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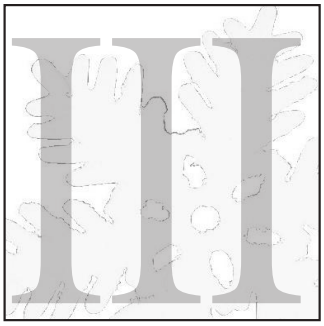

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President's Corner

By: Terence P. Durkin, *Kitch Drutchas Wagner Valitutti & Sherbrook, P.C.*
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Terence Durkin's practice blends labor and employment law with medical malpractice and general litigation. His years of experience as a litigator gives him a unique ability to help clients sort through the challenging and ever-changing world of labor and employment rules and regulations. Clients come to Terence and the firm's labor and employment practice group for guidance because they understand the priorities and risks involved with managing a diverse workforce, creating contracts, and implementing the best policies and procedures.

Terence and the Kitch labor and employment practice group offer a full array of employment and labor law services, including dispute resolution in all types of forums: the courts, mediation panels, arbitration, and administrative agencies. Clients rely on Terence to help them navigate collective bargaining, contract administration, and grievance and arbitration proceedings, and he often participates with them in those proceedings.

Terence plays an active role in the community by serving on the Executive Board of the Michigan Defense Trial Counsel, chairing the Ascension Providence Foundation, and being a member of the Plymouth Rotary. Most recently, he was elected to the Board of Directors and the Core Leadership Team of Oak Mac SHRM (Society of Human Resource and Management).

Terence received his Bachelor of Arts in political science from Millikin University in Decatur, Illinois, and his Juris Doctorate from Western Michigan University Cooley Law School, where he was Article Editor of the Journal of Practical and Clinical Law. He is licensed to practice law in Michigan as well as the United States District Courts of Eastern and Western Michigan.

He is married to Jessica and lives in Northville.

It is my distinct honor and pleasure to begin my term as the 41st President of the Michigan Defense Trial Counsel (MDTC). The MDTC was established in 1979 to enhance and promote the Defense Bar. Over the years, the MDTC has had a profound impact on the legal system and the practice of law through its amicus briefs, *Michigan Defense Quarterly* publication, seminars, and webinars.

During the past year, the COVID-19 pandemic affected every industry on a global scale. The courts and legal profession were not immune to these changes and had to adapt to how we practice law. We went from working in our offices to working remotely. Meetings, depositions, and court proceedings took place by Zoom or some other virtual technology. There has been a seismic shift in how we practice our profession, and it appears to be "the new normal"–at least for the foreseeable future.

The MDTC also had to adapt to the changes brought about by the pandemic. Outgoing President Irene Bruce Hathaway had a year that she never expected to have as the leader of the MDTC. She had to make difficult decisions, including canceling the annual seminar and rescheduling the third annual Excellence in Defense Awards. These were not easy decisions to make, and they showed her steady leadership. Her guidance during these tumultuous times has left the MDTC financially sound with a strong and active membership. I have very large shoes to fill as I embark on my role as president.

As I begin my presidency, I look back at all that the MDTC has accomplished since I became a member in 2009. These accomplishments could not have been achieved without the support and tireless efforts of the MDTC leadership and its members. Each person brings his or her vision and perspective on how to improve the MDTC while adapting to the ever-changing social and legal environment. In addition to the leadership and members, our Executive Director, Madelyne Lawry, and her hard-working team, provide the much-needed support to effectively run this organization. I thank each and every one of you for all that you have done to ensure that the MDTC moves forward.

In the upcoming year, the MDTC must continue to adapt to the changes brought about by the pandemic. We must remain fiscally responsible, as well as exercising appropriate caution and consideration with our events. The silver lining to this pandemic is that many of us are finally learning to use remote technologies such as video conferencing and cloud sharing documents (myself included!). These new technologies will, in the long run, allow us to be more efficient and enable us to serve our clients better.

In addition to adapting to our "new normal," the MDTC must continue to be a diverse organization. We are all in this together as we navigate the changes that have transpired over the past year and move forward as an organization and society. The MDTC can only grow and improve as an organization by the input and involvement of its members. Therefore, if you are not a member of the MDTC, I encourage you to join. If you are a member, I encourage you to become more active in one of the MDTC's committees or sections. Your voice and perspective are welcome.

