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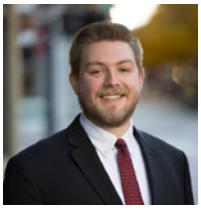

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President's Corner

By: John C. W. Hohmeier, *Scarfone & Geen PC*
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John Hohmeier assists insurance carriers to identify and defend against fraudulent claims as well as investigates and defends multiple-claims cases - he also analyzes and advises major carriers on the prospects of civil RICO cases against litigious medical providers. Hohmeier is recognized by Super Lawyers® and is among only 2.5% of attorneys named on the list. In 2019, John was added to America's Top 100® Civil Defense Litigators – less than 1% of attorneys are chosen for this list. In 2021, he was listed in the Top 100 Lawyers Magazine®. In 2023, he was named one of DBusiness Magazine's Top Lawyers®. In 2024, John will be featured in the 30th Edition of the Best Lawyers in America® for two categories: Litigation (Civil Defense) and Appellate Practice.

Well, this is a good news/bad news article, folks, so I'll start with the veggies and then serve the meat and potatoes. The MDTC lost our annual charity softball game to the MAJ this year. It was a hard-fought battle, and it was a very close game until the later innings. Now, I'm not entirely blaming the coach (me), but he just didn't have it this year; the popular opinion is that he became too focused on the concessions, but I digress. Everyone is busy all the time, especially us, so it must be said that everyone who played in the game and participated and sponsored this year is absolutely amazing. All of you made it such a phenomenal event that we cannot thank you enough. It is only through your support that the MDTC is able to have such great events, so we thank you.

Now that you've choked those Brussels sprouts down, here's some truffle fries and a Cajun-rubbed tomahawk: The softball event raised and donated $10,000 to the local charity PAL in Detroit. Detroit PAL prides itself on helping youth find their greatness through athletic, academic, and leadership development programs. Everyone who came through this year at the softball game should rejoice in our contribution to PAL.

Now, some more delectable items: The MDTC's Meet The Judges Event was the most-attended event since its inception, and the committee who put it together this year could not have done a better job, so a huge congratulations to the Meet The Judges Committee, especially Sarah Cherry who nailed it this year...I feel like there should be a shoutout to Mike Jolet here for all his contributions, as there always should be, but he still has my sunglasses in his locker so he can seek comfort in those sweet Carreras he has access to. Also, and obviously, thank you to the Detroit Golf Club as well for allowing us to come back this year.

Hunter Thompson had a theory that "the truth is never told between the nine-to-five hours." There are surely times when some of us reading this most certainly believe that to be true, sometimes even when we are dealing with our colleagues on the other side of the aisle. Regardless of what side of the aisle we are on, however, we all have complicated lives burdened further by difficult jobs that are sometimes made worse by the fact that we care so much about our families, our clients, our colleagues, and the people around us. But I look at our MDTC community, and I look at what we recently achieved jointly with the MAJ through the softball event and know that all of us here are collectively doing great things in our lives. How do you know that's the truth? Because I'm writing this at 11 p.m. and editing it at 11:58.

Everyone enjoy their family this Thanksgiving and thank you for your continued support of this incredible organization.

MDTC Legal Excellence Awards 2025

Save the Date!

Thursday, March 20, 2025
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E-Discovery Report

By: Ken Treece and B. Jay Yelton, III, *Warner Norcross + Judd LLP*
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Cavalier and Uncooperative Approach to Discovery Leads to Sanctions

Domus BWW Funding, LLC v. Arch Ins. Co., 2024 WL 3761737 (E.D. Pa. Aug. 12, 2024)

Domus BWW Funding LLC and 1801 Admin, LLC, collectively known as Domus, were involved in a legal dispute with Arch and other excess insurance carriers over coverage for defense costs. Domus first notified Arch about their claim in July 2018. Arch's claims adjuster, Lynne Miller, and policy underwriter, Greg McGowan, were both involved in handling the claim. However, Arch denied coverage in December 2019. Domus made several attempts to challenge this denial throughout 2020 and 2021.

In October 2022, as the dispute progressed into litigation, Arch issued a litigation hold to preserve relevant documents. This hold included documents from both Miller and McGowan. Despite this, issues quickly arose with Arch's handling of electronically stored information (ESI). The process of collecting and reviewing ESI was mishandled, leading to significant delays. Arch's in-house paralegal, responsible for gathering ESI, made errors that resulted in the search falling behind schedule. By June 2023, Arch had only produced a small number of documents, and continued delays in producing ESI were evident. This caused complications for Domus, who had to proceed with depositions and expert reports under the incorrect assumption that Arch had fulfilled its discovery obligations.

A major issue emerged when Arch's data migration in the summer of 2023 led to the accidental deletion of emails from Mr. McGowan, who had left the company. Arch did not discover this loss until later, and by then, the backup tapes containing McGowan's emails had also been overwritten. This loss was significant as it meant that potentially relevant information was no longer available.

Arch's handling of the ESI production continued to be problematic. Although Arch's outside counsel eventually obtained and processed a large set of documents in October 2023, this was done too late, and Domus was not informed of these developments in a timely manner. Arch's defense team, including Dan Layden, appeared dismissive of the ESI search, assuming it would not yield useful information, which contributed to further delays. By November 2023, after a deposition of Miller, Domus realized the extent of Arch's failure to produce documents and subsequently sought remedies.

B. Jay Yelton, III

After 30+ years as a litigator and manager of eDiscovery teams, Jay now focuses on serving as discovery mediator and special master where he assists parties to design proportional discovery plans and to resolve discovery disputes. Jay is an Adjunct Professor at Michigan State University College of Law and at Thomas M. Cooley Law School where he teaches eDiscovery. Jay is recognized by *Best Lawyers in America* for eDiscovery, Litigation, and Data Privacy. He serves as Education Director and Chairman Emeritus for the Detroit Chapter of BarBri's eDiscovery Association (Association of Certified eDiscovery Specialists), as a member of the Global Advisory Council for E.D.R.M. and as a member and editor for The Sedona Conference.

Ken Treece

Ken Treece began his practice as a litigator in commercial law and railroad defense. After a brief departure from practice as a human resources professional, he returned with a focus on eDiscovery law. Ken has conducted and supervised all phases of eDiscovery document review projects from collection and initial search terms preparation to document review and production, and privilege log preparation. He has assisted litigation teams with deposition and trial preparation and drafted eDiscovery plans/protocols along with briefs in support of the prosecution and defense of discovery-related motions. His diverse eDiscovery experience includes complex commercial litigation, antitrust litigation and pre-merger investigations, white collar criminal defense, intellectual property disputes, labor and employment actions, and internal investigations. Ken has also written numerous articles on eDiscovery law and practice and has spoken to various groups throughout Michigan on all matters related to eDiscovery.

In April 2024, Domus filed a motion seeking sanctions for the delays and issues caused by Arch's handling of discovery. The court held a hearing on this motion in June 2024. The court found that Arch's approach to the ESI search was unprofessional and reflected a disregard for discovery obligations. Although monetary sanctions were not imposed because Domus had not formally requested them in time, the court noted that Arch's delay had imposed additional burdens on Domus. This included the need to reopen depositions and revise expert reports.

Regarding the loss of McGowan's emails, the court concluded that while the destruction was not intentional, it was nonetheless prejudicial to Domus. As a result, the Plaintiffs will be allowed to present evidence showing that Arch failed to preserve these emails. The court will also provide instructions to the jury during the trial to make sure this sanction is applied correctly and does not lead to assumptions that are only permitted for intentional spoliation under Fed. R. Civ P. 37(e)(2).

PRACTICE TIP: The case illustrates the importance of clear and honest communication between parties. Arch's failure to inform Domus about delays and issues with ESI production led to additional complications and misunderstandings. Regular updates and transparency are essential to avoid conflicts and ensure both sides are on the same page.

Production of Hyperlinked Documents Can be a Complicated and Evolving Process

In re: Uber Technologies, Inc., Passenger Sexual Assault Litigation, 2024 WL 1772832 (N.D. Cal. Apr. 23, 2024)

In a multidistrict litigation case, the Court examined a dispute over the production of electronically stored information (ESI) involving links to "evolving" hyperlinked documents. The case centers on allegations of sexual assault by Uber drivers and involves the handling of data stored on Google Vault servers, a platform used by Uber for its business operations.

To better understand the issues concerning Uber's discovery productions, the Court explained how Google Drive and Vault interface. When someone sends a Gmail or Google Chat message containing a hyperlink to a Google Drive document, that document may still be a work in progress, subject to changes and updates by others. Because the document is stored in a central location, multiple people can access and modify it. This creates a challenge when it comes to keeping track of the exact version of the document that existed at the time the email was sent.

Google Vault, a tool designed to archive emails and documents, complicates this issue further. It doesn't capture the exact version of the hyperlinked document as it appeared when the email was sent. Instead, when a Google Drive document is exported from Google Vault, the version retrieved is the most current one. If the document has been edited since the email was sent, that original version is lost in the vault's export process. This poses a significant challenge in cases where it is important to know exactly what a document looked like at a specific point in time, particularly in legal or archival contexts.

The court found that Arch's approach to the ESI search was unprofessional and reflected a disregard for discovery obligations.

Certain technologies have been developed to address this issue. For instance, Metaspike's Forensic Email Collector (FEC) can retrieve both active emails and the versions of linked Google Drive documents that existed at the time. However, it is limited to current data and cannot perform the same function for emails and documents archived in Google Vault. Meanwhile, Uber's e-discovery vendor, Lighthouse, has created a tool called Google.

Parser. This tool extracts links to Google Drive documents from emails and chat messages and gathers metadata for review. While useful, Google Parser is still limited—it doesn't currently retrieve the original versions of hyperlinked documents archived in Google Vault.

In short, cloud computing and document storage via Google Drive and Google Vault introduce challenges when it comes to producing hyperlinked documents, particularly in legal cases. The evolving nature of how documents are stored raises complex questions about how to search and collect information effectively. This makes it difficult to ensure that evidence in the form of hyperlinked documents is accurately represented as it was at the time of an email or chat message. In legal contexts, such documents may be critical for showing who knew what and when, yet retrieving the correct version is not as straightforward as it is for traditional email attachments.

Ultimately, while tools like FEC and Google Parser offer some help, they don't fully solve the problem of tracking the exact versions of cloud-based documents linked in emails at specific points in time, leaving key pieces of evidence difficult to access and produce.

In this case, Uber relied on Google Workspace, which includes Gmail, Google Drive, and Google Vault, to manage its ESI for discovery purposes. A key issue in this litigation was that Google Vault did not automatically capture the version of

a hyperlinked document that existed at the time it was linked in an email or chat message. When these messages included hyperlinks to documents that could be edited by multiple users, Google Vault would export the version of the document as it existed at the time of the export, not when the email was originally sent.

To address this, Uber used a manual process to identify and retrieve the version of the hyperlinked document that was contemporaneous with the email or chat message.

In this case, the Court found no cooperation between the parties in crafting the search terms and no evidence of testing to ensure the keywords would be effective.

The Court acknowledged the technical challenges associated with producing hyperlinked documents stored on Google Drive and Google Vault, emphasizing that such documents could be important evidence, especially when assessing who knew what information and when. Despite the complexities, Uber was required to investigate how to retrieve these contemporaneous versions and meet with the plaintiffs to explore possible solutions.

