rapidly evolving technology.

Older vehicles with ACMs will typically record event data to indicate whether the internal algorithm criteria for airbag deployment had been met, some information about the accelerations experienced during the event, and whether the front seat belts were buckled. In later vehicle models with EDRs, data is also recorded indicating select vehicle parameters for a period of seconds prior to the event, such as vehicle speed, and throttle and/or brake application. In addition, more than one event can often be stored.

The standard publicly-available tool for accessing recorded ACM or EDR data, when it is accessible, has been the Crash Data Retrieval (CDR) tool by Bosch (www.boschdiagnostics.com). The CDR tool is a software and hardware package that allows an investigator to connect to the vehicle's OBD II data connector, usually under the instrument panel, with a personal computer. The PC and the CDR software are used to create an image of the data stored in the EDR, without altering or removing the data, and to translate the computer-ese hexadecimal data into a readable format. In cases where the vehicle's electrical system has been compromised by collision damage, the ACM/EDR can be removed from the vehicle and imaged directly. In some cases, even if the vehicle has been involved in a post collision fire, the EDR data may still be retrieved. The CDR software can also be used to print a report that includes a tabulation of the data, as well as a listing of limitations on that data.

Federal Rule 49 CFR Part 563

Effective September 1st of 2012, the NHTSA enacted Federal Rule 49 CFR Part 563 – Event Data Recorders. Among other things, the rule specifies uniform requirements for EDRs in light passenger vehicles, and requires the EDRs be compatible with commercially available tools to image the retained data.

Part 563, however, does not require all applicable vehicles to incorporate an EDR. It places conditions and requirements on the nature and function of the EDR, but only if the manufacturer chooses to include one. Even today, certain manufacturers choose not to utilize an EDR in their airbag control systems.

Similarly, Part 563 does not dictate the type of tool that can be used to image the data. Most manufacturers that choose to include an EDR have designed their systems to be compatible with the Bosch CDR tool, which currently supports 60+ vehicle makes. Some manufacturers, most notably Hyundai and Kia, have opted to utilize a brand-specific tool.

Because of rule 49 CFR Part 563, most cars and light trucks manufactured today include EDR capability. Estimates by the NHTSA have placed the level of EDR penetration as high as 99.5% of production. As older vehicles leave the active fleet, the percentage of vehicles with accessible EDR data continues to rise.

Recorded Event Data

Stored event data may include important information such as:

- Airbag system status, such as active fault codes
- Vehicle indicated speed before and at impact
- Seat belt buckle status (buckled or unbuckled, front and some rear seats)
- Front passenger seat occupancy status
- Brake pedal application status before and at the time of impact
- Accelerator or throttle position before and at the time of impact
- Steering wheel angular input before and at the time of impact
- Antilock Brake System (ABS) engagement before and at the time of impact
- Cruise control engagement status
- Change in vehicle velocity (Delta-V) during the impact phase of the event versus time, as calculated by the crash accelerometers

- Whether multiple events were detected, and if so, event order and relative timing
- Pre-crash acceleration rates, fore-aft, and side-to-side, as measured by the stability control sensors
- Photographic images recorded by the vehicle's forward-facing camera
- Distance and relative velocity of pedestrian or vehicle sensed by an active safety system

Many people assume that if the airbags did not deploy in a crash, no event data will be recorded. This is not the case. In most cases, a Delta-V of greater than approximately 5 mph within a certain time interval (typically 0.15 sec) will trigger the event to be recorded, independent of any airbag deployment. How, and for how long, the data for a non-deployment event is retained in EDR memory varies by manufacturer, car model, and car model year. The recorded data might be retained for only a certain number of on/off cycles of the ignition, or until it is overwritten by a subsequent event. Deployment events are locked in memory and require replacement of the EDR as part of repairs.

Some vehicle models contain EDRs that record the date or odometer mileage at the time of the event, which makes the data easier to link to a particular occurrence. If the vehicle ignition is turned off at the time of the incident, the airbag system is not active, and the EDR will not record anything.

Lack of a recorded event can in itself be good information, in conjunction with other evidence, to help understand a collision occurrence. If an event is supported by physical damage to the vehicle, lack of an event recording can indicate that the subject event was not of sufficient severity to meet the recording trigger threshold, or that the ignition was turned off at the time the damage was caused.

Three types of data are included in the typical CDR crash event report. These include:

1. Data Limitations Information
2. Pre-Crash Data
3. Crash Event Data

Data Limitations Information

The data limitations information is not really data but is an extremely important part of the CDR report. It explains the characteristics of the data reported, and it gives direction on how the data is internally taken and processed. What triggers a recording, the recording time length, data sampling rates, how long recorded data is retained, and measurement sign conventions (e.g., steering wheel, acceleration, roll direction, etc.) are typical items explained in the data limitations information. The data limitations are sometimes ignored or poorly understood by people interpreting the tabulated data reports; this can have a major impact on the validity of the interpretation.

Pre-Crash Data

Vehicle speed is always an important part of an accident reconstruction, as is an understanding of what happened in the seconds prior to the impact.

One of the most significant benefits of an EDR is the ability to capture and record certain pre-crash data. The EDR is capable of recording data for a short period (usually 5 seconds) prior to an event at a set sampling rate, generally once or twice per second.

The EDR pre-crash data generally includes accelerator (gas pedal) percent application, indicated vehicle speed, and if the brake pedal was applied (on/off only, not application intensity). On some models, the pre-crash data may include other things such as information on steering wheel angle, front seat belt use, passenger seat occupancy, and Antilock Brake System (ABS) activation status, or vehicle stability control status.

EDR data can supplement and corroborate other reconstruction calculation methods. It helps establish the state of the vehicle prior to the impact and may help quantify any evasive or mitigating actions that were or were not taken by the driver.

Another important point is that recorded event data from the EDR supplements (and can potentially supplant) eyewitness and operator statements with more factual data. The EDR does not record any personal information that can identify the driver of the vehicle, and unlike an airplane cockpit flight recorder, does not capture any sounds or conversations.

Crash Event Data

The crash event data consists of information such as the type of crash (front, side, rear, rollover), if it was a deployment event, and how many events occurred. Many reports contain graphs of either velocity or acceleration versus time during the crash, which can supplement and verify reconstruction results.

The event data also provides information on crash severity, including a calculated Delta-V. Further, it provides a time between impacts in multiple impact scenarios, and information on sequencing the events. This can be very useful in understanding why specific safety devices deployed or did not deploy.

Crash event data typically also includes information on seat belt status at the time of the incident. It will indicate whether the front seat belts, and in some cases rear seats as well, were buckled or not, but not whether the belt was being properly worn.

Modern vehicles often incorporate a "smart" airbag system with sensors to determine driver position and passenger seat occupancy, in order to enhance occupant safety in the case of an airbag deployment. Accordingly, some vehicle models will also provide information on the fore-aft positioning of the driver's seat, and whether the passenger seat was occupied. There are some vehicles that can discern between small and large occupants in the right front seating position, referred to as occupant classification.

Ownership and Disclosure of EDR Data

Ownership of EDR data and related disclosure requirements are a privacy concern, and a matter of state laws – which can vary considerably. In general, the owner of the vehicle is considered to be the owner of the data retained in that vehicle's EDR and must give permission for legal access to that data. Some insurance companies have contract terms related to access of EDR data, and courts can subpoena EDR data through court orders. In some states, law enforcement officers are authorized to collect EDR data under existing state laws governing crash investigations.

Summary

While often referred to as a "black box," the EDR is only very generally comparable to the devices found in airplanes, trains, and ships. An EDR records vehicle technical data for a brief period of time during the event of a collision.

Correctly interpreted by a qualified analyst, EDR data can be a powerful asset in fully understanding the nature and substance of a collision. It can be used to validate accident reconstruction calculations and estimates based on the physical data, and can provide valuable assistance in understanding why specific safety devices, such as airbags, did or did not deploy. It can also be used, in concert with physical evidence, to test the veracity of eyewitness statements and claims with respect to the incident.

As noted earlier, the exact nature of the data that might be retained in a particular vehicle's EDR is difficult to know in advance, particularly in vehicles prior to the 2013 models. In some older vehicles, the data may only be retained temporarily. In addition, if the vehicle's airbags deployed in the event, then the ACM will probably require replacement as part of the repair process. It is important for crash investigators, attorneys, and insurance claims professionals to know that if they have questions about the facts of the incident, any EDR data should be secured as quickly as possible. It can always be decided later how (or whether) to use the data.

It is also important for crash investigators, attorneys, and claims professionals to obtain the proper authorization for accessing and downloading the EDR data, to avoid admissibility issues.

Case Studies

In one incident, the owner of a 2003 Cadillac CTS testified that they had been cut off by a large pickup truck that pulled out in front of him. He was unable to slow in time, and struck the rear of the pickup truck, which then fled the scene. The driver of the Cadillac was claiming head and neck injuries from the collision.

In this instance, the damage to the front of the Cadillac, shown in Figure 2, was consistent with impacting the rear of another vehicle, such as a pickup truck. There was even a square imprint in the plastic front bumper cover of the Cadillac that was suggestive in shape, size and height of the trailer hitch receiver found below the rear bumper on many pickups. The imprint is circled in Figure 2. From other photographs, it was apparent that the Cadillac's frontal airbags had not deployed.

Figure 2 - Cadillac front end damage

Impact severity could be calculated based on vehicle crush measurements and comparison to crash test data, but this vehicle also contained an EDR, which was imaged using the Bosch CDR tool. The EDR data told an entirely different story.

The EDR contained a single event, that being a non-deployment event. As noted prior, a non-deployment event is an event that is significant enough to "wake up" the EDR system, but not significant enough to cause the airbags to be deployed.

The EDR pre-crash data indicated that for the 5-second interval preceding the collision, the Cadillac was sitting stationary, with the engine idling at 640 rpm, with no throttle or brakes applied. Event data indicated that at the time of the incident, the driver's seat belt was unbuckled, and the vehicle experienced a rearward Delta-V of approximately 5 mph. The EDR data was clearly contrary to the claimed collision scenario.

In another incident, a 2016 Ford Mustang and a 2016 Toyota Sienna minivan were involved in an opposing-direction sideswipe collision. The left side of each vehicle collided with that of the other vehicle. The event took place on a semi-rural two-lane road in the small hours of the morning. Each vehicle was occupied by multiple passengers, with a total of eleven (11) people involved between the vehicles. All occupants were claiming injuries from the incident.