I hope to make a difference in my year at the helm by growing and improving the MDTC with you. If there is something you think we can do better, please do not hesitate to let me know. I look forward to seeing you all at future events, even if it is by Zoom.

Setting the Stage: Tips for Making Your Best Impression and Conveying the Message You Want During a "Zoom" Hearing[1]

By: Donald C. Wheaton, Jr. and Hon. Tracey A. Yokich

Executive Summary

Over the past four months, the COVID-19 pandemic has changed legal practice as we know it. With Michigan Supreme Court Administrative Orders temporarily suspending most in-person court hearings, Zoom hearings became the new "norm." Even with the easing of restrictions, Zoom hearings will more likely than not continue to be the "norm" for the foreseeable future. There are several important factors to take into consideration when attending a Zoom hearing.

Even as the Governor relaxes the restrictions imposed through Executive Orders and life outside the practice of law resumes some semblance of normal, it would appear that "Zoom" hearings are with us for the foreseeable future. Accordingly, all practitioners should think of each court appearance as if they were staging a show – because they are.

For example, the first thing you must consider is scenery. When you attend a theater production and the curtain opens, one of the first things you'll see is the backdrop that helps evoke the setting of the tale. So, remember, what you choose to put "upstage" could upend your argument. Are you looking down into your laptop or phone and the ceiling is your backdrop? Or are you sitting at your kitchen table with your refrigerator in view? Don't Zoom from your bed, either! And avoid having your well-stocked bar anywhere in the background.

You should not choose a "virtual" background from Zoom; it can be distracting for other participants, and when you move your image can -- and will -- disappear into it. If in doubt, a blank wall is a good choice so others can easily focus on what you are saying. Remember that you must be deliberate and careful of "what's behind you" when choosing your Zoom location. This attention to detail will inspire a client's confidence in their decision to seek your help.Lighting is also crucial, and equally as important as your scenery choice. Whatever you do, don't be backlit by positioning yourself in front of a window, or positioning yourself under a light fixture while peering down at

Don Wheaton is a solo general practice litigation attorney who focuses on real people with real problems. His practice involves mainly divorce and family law matters, and he also handles consumer bankruptcy, criminal defense, civil/commercial litigation, probate, and driver's license restoration. A graduate of Alma College and the University of Michigan Law School, Don is an active volunteer in his community, having served more than 26 years on the Lakeview Public Schools' Board of Education, 18 years with the St. Clair Shores Goodfellows, and over 20 years as a highly-decorated Boy Scout leader. In his spare time, Don enjoys reading, music, hiking, camping, cooking, international travel, and the company of friends.

Judge Tracey A. Yokich was appointed to the Macomb County Probate bench by Governor Jennifer M. Granholm on July 1, 2003 and was elected to the 16th Circuit Court for the County of Macomb in 2004. She is a 1982 graduate of James Madison College at Michigan State University and received her Juris Doctorate from the University of Detroit School of Law in 1985. Judge Yokich subsequently clerked for the Hon. George Clifton Edwards, Jr. in the United States Court of Appeals for the Sixth Circuit in Cincinnati, OH.

Judge Yokich returned to Michigan and served as a Macomb County Assistant Prosecuting Attorney, from 1986 to 1989, Macomb County Assistant Corporation Counsel from 1989 to 1990. She returned to the Office of the Prosecuting Attorney in 1997.

She has also served three terms in the Michigan House of Representatives representing the citizens of Eastpointe, St. Clair Shores, Lake Township and Harrison Township from 1991-1996. During her tenure in the Michigan House of Representatives, Judge Yokich served on the Appropriations Committee, Judiciary Committee, Public Health Committee, and the Conservation, Environment, and Great Lakes Committee.

Judge Yokich is a Michigan State Bar Foundation Fellow and a Past President of the Michigan Judges Association. She is a member of the Selfridge Base Community Council, the Michigan Air Guard Historical Association and served in the Michigan Air National Guard from 2005-2006.

your webcam. Is your lighting overhead? Are you relying on ambient light (now that you're not in front of a window)? Do you have lamps you can use to provide a more pleasant atmosphere? Have you considered changing light bulbs to select a more flattering color? Is the light you are using bouncing off your forehead (or your eyeglasses) and blinding the viewer? Use lighting to your advantage, and provide others watching a softer and less stark impression whenever possible.