Uber claimed it had thoroughly investigated the matter and found no scalable, automated way to collect the contemporaneous versions of hyperlinked documents. In contrast, the plaintiffs proposed a methodology they believed would work, though it required creating a new computer program. However, the Court was not convinced by the plaintiffs' approach, as it was based on an anonymous post from a developer forum and lacked proof of success.

While the Court recognized the potential technical hurdles in Uber's current system, it did not mandate Uber to develop the plaintiffs' proposed solution. However, the Court did not fully accept Uber's argument about the burden of manual document production, pointing out that Uber had chosen Google Vault despite its known limitations in handling hyperlinked documents.

A major issue emerged when Arch's data migration in the summer of 2023 led to the accidental deletion of emails

Ultimately, the Court ruled that Uber was not required to produce the contemporaneous versions of hyperlinked documents in an automated way. However, it did order Uber to manually review and produce up to 200 hyperlinks identified by the plaintiffs. Additionally, the plaintiffs retained the option to request further documents, while Uber could request relief from specific production requirements if it could demonstrate undue burden or disproportionality.

PRACTICE TIP: The complexity of cloud-based document storage is influencing legal standards for document production, particularly in e-discovery processes. Courts have recognized that cloud computing presents new challenges for determining what constitutes a reasonable search and collection of documents. Legal teams must stay updated on these evolving standards and adapt their practices accordingly.

Party Ordered to Produce Technical Files in Their Pure Native Format

Energy Mgmt. Collab., LLC v. Darwin Tech LLC, et al., 2024 WL 2335629 (C.D. Cal. Apr. 25, 2024)

The lawsuit involved claims of breach of contract, fraud, conversion, and unjust enrichment. The plaintiff alleged that the defendant failed to deliver critical project files, such as firmware source code and circuit-board design files, as part of the contract for designing and developing an emergency light-testing system. The defendant argued that it was not required to provide these materials, claiming they were its intellectual property.

Additionally, the defendant failed to demonstrate that producing the files in their unaltered state would be burdensome.

During the discovery phase, the plaintiff requested various documents related to the project. The defendant produced over 20,000 technical files, many of which had file extensions like ".s37" and ".hex," which could only be opened using specific technical software. The plaintiff's discovery vendor found that 17,857 of these files could not be opened using common e-discovery tools like Relativity. Additionally, when the defendant processed the files for production, the folder structure was altered, meaning the files could only be properly viewed using the original software.

The plaintiff filed a motion to compel the defendant to produce the original, or "pure," native technical files. They argued that the defendant failed to meet the requirement under Rule 34(b)(2)(E)(ii), which states that files must be produced in their original format or a reasonably usable form. The plaintiff emphasized that the files needed to be viewed as part of larger "projects," which required opening multiple files together in specialized software.

They also claimed that processing the files through Relativity had disrupted the organizational structure.

In response, the defendant argued that they had produced the files as they were kept in the ordinary course of business and had provided metadata to allow the plaintiff to re-create the folder structure. They also identified the necessary software to open the files.

The Court evaluated the situation under Rule 26, which governs discovery. It explained that the plaintiff must first show that their request is relevant, and then the defendant bears the burden of explaining why the discovery should be limited. In this case, the Court found that the technical files were clearly relevant to the claims and, under Rule 34, should be produced in their original form or a usable format.

The Court sided with the plaintiff, noting that the defendant did not contest that technical files are typically produced in pure native format. Additionally, the defendant failed to demonstrate that producing the files in their unaltered state would be burdensome. The Court ordered the defendant to produce the files in their pure native format, emphasizing that doing so would involve minimal effort and was necessary to maintain the files' structure.

The lawsuit involved claims of breach of contract, fraud, conversion, and unjust enrichment.

PRACTICE TIP: In this case, the Court reinforced the importance of producing electronic files in a way that preserves their original format and organizational structure, especially when they require specialized software to be properly viewed. Parties in cases that are likely to involve unconventional file types should discuss production parameters in advance to avoid the necessity of court intervention.

Motion to Compel Denied Because Party's RFP and Proposed Keyword Searches Were Overly Broad

Ravin Crossbows, LLC v. Hunter's Manufacturing Company, Inc., 2024 WL 3253265 (E.D. Ohio July 1, 2024)

In this patent infringement case involving crossbow technology, the Court addressed the issue of using keyword searches to compel document production.

The defendant requested all documents containing 38 specific keywords related to crossbow parts, Plaintiff's technology, and inventors. A magistrate judge initially denied the defendant's motion to compel, stating the request was overly broad and lacked proper narrowing criteria. The defendant then sought reconsideration, offering to reduce the number of terms and arguing that keyword searches are valuable tools in e-discovery.

In short, cloud computing and document storage via Google Drive and Google Vault introduce challenges when it comes to producing hyperlinked documents, particularly in legal cases.

The Court referenced Rule 26, which allows discovery of relevant information but gives courts discretion to limit overly broad requests. The Court emphasized that keyword searches, while potentially useful, carry risks of producing irrelevant or insufficient results. Drawing on guidance from the Sedona Conference, the Court noted that keyword searches are most effective when created cooperatively between parties and tested for accuracy.

In this case, the Court found no cooperation between the parties in crafting the search terms and no evidence of testing to ensure the keywords would be effective. The Court also criticized the defendant's request for being too broad, as it lacked limitations on source, time, or custodian and was likely to duplicate other document requests already addressed by the plaintiff.

Ultimately, the Court ruled that the defendant had not shown the magistrate judge erred in denying the motion to compel. The Court upheld the magistrate's decision, concluding that the defendant's keyword-based request was unnecessary and overly broad.

PRACTICE TIP: Keyword searches in e-discovery must be carefully crafted with cooperation between parties to ensure relevance and effectiveness. Broad or poorly defined requests increase the risk of irrelevant results and missed key information. Testing and validating search terms before submission improves accuracy and reduces unnecessary discovery burdens.

Failure to Conduct Thorough Custodian Interviews Resulted in Spoliation of Mobile Phone Data

Two Canoes LLC v. Addian Inc., 2024 WL 2939178 (D.N.J. Apr. 30, 2024)

The dispute arose from a business transaction during the COVID-19 pandemic, where Addian allegedly sold counterfeit N95 masks to Two Canoes through a chain of companies. Addian had purchased the masks from a supplier in China, and Two Canoes resold them to end users. A lawsuit by 3M in November 2020 alleging counterfeit masks triggered Addian's duty to preserve relevant electronic data, which contin-

ued through subsequent litigation initiated by Two Canoes. Two Canoes filed a motion for sanctions against Addian for spoliation of WeChat messages by Addian's CEO, Addam Wolworth.

Despite the preservation duty, Addian's CEO admitted to discarding multiple cell phones between 2020 and 2022, which resulted in the loss of relevant WeChat messages that had not been backed up. Two Canoes sought sanctions under Rule 37(e)(2) of the Federal Rules of Civil Procedure, requesting an adverse inference instruction at the summary judgment stage. The Court meticulously analyzed the spoliation claim under Rule 37, particularly examining the timeline of events and whether Addian had met its duty to preserve the WeChat messages.

The Court found that Addian failed to take reasonable steps to preserve the messages after the duty to preserve arose. Although Wolworth testified that most communications with his supplier were via phone calls, the Court acknowledged the loss of some relevant WeChat messages. However, it was unclear how much prejudice, if any, the plaintiffs suffered as a result of the lost data. Importantly, the Court did not find sufficient evidence of bad faith on Addian's part but allowed the issue of intent to be explored at trial. The Magistrate Judge recommended deferring a final decision on sanctions until trial, where the jury could assess Wolworth's credibility and determine whether the lost messages impacted the case.

The Court also emphasized the importance of early planning and conducting thorough custodian interviews to identify and preserve all relevant sources of electronically stored information (ESI). In this case, the failure to adequately preserve mobile device data created significant complications, highlighting the critical need for counsel to be proactive in preserving relevant data, particularly from mobile devices like cell phones. The evolving nature of messaging applications like WeChat and their data retention practices makes it crucial for parties to understand how such platforms function at the time preservation duties arise. By doing so, parties can avoid motion practice and the risks associated with spoliation claims.

PRACTICE TIP: Given the role mobile devices play in storing key communications, early identification and preservation of ESI on phones and messaging apps like WeChat is essential to avoid spoliation risks. Taking timely steps to preserve this data can prevent costly sanctions and complications during litigation. Proactively safeguarding mobile data is far less burdensome than addressing its loss later.

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Insurance Coverage Report

By: Drew W. Broaddus, *Smith Haughey*
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***Childers v Progressive Marathon Ins Co*, __ Mich __; __NW3d __ (2024) (Docket Nos. 164953 &164954).**

Ordinarily, I would leave a first-party automobile case like *Childers* for the No-Fault Report. But this Supreme Court decision deals with something that is relevant to all types of insurance (except health and disability): the Michigan Property and Casualty Guaranty Association ("MPCGA"). The MPCGA "is an association of insurers (other than life and disability insurers) licensed to do business in Michigan which was established pursuant to the" Guaranty Act, MCL 500.7901 et seq.[1] All applicable Michigan insurers are members of the MPCGA "as a condition of [their] authority to continue to transact insurance in this state."[2] "Under certain circumstances, the MPCGA is statutorily responsible for paying insurance benefits owed to an insured if their insurer becomes insolvent."[3] "To fund the cost of the MPCGA's operations, all member insurers are levied assessments by the" MPCGA.[4] Although it has been around since 1969, the Guaranty Act has rarely been discussed in case law – presumably because insurers don't go bankrupt very often.

But on June 12, 2013, American Fellowship Mutual Insurance Company ("American Fellowship") was declared insolvent.[5] American Fellowship wrote automobile no-fault policies in Michigan – including one that provided PIP[6] benefits to Justin Childers, relative to an August 6, 2011 accident. After American Fellowship was declared insolvent, the MPCGA "assumed responsibility for Justin's PIP benefits."[7] "After an investigation, the MPCGA concluded that" Progressive "was next in statutory priority after American Fellowship to provide Justin's PIP benefits."[8] "Progressive first received notice of Justin's injuries when it was informed of his claim on September 24, 2013…."[9] The problem, from Progressive's perspective, is that this was well after the one-year statute of limitations provided for in the No-Fault Act, MCL 500.3145(1). So, Progressive denied the claim as untimely.[10] Mr. Childers and the MPCGA both sued Progressive.

The Court of Appeals found that the suit against Progressive was timely.[11] The panel essentially held that the Guaranty Act trumped the No-Fault Act when a higher-priority carrier is insolvent.[12] The panel explained: "Given the structure and purpose of the MPCGA, we hold that the one-year limitations period in MCL 500.3145(1) does not govern because the MPCGA is not generally subject to the no-fault act and has not brought this action directly under the no-fault act."[13] "Instead,

The complaint asserted three counts against Endurance.

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.