The occupants of each vehicle indicated that they were traveling straight down the road, at or near the speed limit of 45 mph, with no braking or steering actions, when an oncoming vehicle crossed the road center line and collided with them.

Physical evidence on the vehicles and at the collision site was consistent with the claimed collision scenario. The left front corner of the Sienna contacted the left side of the Mustang in an opposite-direction sideswipe collision, beginning on the left door of the Mustang and continuing rearward until the left front tire and wheel of the Sienna contacted the left rear tire and wheel of the Mustang, where the Mustang's wheel and/or axle were displaced, and the Mustang was caused to rotate counter-clockwise. Damage to the involved vehicles is shown in **Figure 3** and **Figure 4**.

Figure 3 – Damage to the subject Toyota Sienna (area of damage circled)

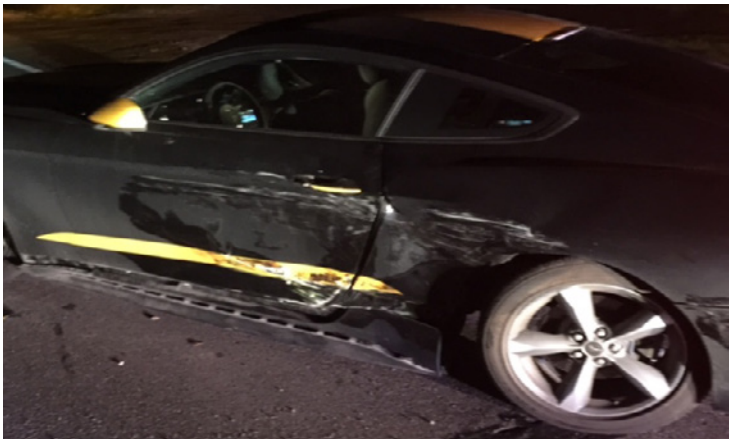

Figure 4 – Damage to left side of the subject Mustang

EDR data was accessed from both vehicles, using the Bosch CDR tool. As in the previous case study, the EDR data provided very different insights into the collision.

Contrary to witness testimony, both vehicles were braking and slowing down as they approached each other prior to the collision. At impact, both vehicles were moving slowly, with a closing speed between the vehicles of approximately 15 mph (6 mph travel speed for the Sienna, 9 mph for the Mustang).

Also contrary to witness testimony, the subject Sienna was steered to the left in the final seconds prior to the impact, consistent with angling leftward into the left side of the oncoming Mustang.

The Delta-V recorded for each vehicle was consistent with a collision at a closing speed between the vehicles of approximately 15 mph. This was further confirmed by the observable level of damage to both vehicles, which was consistent with a sideswipe collision at a low closing speed, such as the 15 mph closing speed identified in the combined EDR data.

Based on the significant inconsistencies between the physical evidence (including EDR data) and witness testimony, the collision did not occur as claimed. The collision was most likely caused on purpose as a planned or staged event.

The probable scenario is that the Sienna was intentionally steered into the side of the Mustang, with both vehicles traveling at a slow speed.

By physical damage evidence alone, everything was consistent with each of the two example collisions as claimed. In conjunction with the EDR data, a different picture emerged in each case that was totally inconsistent with the claimed collision scenario. The Cadillac was sitting still, idling, when it was impacted in the front end by what could have been another vehicle, perhaps even the rear end of a pickup truck. The Toyota and the Mustang were steered together at a low closing speed into a sideswipe collision. Both were possibly staged collisions, which puts them in a completely different perspective. Without the EDR data, it would have been much more difficult to make that determination.

As more manufacturers equip their vehicles with active safety features, such as forward collision warning, automatic emergency braking, and pedestrian detection and braking, data recorded by these systems has also become available. GM and Toyota, for example, both have vehicles which can store images captured by their forward-facing cameras when an active safety feature is activated. A sample image captured by a GMC truck during an automatic emergency braking event is shown in **Figure 5**.

Figure 5 – Forward camera image from a GMC truck during automatic emergency braking

These images can be accompanied by event data such as the vehicle's speed, acceleration, and accelerator and brake pedal positions, as well as the distance, relative speed, and acceleration of the detected object. Active safety features can save these records whenever they activate, not just in a collision. This makes it important to inspect and image the data as soon as possible to prevent it from being overwritten by a subsequent event.

Additional information and research about the EDR are available on the NHTSA EDR web site at: https://www.nhtsa.gov/research-data/event-data-recorder

MEMBER NEWS

Work, Life, and All that Matters

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

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright*
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Is it Proper to Raise New Arguments or Submit New Evidence in a Motion for Reconsideration?

There may be times when a party facing an adverse summary disposition decision (whether it be the grant or denial of such a motion) wishes either to raise a new issue or submit new evidence in a motion for reconsideration under MCR 2.119(F). Is this proper? The weight of authority from the Michigan Supreme Court and Court of Appeals suggests a party proceed with caution.

Regarding submission of new evidence at the reconsideration stage, the Supreme Court in *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996), refused to consider an affidavit that was not submitted in response to the defendant's motion for summary disposition, but was instead offered for the first time as part of the plaintiff's motion for reconsideration. In declining to consider the affidavit, the *Quinto* Court observed that it "was not before the trial court":

> The affidavit was filed with a motion for rehearing, *after* the trial court granted defendant's dispositive motion. In ruling on a motion for summary disposition, a court considers the evidence then available to it. . . . Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the second affidavit. [*Id.* at 366 n 5.]

Relying on *Quinto*, the Supreme Court reached the same result in *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999), holding that additional evidence submitted in a motion for reconsideration "was not properly before the [trial] court":

> Plaintiff offered the textbook passages for the first time in support of its motion for rehearing. In ruling on a motion for summary disposition, a court considers the evidence then available to it. Accordingly, in ruling on the propriety of the trial court's grant of defendant's motion for summary disposition, we do not consider the textbook evidence.

See also *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474 n 6; 776 NW2d 398 (2009) ("Attached to the motion for reconsideration, plaintiff submitted several affidavits in support of its assertion that that the individuals listed on Exhibit A were elected to Innovative AFC's board of directors in 1999. The circuit court properly declined to consider these affidavits, which were presented for the first time in support of plaintiff's motion for reconsideration.").

Phillip J. DeRosier

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@dickinson-wright. com or (313) 223-3866.

At the same time, the Court of Appeals has recognized a trial court's discretion to consider new evidence presented by way of a motion for reconsideration. Most recently, in *Gary v Farmers Ins Exch*, ___ Mich App ___; ___ NW2d ___; 2023 WL 5808505 (2023), the Court considered medical records that the plaintiff provided when moving for reconsideration of the trial court's decision to grant summary disposition to the defendant because "the trial court exercised its discretion to accept the exhibits filed with the reconsideration motion." *Id.* at *2 n 3, citing *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012) ("Because the trial court considered the affidavits in making its ruling, we include them in our review de novo of the trial court's [summary disposition decision].").

While it is theoretically *possible* to successfully raise an issue for the first time in a motion for reconsideration, or even to present new evidence, that is certainly not the norm, and parties should not assume that it'll be successful.

Of course, the trial court also has discretion to *decline* to consider such evidence. See, e.g., *Zehel v Nugent*, 344 Mich App 490, 513 n 6; 1 NW3d 387 (2022) ("[A] trial court need not consider evidence presented for the first time on reconsideration that could have been presented initially."); *Yachcik v Yachcik*, 319 Mich App 24, 42; 900 NW2d 113 (2017) ("[A] court has full discretion to decline to consider evidence presented with a motion for reconsideration 'that could have been presented the first time the issue was argued.'") (citation omitted).

It appears that the trial court has similar discretion when it comes to new legal issues or arguments. On the one hand, the Court of Appeals has long recognized that a trial court does not abuse its discretion by refusing to consider arguments raised for the first time in a motion for reconsideration. *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987) ("We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order."). And the general rule is that "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 519; 773 NW2d 758 (2009).

But, the Court of Appeals has also recognized a trial court's discretion to consider new arguments raised in a motion for reconsideration. For example, in *Sutton v City of Oak Park*, 251 Mich App 345; 650 NW2d 404 (2002), which involved a statutory issue raised for the first time in a motion for reconsideration, the Court of Appeals recognized the discretion of trial courts to consider such a new argument:

> Initially, we address the position of plaintiff and the trial court regarding the motion for reconsideration that defendants' reliance on MCL 15.243(1)(s)*(ix)* was improper because it was not relied on in defendants' motion for summary disposition and that the trial court was therefore required to deny defendants' motion for reconsideration. This is not an accurate statement of the law because defendants' motion for reconsideration was brought under MCR 2.119(F), which, by its terms, does not restrict the discretion of the trial court in ruling on the motion. See MCR 2.119(F)(3). Clearly, whether MCL 15.243(1)(s)*(ix)* applies to the records at issue to exempt them from disclosure was presented both by the city council and defendants in their motion for reconsideration. [*Id.* at 348-349.]

The *Sutton* Court further recognized the Court of Appeals' own discretion to consider a legal issue on appeal even though it was raised for the first time in a motion for reconsideration:

> More importantly, the issue on appeal is a question of law, brought under MCR 2.116(C)(8), and the facts necessary for its resolution are before this Court. *Michigan Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 435-436; 592 NW2d 760 (1999) (An issue not addressed by the trial court may nevertheless be addressed by the appellate court if it concerns a legal issue and the facts necessary for its resolution have been presented). [*Id.* at 349.]

Relying on its discretion, the *Sutton* Court ended up reversing the trial court's decision based on the belatedly-raised statutory issue. A separate concurring opinion further expanded on the arguable distinction between submitting new evidence in support of a motion for reconsideration and making new arguments:

> [W]hile a party may be precluded from submitting new *evidence* to the trial court in support of a motion for reconsideration, see *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999); *Quinto v Cross & Peters*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996) (in ruling on a motion for summary disposition, a court considers *the evidence then available to it*), a party raising a newly asserted *basis* for dismissal in a motion for reconsideration does not necessarily run afoul of *Maiden* and *Quinto* in the appropriate circumstances. [*Id.* at 351 (Wilder, J., concurring).]

Similarly, in *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019), the Court of Appeals observed that preservation requirements may be overlooked in civil cases "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." *Id.* at 454 (citation and quotation marks omitted).

While it is theoretically *possible* to successfully raise an issue for the first time in a motion for reconsideration, or even to present new evidence, that is certainly not the norm, and parties should not assume that it'll be successful.