Costuming and makeup are also important, whether you like it or not. If you wouldn't show up in court in a bathing suit (with or without a tee-shirt or robe or other cover), don't do it on Zoom! Dress for a court hearing as if you were appearing in person. It shows your client and the court that you take the matter seriously. If you are not willing to put some time and effort into your appearance, the court may assume you have been equally lax in preparing and presenting your client's case. So, wear your suit and tie, gents; ladies, you know what is and isn't professional. Watch your favorite newscaster and note what colors and designs photograph well. A great starting point is to avoid white shirts in favor of blue or beige and save plainly visible checks or stripes in your suits or shirts for your next in-person appearance as they tend to blur on camera. But keep wearing those sharp ties.

It goes without saying that no shorts, tank tops, or tee shirts should be worn, and for men, no open-collared shirts. While it may be tempting to cheat or skimp on your appearance by looking well on top but wearing shorts or pajama bottoms or yoga pants below, that is a big "no-no" and an invitation for the inevitable disaster in your surroundings that forces you to stand up and make a "reveal" you may not want. Your look should be completely professional, from head to toe. Take the time to check on your client's appearance before the hearing to avoid potential embarrassment, too: remember, your hearing will be live streaming on YouTube!

Actors and directors work together to plot and point the paths the actor will take on the stage to project the purpose of the production. This is called "blocking." You should similarly think about blocking from the standpoint of whether you wish to be seated for a Zoom hearing. Ordinarily, we don't sit in court when we are making arguments, so why would you do it on Zoom? Stand up! (But if you insist on sitting and you are wearing a jacket, pull the back of the jacket down under your behind so that you don't have a huge fabric ripple behind your neck.) Find something you can use to put your file/notes/papers on so that they are immediately handy for your use and reference, but hopefully can't be seen -- and be distracting as a result. And take note of your posture and stance. If your proportions are "more generous," as it were, you may wish to position yourself diagonally to the camera so as to make you seem more frugal. Regardless, position yourself to look attentive and alert at all times**.** And **always, always, always** make sure your camera is stationary -- you don't want the judge getting motion sickness during your hearing.

The height and quality of your camera also factor in. If your camera is not at eye level or a bit above, and you are using a laptop or smartphone camera where you are peering down into the webcam, you run the risk of distracting the observers with an overly-expansive view of your nostrils (or worse; it's just not a picture you want to project.) Consider purchasing a 1080p camera, too: these are relatively inexpensive, as good versions can be had for less than $100, and they have better photogenic and audio quality (than do most built-in microphones). In short: don't be cheap, a good camera and microphone is worth the minimal investment.

You should also demur from making additional comments after your case is concluded until you are certain you have left the virtual courtroom. There is some lag time when you are removed from the hearing, and video may be off, but your microphone may still be hot!

Every electronic device that you use in a Zoom hearing should be renamed with your first and last name. If you really want to be a superstar, rename your device for each hearing and add the case number of the matter on which you appear. Remember, you must turn off the device completely after you have changed your name and restart it for this to work. Test it out well before your hearing. This will allow the court to identify you in the waiting room. Failure to properly name your device will pretty much guarantee you will be the last matter called, if at all. And this should be a relatively easy and straightforward point: give the Court your real, honest-to-goodness name you have listed with the State Bar (no "Fratboy 2010" or something equally juvenile or inappropriate).

You are also responsible for making sure your client's device is identifiable and appropriately named. On most days, the court staff does not have the time to call or contact "mystery" participants, identify them, instruct them on how to rename their device, and rename them for the judge.

Many of your Zoom hearings will require the use of exhibits – otherwise known as props in the theater. And how you use and manipulate those props could be considered choreography. You need to work with the court before the hearing to see how it wants exhibits identified, produced, and ready to be used during your hearing. Don't hesitate to ask the court to set up a practice session – this is new territory for the Judge too! Equally important are the orders or judgments you want the court to enter: it is your burden, not the clerk's, secretary's, or judge's, to find out the best way to get the paper signed that you and your client require.

Each Judge has a separate email account for document exchange only -- submitting paperwork 48 hours before the hearing (e.g., JudgeYokichClerk@macombgov.org). Don't confuse that e-mail used for items you want the Judge to have ***on the date of the hearing*** (proposed consent judgments, judge's copy of pleadings, confidential records, etc.) with the Court's regular e-file/file by fax/file by email system. The judicial court clerks will not accept any other than the limited scope of documents, and those they don't accept

won't be "officially" received by the court or entered into Courtview.