Throughout his career, Mr. Broaddus has successfully handled cases involving general negligence, premises liability, motor vehicle accidents, and insurance coverage disputes. His strategic approach has earned him recognition among clients and peers alike as seen through a variety of Super Lawyers and Top Lawyers accolades that he has received in recent years. Additionally, Mr. Broaddus has received an AV Preeminent® Peer Review Rating by Martindale-Hubbell.

the MPCGA's right to proceed against Progressive flows from its authority to file a claim for reimbursement from another insurer in the chain of designated priority insurers."[14] So, the claim was subject to the general six-year statute of limitations.[15] The panel added that even if § 3145(1) applied, the one-year period would run from the date of insolvency because the MPCGA had no claim against a lower-priority insurer until the higher-priority insurer became insolvent.[16]

But the Supreme Court reversed, finding that § 3145(1) controlled because both the MPCGA and Mr. Childers had filed actions "seeking to recover PIP benefits from Progressive."[17] Mr. Childers' claim was clearly based on the No-Fault Act, whereas the MPCGA's claim was derivative of "whatever rights [Childers] possessed."[18] "[T]he relevant guaranty act provisions tie the MPCGA's rights to the underlying claimant's rights to recover PIP benefits," and a "claimant cannot recover PIP benefits from an insurer for the purposes of the credit provision if the claimant fails to comply with MCL 500.3145(1)."[19] The Court found "no inconsistency between the MPCGA's role as an insurer of last resort and requiring compliance with MCL 500.3145(1)," where § 3145(1) "contains no exception for an injured person seeking PIP benefits from a lower priority insurer if a higher priority insurer becomes insolvent…."[20] The Court acknowledged that the MPCGA is only responsible when "there is no other no-fault insurer in the statutory order of priority…."[21] However, the fact that the MPCGA's rights to recover are predicated on the claimant's ability to recover meant that the MPCGA had no right to "inherit" from Mr. Childers, where his claim was barred by § 3145(1).[22]

> So, plaintiff "sued Auto-Owners for breach of contract and sued Kiebler Insurance for negligently handling the insurance requests."

For non-PIP practitioners, the most important part of *Childers* may be its description of the MPCGA's "structure and purpose" (since it comes up so infrequently). As the opinion explains, the MPCGA "has the statutory duty to pay obligations of insolvent insurers which come within the act's definition of 'covered claims.'"[23] "Covered claims" are "obligations of an insolvent insurer" that meet specific statutory conditions set forth at MCL 500.7925. The MPCGA's obligations are not limited to no-fault insurance benefits but rather include "all kinds of insurance except life and disability insurance."[24] However, the MPCGA is not obligated to pay benefits for *all* "covered claims."[25] Rather, the MPCGA has the right to receive a credit toward payment on covered claims "[i]f damages or benefits are recoverable by a claimant" from another "insurance policy…."[26] "Relatedly, the claimant is required to first exhaust all coverage provided by any policy before obtaining benefits from the MPCGA."[27] It is important for all insurance practitioners to have a basic understanding of this scheme, as underscored by the recent insolvency of Arrowood Indemnity, which affected multiple coverage types.[28]

***Progressive Marathon Ins Co v Espinoza-Solis*, __ Mich App __; __ NW3d __ (2024) (Docket No. 366764).**

This is another decision that, at first blush, seems to be important only to no-fault practitioners. However, *Espinoza-Solis* underscores a broader point: while the meaning of an insurance policy is chiefly a matter of contract law,[29] policies also exist within a regulatory framework. Changes in that framework can affect the policy, even when the policy language doesn't change.

The question presented in *Espinoza-Solis* was: what effect did 2019 amendments to MCL 500.3009 have on Progressive's responsibility to provide automobile liability coverage to an uncooperative insured? In a situation not involving automobile coverage, such noncooperation would generally void liability coverage under contract principles.[30] But, under *Coburn v Fox*,[31] an automobile insurer faced with this predicament is still "statutorily required to provide minimum liability coverage for bodily injury…."[32] But the amendments to § 3009 created uncertainty about what that "minimum" is. For policies issued after July 1, 2020, the statute sets default liability limits of $250,000/$500,000, but § 3009(5) allows an insured to elect as little as $50,000/$100,000.00.[33]

The coverage dispute arose after Espinoza-Solis and Shkreli were involved in an automobile accident on June 23, 2021, and Shkreli filed a negligence action against Espinoza-Solis. Espinoza-Solis maintained automobile coverage through Progressive, which retained counsel to defend him in the negligence action. After a breakdown in the attorney-client relationship, the retained counsel for Espinoza-Solis withdrew as his counsel. Shkreli then moved for entry of default judgment, which resulted in a $250,000 judgment in his favor against Espinoza-Solis.

Progressive subsequently brought this declaratory judgment action against Espinoza-Solis and Shkreli. Acknowledging its responsibility under *Coburn*, Progressive sought a declaration that the applicable statutory minimum was $20,000, as stated in MCL 257.520(b)(2),[34] or in the alternative, $50,000 pursuant to MCL 500.3009(5). Shkreli argued the minimum is $250,000, under MCL 500.3009(1). The trial court entered summary judgment in favor of Shkreli, finding that Progressive was obligated to indemnify Espinoza-Solis in the amount of $250,000 because he did not elect a lower limit under §

3009(5). Progressive appealed.

The Court of Appeals affirmed, finding as a matter of statutory construction that § 3009(1) sets the "minimum," whereas § 3009(5) is only relevant when there has been a specific election by the insured.[35] The panel explained, "The language of MCL 500.3009 is clear that the $250,000 per person and $500,000 per accident limits in Subsection (1) apply by default and are mandatory for all no-fault policies issued after July 1, 2020. MCL 500.3009(1), (5), and (8)…."[36] "We further conclude that Subsection (5) of the statute provides an 'option' to obtain an exception to the mandatory minimums of Subsection (1) if certain conditions are met."[37] "Because the minimums in Subsection (5) do not apply automatically to every policy issued after July 1, 2020, and are not *required,* while the minimums in Subsection (1) *do* apply automatically by default to every policy issued after July 1, 2020, and *are* required unless certain requirements are met to obtain an exception to these mandatory minimums, we conclude that *Coburn* commands the statutorily required minimum residual liability insurance under the current version of MCL 500.3009 for policies issued after July 1, 2020 is $250,000 per person and $500,000 per accident as stated in MCL 500.3009(1)."[38]

The panel next considered Progressive's argument that the $20,000 minimum under MCL 257.520(b)(2) still applied despite the amendments to § 3009. Progressive argued that § 520(b)(2) determines the coverage that "must be afforded to protect the general public," while §3009 deals only with the minimum coverages as a matter of contract law between an insurer and an insured.[39] Rejecting this argument, the panel noted that § 520(b)(2) is contained within the Financial Responsibility Act, while § 3009 is expressly incorporated into the No-Fault Act.[40] The "no-fault act, as opposed to the financial responsibility act, is the most recent expression of this state's public policy concerning motor vehicle liability insurance."[41] Moreover, § 3009 also "exists for the protection of injured third parties and the public at large."[42]

***Opera Block Properties, Inc v Auto-Owners Ins Co,* __ Mich App __; __ NW3d __ (2024) (Docket No. 366764).**

This was a combined first-party property loss (as to Auto-Owners) and negligence action (as to the independent agent, Kiebler Insurance), which arose out of a drain backup and flood. The specific coverage in place at the time of the loss for the plaintiff's five buildings (at three locations) was disputed. Plaintiff had insured these buildings with Auto-Owners for about two years. The day before the loss was reported, the insured allegedly asked the agent to add a "premier, property-plus endorsement," which provided $50,000 in coverage for drain backups per location.[43] Without this endorsement, the plaintiff's policy did not provide any coverage for drain backups. The agent "formally made the requested changes at 10:11 a.m., on February 6, 2019," backdating them "to 12:01 a.m., February 5, 2019, because that was the day that" plaintiff's representative requested them.[44] "In the early morning hours of February 6, 2019," plaintiff discovered flooding in "all five basements," caused "by backups through the drains…."

"Auto-Owners denied the claims because the backups occurred on February 6, 2019, before [the agency] sent in the request to change [plaintiff's] coverage."[45] So, plaintiff "sued Auto-Owners for breach of contract and sued Kiebler Insurance for negligently handling the insurance requests."[46] After discovery, the trial court found that the agent bound Auto-Owners on February 5, so there was coverage under the endorsement.[47] The trial court, therefore, dismissed plaintiff's claim against the agency because there was no evidence that any act or omission of the agency caused plaintiff "to have less coverage than it should have had for the loss…."[48] The Court of Appeals affirmed both of these summary disposition rulings in this published opinion.

Auto-Owners' position on appeal turned on the "completed-loss and loss-in-progress doctrines."[49] "Generally, a party cannot purchase insurance for a contingency that has already occurred; the contingency must be unknown at the time the parties enter into the insurance agreement."[50] "It is also contrary to public policy to allow an insurance agent to bind an insurance company to insure a loss that has already occurred."[51] "Accordingly, a 'completed loss' cannot be covered under an after-acquired insurance policy."[52] The related "loss-in-progress doctrine recognizes that, once a loss is in progress, the event is no longer fortuitous, and the risk has also been realized."[53] "The loss-in-progress doctrine defeats an insured's claim against an insurer under a policy only where the insured is aware of a threat of loss so immediate that it might fairly be said that the loss was in progress and that the insured knew it at the time the policy was issued or applied for."[54] "Thus, application of the doctrine requires foreknowledge of loss or an awareness of an immediate threat of loss on the part of the insured."[55] Here, the panel found no evidence that "the water backup occurred or was in progress on February 5, 2019," when plaintiff asked the agent to add the endorsement.[56] Although the timeline was tight (a matter of hours), the testimony established that plaintiff's representative was unaware that the basements had flooded when he asked the agency for the endorsement.

"Because the timing of the loss was not in dispute, whether the certain loss and loss-in-progress doctrines applied depended on when Auto-Owners committed to providing" the additional coverage contained in the "premier, property-plus

endorsement."[57] Auto-Owners claimed that the "certain loss" and "loss-in-progress" doctrines applied to this case because the agency did not request the change in coverage until 10:11 a.m. on February 6, 2019.[58] "Auto-Owners, in effect, treated [the agency's] e-mail informing Auto-Owners of the changes in coverage … as though it were an application for a change in coverage that did not become effective until approved."[59] The panel rejected this characterization of that e-mail because it "ignore[d] the evidence that [the agency] had the authority as Auto-Owners' duly-authorized agent to bind Auto-Owners to an insurance agreement *without first getting its approval*."[60]

Although "Kiebler Insurance was an independent insurance agency,"[61] this did not "preclude Kiebler Insurance from being an agent for Auto-Owners as well."[62] "A single person may occupy different roles at successive points in an ongoing interaction among the same parties."[63] Moreover, it is "well-settled that an insurer may be bound by the acts of a duly authorized agent acting within the scope of his or her authority."[64] And, if "an agent has the authority to bind an insurer, then it has the authority to effect an insurance binder – a temporary insurance contract that lasts until the insurer issues a formal policy or declines the risk."[65] That, according to this panel, is what the agency did here when it assured the plaintiff that the endorsement was in place on February 5.[66]

Although this ruling seemingly disposed of the negligence claim against the agency, the plaintiff maintained that there should have been even more coverage than what the endorsement provided. This related to the fact that the endorsement, as written, provided $50,000 per *location* (plaintiff had three), rather than per *building* (plaintiff had five).[67] Plaintiff believed there should have been $250,000 in coverage for this loss rather than $150,000. But, e-mails exchanged between the plaintiff and the agency showed that the agency explained this distinction to the plaintiff, and there was "no indication that [the plaintiff] objected to this form of coverage" (i.e., by location rather than building).[68]

Although plaintiff proffered an affidavit from a "coverage expert" – who opined "that Kiebler Insurance should have requested insurance for five separate locations" – the panel noted that "a conclusory affidavit is not sufficient to establish a question of fact for purposes of summary disposition."[69] This expert's "statements only established it was theoretically possible that some insurer might have insured Opera Block for more than $50,000 in water-backup coverage, or insured the buildings as more than three locations."[70] Such "speculation was insufficient to create a question of fact."[71] Plaintiff's inability to show that "better" coverage was available was also fatal to its "duty to advise" claim.[72]

***Harris v Endurance American Ins Co,* unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued July 16, 2024 (Docket No. 23- 12350).**

This diversity case illustrates the important differences between first and third-party (or liability) coverages. The claim arose out of a fatal small plane crash. The plaintiff's decedent (Yott) and another individual, not a party to this suit (Kennedy), died. Endurance insured the owner of the plane, an LLC named N290KA. Kennedy's estate made a negligence claim against N290KA, which Endurance settled for nearly all of the policy's $5 million per occurrence liability limit. Several months later, Yott's estate sent a demand letter to Endurance.