Welcome New Associate Editor

Kevin Cowan, *Associate Editor*

Kevin is an associate attorney at Smith Haughey Rice & Roegge in the Grand Rapids office. He works in SHRR's litigation practice group.

Kevin has experience working in a variety of legal settings involving all aspects of litigation. As a clerk at the 17th Circuit Court in Kent County, he conducted legal research for civil and criminal motion arguments and drafted proposed opinions and orders. During his time with the Michigan Department of Attorney General, he helped represent the state's Department of Corrections and its employees.

Kevin graduated from Central Michigan University with a bachelor's degree in law and economics. He earned his juris doctor from Michigan State University College of Law, where he also served as assistant managing editor for the International Law Review and participated in the Alvin L. Storrs Low-Income Tax-Payer Clinic.

Outside the practice of law, Kevin enjoys golfing, cooking, spending time with family and friends, and watching football, especially the Detroit Lions!

To a Reasonable Degree of Medical Certainty

Virtually every trial attorney at the close of their direct examination of a medical expert will ask their medical witness if their opinion was ***to a reasonable degree of medical certainty***.

What does a reasonable degree of medical certainty mean?

It merely means ***more likely than not***. That is the standard of proof in civil litigation.

What is the origin of the phase "to a reasonable degree of medical certainty?"

In the early part of the 20th Century, Chicago attorneys began using the phase ***"to a reasonable degree of medical certainty"*** in questioning their medical experts in order to establish proof of future medical damages. Irwin Goldstein, a law professor at Northwestern University Law School in 1935, wrote a popular trial advocacy book in which he used the Chicagoland phrase. This is why attorneys throughout the United States use the phrase in questioning their medical experts.

What is the medical meaning of the phrase "to a reasonable degree of medical certainty?"

There is no medical meaning to the phrase. The phrase means nothing to the medical expert. Nowhere in their education, training, or practice has the medical expert ever heard the phrase. Most medical experts have no clear understanding that the phrase simply means ***"more likely than not"***. This is because the phrase is not a medical phrase but rather a legal phrase that only arose in jurisdictions outside of Chicago due to Irwin Goldstein's trial advocacy book. Frankly, many attorneys do not know that the phrase merely means ***"more likely than not"***. Most lawyers use the phrase because they have heard it use by other lawyers and assume it has a medical meaning.

How can the trial attorney use the information in this brief article?

The trial attorney cross examining the medical expert can simply ask the following line of questioning:

> ***Doctor, you have just testified that your opinion in this matter is to a reasonable degree of medical certainty, correct?***
>
> The doctor will then likely answer "***correct***".
>
> **Doctor, please define what is meant by the phrase "to a reasonable degree of medical certainty".**

Ernest Chiodo

Ernest Chiodo MD JD MPH MS MBA CIH is a physician, attorney, biomedical engineer, and toxicologist with graduate degrees from Wayne State University, Harvard, the University of Chicago, and the University of Oxford (UK). Dr. Chiodo has been honored as a distinguished biomedical engineer and physician by Wayne State University. He has served as the Medical Director and Manager of Medical and Public Health Services for the City of Detroit as well as the Medical Director of the pension board for the City of Lansing. In addition to actively practicing medicine and law, Dr. Chiodo has served as a medical school and law school professor.

Any attorney wishing to speak with Dr. Chiodo should contact Debbie Hill at (586) 405-2349.

The doctor may answer that the phrase means ***more likely than not***. However, there is a good chance that the doctor will fumble and not have a clear answer to the question. This is because the doctor has never been asked that question before and does not know that the phrase means ***more likely than not***.

The jury will see the doctor fumble after having answered the question favorably for the direct examining attorney without actually knowing what the question means. The jury will see that the doctor answered "***yes***" without actually understanding the question only because he or she believed that the direct examining attorney wanted him or her to answer ***"yes"***.

There is a good chance that this will destroy the credibility of the medical expert in the eyes of the jury. This has been the usual result when the author of this article has used this approach in his trial practice. Rarely has the doctor being cross examined given a clear answer to the question.

E-Discovery Report

By: B. Jay Yelton, III, *Warner Norcross + Judd LLP*
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***Freeman v. Giuliani*, ___ F.Supp.3d ___; 2023 WL 5600316 (D.D.C. Aug. 30, 2023)**

In *Freeman v. Giuliani*, the plaintiffs, who were election workers, brought a lawsuit against Rudy Giuliani and others for defamation related to statements about the 2020 presidential election. The core issue in the case revolved around Giuliani's alleged spoliation of evidence, and the court considered whether the plaintiffs were entitled to a default judgment as a sanction for this misconduct.

During the discovery process, Giuliani informed the plaintiffs that the FBI had seized his electronic devices in April 2021, leading to a loss of access to some accounts. Giuliani produced what the plaintiffs considered to be a limited number of documents, prompting them to seek confirmation of reasonable preservation efforts. However, Giuliani's counsel disclaimed awareness of these efforts, and Giuliani himself provided vague details about his searches for responsive material.

As the litigation progressed, Giuliani's preservation efforts were repeatedly questioned by the court. Despite court orders, Giuliani failed to provide a clear explanation of the data on the TrustPoint dataset and did not comply with requests to produce responsive materials. The plaintiffs filed a motion to compel, requesting a sworn declaration regarding preservation efforts.

Giuliani submitted a declaration acknowledging his obligation to preserve evidence but claimed that further searches of the TrustPoint dataset were not possible as the documents had been archived. Subsequent hearings revealed inconsistencies in Giuliani's statements about his preservation efforts, and the court warned of potential severe sanctions.

In a joint status report, the plaintiffs asserted that Giuliani had not taken steps to collect and search repositories outside of TrustPoint and had produced no materials from his businesses. Despite warnings from the court, Giuliani did not comply with orders, leading the plaintiffs to file a motion for sanctions, including the possibility of a default judgment.

In her analysis, Judge Howell referred to relevant federal rules, specifically Rules 37(b) and (e), which authorize sanctions for a party's failure to preserve electronically stored information (ESI) and comply with discovery orders. She emphasized that parties are required to preserve potentially relevant evidence, and failure to do so may result in sanctions.

B. Jay Yelton, III

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.

The Judge found that the plaintiffs met the four required elements for spoliation sanctions under Rule 37(e): (1) ESI should have been preserved; (2) the party failed to take reasonable steps to preserve it; (3) ESI was lost; and (4) the ESI could not be restored or replaced. Giuliani should have preserved ESI by early 2021, but he did not take reasonable steps, such as implementing a litigation hold. The court rejected Giuliani's blame-shifting to the government for his preservation failures.

Giuliani's ESI was deemed irretrievable as he admitted it had been "wiped" or that he lost access to it. The court found that sanctions under Rule 37(e)(2) were warranted, which could include presuming the lost information was unfavorable to Giuliani, instructing the jury accordingly, or even entering a default judgment.

Judge Howell concluded that Giuliani's failure to preserve evidence significantly prejudiced the plaintiffs, impacting their ability to prove their claims. She determined that Giuliani's actions were deliberate and warranted Rule 37(e)(2) sanctions. She also found that a default judgment was an appropriate sanction due to Giuliani's willful misconduct, repeated violations, and the inadequacy of lesser sanctions to deter his behavior.

PRACTICE TIP: Courts always prefer to resolve a case on its merits rather than on procedural grounds. But, when a party acts as a scofflaw with respect to its discovery obligations and to its obligation of candor with the court, even the most patient court will impose case-terminating sanctions. Counsel should never facilitate a client's foot-dragging during discovery, and certainly not intentionally obstructive conduct. If your client will not cooperate during discovery, counsel needs to seriously consider withdrawing from a case before damaging their reputation with the court.

The Judge found that the plaintiffs met the four required elements for spoliation sanctions under Rule 37(e): (1) ESI should have been preserved; (2) the party failed to take reasonable steps to preserve it; (3) ESI was lost; and (4) the ESI could not be restored or replaced.

***Medcenter Holdings Inc. v. Web MD Health Corp.*, ___ F. Supp. 3d ___; 2023 WL 5963616 (S.D.N.Y. Sept. 14, 2023)**

In *Medcenter Holdings Inc. v. Web MD Health Corp.*, the court addressed whether spoliation sanctions were appropriate due to the plaintiff's conduct when it could no longer afford online hosting for relevant electronically stored information (ESI). The plaintiff, a provider of medical and pharmaceutical information, brought a trade secret action against defendants, including Web MD, related to two databases— the "Physicians Database" and the "Salesforce Database."

The plaintiff alleged that defendants conspired to poach an executive, Mariel Aristu, who allegedly stole data from the databases before leaving to work for the defendants. The court considered whether the plaintiff fulfilled its obligation to preserve ESI and whether spoliation sanctions were warranted.

The plaintiff initially disclosed the databases in its Rule 26(a) disclosures, indicating that the data was stored on a "Microsoft Azure platform." However, due to financial constraints, the hosting arrangement for the Physicians Database was terminated, and the plaintiff lost access to the Salesforce Database when its subscription lapsed. The plaintiff downloaded some data but claimed impracticality in backing up all non-contact data from the Physicians Database.

Defendants sought spoliation sanctions, arguing that the plaintiff failed to preserve ESI and requesting restrictions on introducing evidence related to the databases or an adverse inference instruction. The court conducted a detailed analysis.

The court examined when the plaintiff's duty to preserve ESI arose. The defendant argued that it arose in 2016, citing internal communications and meetings discussing Mariel Aristu's conduct. The court rejected this, finding that these communications did not indicate an understanding of the specific trade secrets claims at issue.

The court also dismissed arguments based on emails and board meetings in 2016, as they did not show awareness of Mariel Aristu stealing and providing data to the defendants. The court determined that the duty to preserve arose in early 2017 when the plaintiff's IT administrator investigated Mariel Aristu's use of the Salesforce Database.

Regarding spoliation of the Physicians Database, the court found that the plaintiff had an obligation to preserve non- contact data, which was lost when the hosting arrangement was terminated. The court criticized the plaintiff's explanations for selectively preserving contact data, finding them insufficiently substantiated.

Although the court established spoliation, it rejected the argument that the plaintiff acted with the intent to deprive the defendants, a prerequisite for severe sanctions under Rule 37(e)(2). The court ruled that the loss of non-contact information prejudiced the defendants, and as a remedy, it precluded the plaintiff from presenting evidence on the nature or value of that data.

Concerning the Salesforce Database, the court determined that the plaintiff reasonably preserved the data by downloading

a backup before losing access. The court rejected the defendants' claim that the backup was not as effective as hosting, emphasizing that reasonableness does not demand perfection and that the plaintiff, facing financial constraints, took appropriate steps.