Finally, you must remember that you are also a director for your client's Zoom presentation. As the attorney and advocate, it is on you to virtually "meet" with your client on Zoom to ensure that the client's background, lighting, dress, stance, and name are appropriate. Make sure that both you and your client have access to sufficiently strong Wi-Fi to be heard and seen clearly.

Counsel and their clients should ***always*** participate by video if possible. Participating by audio only is a far less effective way to communicate. Just as you would advise your client to show up wearing court-appropriate attire, not chawing on their gum, directing their attention to the judge and making sure they listen carefully, just because the hearing is being held virtually doesn't relieve you of your responsibility; if anything, a Zoom hearing exponentially increases your culpability for your client.

If you decide that your client will come to your office and will participate over the same device, please follow the CDC recommendations for social distancing and use face masks during the hearing. It is highly unlikely that the court will ask you to sit closer together without face masks. Even if the judge does, it is certainly less embarrassing than being asked to don the mask and rearrange your seating, causing an unnecessary delay. Even more importantly, unless you advise the court before your hearing by email (e.g., JudgeYokichClerk@macombgov.org) that your client will appear with you – the Court staff has no way of knowing that until you are the last matter called that day. And because the choices that both you and your client make when presenting the client's case to the Court impact the court's impression of you, your client, and your client's case, it is incumbent upon you as the experienced professional to ensure that as much as is possible isn't left to chance. That the hearing is virtual makes no difference.

Overture! Curtain! Lights!

Remember, please be safe and be healthy.

Endnotes

1 This article was previously published in the July issue of the Macomb County Bar Association's Bar Briefs. It is republished with permission.

Summary and Analysis of Executive and Administrative Orders Issued in Response to the COVID-19 Pandemic and Their Impact on the Legal System

By: Anthony D. Pignotti, *Foley, Baron, Metzger & Juip, PLLC*

Executive Summary

Over the past four months, Governor Whitmer and the Michigan Supreme Court have issued over 160 Executive Orders and Administrative Orders in response to the COVID-19 pandemic. Many of those orders impact the way that the legal system operates in Michigan. As the official State of Emergency extends into yet another month, it is crucial for litigants and their attorneys to understand how the Executive and Administrative Orders impact civil litigation deadlines and court proceedings in Michigan. This article summarizes the impact of the various orders that have been issued and provides a detailed analysis of how those orders result in the multiple rules summarized in the article.

Anthony D. Pignotti is a Partner at Foley, Baron, Metzger & Juip, PLLC where he specializes in complex medical malpractice and birth trauma litigation. He also has significant experience defending healthcare providers in § 1983 litigation in federal court. He has a growing trial practice, having tried numerous cases in both federal and state courts to verdict. He can be reached at apignotti@fbmjlaw.com.

Introduction

Over the past four months, Gov. Whitmer and the Michigan Supreme Court have issued over 160 Executive Orders and Administrative Orders in response to the COVID-19 pandemic, many of which impact the way that the legal system operates in Michigan. These orders have affected the judiciary and litigants in a piecemeal fashion, making it difficult to track the orders' impact.

The following is a summary of how the Executive and Administrative Orders impact civil litigation deadlines and court proceedings in Michigan and a detailed analysis of how those orders result in the various rules summarized below.

Expiration of Summons

The deadline for the expiration of summons was suspended as of March 24, 2020 and extended for a period of 80 days, reflecting the period between March 24, 2020 and June 12, 2020.

> A summons is issued by the court clerk on the date that a complaint is filed. MCR 2.102(A). MCR 2.102(D) provides that a summons expires 91 days after the date the summons is issued.
>
> Administrative Order 2020-9, which was further extended by Administrative Order 2020-12, extended the deadline for the expiration of summons indefinitely until further court order. On June 26, 2020, Administrative Order 2020-19 indicated that the time deadline set forth in MCR 2.102(D) is extended 80 days, reflecting the period between March 24, 2020 and June 12, 2020.

Filing of a Complaint

The statutes of limitations, statutes of repose, and any other deadline applicable to the commencement of a civil action and proceeding in Michigan were suspended from March 10, 2020 through June 20, 2020, and were therefore tolled during that period. For time periods that began before March 10, 2020, filers have the same number of days to submit their filings on June 20, 2020, as they had on March 10, 2020. For filings with time periods that did not begin to run because of the exclusion period, filers have the full periods of filing beginning on June 20, 2020.