"Unlike the demand sent by the Kennedy estate, the letter from the Yott Estate did not claim that N290KA had liability arising out of the accident, nor did the letter identify any allegedly negligent or wrongful conduct by N290KA related to the accident."[73] Instead, the letter asserted that the Yott Estate was entitled to coverage under the Policy because "Yott was a passenger on board the aircraft" and had "suffer[ed] bodily injuries."[74] Therefore, according to Yott's estate, Yott was "included in and covered by the limit of liability – section D, which has a single limit of $5,000,000."[75] Endurance denied the claim, finding that Yott's estate "had not identified any facts or circumstances that would give rise to coverage for the Yott Estate under Coverage D of the Policy."[76] This suit followed.

The complaint asserted three counts against Endurance. Count I was a breach of contract claim. There, "the Yott Estate asserted that it (or Yott) was" an "intended third-party beneficiary" of Coverage D of the Policy.[77] Endurance allegedly "breached that provision of the Policy when it (a) failed to act in good faith in investigating, negotiating, and paying for the losses suffered; (b) denied the Yott Estate benefits under the Policy and exhausted the Policy limits, excluding the Yott Estate, wrongfully denying the Yott Estate's claim; (c) failed to allocate the policy limits between the passengers as set forth in the Policy; (d) failed to adjust the loss between the passengers; and (e) intentionally misrepresented to the Yott Estate that Endurance was adjusting the loss between the passengers."[78] "In Count II, the Yott Estate [alleged] that Endurance failed to act in good faith in adjusting, investigating and paying the claims when Endurance … led the estate to believe that Endurance was adjusting the loss between the Yott Estate and the estate of Kennedy."[79] "Finally, in Count III, the Yott Estate [brought] a claim under the Michigan Uniform Trade Practices Act [UPTA]," MCL § 500.2001 et seq.[80]

Endurance moved to dismiss the suit under Fed R Civ P 12(b)(6), arguing that none of these counts stated a claim.

The District Court agreed. As to Count I, Judge Matthew Leitman noted that "the coverage available under Coverage D does not apply to the Yott Estate."[81] This section provided coverage for "all sums which you become legally obligated to pay as damages because of Bodily Injury sustained by any person," and the word "you" as used in Coverage D referred to the "named insured" – N290KA.[82] "Thus, because the Yott Estate is not the 'named insured' under the Policy, it is not entitled to coverage under Coverage D."[83] This coverage provided defense and indemnity to N290KA if it was sued, not direct benefits to an injured person.

Nor was the estate a third-party beneficiary of the "named insured." "The controlling Michigan statute concerning third-party beneficiaries provides that '[a]ny person for whose benefit a promise is made by way of contract [...] has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.'"[84] Judge Leitman found "no indication that any promise in Coverage D was made for the benefit of the Yott Estate."[85] "Instead, Coverage D provides coverage for any 'sums' that the named insured becomes 'obligated to pay as damages.'"[86] "Simply put, the point of Coverage D is to protect the named insured from liability, not to protect anyone else."[87] While "persons injured by the named insured may incidentally benefit from Coverage D," that "does not mean that those persons are intended third-party beneficiaries of Coverage D" under Michigan law.[88] "In fact, in the lone case cited by the Yott Estate in its discussion of its third-party beneficiary theory, the Michigan Supreme Court held that an injured party was not a third-party beneficiary of a liability policy between insurer and insured."[89]

This left the UPTA claim, which Judge Leitman had little trouble disposing of on the pleadings. His claim fails for at least two reasons. "First, it does not appear that the UTPA provides for a private cause of action for damages."[90] "Second, even if the UTPA did create a private cause of action for damages, the Yott Estate's claim would still fail because … [it] was not entitled to coverage under Coverage D, and thus [could not] plausibly allege that the manner in which Endurance allegedly adjusted the estate's insurance claim caused the estate any damages."[91]

Reading between the lines, it appears that Yott's estate couldn't have simply made a negligence claim against Endurance's insured (like the Kennedy estate did) because Yott was the pilot. Therefore, Yott arguably would have had comparative negligence. Presumably, that is why the estate's counsel made such unusual arguments for coverage – the goal was to obtain liability coverage without showing that Endurance's insured had liability. But, a claimant cannot mix and match policy provisions to create coverage.[92]

Endnotes

1 *Childers,* __ Mich at __; slip op at 6 (cleaned up).
2 *Id.*, citing MCL 500.7911(1).
3 *Childers,* __ Mich at __; slip op at 7, citing MCL 500.7931(1) and MCL 500.7925.
4 *Childers,* __ Mich at __; slip op at 6. See also MCL 500.7941(1).
5 *Childers,* __ Mich at __; slip op at 2.
6 "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute." *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan,* 507 Mich 498, 504 n 1; 968 NW2d 482 (2021) (citation omitted). "However, lawyers and others call these benefits PIP benefits to distinguish them from property protection insurance benefits." *Id.*
7 *Childers,* __ Mich at __; slip op at 2-3.
8 *Id.* at __; slip op at 3.
9 *Id.*
10 See *Id.*
11 *Childers v Progressive Marathon Ins Co,* 343 Mich App 257, 261; 997 NW2d 273 (2022).
12 See *Childers,* __ Mich at __; slip op at 4.
13 *Childers,* 343 Mich App at 273.
14 *Id.*
15 See *Childers,* __ Mich at __; slip op at 4-5.
16 See *Id.* at __; slip op at 5.
17 See *Id.* at __; slip op at 9.
18 See *Id.* at __; slip op at 10.
19 See *Id.* at __; slip op at 11 (cleaned up).
20 See *Id.* at __; slip op at 12.
21 See *Id*.
22 See *Id*.
23 *Childers,* __ Mich at __; slip op at 7 (citation omitted).
24 *Id.*, citing MCL 500.7925(1)(e).
25 *Id.* (citation omitted).
26 *Id.,* citing MCL 500.7931(3).
27 *Id.* (citation omitted).
28 See <https://mpcga.org/> (accessed August 20, 2024).
29 See, for example, *Rory v Continental Ins Co,* 473 Mich 457; 703 NW2d 23 (2005).
30 See *Espinoza-Solis,* __ Mich App at __; slip op at 4.
31 425 Mich 300; 389 NW2d 424 (1986).
32 *Espinoza-Solis,* __ Mich App at __; slip op at 2.
33 *Espinoza-Solis,* __ Mich App at __; slip op at 5.
34 MCL 257.520(b)(2) has not been amended. See *Espinoza-Solis,* __ Mich App at __; slip op at 8. That portion of the Financial Responsibility Act still contains the "$20,000 per person and $40,000 per accident minimum limits" that appeared in § 3009 for many years prior to 2019. See *Espinoza-Solis,* __ Mich App at __; slip op at 8.
35 *Espinoza-Solis,* __ Mich App at __; slip op at 5-7.
36 *Id.* at __; slip op at 8 (citation omitted).
37 *Id*.
38 *Espinoza-Solis,* __ Mich App at __; slip op at 8.
39 *Id.*
40 *Id.* at __; slip op at 8-9.
41 *Id.* at __; slip op at 8 (citation omitted).
42 *Id.* at __; slip op at 9.
43 *Opera Block Properties,* __ Mich App at __; slip op at 2.
44 *Id.*
45 *Id.*
46 *Id.*
47 "When a conflict arises between the terms of an endorsement and the form provisions of an insurance contract, the terms of the endorsement prevail." *Besic v Citizens Ins Co of the Midwest,* 290 Mich App 19, 26; 800 NW2d 93 (2010) (citation omitted). "Endorsements by their very nature are designed to trump general policy provisions, and

where a conflict exists between provisions in the main policy and the endorsement, the endorsement prevails." *Id.* (cleaned up).

48 *Opera Block Properties,* __ Mich App at __; slip op at 2-3.
49 *Id.* at __; slip op at 4.
50 *Id.,* citing *Gauntlett v Sea Ins Co*, 127 Mich 504, 511; 86 NW 1047 (1901).
51 *Opera Block Properties,* __ Mich App at __; slip op at 4, citing *Harper v Mich Mut Tornado, Cyclone & Windstorm Ins Co,* 173 Mich 459, 463; 139 NW 27 (1912).
52 *Opera Block Properties,* __ Mich App at __; slip op at 4, citing *American Bumper and Mfg Co v Hartford Dire Ins Co,* 452 Mich 440, 459; 550 NW2d 475 (1996) (cleaned up).
53 *Opera Block Properties,* __ Mich App at __; slip op at 4, citing *American Bumper,* 452 Mich at 459 (cleaned up).
54 *Opera Block Properties,* __ Mich App at __; slip op at 4 (citations omitted).
55 *Id.* (citations omitted).
56 *Id.* at __; slip op at 5.
57 *Id.*
58 *Id.*
59 *Id.* (citation omitted).
60 *Id.* (emphasis added).
61 An independent insurance agent is generally treated as "an agent for the insured." *Id.* (citation omitted). See also *Al-Hajjaj v Hartford Accident & Indem Co*, 345 Mich App 361; 5 NW3d 353 (2023).
62 *Opera Block Properties,* __ Mich App at __; slip op at 6.
63 *Id.* (cleaned up).
64 *Id.* (citation omitted).
65 *Id.* (citation omitted).
66 *Opera Block Properties,* __ Mich App at __; slip op at 7-8.
67 *Id.* at __; slip op at 9. Plaintiff also argued that the trial court misinterpreted the policy on this point, and that Auto-Owners should have owed $250,000. *Id.* The panel gave little attention to that argument, finding that it had not been raised in the trial court. *Id.*
68 *Id.* at __; slip op at 12.
69 *Id.* (citation omitted).
70 *Id.* at __; slip op at 13.
71 *Id.*
72 *Id.*
73 *Harris,* 2024 WL 3448453, at *2.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Harris,* 2024 WL 3448453, at *3 (cleaned up).
78 *Id.* (cleaned up).
79 *Id.* (cleaned up).
80 *Id.*
81 *Harris,* 2024 WL 3448453, at *4.
82 *Id.*
83 *Id.*
84 *Id.,* quoting MCL 600.1405.
85 *Harris,* 2024 WL 3448453, at *4.
86 *Id.*
87 *Id.*
88 *Id.,* citing *Koenig v City of South Haven,* 460 Mich 667; 597 NW2d 99 (1999).
89 *Harris,* 2024 WL 3448453, at *4, citing *Schmalfeldt v North Pointe Ins Co,* 469 Mich 422; 670 NW2d 651 (2003).
90 *Harris,* 2024 WL 3448453, at *6 (citations omitted).
91 *Id.*
92 See, for example, *Fuller v GEICO Indem Co,* 309 Mich App 495, 500; 872 NW2d 504 (2015) (noting that the plaintiffs could not import definitions from the liability portion of the policy to create first-party coverage).