In conclusion, the court found spoliation of ESI from the Physicians Database but rejected severe sanctions due to a lack of intent. It ruled in favor of restrictions on presenting certain evidence. The court determined no spoliation occurred with the Salesforce Database, as the plaintiff took reasonable steps to preserve the data.

PRACTICE TIP: Not all loss of electronic data is due to intentional destruction. When data accessibility becomes an issue, it is in a party's best interest to raise the issue timely with opposing counsel and the court. Ideally, the parties can work together on a reasonable plan to preserve case-critical data before access is lost.

***United States v. Captive Alternatives, LLC*, 2023 WL 5573954 (M.D. Fla. Aug. 29, 2023)**

In *United States v. Captive Alternatives, LLC*, Magistrate Judge Christopher P. Tuite addressed the standards for imposing a clawback order, under Federal Rule of Evidence 502, in the context of an action by the Internal Revenue Service (IRS) to enforce an administrative summons against the defendant.

The IRS had issued information document requests and an administrative summons to the defendant, seeking various documents. Following a recommendation by Magistrate Judge Tuite to comply with the summons, the parties attempted to negotiate a clawback order under Federal Rule of Evidence 502. However, negotiations were unsuccessful, leading the defendant to seek court approval for a clawback order over the IRS's objection.

The defendant argued that, given the large volume of responsive documents, it should be allowed to produce the materials first and assert privilege claims later, rather than designating privileged documents in advance. Magistrate Judge Tuite rejected this request, emphasizing that the "good cause" standard for entering clawback orders traditionally applied with the court's discretion. However, he declined to apply this standard in the IRS summary proceeding context, stating that such proceedings did not involve typical civil litigation discovery.

Magistrate Judge Tuite identified specific reasons for rejecting non-consented clawback orders in IRS enforcement cases. Firstly, he found that shifting the burden of making the initial privilege determination to the IRS would provide the targeted entity with improper insight into the IRS's inquiry. Secondly, he noted that IRS enforcement agents were not trained to assess attorney-client privilege, which might be exclusively within the target's knowledge.

Additionally, he highlighted two problematic aspects of the defendant's proposed order: allowing privilege assertion years after production and restricting the use of materials in separate IRS proceedings. Magistrate Judge Tuite rejected the argument that the IRS's refusal to enter into a clawback agreement violated their previous agreement to negotiate in good faith, clarifying that the initial agreement only indicated discussions and did not bind the IRS to such an arrangement.

Not all loss of electronic data is due to intentional destruction. When data accessibility becomes an issue, it is in a party's best interest to raise the issue timely with opposing counsel and the court. Ideally, the parties can work together on a reasonable plan to preserve case-critical data before access is lost.

PRACTICE TIP: While seeking to obtain a FRE 502 clawback order is good practice, a party is not required to enter into one. And, as this case illustrates, the type of judicial proceeding plays a part in whether a court will order one over a party's objection. In the absence of a 502 order, counsel should consider alternatives for reducing the population of potentially responsive documents through the use of date and custodian limitations, agreed-upon search terms, and/or the use of technology assisted review.

***Kosmicki Investment Services LLC v. Duran*, 2023 WL 4899541 (D. Colo. Aug. 1, 2023)**

In *Kosmicki Investment Services LLC v. Duran*, Magistrate Judge Susan Prose addressed the standards for compelling the production of a personal laptop in connection with allegations of unauthorized access to computer files. The defendant, Joseph Duran, a former employee of the plaintiff, was accused of accessing sensitive client information stored on cloud platforms after his termination, violating Colorado civil statutes and the Computer Fraud and Abuse Act.

Duran had previously downloaded information onto both his personal computer and a Seagate drive after being ordered to produce the Seagate drive. Despite a court order prohibiting access to the drive, Duran accessed it, copied data, and added files, actions later deemed improper by a special master. In response, the plaintiff sought to compel inspection of Duran's personal laptop, arguing its relevance to the case.

Magistrate Judge Prose found the files on the personal laptop relevant to the essence of the case, emphasizing that they were central to the claim that Duran improperly downloaded plaintiff's files for personal use. She rejected Duran's argument that the plaintiff must identify specific files on the laptop before production.

Regarding the proportionality of imaging the laptop, Magistrate Judge Prose noted that Duran had not shown it would be unduly burdensome relative to the files' relevance. Despite recognizing the personal and business inconveniences for Duran, she ordered the parties to agree on an ESI (Electronically Stored Information) protocol for the laptop's production, ensuring a quick and secure forensic imaging process.

PRACTICE TIP: Courts are hesitant to allow forensic imaging of personal computers or other personal devices in business litigation. To overcome the court's reluctance, counsel should be prepared to demonstrate the connection between the device and claims or defenses in the case. The higher the degree of connection, the more likely the device contains relevant information, and the more likely the court will order a forensic examination.

***LKQ Corporation v. Kia Motors America, Inc.*, 2023 WL 4365899 (N.D. Ill. July 6, 2023)**

In *LKQ Corporation v. Kia Motors America*, U.S. Magistrate Judge Sunil R. Harjani analyzed the circumstances under which "discovery on discovery" is allowed in federal courts. The case involved a declaratory judgment of non- infringement and patent invalidity initiated by the plaintiff in response to the defendants' allegations of patent infringement.

During discovery, Magistrate Judge Harjani ordered the parties to file separate electronically stored information (ESI) disclosures about their search processes. The plaintiff later served a deposition notice, primarily focusing on the defendants' document collection efforts, leading to a motion to compel.

Magistrate Judge Harjani clarified that the Federal Rules of Civil Procedure do not explicitly permit "discovery on discovery." He identified Rule 26(g) as the applicable authority, emphasizing that it requires counsel and clients to make a reasonable inquiry in responding to discovery. A violation of Rule 26(g) could lead to the imposition of sanctions, including additional discovery to address a failure in the initial production process.

He further explained that court authorization should be sought via motion before conducting discovery on discovery. While Rule 26(g) lacks a specific standard for authorizing such discovery, Magistrate Judge Harjani referred to the Sedona Principles, stating that a party must present tangible evidence of a material failure in the discovery process.

Courts are hesitant to allow forensic imaging of personal computers or other personal devices in business litigation. To overcome the court's reluctance, counsel should be prepared to demonstrate the connection between the device and claims or defenses in the case. The higher the degree of connection, the more likely the device contains relevant information, and the more likely the court will order a forensic examination.

Applying these principles to the case, Magistrate Judge Harjani ruled that the plaintiff had not demonstrated a specific and material failure by the defendants in conducting a reasonable inquiry during discovery. He rejected arguments related to the listing of custodians and the absence of responsive documents, finding them insufficient to justify discovery on discovery. Additionally, he denied requests for fees under Rule 37, stating that the request for discovery on discovery was itself a request for sanctions under Rule 26(g).

***Deal Genius, LLC v. O2COOL, LLC*, 2023 WL 4556759 (N.D. Ill. July 14, 2023)**

In *Deal Genius, LLC v. O2COOL, LLC*, a patent infringement lawsuit involving a neck-worn cooling fan device, the parties faced significant disputes related to the production of relevant emails during the discovery process. The disagreement primarily revolved around whether the plaintiff, Deal Genius, had made comprehensive email productions.

Due to the parties' inability to resolve these issues during fact discovery, Special Master Philip J. Favro was appointed to oversee the e-discovery disputes. Upon his appointment, Special Master Favro collaborated with the parties to implement a stipulated order. This order mandated that Deal Genius redo some of its production and undergo elusion testing.

Elusion testing, as described by Special Master Favro, involves the producing party reviewing a random sample from the "null set," which consists of documents that did not match any search terms, along with documents the producing party considered non-responsive after reviewing the search term hits. The sample size is typically determined with a statistical confidence level of 95% and a margin of error of 2%, ranging from 1,000 to 2,400 documents. The producing party then reviews this sample and produces any additional relevant documents, aiming to validate the reasonableness and proportionality of the initial production.

The dispute arose concerning the adequacy of Deal Genius's elusion testing conducted in accordance with Special Master Favro's order. Deal Genius's initial elusion testing, involving a sample of 2,397 documents, identified only two responsive documents. Following a request from the defendant, O2COOL, Deal Genius performed additional searches on the null set, revealing 28 documents deemed relevant. O2COOL requested a second search, which produced 18 unique documents. Deal Genius objected to producing these 18 documents, arguing that it should not be required to do so.

Special Master Favro ruled on the dispute, considering the questions of relevance and proportionality under Rule 26(b)(1). He found that both factors favored production—Deal Genius did not contest the relevance of the documents, and the production of 18 documents was not argued to be unduly burdensome.

Technology assisted review does not always work as precisely as preferred. When review statistics demonstrate the likelihood that relevant information has been missed, the producing party should acknowledge the issue and work to alleviate the reasonable concerns of the opposing party and the court, keeping in mind that the missing information could be favorable to the producing party's case

Deal Genius raised three objections to production, all of which Special Master Favro overruled. First, Deal Genius argued that the 18 documents lacked a "causal connection" to the initial elusion testing. Special Master Favro clarified that his order did not require such a causal connection. Second, Deal Genius contended that O2COOL's objection came after the seven-day window specified in the stipulated order. Special Master Favro deemed responding to the first modified search query as a waiver of any rights under the order and emphasized a preference for resolving disputes on the merits rather than procedural issues. Third, Deal Genius argued that the new search should have been conducted before the close of fact discovery. While sympathetic to this argument, Special Master Favro rejected it, considering O2COOL's long-standing dispute over the adequacy of Deal Genius's email searches during fact discovery.

Special Master Favro concluded that problems with Deal Genius's elusion testing justified the production of the 18 documents from the second additional search. He highlighted that the results of the first additional search raised concerns about the reliability of Deal Genius's elusion testing, particularly the purported statistical "elusion rate" of 0.08%. He noted that this rate, when applied to the total null set of about 660,000 documents, suggested the existence of approximately 530 remaining relevant documents. However, he expressed reservations about the null set containing an excessive number of irrelevant documents, impacting the reliability of the elusion rate.

In light of these considerations, Special Master Favro ordered Deal Genius to produce the 18 documents from the second additional search, emphasizing the need to ensure the production of potentially crucial documents despite the challenges Deal Genius faced in conducting ESI searches.

PRACTICE TIPS: Technology assisted review does not always work as precisely as preferred. When review statistics demonstrate the likelihood that relevant information has been missed, the producing party should acknowledge the issue and work to alleviate the reasonable concerns of the opposing party and the court, keeping in mind that the missing information could be favorable to the producing party's case.