> MCR 2.101(B) provides that a civil action is commenced by filing a complaint with a court.
>
> The deadlines for when a complaint must be filed with a court in order to commence a civil action are established by the statutes of limitations and statutes of repose set forth in the Michigan Compiled Laws.

Administrative Order 2020-3 and Amended Administrative Order 2020-3, taken with Executive Order 2020-58, which extended and elaborated upon Administrative Order 2020-3, provide that all deadlines applicable to the commencement of all civil actions and proceedings were suspended as of March 10, 2020, and are tolled until the end of the declared states of disaster and emergency. Executive Order 2020-99 extended the state of disaster and state of emergency until June 19, 2020 at 11:59 p.m.

On June 12, 2020, the Michigan Supreme Court issued Administrative Order 2020-18, which, effective June 20, 2020, rescinds Administrative Order 2020-3.

Initial Answer to Complaint or Motion Raising a Defense

All deadlines for answers to an initial complaint or an initial motion raising a defense or objection to an initial complaint have been suspended from March 10, 2020 through June 20, 2020, and are tolled during that period. For time periods that began before March 10, 2020, filers have the same number of days to submit their filings on June 20, 2020, as they had on March 10, 2020. For filings with time periods that did not begin to run because of the exclusion period, filers have the full periods of filing beginning on June 20, 2020.

Administrative Order 2020-3 and Amended Administrative Order 2020-3, taken in conjunction with Executive Order 2020-58, which extended and elaborated upon Administrative Order 2020-3, provide that all deadlines applicable to the filing of an initial pleading, which includes an initial Answer under MCR 2.110, or an initial motion raising a defense or an objection under MCR 2.116, were suspended as of March 10, 2020 and shall be tolled until the end of the declared states of disaster and emergency. Executive Order 2020-99 extended the state of disaster and state of emergency until June 19, 2020 at 11:59 p.m.

On June 12, 2020, the Michigan Supreme Court issued Administrative Order 2020-18, which, effective June 20, 2020, rescinds Administrative Order 2020-3.

Service of Pleadings and Other Documents

The requirements of MCR 2.107(C) pertaining to service of pleadings and other documents have been temporarily amended, effective April 17, 2020, and continuing indefinitely until further order from the Michigan Supreme Court, to require all service of process under MCR 2.107 to be performed using electronic means (such as e-filing where available, e-mail, or fax).

The rules pertaining to service of pleadings and various other documents are set forth in MCR 2.107. MCR 2.107(C) sets forth how pleadings and other documents covered by MCR 2.107 must be served.

Administrative Order 2020-9, which was further extended by Administrative Order 2020-12, requires all service of process under MCR 2.107(C) to be performed using electronic means (e-filing where available, e-mail, or fax, where available) to the greatest extent possible. E-mail transmission does not require agreement by the other party(s) during the effective period of this order, but should otherwise comply as much as possible with the provisions of MCR 2.107(C)(4). This order became effective April 17, 2020, and will continue to remain in effect until further order of the Michigan Supreme Court. Administrative Order 2020-19 reiterates that the requirements of Administrative Order 2020-9 regarding service shall continue in effect until further order of the court.

Subpoenas

Effective April 17, 2020, and continuing indefinitely until further order of the Michigan Supreme Court, subpoenas issued for depositions or for testifying in open court, and other limited circumstances, may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

Administrative Order 2020-9, which has been further extended by Administrative Order 2020-12, permits subpoenas issued under MCR 2.305, 2.506, 2.621(C), 9.112(D), 9.115(I)(1), and 9.212, to require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools. These provisions became effective April 17, 2020, and continue indefinitely until further order of the Michigan Supreme Court. Administrative Order 2020-19 reiterates that the requirements of Administrative Order 2020-9 regarding subpoenas shall continue in effect until further order of the court.

Trials

All civil jury trials were delayed until June 22, 2020, at the earliest. Local Court Orders may delay jury trials for a longer period of time.

Administrative Order 2020-10 delayed all jury trials for a period of 60 days from April 23, 2020 until June 22, 2020, or as otherwise provided for by local order, whichever date is later.

While the 60-day delay of jury trials instituted by Administrative Order 2020-10 officially ended on June 22, 2020, most courts have not yet resumed civil jury trials. Local court orders should be consulted in order to determine whether

specific courts have resumed civil jury trials.