News

Deborah Brouwer

Nemeth Bonnette Brouwer named among *Michigan Lawyers Weekly's* In the Lead: Best Women-Led Law Firms

Media Contact: Barbara Fornasiero; EAFocus Communications; 248.260.8466; barbara@eafocus.com

Detroit – October 7, 2024 – Management-side labor and employment law firm Nemeth Bonnette Brouwer PC is pleased to announce the firm has been recognized by Michigan Lawyers Weekly as a Best Women-Led Law Firm. To be considered for the legal publication's inaugural 'In the Lead' Best Women-Led Law Firms program, firms must employ a minimum of four attorneys, be led by a woman (or women), and be based in Michigan. Contenders were also evaluated on a broad spectrum of additional criteria including:

- Can demonstrate success in the local legal community through growth in revenue or employees.
- Recognized as a best workplace because of employee support programs.
- Can show a high level of employee morale.
- Can demonstrate strong and consistent community engagement.
- Has a record of promoting DE&I efforts designed to help women attorneys thrive professionally and diversify the profession.

Majority owner and managing partner Deborah Brouwer, along with co-owner Terry Bonnette, has carried on the vision that firm founder Patricia Nemeth (now of counsel to the firm) launched 32 years ago when the practice niche of management-side labor and employment law was dominated by men. That ongoing vision has always put the interests of the clients first; embraced a culture where the attorneys are collaborative—not competitive; allowed for flexibility in work hours; and accepted a workplace norm where women (and men) can reach their full potential and help others do the same.

A pioneer herself in labor and employment law, Brouwer defied early career advice that women couldn't be attorneys – or if they did, could only practice divorce and family law. Ignoring naysayers helped her reach multiple milestones for herself and the firm—and she became the majority shareholder in 2020.

"I'm so proud to continue Nemeth Bonnette Brouwer's tradition of being women-owned and women-led and thrilled that others also recognize our legacy," Brouwer said. "It's amazing how winning cases, serving hundreds of clients and creating our own success since 1992 has helped us overcome the patriarchal challenges associated with both the legal and business professions. It's an honor to be named a Best Women-Led Law Firm and celebrate the accomplishments of female-led firms across Michigan!"

Now a career-long role model for female litigators and change agent for women in the profession, Brouwer has a bustling management-side labor and employment law practice, working with employers to establish productive and harmonious workplace environments. She provides counseling, training, and litigation services to a wide range of public and private sector and nonprofit clients and has extensive experience with claims of race, age, disability, gender, and religious discrimination and harassment, as well as claims brought under the FMLA and FLSA. She has appeared before state and federal administrative agencies and courts in multiple states and is also a skilled workplace investigator.

Nemeth Bonnette Brouwer has been long-active in NAMWOLF (National Association of Minority & Women Owned Law Firms) and is a certified woman-owned business by WBENC (Women's Business Enterprise National Council) and NWBOC (National Women Business Owners Corporation). The firm has also mentored women attorneys both within and outside of the firm and created and supported alternative career tracks to support its staff's personal commitments beyond work. Further, firm attorneys serve on multiple boards that have a special emphasis on protecting/promoting women, families, and vulnerable populations.

Brouwer, firm attorneys and the firm itself have won myriad legal awards and honors as a result of their work. This latest list will be featured in Michigan Lawyers Weekly's October 21 issue in a special *In the Lead Best Women-Led Law Firms* section, individually highlighting each firm's achievements.

About Nemeth Bonnette Brouwer PC

Nemeth Bonnette Brouwer specializes in employment litigation, traditional labor law, workplace investigations, and management consultation and training for private and public sector employers. The firm also provides arbitration and mediation services. Woman-owned and led since its founding in 1992, Nemeth Bonnette Brouwer exclusively represents management in the prevention, resolution and litigation of labor and employment disputes.

Public Policy

By: Silvia Mansoor, *Foley, Baron, Metzger & Juip, PLLC*
and **Zach Larsen,** Member of *Clark Hill PLC,*
on behalf of the MDTC Public Policy Committee
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While the summertime usually brings up images of the sun, pools, beaches, travel, and barbeques, the legislature still has work to do. Some bills were introduced or signed into law this past summer that may be relevant to your practices and clients.

First, we have **HB 5724**. This was originally introduced on May 14, 2024, but was referred to the Committee on Civil Rights, Judiciary, and Public Safety on July 30, 2024. This bill, if passed, is meant to create the "Judicial Protection Act," which intends to protect the safety and privacy of judges and their immediate family members. Then we have **HB 5898, 5899,** and **5900**, which were all introduced on July 30, 2024, and seek to change the laws regarding notarial acts. The first and third seek to amend already existing laws, while the second would create a new act. Read together, the proposed bills are intended to increase the educational requirements of notary publics. These have been referred to the Committee on Local Government and Municipal Finance.

Over in the healthcare realm, **SB 952,** that was introduced on June 26, 2024, seeks to create a new act, which would be called the "Hospital Price Transparency Act," to prohibit hospitals from pursuing collections of debts if they were not in compliance with federal hospital price transparency laws at the time of service(s). This has been referred to the Committee on Finance, Insurance, and Consumer Protection.

On July 30, 2024, the Governor signed many bills into law. Included in that was **SB 482 (2024 PA 103 amending Mich. Comp. Laws § 333.13809)**, which is an amendment to Michigan's medical waste laws. Sharps disposal containers are generally regulated by the FDA, which requires a disposal of the container when it is about 75% full. Existing Michigan law, however, required the disposal of on-site medical waste after 90 days. It is understood that this posed a problem for the facilities that operated on a lower volume. They would have to dispose of the containers even before they were filled to a 75% level, which would be costly and wasteful. With the new law in place, the 90-day requirement is effectively lifted. Containers can be disposed of when they are 75% full so long as 18 months have not passed since the first sharps were placed in the container.

A violation thereof carries a misdemeanor punishable by a fine of not more than $500, imprisonment of not more than 90 days, or both.

Silvia Mansoor

Silvia is a Senior Associate at the firm. Her work focuses on defending health care professionals and organizations in complex medical malpractice claims and business dispute claims.

Before joining Foley, Baron, Metzger & Juip, Silvia worked several years at a busy Detroit litigation firm handling cases from start to finish. Before that, she gained experience in business transaction and startup work.

Zach Larsen

From defending disaster-related lawsuits like the Flint Water and Edenville Dam class actions to filing industrywide administrative rulemaking challenges or remediation cost-recovery actions, Zach Larsen has litigated some of Michigan's largest environmental and regulatory disputes. Zach has litigated cases at all levels—conducting trials and administrative hearings while also arguing numerous times before the Michigan Court of Appeals, the Michigan Supreme Court, and the U.S. Court of Appeals. Now a partner at Clark Hill, Zach served for eight years as an Assistant Attorney General for the State of Michigan, working in both the Environment, Natural Resources, and Agriculture Division and the Revenue and Tax Division and receiving the Department's award for excellence in appellate advocacy.

This bill, if passed, is meant to create the "Judicial Protection Act," which intends to protect the safety and privacy of judges and their immediate family members.

Also signed into law on July 30, 2024, were companion bills **SB 449** and **SB 450 (2024 PA 103 & 104 adding Mich. Comp. Laws §§ 400.108a & 108b)** dealing with complex rehabilitation technology (CRT) (i.e., durable medical equipment that is individually configured to a complex needs patient) that amend the Social Welfare Act to require the Department of Health and Human Services to develop policies and rules for such technology. Briefly, this requires designating billing codes for the CRT, establishing supplier standards, requiring focused evaluation of the complex needs of patients, maintaining payment policies and rates for the CRT, exempting the CRT billing codes from inclusion in biddings or otherwise, requiring that managed care Medicaid plans adopt the regulations and policies in the act, and "[m]ake other changes as needed to protect access to complex rehabilitation technology for complex needs patients."

For those who practice environmental law, **SB 966,** introduced on July 30, 2024, seeks to amend the Natural Resources and Environmental Protection Act by including methods to reduce fugitive methane and VOC emissions from oil and gas wells. This has been referred to the Committee on Energy and Environment.

Finally, for those who work with rental properties, **SB 979** that was introduced on August 15, 2024 proposes amending existing law and requiring a landlord to install at least one operational carbon monoxide device in every rental unit. A violation thereof carries a misdemeanor punishable by a fine of not more than $500, imprisonment of not more than 90 days, or both. This has been referred to the Committee on Housing and Human Services.

Shakespeare and RBG

By: Mona K. Majzoub, *United States Magistrate Judge (Ret.)*

William Shakespeare's insights into the human condition cannot be surpassed. He develops plots and themes and creates characters in his plays whose psychological and social interplays have fascinated readers for centuries. In this he is the quintessential master, and his perceptions are so keen as to make his dramatic works timeless and memorable. In *Henry VI*, Part II, act IV, Scene II, line 73, he famously announces through his character, Dick the Butcher, "The first thing we do, let's kill all the lawyers." Unfortunately for all of us, this line has been much misinterpreted and misconstrued through the years. Dick the Butcher was a follower of the rebel and rogue agitator, Jack Cade, who had designs on becoming king by any means necessary. Jack Cade's thinking was that if he disrupted and upended the social system of law and order (i.e., rid the land of all the lawyers), his pathway to the crown would be assured. Shakespeare's point was to recognize and laud the bar and bench, the lawyers and judges, for their roles in upholding the legal framework of the land and instilling justice in society.

Ruth Bader Ginsburg's life mission was to instill justice equitably in our society by galvanizing a strategy to right the wrongs that prevented her and so many others from enjoying the "equal" protections of the Fourteenth Amendment regarding the issue of gender equality. Her motivation was driven by an unabating continuum of adverse personal experiences in the workplace. Yet, she had the wisdom, vision and intelligence to set her sights high and fight for all gender equity, not just her own.

Ruth Bader was born in Brooklyn, New York in 1933. Her mother died the day before she graduated from public high school. She attended Cornell University on a full scholarship, and it was there that she met, and after graduation married, her husband of 56 years, Marty Ginsburg. They moved to Fort Sill, Oklahoma, so that he could fulfill his two-year military service obligation. RBG took a civil service examination and tested highly but was only offered the position of typist (a job she lost as soon as she became visibly pregnant).