***Latin Markets Brazil, LLC v. McArdle*, 79 Misc.3d 1224(A), 191 N.Y.S.3d 615 (Sup. Ct N.Y. Co. July 14, 2023)**

In *Latin Markets Brazil, LLC v. McArdle*, Justice Robert R. Reed of the New York Supreme Court addressed a motion to compel the production of text, social media, and LinkedIn messages in the context of a dispute involving noncompete agreements and tortious interference with business relationships. The plaintiff argued that the requested communications were relevant to the case, specifically to demonstrate the formation of a competing company and the alleged theft of confidential business information by the defendants while still employed by the plaintiff.

However, the defendants opposed the motion, contending that the terms of an Electronic Stored Information (ESI) stipulation entered into by the parties prohibited the disclosure of such materials. The stipulation, according to the defendants, included a waiver by the plaintiff of the right to request text messages.

Justice Reed considered the relevant discovery rules, highlighting the requirement of full disclosure of material and necessary information in the prosecution or defense of an action. Despite recognizing the general principles of discovery, Justice Reed concluded that the defendants were correct in asserting that the ESI stipulation prohibited the disclosure of the requested materials. He emphasized that the plaintiff, represented by counsel, voluntarily waived its right to certain discoverable materials by stipulating that specific sources of

ESI information, including voicemail, text messages, personal phones or tablets, and instant messages, did not warrant collection, search, review, or production.

An unartfully worded ESI Protocol may end up costing a party avoidable expenses (which, may end up being paid by counsel if the error arises to the level of malpractice). Make sure the language cannot be construed to place obligations on your client that were not intended. That said, the authors respectfully suggest that ordering manual review of every document was not the court's only option. The protocol, as written, does not appear to preclude the use of technology assisted review to assist in the review process.

Justice Reed found no evidence of fraud, duress, coercion, or mistake that would justify overturning the stipulation. Consequently, he denied the plaintiff's motion to compel, upholding the binding nature of the waiver outlined in the ESI stipulation.

PRACTICE TIP: There might be a good reason to enter into a stipulation at the beginning of the case that excludes broad categories of potentially relevant information from discovery. But, short of a desire to "hide the ball," no good ones come to mind. Be careful.

***McCormick & Co., Inc. v. Ryder Integrated Logistics, Inc.*, --- F.Supp.3d, 2023 WL 2433902 (D. Md. March 9,** 2023)

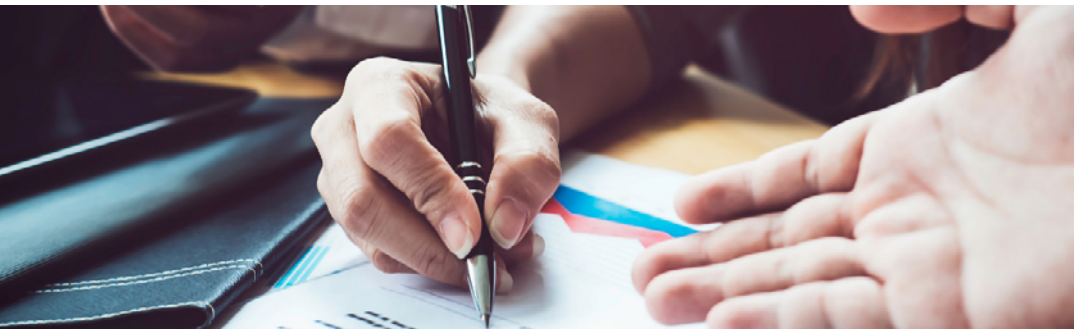
In *McCormick & Co., Inc. v. Ryder Integrated Logistics, Inc.*, Chief Judge James K. Bredar addressed a disagreement between the parties regarding the review of electronically stored information (ESI) in the context of a breach of contract litigation. The parties had previously agreed on specific search terms and established an ESI protocol governing the review and production of relevant documents. According to this protocol, the parties' obligation to conduct a reasonable search for documents in response to discovery requests would be deemed satisfied by reviewing documents captured through the agreed-upon methodology. Importantly, the protocol clarified that the mere capture of a document did not automatically render it responsive or relevant to the litigation.

The dispute arose when the parties disagreed on whether they were required to conduct a manual review of the documents identified by the agreed-upon search terms for relevance before production. The plaintiff argued that the ESI protocol did not mandate a page-by-page review, while the defendant contended that such a review was necessary. A special master, appointed to resolve this dispute, sided with the defendant. The special master reasoned that the ESI protocol explicitly contemplated a manual review of the captured documents, and this interpretation was consistent with Rule 26(b)(1), which stipulates that only relevant evidence is discoverable. The special master also rejected the plaintiff's argument that the estimated $240,000 cost of manual review was disproportionate to the $4 million claim.

Chief Judge Bredar delved into the language of the ESI protocol, emphasizing the provision stating that a party's obligation to conduct a reasonable search would be satisfied by reviewing documents captured through the specified methodology. He concluded that the protocol indeed required a page-by-page responsiveness review. In rejecting the plaintiff's interpretation that the protocol merely permitted a party to review captured documents without a manual review, Chief Judge Bredar underscored the language that explicitly mentioned reviewing documents.

Additionally, Chief Judge Bredar dismissed the plaintiff's claim that the special master's order violated the proportionality standard outlined in Federal Rule of Civil Procedure 26(b)(2)(B). While acknowledging that the special master's order did not expressly address each factor outlined in the rule, Chief Judge Bredar noted that the order had concluded that the costs associated with the manual review were proportional to the needs of the case.

PRACTICE TIP: An unartfully worded ESI Protocol may end up costing a party avoidable expenses (which, may end up being paid by counsel if the error arises to the level of malpractice). Make sure the language cannot be construed to place obligations on your client that were not intended. That said, the authors respectfully suggest that ordering manual review of every document was not the court's only option. The protocol, as written, does not appear to preclude the use of technology assisted review to assist in the review process.



Vendor Profile: **Michael Warmbier**

Where are you originally from?
- Born in Champagne, IL
- Grew up in Plymouth, MI
- Moved to various states (Indiana, Illinois, Texas) for work purposes throughout the 90's
- Now live in Plymouth, MI again

What was your motivation for your profession?
In the 80's Computers and Networking was new – it was new to people, it was new to colleges – I explored it throughout high school and chose to move in that direction

What is your educational background?
Purdue University, Computer Technology

How long have you been with your current company and what is the nature of your business?
- 22 Years
- Information Technology Services – we are a Managed Solution Provider, providing Technology Services to Small/Medium sized businesses. We took our "Big Business" experiences and knowledge and we apply it to the small and mediums sized (often underserved) businesses.

What are some of the greatest challenges/rewards in your business?
- Solving Problems
- Helping others do things Faster, Cheaper and Easier
- Proving Solutions that pay for ourselves in short order
- Protecting users from the Internet (and themselves!)

Describe some of the most significant accomplishments of your career:
- AT&T Clean Up Project – dropping old PRIs and T1s – annual save of nearl $1M
- Global Rollout of Netware 4.1 for Ford Motor Company
- Building Kinetix to who we are today

How did you become involved with the MDTC ?
- We have many clients in the legal field.
- We have clients (and prospective clients) that are Members

What do you feel the MDTC provides to Michigan lawyers?
- Collaboration
- New Solutions for various pieces of their business (including Technology)
- Education

Michael Warmbier
Kinetix

9161 Sparta Ave NW Ste C
Sparta, MI 49345
(616) 887-5689

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

Why would you encourage others to become involved with MDTC ?
• Collaboration, Education, and from a specific Kinetix perspective, awareness of Technology (and Security Solutions/ Concerns) and how it can benefit.

What are some of your hobbies and interests outside of work?
• Water Sports
• Basketball
• Softball
• Competitive Shooting

MDTC **Schedule of Events**

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2024

Thursday & Friday, June 13-14	8:00 am – 12:00 pm 1:00 pm – 5:00 pm	Annual Meeting & Conference – *H Hotel – Midland*
Thursday, August 22	1:00 pm - 3:00 pm	MDTC/MAJ Battle of the Bar – *Corner Ballpark, Detroit*
Thursday, September 13	8:30 am	Golf Outing – *Mystic Creek Golf Club*
Tuesday, October 1	TBA	Award Nomination Deadline
Thursday, October 10	6:00 pm – 8:00 pm	MTJ – *Detroit Golf Club*
Friday, November 1	8:00 am – 5:00 pm	Winter Meeting – *Sheraton Detroit Novi Hotel*

2025

Thursday & Friday, June 19-20	1:00 pm – 5:00 pm 8:00 am – 12:00 pm	Annual Meeting & Conference – *Soaring Eagle Casino*

Insurance Coverage Report

By: Drew W. Broaddus, *Smith Haughey*
dbroaddus@shrr.com

***Hoekstra v Ottawa Kent Ins Agency, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 21, 2023 (Docket No. 364241).**

The scope of an independent agent's duty to an insured is often a source of confusion. It has been described as a "fiduciary duty of loyalty…." *Genesee Food Servs, Inc v Meadowbrook, Inc,* 279 Mich App 649, 656; 760 NW2d 259 (2008). Yet, courts have generally limited that duty to providing the insurance requested by the customer; "an insurance agent does not have an affirmative duty to advise a client regarding the *adequacy* of a policy's coverage." *Mate v Wolverine Mut Ins Co,* 233 Mich App 14, 22; 592 NW2d 379 (1998) (emphasis added). "Instead, the insured is obligated to read the policy and raise questions concerning coverage within a reasonable time after issuance." *Id.* But in *Hoekstra,* the dispositive issue was causation rather than duty. The panel found that the insured could not prove a negligence claim against the agent because the insured inexplicably allowed a default judgment to be entered against him in an underlying personal injury suit – a suit for which he allegedly would have had liability coverage, but for the agent's supposed breach.

The plaintiff in *Hoekstra* claimed that the defendant agency failed to follow his "directive to procure an insurance policy covering, along with a condominium in Michigan, a mobile home located in Florida." *Hoekstra*, unpub op at 1. The agency did secure a policy, but "failed to make sure that the policy also included liability coverage on the Florida property." *Id.* Later, the insured's sister-in-law "fell and broke her hip when walking down three steps during a stay at the Florida mobile home, leading her to file suit against Hoekstra in Michigan and obtain a default judgment in the amount of $358,736.25." *Id.* The insured – seemingly believing that this was all the agency's problem – "intentionally did not file an answer to" his sister-in-law's complaint "at the direction of his brother…." *Id.* Instead, the insured filed this action against the agency "to recover monies that he owed under the default judgment, although no collection efforts had been initiated by Joyce." *Id.* The trial court dismissed the suit; plaintiff appealed, arguing that he had potential causes of action in negligence and/or for misrepresentations. *Hoekstra*, unpub op at 8. The Court of Appeals disagreed.

Regarding the negligence theory, the panel noted that "factual or 'but for' causation required proof of an actual substantive determination that Hoekstra was liable in the premises liability suit or, arguably, evidence that demonstrated more likely than not that Joyce would have succeeded in her suit had it gone to trial." *Id.*, unpub op at 5. The panel found that the underlying premises liability suit probably would not have resulted in a verdict and may not have even survived summary disposition. *Hoekstra*, unpub op at 6-7. That judgment only came into being because of "Hoek-

Drew W. Broaddus

Drew Broaddus is a leading appellate advocate with two decades of experience in litigation and insurance matters. He has argued over 150 cases in the Michigan Court of Appeals and has also argued multiple cases in the Michigan Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, and various state and federal trial courts.

stra's conduct in intentionally permitting entry of the default judgment because of his brother's directive"; this, according to the panel, was "an intervening and superseding cause" of the insured's allegedly injury (i.e., "his personal liability on the judgment"). *Id.*, unpub op at 6. The panel also expressed doubt about whether the insured had any damages, since his sister-in-law apparently had no intention of collecting on the default judgment. *Id.*, unpub op at 8 n 8.

"With respect to the misrepresentation count," the panel found that its "ruling on causation relative to the negligence claim" applied equally to that theory. *Hoekstra*, unpub op at 8. The panel also reiterated its belief that there were no damages. *Id.* But a more fundamental problem with this theory was "that Hoekstra presented absolutely no evidence of a misrepresentation by" anyone associated with the agency. *Id.*, unpub op at 9. The agent admittedly "messed up" by failing to obtain liability coverage for the Florida property, but never lied to the plaintiff about that oversight or the existence of coverage. *Id.* "This was not a case of fraud; at most, Hoekstra merely showed a broken promise." *Id.* Additionally, this claim failed because the insured admittedly did not read his policy and therefore could not show "reasonable reliance." *Id.*, unpub op at 10.

***Mount Group, LLC v Macomb Athletic Club, Inc,* unpublished opinion per curiam of the Court of Appeals, issued January 11, 2024 (Docket No. 365841).**

Like *Hoekstra*, causation was also dispositive in this negligence action against an insurance agent. This litigation arose out of an underlying personal injury claim; a gym member fractured her ankle during an outdoor exercise class. She sued Mount Group LLC and Mount Clements Investment Group LLC ("MCIG"), which owned the shopping center where the gym was situated. MCIG, in turn, sued Macomb Athletic Center ("MAC"), the gym operator; Howard Realty Group, Inc. ("HRG"), and John Rinaldi, an insurance agent engaged by HRG. The agent allegedly erred because HRG supposedly asked that MCIG be covered under a policy covering the shopping center, which "did not occur." *Mount Group,* unpub op at 2. "HRG was the only named insured on the policy." *Id.*

Without the liability coverage it expected to have through the mall's policy, MCIG never answered the personal injury complaint, allowing a $600,000 default judgment to be entered against it. *Id.* MCIG claimed that this was the result of the agent's negligence. *Id.* The agency moved for summary disposition "because plaintiffs could not establish causation"; the agency "asserted that the default judgment did not enter but for any omission by" the agency but rather, because MCIG "did not defend or oppose the" personal injury action. *Id.* The trial court agreed and dismissed MCIG's suit against the agency. All of the other claims between the other parties were eventually resolved, with the "sole issue on appeal" being "whether the trial court erred in granting summary disposition" as to MCIG's "claim of negligence against" the agency. *Id.*

The Court of Appeals unanimously affirmed, finding that "[c]ontrary to plaintiffs' [MCIG's] assertions on appeal, the trial court did not err in its analysis regarding proximate cause." *Mount Group,* unpub op at 5. "There is no genuine issue of material fact that any alleged negligence by [the insurance agent or agency] was not the proximate cause of the damages plaintiffs incurred –

namely, the $600,000 default judgment." *Id.* As the trial court found, the agency's failure "to procure an insurance policy with plaintiffs as the named insureds or additional insureds was not the 'but for' cause of the entry of the default judgment." *Id.* "Plaintiffs' failure to respond or otherwise defend … was the reason why the default and default judgment were entered." *Id.* "Thus, plaintiffs cannot establish factual cause, and the analysis may end here." *Id.*

However, the panel went on to explain why MCIG also could not establish proximate cause: it was not foreseeable that the agency's "failure to procure insurance would result in the default judgment being entered against plaintiffs." *Mount Group,* unpub op at 6. Moreover, the panel rejected MCIG's assertion that additional discovery would have been relevant to causation. *Id.* The discovery MCIG wanted – "regarding the insurance applications filled out by" the agent and agency – simply was not relevant to the question of causation, in this panel's view. *Id.*

***Taylor v Lake Michigan Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued August 24, 2023 (Docket No. 360974).**

While *Hoekstra* and *Mount Group* turned on causation, the scope of the independent agent's duty was front and center in this suit. In *Taylor,* unpub at p 3, a divided panel held that the independent insurance agent owed no duty to the plaintiffs "to ensure the adequacy of the insurance coverage they obtained" for their home. After a fire destroyed the home, the carrier paid the policy limits, but this left the plaintiffs around $400,000 short of being able to rebuild.

According to the majority, the agent had no duty to recommend higher policy limits, where the limits were clear from the quote, there was no misrepresentation by the agent, plaintiffs did not make "an ambiguous request or one that required clarification," the agency used accurate information to generate the quote, and the agency did not assume "an additional duty at any time by either express agreement or promise to plaintiffs." *Taylor,* unpub op at 5-6.

In reaching this conclusion, the *Taylor* majority noted that "[w]hen an insurance policy is facilitated by an independent insurance agent," that agent "is considered an agent of the insured rather than an agent of the insurer." *Id.*, unpub op 4 (cleaned up). "An insurance agent owes a duty to procure insurance coverage requested by an insured." *Id.* "The insured's agent must strictly follow the insured's instructions which are clear, explicit, absolute, and unqualified." *Id.* (citation omitted). "Michigan law requires an agent to procure the coverage actually ordered by the insured but does not require an agent to meet or exceed an insured's expectations." *Id.* However, in *Harts v Farmers Ins Exchange,* 461 Mich 1, 9-11; 597 NW2d 47 (1999), the Michigan Supreme Court found that "the general no-duty-to-advise rule, where the agent functions as simply an order taker for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured." "This alteration of the ordinary relationship between an agent and an insured has been described … as a 'special relationship' that gives rise to a duty to advise on the part of the agent." *Taylor*, unpub op at 5, citing *Harts,* 461 Mich at 9-11.

The plaintiffs in *Taylor* purchased a vacation home and reached out to the defendant agency (with whom they had previously obtained a homeowners' policy) to insure it. The agency obtained information from the Plaintiffs about the nature of the house, and used that information to generate a rate comparison. The agency, using software provided by the insurer, estimated the house replacement cost for plaintiffs' new property to be $700,650. After an inspection, the insurer increased that estimate to $709,734. The insurer then issued a policy to the plaintiffs with a dwelling limit of $701,000. *Taylor,* unpub op at 2. The policy also contained an increased cost endorsement ("ICE") that provided for payment to plaintiffs of an additional 25% ($175,250) in certain situations. *Id.*

A little over a year later, the vacation home was destroyed in a fire. The insurer paid $876,250, which represented the dwelling limit plus the ICE. *Id.* But the plaintiffs "submitted three contractors' quotes estimating the cost of rebuilding around $1,162,415." *Id.* Plaintiffs then sued the agency, "alleging that defendant owed them a duty to ensure the adequacy of their homeowner's insurance policy to enable them to rebuild their house." *Id.*

After discovery, the agency moved for summary disposition, arguing that it did not owe the plaintiffs a duty to ensure the adequacy of the insurance coverage they obtained, and that there was no "special relationship" between the plaintiffs and the agency. *Taylor*, unpub op at 3. The trial court granted the agency' motion and dismissed the suit. *Id.* In affirming, the majority (Judges Michael Kelly and James Redford) noted that "an independent insurance agency" such as this defendant "serves as an agent of several insurance carriers and assists its clients in procuring insurance from those carriers." *Taylor*, unpub op at 5. "As such, defendant owed plaintiffs a duty to strictly follow their instructions." *Id.* The agency did exactly that: "[t]he record reflects that plaintiffs gave defendant a clear, explicit, absolute, and unqualified directive to assist them in obtaining a replacement cost homeowners policy for their Bellaire property, similar to the insurance policy that they had covering their previous home located in Grand Rapids." *Id.* The agent "testified that not all carriers would insure log homes," but the particular carrier he used did. The agent "followed the standard practice of inputting information obtained from [the plaintiffs] regarding the Bellaire house into a computer that processed the information to derive rate comparisons and a replacement cost estimate." *Id.* The agent sent the plaintiffs the insurer's quote "and plaintiffs ultimately signed without question or objection an application for insurance with dwelling coverage of $701,000." *Id.* The agency "did not have a role in having the inspection performed, setting the replacement cost, or writing" the policy. *Id.* Also, the agency "did not assess the adequacy of replacement cost estimates and relied on [the insurer's] software to determine the dwelling replacement cost of $701,000." *Id.*

The majority also rejected the plaintiffs' argument that a "special relationship" existed: "[n]o evidence established that defendant misrepresented the nature or extent of the coverage offered or provided by" the insurer. *Taylor*, unpub op at 6. "No evidence established that plaintiffs made an ambiguous request or one that required clarification." *Id.* "No evidence established that plaintiffs made an inquiry to defendant that required advice." *Id.* "No evidence established that defendant inputted inaccurate information into the system or provided plaintiffs inaccurate advice of any sort." *Id.* Moreover, there was no indication that the agency "assumed an additional duty at any time by either express agreement or promise to plaintiffs." *Id.*

Judge Douglas Shapiro dissented. In his view, the majority incorrectly applied "the test used to determine if a captive agent, who normally owes no duty to the insured, might under certain circumstances still owe some duty to the insured" to an independent agent. He further noted "confusion in the wake of the *Harts* decision" and urged the Michigan Supreme Court to "grant leave in this case and provide clarification to bench and bar." However, the plaintiffs did not file a leave application to the Supreme Court.