After two years, RBG and her husband and infant child settled near Cambridge, Massachusetts where Marty had been accepted at Harvard Law School. RBG then applied to Harvard Law and was admitted a year later, in 1956. RBG was one of nine women in a class of more than 500 first-year law students. Even though she soon proved her academic star power, becoming the first woman ever to earn a place on the Harvard Law Review, the dean of the law school still felt compelled to ask her why she was taking a place that "should go to a man." During his third year of law school, Marty Ginsburg was diagnosed with testicular cancer which required surgeries and radiation. At the time RBG had a three-year-old toddler, her own class schedule, law review, and now also attended classes for her husband. RBG typed up the notes, along with Marty's senior thesis which he dictated to her late in the evenings, so that

Mona K. Majzoub

Mona K. Majzoub retired from the federal bench after serving 16 years as a United States Magistrate Judge for the Eastern District of Michigan. Judge Majzoub returned to private practice, launching Mona K. Majzoub Dispute Resolutions PLLC, where she offers facilitative and evaluative mediation services. You may learn more about her professional background and practice at www.mkmpllc.com.

he could keep up with his classes and study from home while undergoing treatment. Marty recovered and graduated from Harvard Law School on time in 1958. Through it all, RBG never faltered or flailed, either academically or at home.

Because Marty Ginsburg received an attractive job offer from a Wall Street law firm, the Ginsburgs moved to New York City. RBG transferred to Columbia Law School, entering as one of 12 women in her 3L year. She graduated at the top of her class, tying for first place. Notwithstanding her outstanding academic credentials, not a single law firm to which RBG applied would hire her. And although she was highly recommended for a Supreme Court clerkship, she was not offered even the courtesy of an interview. Commensurate with the late 1950's-1960's attitudes regarding women in the law, and especially mothers in the law, pretenses were neither *de rigeur* nor considered facially necessary.

Justice Ginsburg at the National Archives in 1993

It took some serious intervention by a Columbia Law School professor and mentor, Gerald Gunther, to secure RBG a federal judicial clerkship with Judge Edmund Palmieri in the Southern District of New York in 1959. Professor Gunther put it to Judge Palmieri this way: if you don't take RBG as your law clerk, I will never again send you another student of mine to fill your clerkship openings. And if she doesn't work out, I promise I will immediately send a student to fill her place. Apparently RBG "worked out" just fine; Judge Palmieri extended her clerkship an extra year, doubling the normal clerkship period of service in his chambers.

In 1963, RBG successfully applied for and accepted a teaching appointment at Rutgers Law School. In the interest of job security, she hid her second pregnancy by wearing oversized clothing. Her contract was renewed, but more importantly, it was at Rutgers that she embarked on her quest to champion gender equality and women's rights. Fueled by her own appalling discriminatory workplace experiences, she proved to be a most brilliant visionary and strategist. Her razor-sharp focus was on the language in the 14th Amendment which reads: "... nor shall any state deny to any person the equal protection of the laws." When RBG argued equal protection cases in the Supreme Court of the United States, she had the foresight to understand that the deciders were a group of educated men who truly did not understand that "any person" includes women as well as men, and that inequities existed both in the application of laws and/or within the scope of the laws themselves. She took it upon herself to calmly, rationally, logically, and articulately demonstrate the intrinsic problems brought about by disparate treatment of either gender in a manner in which the Justices were neither offended nor able to disagree. She argued successfully for the striking down of state laws which favored one gender over another, irrespective of whether the disfavored gender was a man or a woman. For example, RBG argued on behalf of men who were denied tax deductions women received for the care of their elderly parents, and on behalf of men who were denied widower Social Security benefits available to widows. "I ask no favor for my sex. All I ask of our brethren is that they take their feet off of our necks" (quoting abolitionist Sarah Moore Grimke). The reputation of this diminutive giant as a brilliant legal strategist and constitutional legal analyst, who won five of her six cases in the Supreme Court, was unparalleled.

In 1969, RBG became a tenured professor at Rutgers Law School. On January 1, 1972, Columbia Law School announced that RBG had accepted a faculty appointment as a tenured professor, making history again as the first woman ever to receive a tenured position at Columbia University. RBG became the Director of The Women's Rights Project for the ACLU and worked relentlessly throughout the 1970's to develop strategies and deliver results that would help correct targeted inequities caused by gender inequality.

In 1980, President Jimmy Carter appointed RBG to the United States Court of Appeals for the District of Columbia Circuit, where she forged her deep and lifelong friendship with then Judge Antonin Scalia, demonstrating her personal philosophy of respect for those with whom one may not always agree. Thirteen years later, President Bill Clinton nominated her to the United States Supreme Court as the second woman ever to hold that honor. Known over the years for her clear and precise opinions and dissents, her jabots and judicial lace collars, her practice of standing to announce her dissents, her love of opera, her touching fireside dialogues with Justice Antonin Scalia, her insistence on a personal regimen of physical fitness, her preference for Armani suits, and the fun she had with her "Notorious RBG" fame, there is no modern judicial officer who remotely comes close to having the personal and professional impact that this incredible woman has had on our nation's citizenry.

Justice Ruth Bader Ginsburg spent her entire legal career advocating for equal protection and gender equality, not just for some, but for all. She is exactly the lawyer William Shakespeare, more than 400 years ago, praised as an esteemed member of a noble profession—one who undertakes to uphold the legal framework of the land and works to ensure justice for all citizens. And she is precisely whom Dick the Butcher and Jack Cade would have targeted for annihilation. Although Shakespeare in his day did not live to see women filling this prestigious role, there is no doubt that he would smile upon Justice Ruth Bader Ginsburg with great satisfaction and pride, appreciating her for all of her trailblazing legal endeavors and hard fought successes, for taking on and repairing pieces of the fractured fabric of our social structure, and for working tirelessly to instill social justice through our system of laws. William Shakespeare would have loved RBG, and if given the chance, would have immortalized her in his incomparable dramatic works as a heroine for the ages. Fortunately for us, she has done an excellent job of that all by herself.

Legal Malpractice Update

By: James J. Hunter, *Collins Einhorn Farrell PC*
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Thank you to **Katie Smith**, *Associate* for her work on the article.

Elder v Defendant Attorney, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2024 (Docket No. 363259); 2024 WL 3548633.

Proving legal malpractice not impossible where the judge or arbitrator can't be forced to testify on their decision.

Facts

Defendant attorney represented plaintiff and another individual in a wrongful termination and retaliation suit against their former healthcare employer. The action proceeded to arbitration through JAMS. At arbitration, defendant attorney presented calculations from a damages expert outlining plaintiff's losses relating to his wrongful termination broken down into three charts.

The arbitrator awarded plaintiff and his co-party $10.6 million in total compensation, costs, and attorney fees. The award included an explanation as to how the arbitrator reached her conclusion; however, it specifically referenced one expert chart while citing numbers from another. Defendant attorney filed a motion in the court to confirm the award, which the court granted.

Plaintiff subsequently brought suit against defendant attorney, arguing in part that defendant attorney was liable for legal malpractice because she failed to recognize and correct the allegedly erroneous amount of the arbitration award. Plaintiff argued that by using numbers from Chart A, rather than Chart B, as the award said, the arbitration award was approximately $2.5 million less than it should have been.

The trial court first ordered that the arbitrator explain whether she intended to award the amount stated in the written award or if she intended to award some other amount. Plaintiff appealed that order. On appeal, the appellate court reversed and held that MCL 691.1694 precludes asking that question to an arbitrator after finalizing an award. After remand, the trial court then determined that there was no discovery available to prove that the arbitrator had made an error and plaintiff could not prove that the defendant attorney was negligent. The trial court granted summary disposition to the defendant attorney under MCR 2.116(C)(8) on the legal-malpractice claim. Plaintiff appealed.

James J. Hunter

Jim is a member of the firm's Professional Liability and Commercial Litigation practice groups. He has extensive experience defending lawyers and other professionals in malpractice claims. Jim's practice also concentrates on representing lawyers and judges in ethics matters.

Before joining the firm, Jim worked on complex litigation and federal white-collar criminal defense. He has experience representing clients in healthcare fraud cases and antitrust investigations. He also served as an Assistant Prosecuting Attorney in Wayne County, Michigan, where he gained valuable trial experience.

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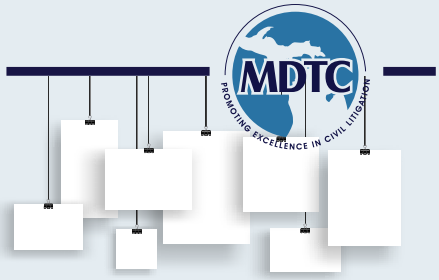

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Ruling

The appellate court reversed the trial court's decision granting summary disposition as to the legal malpractice claim. It concluded that it was evident that the arbitration award relied on numbers from one chart, which was substantially lower than the numbers for the corresponding years in the chart actually referenced in the decision. The appellate court reasoned that it must, at this stage, accept the plaintiff's allegations as true and found that the plaintiff alleged a *prima facie* legal malpractice claim based on the discrepancy in the award.

The appellate court clarified its understanding of plaintiff's legal malpractice claim—it was not simply that the defendant attorney should have challenged the award to obtain a higher amount. Instead, the claim was that there was a discrepancy, and questioning that discrepancy would determine whether there was an error in the number. The appellate court determined that the applicable arbitration rules would not have permitted a substantive revision of the award but that the arbitrator could have corrected the "blunder" included in the decision "without altering the substance of the arbitrator's analysis or reopening the merits of the decision."

As the trial court determined, the appellate court agreed that the issue would ultimately come down to the arbitrator's intent. However, unlike the trial court, the appellate court explained that asking the arbitrator personally for an answer to that question was not the only way to make a determination on that issue. The appellate court held that the trial court's dismissal of plaintiff's legal malpractice claim was in error. It explained that the trial court would need to determine what the outcome should have been under the relevant legal principles if the defendant attorney had promptly sought to correct the award.

Practice Note

An attorney isn't insulated from a legal malpractice claim simply because there isn't an opportunity to obtain discovery into the underlying decision-making process. Instead, a court can (and will) use its judgment to determine how a judge or arbitrator would have decided an issue within their authority in the original case.

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Thursday, March 20, 2025	6:00 pm – 9:00 pm	Legal Excellence Awards – *Gem Theatre*
Friday, June 20, 2025	9:00 am – 5:30 pm	Annual Meeting & Summer Conference – *Soaring Eagle Casino*

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright*
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The Michigan Court of Appeals' Internal Operating Procedures (a/k/a "the IOPs")

When it comes to handling a case in the Michigan Court of Appeals, one of the most useful resources may be the Court's Internal Operating Procedures (commonly known as the "IOPs"). Although much of the information in the IOPs can be obtained from the court rules themselves, the IOPs, which are updated regularly, provide many helpful details about the Court's internal processing of appeals. Here are some of the highlights:

- The IOPs explain the intake process for both claims of appeal and applications for leave to appeal, including the assigning of docket numbers, the processing of appeals involving multiple lower court case number or orders, and, in the case of appeals as of right, the Court's initial determination of its jurisdiction.
- The IOPs provide details about the filing of interlocutory appeals, including how to seek emergency relief and a stay of proceedings. The IOPs also explain the process for submission of emergency appeals and related motions to hearing panels.
- The IOPs provide guidance for securing the transcript for appeal, including how the Court addresses late transcript orders, the late filing of transcripts, and situations when the transcript is not available.
- The IOPs explain motion practice in the Court of Appeals, including the various types of motions that can be filed and when they should be filed.
- Perhaps most useful for practitioners, the IOPs contain comprehensive information relating to the filing of briefs, including timing, form, and how to go about seeking an extension of time. The IOPs also explain the filing of adoptive briefs, joint briefs (e.g., appellant/cross-appellee or appellee/cross-appellant), supplemental authority, and amicus briefs (including the availability of a response).
- The IOPs explain how cases are placed on the Court's calendar for oral argument, the ability of parties to advise the Court of scheduling conflicts, and how to seek an adjournment or disqualification of a judge.
- The IOPs explain the process for obtaining an audio recording of an oral argument.
- The IOPs provide helpful information on the issuance of opinions and orders, filing motions for reconsideration, and taxing costs.
- Finally, the IOPs explain the various circumstances that can lead to the involuntary dismissal of an appeal and how to avoid them.