***Abdelmaguid v Dimensions Insurance Group, LLC,* __ Mich App __; __ NW2d __ (2024) (Docket No. 361674).**

Like any other negligence action, a suit against an insurance

agent requires that the plaintiff show damages. In *Abdelmaguid,* the panel addressed – in a published decision – whether that element can be satisfied where the insured has assigned away its negligence claim against the agency in exchange for not having to pay an underlying judgment. Finding this to be a question of first impression in Michigan, a divided panel adopted the "majority" approach "in holding that an insured, who has entered into a covenant not to sue or execute on an excess judgment" has a right "against an allegedly negligent insurance agent, which could be assigned to others." *Abdelmaguid,* __ Mich App at __; slip op at 17-18. The negligence suit against the agent can be maintained "so long as the assignment contains only a covenant not to sue or to execute on the excess judgment, instead of a full release of rights." *Id.* at __; slip op at 18.

This lawsuit arose out of a fatal 2018 semitruck accident. Pure Transportation, LLC, owned the semitruck and obtained liability coverage for it through Dimensions Insurance Group ("Dimensions"), an independent insurance agency. *Id.* at __; slip op at 1-2. Specifically, Pure Transportation asked Dimensions for "business automobile, trucking and other insurance" coverage. *Id.* at __; slip op at 1-2. Dimensions informed Pure Transportation that the maximum amount of liability coverage it could obtain in a primary insurance policy was $1 million. *Id.* at __; slip op at 2. Pure Transportation purchased that coverage; a couple years later, Pure Transportation asked Dimensions about obtaining supplemental insurance coverage, which was referred to as "an Excess Liability Insurance Policy." *Id.* Dimensions secured an excess policy on behalf of Pure Transportation through Hallmark Insurance Company. *Id.* That policy had a limit "of $2,000,000 which provided excess limits beyond the $1,000,000 Primary Policy insured by ICSOP, bringing the total limits to $3,000,000." *Id.* Dimensions did not tell Pure Transportation of any limitations or exceptions to the excess policy. *Id.* Pure Transportation never actually saw the policy, but "expected that there be full coverage up to the limits of the excess Policy for all motor vehicles, regardless of the client or use of any vehicle." *Id.* Unbeknownst to Pure Transportation, the excess policy had a "Designated Shipper Limitation Endorsement," which barred coverage unless Pure Transportation provided a bill of lading to the designated shipper. *Id.*

A fatal accident on March 8, 2018 involving Pure Transportation's truck led to a wrongful death action against Pure Transportation. *Abdelmaguid,* __ Mich App at __; slip op at 2. Pure Transportation tendered its defense, both to its primary liability carrier (which was not at issue in this appeal) and to Hallmark as the excess carrier. *Id*. Hallmark "denied coverage under the excess policy on the basis of the designated shipper endorsement." *Id.* Left with no coverage after the first $1 million, Pure Transportation entered into a "Release Agreement and Assignment of Rights and Interest of Legal Claims." *Id.* The estate agreed not to seek recovery from Pure Transportation beyond the limits of the primary policy, while Pure Transportation "unconditionally assign[ed], transfer[ed] and convey[ed] all rights [it] has or may have under the [excess] Policy and any breach of contract or other legal claims against Hallmark and any insurance agent(s) or broker(s), including but not limited to [defendant]...." *Id*.

As part of this deal, the estate entered into a consent judgment with Pure Transportation, which held Pure Transportation liable to pay $5 million in damages. *Abdelmaguid,* __ Mich App at __; slip op at 3. Pure Transportation agreed to pay the primary policy's limit to the estate, but it was shielded from any further liability. *Id.* The idea was that by way of the assignment, the estate (standing in the shoes of Pure Transportation[1]) could then bring a negligence action against Dimensions. *Id.*

When served with that action, Dimensions promptly moved for summary disposition under MCR 2.116(C)(8), arguing that Pure Transportations' deal with the estate meant that Pure Transportation had no damages – and thus no cause of action to assign. The estate cited *Stephens v Worden Ins Agency, LLC,* 307 Mich App 220; 859 NW2d 723 (2014) for the proposition that "a claim of negligent procurement of an insurance policy by an insurance agent accrues when coverage under the relevant policy is denied" – meaning damages are not contingent on an underlying recovery against the insured. *Abdelmaguid,* __ Mich App at __; slip op at 4. The trial court agreed and denied Dimensions' motion, but the Court of Appeals granted Dimensions' leave application.

The Court of Appeals later affirmed in a 2-1 decision. The majority provided a lengthy analysis of the agreement between Pure Transportation and the estate, the *Stephens* opinion, and case law from jurisdictions. The majority ultimately determined that *Stephens* was not controlling because – although factually analogous – the legal issue presented here was not decided by *Stephens*. The majority also determined that the agreement between Pure Transportation and the estate was more appropriately characterized as a covenant not to sue (rather than a release), meaning "the liability of the assignor [Pure Transportation] ha[d] not been extinguished." *Abdelmaguid,* __ Mich App at __; slip op at 12, 14. The panel then adopted what it deemed "the majority approach," which allows the cause of action to proceed (at least on the pleadings) under these circumstances. *Id.* at __; slip op at 12. Despite the covenant not to sue, Pure Transportation potentially had damages which were capable of being assigned because it "was harmed

when Hallmark Insurance denied coverage after the accident resulting in the death of plaintiff's decedent." *Abdelmaguid,* __ Mich App at __; slip op at 16. Again, this was a (C)(8) motion (challenging the legal sufficiency of the complaint), not a (C)(10) motion (which challenges the factual support for a claim, typically after discovery), so "[w]hether Pure Transportation suffered damages for the alleged harm purportedly caused by defendant's negligence is an issue still to be litigated." *Abdelmaguid,* __ Mich App at __; slip op at 16.

Recognizing that this rule opens the door to potential collusion between insureds and third-party claimants, the panel noted: "in order to protect defendant in the present case from collusion and fraud, the consent judgment between plaintiff and Pure Transportation will not be binding on defendant, as it was not a party to the negotiations." *Abdelmaguid,* __ Mich App at __; slip op at 13. "Further, should the present case go to trial, plaintiff will be required to bear the burden of proving all of the claims, including damages" *in excess of the primary policy limit*, which had been paid. *Id.*

Judges Stephen Borrello & Colleen O'Brien made up the majority; Judge Thomas Cameron concurred in part and dissented in part. Essentially, Judge Cameron would have adopted the "minority view" – at least as it relates to excess carriers – because he was not persuaded that the "majority view" adequately protects against collusion.

***Blankenship v Shelter Mut Ins Co*, unpublished opinion of the U.S. Court of Appeals for the Sixth Circuit, issued October 16, 2023 (Docket No. 23-5247).**

Departing from this quarter's theme of agents' liability, this case dealt with the familiar topic of the duty to defend. Although the opinion applied Kentucky law in diversity, I mention it here because the Sixth Circuit covers Michigan, and because of the similarity between Kentucky and Michigan law on this issue. See *Burka v Vanderbilt Univ Med Ctr*, 550 F Supp 3d 530, 545 (MD Tenn, 2021).

The plaintiff in this case, Blankenship, was the former director of a daycare. After a parent's complaint of abuse led to an investigation, Blankenship was charged with four counts of fourth-degree assault. She pleaded guilty to two of those counts. A civil suit followed against Blankenship and the daycare, specifically alleging that Blankenship assaulted and battered the children on multiple occasions. Blankenship sought a defense from GuideOne Mutual Insurance Company ("GuideOne"), the daycare's commercial general liability insurance provider. *Blankenship*, unpub op at 2. GuideOne "declined to defend Blankenship," so she "defended herself *pro se* through trial." *Id.*, unpub op at 3. The jury entered a $4 million judgment against her. *Id.* GuideOne settled on behalf of the daycare prior to trial. A second suit involving two other children played out much the same way, except this time Blankenship did not bother to defend herself and allowed a $650,000 default judgment to be entered against her. *Id.*

Two of the plaintiffs who had judgments against Blankenship sought to recover from Blankenship's homeowner's insurer, Shelter Mutual Insurance Company ("Shelter").[2] Blankenship had also tendered her defense of the underlying suits to Shelter, to no avail. *Blankenship*, unpub op at 3. Shelter prevailed in the trial court based on a "business activities" exclusion. *Id.* While that suit was pending, Blankenship filed her own suit against Shelter and GuideOne, seeking indemnification for the two judgments. *Id.*

Blankenship's suit against Shelter did not get very far, since there was an earlier-filed case between the same parties where Shelter prevailed. But Blankenship's suit against GuideOne proceeded through discovery. *Blankenship*, unpub op at 4. After discovery, the District Court granted GuideOne's motion for summary judgment, finding that Blankenship's triggered multiple policy exclusions. *Id.* These included "expected or intended" acts and claims "arising out of the willful or intentional violation of any statute." *Id.* Blankenship appealed that ruling to the Sixth Circuit, which unanimously affirmed.

The panel found no duty to defend for slightly different reasons than the District Court did. Rather than relying upon policy exclusions, the Sixth Circuit found that the underlying suits did not involve injuries caused by an "occurrence." *Blankenship,* unpub op at 5. In other words, the acts or omissions that Blankenship was sued for needed to be "accidents" in order for there to be liability coverage. *Id.*, unpub op at 6.[3] "Inherent in the plain meaning of 'accident' is the doctrine of fortuity," which requires courts to analyze the insured's intent and control. *Id.,* citing *Cincinnati Ins Co v Motorists Mut Ins Co,* 306 SW3d 69, 74 (Ky, 2010). Under Kentucky law, courts consider "1) whether the insured intended the event to occur; and 2) whether the event was a chance event beyond the control of the insured." *Blankenship,* unpub op at 6, citing *Martin/Elias Props, LLC v Acuity,* 544 SW3d 639, 643 (Ky, 2018). "If the insured did not intend the event or result to occur, and the event or result that occurred was a chance event beyond the control of the insured, then CGL coverage covering accidents will apply to the benefit of the insured." *Blankenship,* unpub op at 6, citing *Martin/Elias Props,* 544 SW3d at 643.

Here, the underling complaints both described "intentional acts of assault and other abusive conduct committed by Blankenship against minors" at the daycare. *Blankenship,* unpub op at 6. The panel found that these "assaultive actions do not constitute an accident." *Id.* Rather, "[s]he intended to harm the minors," and a "loss or harm is not fortuitous if the loss or

harm is caused intentionally by" the insured. *Id.,* unpub op at 6-7 (citations omitted). For similar reasons, the panel rejected the argument that any assaults by other employees that took place under Blankenship's supervision could have been "accidental." *Id.,* unpub op at 7. Such assaults were "not a chance event." *Id.* The fact that one of the counts in the underlying case alleged "negligence" did not alter this result. *Id.* "[N]egligence alone does not make something an 'accident' under Kentucky law." *Id.*[4]

"Because GuideOne had no duty to defend Blankenship, it also had no duty to indemnify Blankenship." *Blankenship,* unpub op at 9. This makes sense because, although the "duty to defend is separate and distinct from the duty to indemnify," the duty to defend is "*broader* than the duty to indemnify." *Id.* (emphasis added, citation omitted). So, when there is no duty to defend, indemnification necessarily cannot be owed. *Id.* And, upon finding that GuideOne's policy created no duty to defend or indemnify Blankenship, the panel had little trouble rejecting Blankenship's bad faith and public policy arguments. *Blankenship,* unpub op at 9-10.

Endnotes

1 See *Wells Fargo Bank, NA v SBC IV REO, LLC,* 318 Mich App 72, 107; 896 NW2d 821 (2016) ("an assignee stands in the shoes of an assignor, acquiring the same rights and being subject to the same defenses as the assignor").

2 Procedurally, this would also be proper under Michigan law. See *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 589; 592 NW2d 707 (1999).

3 This is in harmony with Michigan law, see *Radenbaugh v Farm Bureau,* 240 Mich App 134, 147; 610 NW2d 272 (2000).

4 This is similar to the idea, reflected in Michigan caselaw, that the "duty to defend and indemnify is not based solely on the terminology used in the pleadings" but rather by "[t]he gravamen of an action," which "is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Matouk v Michigan Muni League Liab & Prop Pool,* 320 Mich App 402, 418; 907 NW2d. 853 (2017). See also *Smorch v Auto Club,* 179 Mich App 125, 128–129; 445 NW2d 192 (1989) ("There is no duty to defend or provide coverage where the complaint is a transparent attempt to trigger insurance coverage....").

Legal Malpractice Update

By: David C. Anderson and James J. Hunter, *Collins Einhorn Farrell PC*
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COVID-Tolling Saves Plaintiffs' Otherwise Untimely Legal-Malpractice Claims, But They Cannot Overcome The Attorney Judgment Rule.

Hamilton Avenue Property Holdings, LLC et al. v Defendant Attorneys, unpublished per curiam opinion of the Court of Appeals, issued July 20, 2023 (Docket Nos. 360404; 360606); 2023 WL 4672283.

Facts

Defendant attorneys represented plaintiffs in relation to various claims arising out of a warehouse fire. During the proceedings, one of the plaintiffs refused to appear for his March 13, 2018 deposition. He cited a breakdown of the attorney-client relationship as the reason for his refusal. Defendant attorneys filed a motion to withdraw as counsel for plaintiffs later that same day.

On March 14, 2018, defendant attorneys received a letter from successor counsel advising that plaintiffs retained him to investigate potential malpractice arising out of defendant attorneys' representation. The court held a hearing on defendant attorneys' motion to withdraw on March 23, 2018. Although the court denied the motion at that time, it made clear that defendant attorneys no longer represented plaintiffs. The court entered an order granting defendant attorneys' motion to withdraw on April 3, 2018.

Plaintiffs proceeded with successor counsel, and in June 2018, a jury found that plaintiffs were negligent, grossly negligent, and liable for damages in relation to the warehouse fire. The court entered a judgment against plaintiffs.

Plaintiffs filed suit against defendant attorneys on March 17, 2020. They asserted several claims, including legal malpractice based on defendant attorneys' alleged failure to investigate and pursue claims under various insurance policies held by the warehouse tenants.

Before filing an answer, defendant attorneys moved for summary disposition, arguing that it was time-barred because the two-year limitations period lapsed. Specifically, defendant attorneys argued that plaintiffs' claim accrued no later than March 14, 2018, the day they received the letter from successor counsel. Plaintiffs responded that their claim was timely because (1) the Michigan Supreme Court tolled the limitations period from March 10, 2020 to June 19, 2020, and (2) in any event, their claims accrued on March 23, 2018, when the court made clear that defendant attor-

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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.

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neys no longer represented plaintiffs. The court denied defendant attorneys' motion, reasoning that they failed to adequately brief the impact of tolling on the limitations period.

Defendant attorneys later filed a second motion for summary disposition of plaintiffs' legal-malpractice claim, arguing that (1) their decision not to pursue claims under various insurance policies held by the warehouse tenants was an exercise of attorney judgment, and (2) plaintiffs could not establish proximate causation because successor counsel could have pursued claims under various insurance policies held by the warehouse tenants. The court denied the motion, reasoning that there was a factual issue regarding whether attorney defendants exercised reasonable judgment. Defendant attorneys appealed.

The series of administrative orders resulting in what has become known as "COVID tolling" apply to legal malpractice claims in Michigan. Thus, legal malpractice claims that accrued before June 20, 2020, are subject to a tolling period between March 10, 2020 to June 19, 2020.

Ruling

The appellate court held that the court did not err by denying defendant attorneys' summary disposition motion on statute-of-limitations grounds. It assumed for purpose of its analysis that plaintiffs' legal-malpractice claim accrued on March 14, 2018, the day defendant attorneys received the letter from successor counsel such that, without other considerations, the March 17, 2020 complaint would have been untimely. However, the appellate court went on to explain that the Michigan Supreme Court tolled the limitations period from March 10, 2020 to June 19, 2020, by virtue of multiple administrative orders related to the state of emergency declared by the governor due to the COVID-19 pandemic. In light of the tolling period, the appellate court held that plaintiffs' March 17, 2020 complaint was timely.

The appellate court further held that the court erred by denying defendant attorneys' summary disposition motion with respect to plaintiffs' claim that defendant attorneys committed malpractice by (1) failing to pursue recovery or reimbursement under the insurance policies held by the warehouse tenants, and (2) failing to pursue breach-of-contract claims against the warehouse tenants. The appellate court reasoned that such decisions were protected by the attorney-judgment rule because, although there were potential claims against the tenants, defendant attorneys opted not to pursue them because of the risk that plaintiffs would be countersued and potentially exposed to more liability.

Lastly, the appellate court held that defendant attorneys were not entitled to summary disposition of plaintiffs' claim that they committed malpractice by failing to pursue indemnification from certain warehouse tenants. It explained that the warehouse tenants' leases included clear, unambiguous, and broad indemnification provisions, and demanding indemnification would not have exposed plaintiffs to greater liability such that the question of whether the failure to pursue indemnification amounted to negligence was a question for the finder of fact.

Practice Note

The series of administrative orders resulting in what has become known as "COVID tolling" apply to legal malpractice claims in Michigan. Thus, legal malpractice claims that accrued before June 20, 2020, are subject to a tolling period between March 10, 2020 to June 19, 2020.

Erroneous Advice To Accept Case Evaluation Unexpectedly Resulting In Dismissal Of Entire Case Leads To Malpractice Claim.

Farrow Group, Inc. v Attorney Defendants, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2023 (Docket No. 361465), 2023 WL 5319270.

Facts

Defendant attorneys represented plaintiff in a construction-contract. Plaintiff contracted with a land developer to provide demolition services for buildings in Detroit. Detroit issued a wrecking permit for the demolition work. Before plaintiff completed the demolition work, the land developer issue a stop work order due to budget issues. Plaintiff advised the land developer that, because of the wrecking permit, it had an obligation to complete the demolition work to Detroit's specifications. The land developer terminated the contract, but plaintiff continued the demolition work until it considered the site to be safe for departure. Plaintiff invoiced the land developer for the work performed, but the land developer did not pay.

Plaintiff recorded a construction lien on the property for $536,778.65. The next month, plaintiff sued the land developer to foreclose its construction lien. Plaintiff also brought claims for unjust enrichment and breach of contract. Plaintiff and the land developer proceeded to court-ordered case evaluation. Attorney defendants substituted in as counsel shortly before case evaluation. The case evaluators issued a $175,000 case evaluation award. Defendant attorneys advised plaintiff to accept the case evaluation award. Plaintiff did so, relying on defendant attorneys' advice that its equitable claims would remain for adjudication. The court dismissed plaintiff's case in its entirety with prejudice.

MCL 2.403(A)(4) provides that a court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.

Plaintiff sued the defendant attorneys for alleged legal malpractice based on their advice that plaintiff could accept the case evaluation award and pursue its equitable claims against the land developer. Defendant attorneys admitted that they had breached the standard of care. Yet they moved for summary disposition, arguing that if plaintiff had not accepted the case evaluation award, it would not have recovered more than $175,000 because it would not have prevailed on its claims. Defendant attorneys argued that plaintiff breached the terms of its contract with the land developer by conducting more work than necessary to preserve and protect the site after the land developer terminated the contract. Defendant attorneys argued that plaintiff's breach meant that the most plaintiff could have recovered was $71,379.41 for two pre-termination invoices. In opposition, plaintiff relied on deposition testimony from two of its employees indicating that plaintiff's additional work was reasonable and appropriate to protect the public. Plaintiff argued that a genuine issue of material fact existed regarding the necessity of the work performed after the stop work order in addition to whether it breached the contract. The court granted summary disposition in favor of defendant attorneys. Plaintiff appealed.

Ruling

The appellate court held that the court erred when it granted summary disposition in favor of defendant attorneys. It reasoned that plaintiff's acceptance of the case evaluation award based on the defendant attorneys' mistaken advice resulted in the loss of its two equitable claims: the right to seek recovery on its construction lien and under an alternative unjust enrichment theory. If plaintiff rejected the case evaluation award, it would have been able to litigate its breach of contract claim to a final resolution on the merits. Plaintiff presented evidence of damages that, if accepted, would have resulted in a judgment greater than $175,000. Thus, plaintiff had established a question of fact as to whether it would have obtained a better result if it had rejected the case evaluation award and proceeded to trial on all three of its claims.

Practice Note

MCL 2.403(A)(4) provides that a court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate. Unless exempted, acceptance of case evaluation will result in dismissal of the entire action. A plaintiff's acceptance of a case evaluation award does not preclude a subsequent legal-malpractice action if the plaintiff presents evidence that it accepted the award based on inaccurate advice and could have obtained a more favorable result at trial.

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