Phillip J. DeRosier

Phil DeRosier has more than 20 years' experience representing industry-leading corporations, banks, insurance companies, and individuals in the Michigan Supreme Court, Michigan Court of Appeals, and U.S. Courts of Appeals. Phil has briefed and argued a wide variety of appeals, ranging from commercial contracts to insurance to business torts. He also devotes a significant part of his practice to briefing dispositive motions and working with trial counsel on pre- and post-trial motions, jury instructions, and preserving issues for appeal.

Phil is a past Chair of the Governing Council of the State Bar of Michigan's Appellate Practice Section, and is consistently recognized in Best Lawyers and Michigan Super Lawyers in the area of appellate practice. Phil is co-chair of the Michigan Appellate Bench Bar Conference and a contributing author to the Institute for Continuing Legal Education's *Michigan Appellate Handbook*. Before joining the firm, Phil served as a law clerk for former Michigan Supreme Court Chief Justice Robert P. Young, Jr., and was a staff attorney at the Michigan Court of Appeals.

Medical Malpractice Report

By: Kevin A. McQuillan, *Kerr Russell & Weber PLC*
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This summer the Michigan Supreme Court and Court of Appeals decided several cases with important implications regarding medical malpractice claims. In *Danhoff v Fahim*, the Court revisited the issue of the extent to which expert testimony must have supporting literature to be reliable. The Court reaffirmed the holdings of prior cases, stating that a lack of supporting literature for an expert's opinion is not dispositive. In *Danhoff*, a patient underwent two lumbar spine surgeries over three days for chronic back pain. Following the second surgery, the patient developed high blood pressure and a high fever, and the first surgical incision became inflamed. When the patient returned to the hospital, a CT scan showed a perforated sigmoid colon. After filing the malpractice lawsuit, the patient offered expert testimony from Dr. Koebbe to suggest that a bowel injury during lumbar spine surgery is very rare and an "unacceptable" complication. See *Danhoff*, 2024 WL 3333321, at *17 (Zahra, J., quoting the trial court in his dissenting opinion). Therefore, based on Dr. Koebbe's experience, the patient's injury was the result of surgical error.

The defendant sought to preclude Dr. Koebbe's testimony, and the trial court agreed: "The only foundation laid as to the reliability of Dr. Koebbe's testimony was his experience and background, and his own opinion as to how he would have performed the surgery." See *Danhoff*, 2024 WL 3333321, at *16 (Zahra, J., quoting the trial court in his dissenting opinion). Plaintiff sought reconsideration and provided literature to support Dr. Koebbe's opinions. The trial court denied reconsideration. While the articles confirmed bowel injury is a very rare complication, the trial court determined there was no support in the articles for Dr. Koebbe's opinion that a very rare complication only occurs when there is surgical error. *Id*. at *17 (Zahra, J., describing procedural history in his dissent). The plaintiff appealed, and the Court of Appeals affirmed: "Dr. Koebbe's opinion was not based on any methodology other than his bare assertion that he had never heard of such an injury, and therefore, he would conclude that any such injury was caused by malpractice." *Danhoff*, 2024 WL 3333321, at *18 (Zahra, J., quoting the Court of Appeals in his dissenting opinion). The Court of Appeals also held that the article submitted with the motion for reconsideration did not directly support Dr. Koebbe's opinion. Plaintiff then applied to the Michigan Supreme Court.

The Michigan Supreme Court's statement of the questions presented suggested a reversal of *Edry v Adelman*, 486 Mich 634 (2010), and *Elher v Misra*, 499 Mich 11 (2016), might occur. Those cases generally held that a lack of supporting literature is an important but not dispositive factor in determining whether a medical malpractice expert's testimony is admissible. The Court ultimately stopped short of overruling those decisions and declined to "opine on the ultimate admissibility of Dr.

Kevin A. McQuillan

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

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

Koebbe's testimony at trial." See *Danhoff*, 2024 WL 3333321, at *14 n 14. The majority instead held that the Trial Court (and Court of Appeals) failed to consider the factors found in MCL 600.2955. In explaining why *Edry* and *Elher* are still good law while being factually distinguishable, the Court found that "defendant in this case did not provide evidence to challenge Dr. Koebbe's position on the standard of care." *Danhoff*, 2024 WL 3333321, at *12. Additionally, "defendants in this case have not refuted Dr. Koebbe's testimony that there is no medical literature that discusses the standard of care in relation to the adverse event experienced by plaintiff." *Id*. The majority went on to say that "Dr. Koebbe was making a reasonable inference based on the objective information available," in response to the lower courts characterizing his opinions as ipse dixit. The Court remanded the matter for the lower courts to consider "whether (1) Dr. Koebbe could have produced such supportive literature, (2) defendant produced any literature or other evidence to contradict Dr. Koebbe's opinion, and (3) Dr. Koebbe's opinion was otherwise sufficiently reliable under the factors provided by statute and MRE 702." *Id*.

Following the second surgery, the patient developed high blood pressure and a high fever, and the first surgical incision became inflamed.

In his dissenting opinion, Justice Zahra noted that "Dr. Koebbe gave the trial court nothing by which the court could possibly find that his opinion was reliable." *Danhoff*, 2024 WL 3333321, at *21 (Zahra, J., dissenting). The dissent concluded that Dr. Koebbe's opinions did not satisfy any of the seven factors found in MCL 600.2955. Moreover, the dissent notes that "the majority opinion does not even identify a single factor that supports the admission of Dr. Koebbe's proffered opinions." *Id*. The dissent concludes by noting the majority essentially shifted the burden of proving expert reliability onto the defense.

The Michigan Supreme Court also decided *Stokes v. Swofford* and *Selliman v Colton*, in a consolidated appeal, regarding the qualifications necessary under MCL 600.2169 to offer standard of care testimony in a medical malpractice action. *Stokes v Swofford*, No. 162302, 2024 WL 3543753, at *1 (Mich, July 25, 2024), reh den sub nom. *Selliman v Colton*, No. 163226, 2024 WL 4151376 (Mich, September 11, 2024). The Court overruled *Woodard v Custer*, 476 Mich 545, 719 NW2d 842 (2006), because it incorrectly conflated the terms "specialty" and "subspecialty." *Id*. The Court determined the words "specialist" and "specialties" as used in MCL 600.2169(1) are those recognized by the American Board of Medical Specialties (ABMS), the American Osteopathic Association (AOA), the American Board of Physician Specialties (ABPS), or other similar nationally recognized umbrella-based physician certifying entities. *Id*. Moreover, the matching requirement under MCL 600.2169 follows the listed general board certifications, which are the baseline specialties. *Id*. The statute does not require matching of subspecialties. *Id*.

The majority noted in a footnote that a certification that requires as a prerequisite the possession of another more general board certification from an umbrella certifying entity before seeking further certification is a subspecialty for purposes of MCL 600.2169. The Court acknowledged that there could be situations in which a pulmonologist might be qualified to testify against a cardiologist if the alleged malpractice was something generally related to internal medicine. But the Court also noted that trial courts retain discretion as to whether to accept the expert as qualified under subsections (2) and (3). More specifically, trial courts have discretion to determine the relevancy of an expert's testimony. Thus, an internist who exclusively treats medical conditions associated with the lungs could be deemed unqualified to testify as an expert for an internist who exclusively treats medical conditions associated with the heart. The majority justified this reasoning so as to not exclude highly qualified medical providers from serving as experts.

The Court addressed the facts from each of the two consolidated appeals. In *Stokes*, the patient suffered from severe headaches due to fluid surrounding her brain. 2024 WL 3543753, at *5. The patient experienced complications following a shunt catheter implantation procedure. Upon returning to the hospital, a diagnostic radiologist reviewed brain scan imaging and relayed the results to emergency room physicians without recommending an immediate referral to neurosurgery. The patient ultimately died after emergency medicine interventions failed to help. The patient's estate filed a medical malpractice lawsuit against the diagnostic radiologist. The defendant radiologist had previously obtained an added qualification in neuroradiology, but the certificate had expired before the alleged malpractice occurred. The estate relied upon the opinions of an expert in neuroradiology and filed a motion to have the trial court determine that the most relevant specialty at issue was neuroradiology. The trial court denied the motion and held that the relevant specialty was diagnostic radiology. *Stokes*, 2024 WL 3543753, at *5. As a result, the trial court precluded plaintiff's neuroradiology expert from testifying regarding the standard of care. The Michigan Supreme Court determined the trial court erred. The most relevant specialty was diagnostic radiology because it was the only specialty that the defendant held and practiced. The plaintiff expert was qualified because his subspecialty of neuroradiology was subsumed within the broader specialty of diagnostic radiology.

In the second case, *Selliman*, the plaintiff sued an ENT physician for negligent performance of rhinoplasty to repair his nose from previous injuries. 2024 WL 3543753, at *5. The defendant physician had an added qualification certificate in facial and plastic reconstructive surgery. The defendant argued that the procedure at issue was cosmetic rhinoplasty, and therefore, the most relevant specialty issue was facial plastic and reconstructive surgery. Defendant further argued that the plaintiff's expert did not devote a majority of his professional time to cosmetic rhinoplasty. The Michigan Supreme Court determined the trial court failed to conduct the proper analysis and remanded the matter for further proceedings. *Id*. at *13. The Court concluded that facial plastic and reconstructive surgery was likely a subspecialty and that the trial court needed to conduct an evident hearing on remand and consider the factors for determining the most relevant specialty. *Id*.

Justice Clement filed a dissenting opinion, which Justices Zahra and Viviano joined. *Id*. at *14 (Clement, J., dissenting). The dissent notes that a subspecialty is treated just like a specialty under MCL 600.2169. According to the dissent, the definition of specialty encompasses subspecialties as well. The dissent disagrees with the majority opinion relying on definitions from the public health code. The dissent is critical of the majority's reliance on definitions provided by nationally recognized physician-certifying organizations while disagreeing with the amicus briefs filed by those same organizations. The dissent notes that the majority's conclusion that specialty does not include subspecialty could lead to problems when different certifying entities label an area practice differently. *Id*. at *19. Further, the dissent takes issue with the majority's stare decisis analysis and notes that the majority's opinion is not any clearer than *Woodard's* rule. "Under the majority's view, so long as an expert is in the same specialty, even if that might be unrelated to the exact subspecialty at issue, the expert satisfies Subsection (1)." 2024 WL 3543753, at *23 (Clement, J., dissenting). The dissent concludes that all of the stare decisis factors favor leaving *Woodard* intact. The dissent would affirm the decisions of the Court of Appeals in both cases. *Id*.

In addition to addressing expert witness issues, the Michigan Supreme Court also addressed the types of damages available in wrongful death actions. In *Daher v Prime Healthcare Servs.-Garden City, LLC*, No. 165377, 2024 WL 3587935 (Mich, July 30, 2024), the Michigan Supreme Court determined that damages for a decedent's lost earning capacity are not recoverable under the wrongful death act, overruling *Denney v Kent Co Rd Comm*, 317 Mich App 727; 896 NW2d 808 (2016) and *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644; 761 NW2d 414 (2008). In *Daher*, a 13-year-old sought care from a hospital but was discharged hours before his death. 2024 WL 3587935, at *1–2. The patient's parents sued for failing to diagnose and treat bacterial meningitis. The parents sought between $11 and $19 million for lost future earnings. *Id*. In the trial court, the defendant sought summary disposition arguing loss of future earnings are not permitted under the wrongful death act. The trial court denied the motion and defendants sought leave to appeal in the Court of Appeals. *Id*. The Court of Appeals acknowledged that a prior Michigan Supreme Court decision, *Baker v Slack*, 319 Mich 703; 30 NW2d 403 (1948), held that lost future earnings were not available. But the Court determined *Baker* had been implicitly overruled by *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 746 NW2d 847 (2008). Thus, the Court of Appeals affirmed. 344 Mich App 522; 1 NW3d 405. Defendants then sought leave to appeal in the Michigan Supreme Court.

> In his dissenting opinion, Justice Zahra noted that "Dr. Koebbe gave the trial court nothing by which the court could possibly find that his opinion was reliable."

The Michigan Supreme Court determined the Court of Appeals erred. The Court began by detailing the history of the Survival Act and Death Act as well as the Wrongful Death Act (WDA) and its amendments. An estate could recover for future earnings under the Survival Act but was limited to a beneficiary's loss of support under the Death Act. *Daher*, 2024 WL 3587935, at *5–6. The WDA combined the Survival Act and Death Act, and the Court held in *Baker* that the decedent's future earnings are not available as damages, but damages for loss of financial support were available. *Baker*, 319 Mich at 714, 30 N.W.2d 403.

The Court rejected the notion that *Baker* was superseded by changes in the law. *Daher*, 2024 WL 3587935, at *7–8. Revisions to wording regarding "pecuniary injury" versus "all of the circumstances" in which an estate could recover, and the addition of language allowing for loss of society and companionship damages, did not expand the three categories of damages available under the WDA. *Id*. at *9–13. The removal of the "pecuniary injury" phrase was not intended to change the relationship between survival actions and the WDA. Amendments inserting the word "including" in 1971 did not convert what had long been an exhaustive list into an open-ended list of damages types left entirely to the discretion of the jury. The jury has a role in determining the amount of damages but not the type of damages. The Court further explained that *Denney* and *Thorn* failed to address *Baker* and failed to provide sufficient analysis to support the holding that lost future earnings are recoverable under the WDA. *Id*. at *8. The Court also noted that *Wesche* failed to explain why *Baker's* "understanding of the [WDA]" was "repudiated" -- "*Wesche* did not undermine our holding in

Baker. *Daher*, 2024 WL 3587935, at *13. The Court concluded by reaffirming *Baker's* holding that lost capacity damages are not available under the WDA and explicitly overruled *Denney* and *Thorn* to the extent they are inconsistent. *Id.* at *14.

In addition to these Michigan Supreme Court decisions, the Michigan Court of Appeals issued a recent published decision confirming that COVID-19 immunity applies to all healthcare service providers, acting in support of the State's response to the COVID-19 pandemic. In *Warren v Flint*, No. 366226, 2024 WL 3543483 (Mich Ct App, July 25, 2024), a person developed shortness of breath and went to a Flint area hospital seeking treatment. The patient was admitted to the COVID-19 floor, intubated, and received a COVID-19 test (which was later shown to be positive). These events occurred on March 31, 2020, during the COVID-19 state of emergency. On April 1, 2020, the patient developed acute respiratory failure and acute kidney injury, and approximately week later developed a pressure ulcer on his coccyx. *Id.* at *1. The bedsore worsened into a large sacral decubitus ulcer. In late May 2020, the patient transferred to a hospital in Ann Arbor. *Id.* The patient sued the Flint hospital, alleging negligence regarding treatment for the ulcer. The defendant hospital asserted immunity under MCL 691.1475. *Id.* at *2. Plaintiff argued in response that there was no indication that the care provided for the ulcer was in support of the State's response to the COVID-19 pandemic. The trial court explained that "it is hard to imagine a more classic progression of events that is related to COVID." Plaintiff appealed. *Id.* at *3.

The Michigan Court of Appeals analyzed the procedural history and impact of the Governor's executive orders and their amendments, as well as the legislature codifying the executive orders in MCL 691.1471. *Id.* at *3-4. The Court then noted that the event at issue occurred during the statutory timeframe. MCL 691.1477. The privately owned hospital met the definition of a "healthcare facility" because the care provided for the ulcer was in support of the State's response to the COVID-19 pandemic. *Id.* at *6. The Court looked to the dictionary definition of the words "in support of" and "response" to reach the conclusion that the State's response to COVID-19 pandemic includes all actions taken as a result of the COVID-19 pandemic. *Id.* at *6-7. This includes healthcare for those infected with COVID-19 and regular healthcare services provided during the statutory period (between March 29, 2020 and July 14, 2020). *Id.* at *8. As a result, the hospital was entitled to immunity under MCL 691.1475. The Court also rejected the plaintiff's void for vagueness challenge because the case indisputably involved a patient who contracted COVID-19 and received treatment for it. *Id.* at *10-11.

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Michigan Court Rules Update

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Proposed Amendments

2024-05-Proposal to amend Court Rules to establish procedure for two new original actions in the Supreme Court related to presidential elections

Rule affected: MCR 7.306
Issued: March 27, 2024
Public Hearing: September 18, 2024

This proposed amendment of MCR 7.306 would establish a procedure for two new original actions in the Supreme Court related to presidential elections in conformity with MCL 168.46 (as amended by 2023 PA 269) and MCL 168.845a (as adopted by 2023 PA 255).

2022-10-Proposal to amend Court Rules to clarify and streamline the process for pro hac vice admission to practice in Michigan courts

Rule affected: MCR 8.126
Issued: March 27, 2024
Public Hearing: September 18, 2024

The proposed alternative amendments of MCR 8.126 would clarify and streamline the process for pro hac vice admission to practice in Michigan courts.

2022-46-Proposal to amend Court Rules to clarify where to file mandamus action

Rule affected: MCR 3.305
Issued: April 11, 2024
Public Hearing: September 18, 2024

This proposed amendment of MCR 3.305 would clarify where to file a mandamus action.

2021-05-Proposal to amend Court Rules to require a court to inform a defendant that final sentencing range may differ from original estimate

Rule affected: MCR 6.302
Issued: April 11, 2024
Public Hearing: September 18, 2024

Carlos A. Escurel

Carlos is an Associate Principal with the firm. He has defended healthcare professionals and institutions for over 17 years. His primary focus is handling complex medical malpractice claims and premises liability claims. Carlos has experience handling cases involving anesthesiology, emergency medicine, orthopedic surgery, general surgery, cardiology, obstetrics and gynecology, nursing, podiatry, and radiology.

Before joining Foley, Baron, Metzger & Juip, Carlos worked for a Detroit law firm handling medical malpractice claims for nursing homes, physicians and hospitals located in Wayne, Oakland, Macomb, Genesee, and Saginaw counties. Prior to that, he worked for a Livonia law firm defending one of Detroit's largest health systems in medical malpractice and premises liability cases. Carlos also has experience defending physicians in state licensing board matters.

While in law school, Carlos served as Chairperson of the Free Legal Aid Clinic (FLAC) and a Board Member for the Student Trial Advocacy Program (STAP). He also served as a member of the Student Board of Governors for the law school.

Carlos was recognized as a "Rising Star" by Michigan Super Lawyers in 2010, 2011, 2012, 2013, 2014, and 2015.

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The proposed amendment of MCR 6.302 would require a court that has engaged in a preliminary evaluation of the sentence to inform the defendant that the final sentencing range may differ from the original estimate and, if different, advise the defendant about whether they would be permitted to withdraw their plea, and include in the evaluation a numerically quantifiable sentence term or range.

2024-09-Proposal to clarify the number of allowed terms for members of the Michigan Judicial Council

Rule affected: MCR 8.128
Issued: May 30, 2024
Public Hearing: September 18, 2024

This proposed amendment of MCR 8.128 would limit the number of terms served consecutively to no more than two full three-year terms on the Judicial Council. If appointed to fill a vacancy on the Judicial Council, the new member may serve the remainder of the term and may consecutively serve for up to two full terms.

2022-38-Proposal to amend Court Rules regarding Taxation of Costs in Court of Appeals

Rules affected: MCR 2.625, 7.115, 7.219, 7.319
Issued: June 18, 2024
Public Hearing: To be determined

These proposed amendments would: (1) require courts to stay enforcement of taxed costs while an appeal is pending or until time for filing an appeal has passed, (2) align the timeframe for filing a bill of costs in the Court of Appeals with the timeframe for filing an application for leave to appeal, (3) incorporate into MCR 7.219 the Court of Appeals internal operating procedure 7.219(B) that allows, upon reversal of a Court of Appeals decision, the new prevailing party to file a new bill of costs in the Court of Appeals, and (4) include in the lists of taxable costs those costs awarded in the lower court in accordance with MCL 600.2445(4).

2024-06-Proposal to amend Court Rules regarding quo warranto action

Rules affected: MCR 3.306
Issued: June 18, 2024
Public Hearing: To be determined

This proposed amendment of MCR 3.306(B)(3)(b) would prohibit a court from granting leave to a private individual who is bringing a quo warranto action that relates to the offices of electors of President and Vice President of the United States, in accordance with MCL 600.4501(2).

2022-56-Proposal to amend Michigan Rules of Professional Conduct to clarify that a lawyer can appear in pro per

Rules affected: MRCP 3.7
Issued: June 26, 2024
Public Hearing: To be determined

This proposed amendment of MRCP 3.7 would clarify that in accordance with Const 1963, art 1, § 13, a lawyer can appear in pro per.

Adopted Amendments

2023-36-Amendments to Court Rules implementing the Justice for Kids and Communities legislation derived from recommendations made by the Michigan Task Force on Juvenile Justice Reform.

Rules affected: MCR 3.901, 3.915, 3.916, 3.922, 3.932, 3.933, 3.935, 3.943, 3.944, 3.950, 3.952, 3.955, 3.977, 6.931 and 6.933 and Addition of Rule 3.907

Issued: June 5, 2024
Effective: October 1, 2024

These amendments include new Rule 3.907 which addresses Screening Tools and Risk and Needs Assessments for minor children, as well as amendments to existing rules regarding Assistance of Attorney, Guardian Ad Litem, Pretrial Procedures in Delinquency and Child Protection Proceeding, Summary Initial Proceedings, Acquiring Physical Control of Juvenile, Preliminary Hearing, Dispositional Hearing, Probation Violation, Wavier of Jurisdiction, Designation Hearing, Sentencing or Disposition in Designated Cases, Termination of Parental Rights, Juvenile Sentencing Hearing, and Juvenile Probation Revocation.

Watch the Michigan Supreme Court Public Administrative Hearing from September 18th on These Proposed Amendments.

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