Stay of Proceedings to Enforce Judgment

The deadlines for a stay of proceedings to enforce judgment as set forth in MCR 2.614 were suspended as of March 24, 2020, and have been extended for a period of 80 days, reflecting the period between March 24, 2020 and June 12, 2020.

The provisions of MCR 2.614 regarding the stay of proceedings to enforce judgment contain many deadlines.

Administrative Order 2020-9, which was further extended by Administrative Order 2020-12, extended the deadlines for a stay of proceedings to enforce judgment as set forth in MCR 2.614 indefinitely until further order of the Court. Administrative Order 2020-19 indicates that the time deadline set forth in MCR 2.614 has been extended 80 days, reflecting the period between March 24, 2020 and June 12, 2020.

Post-Judgment Motions

The deadlines related to post-judgment motions filed in the trial court were suspended as of March 24, 2020, and have been extended for a period of 76 days.

Administrative Order 2020-9, which was further extended by Administrative Order 2020-12, extended the deadlines related to post-judgment motions filed in the trial court indefinitely until further order of the Michigan Supreme Court. On June 26, 2020, Administrative Order 2020-19 indicated that the time deadlines for rules regarding post-judgment motions have been extended for 76 days, or until June 8, 2020, consistent with Administrative Order 2020-16.

Appeals

All filing deadlines in the Michigan Supreme Court and the Michigan Court of Appeals were suspended as of March 24, 2020, and were tolled until June 8, 2020. For filings with time periods that started prior to March 24, 2020, filers are permitted the same number of days to submit their filings on June 8, 2020, as they had when the tolling went into effect. For filings with time periods that did not begin to run because of the suspended and tolled period, the filers shall have the full periods for filing beginning on June 8, 2020.

Administrative Order 2020-4 suspended all filing deadlines in the Supreme Court and the Court of Appeals as of March 24, 2020 (the effective date of Executive Order 2020-21) and tolled the deadlines until the expiration of Executive Order 2020-21, or a subsequent Executive Order that extends the period in which citizens are required to suspend activities that are not necessary to sustain or protect life.

On June 3, 2020, the Michigan Supreme Court issued Administrative Order 2020-16, which, effective June 8, 2020, rescinded Administrative Order 2020-4.

General Court Proceedings

From March 18, 2020 through June 26, 2020, trial courts were required to limit access to courtrooms and other spaces to no more than 10 persons, including staff, and to practice social distancing and limit court activity to only limited, prescribed essential functions. All other civil matters, including trials, were required to be conducted remotely using two-way interactive video technology or other remote participation tools or they were required to be adjourned during that period of time. The courts are still expected to continue to use these requirements as they return to full capacity under the requirements of Michigan Supreme Court Administrative Order 2020-14.

On March 18, 2020, the Michigan Supreme Court issued Administrative Order 2020-2, which directs trial courts to limit access to courtrooms and other spaces to no more than 10 persons, including staff, and to practice social distancing and limit court activity to only essential functions, which include infectious disease proceedings under MCL 333.5201 *et seq*. and limited proceedings regarding personal protection orders. Administrative Order 2020-2 further directs that all other civil matters, including trials, must be conducted remotely using two-way interactive video technology or other remote participation tools or they must be adjourned until after April 3, 2020, or as provided by subsequent order.

Administrative Order 2020-2 was extended by Administrative Order 2020-5, Administrative Order 2020-7, and Administrative Order 2020-12. On June 26, 2020, Administrative Order 2020-2 was rescinded by Administrative Order 2020-19. Administrative Order 2020-19 further states that Trial Courts are expected to continue to follow the requirements of Administrative Order 2020-2 as they return to full capacity under the requirements of Administrative Order 2020-14.

Use of Videoconferencing for Court Proceedings

Courts may conduct proceedings remotely using two-way interactive videoconferencing technology or other remote participation tools. Courts are directed to make a good faith effort to conduct proceedings remotely whenever possible. These rules went into effect on April 7, 2020, and continue indefinitely until further order of the Michigan Supreme Court.

On April 7, 2020, the Michigan Supreme Court issued Administrative Order 2020-6, which authorizes judicial officers to conduct proceedings remotely

(whether physically present in the courtroom or elsewhere) using two-way interactive videoconferencing technology or other remote participation tools under the following conditions:

- Any such procedures must be consistent with a party's Constitutional rights;
- The procedure must enable confidential communication between a party and the party's counsel;
- Access to the proceeding must be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule;
- The procedure must enable the person conducting or administering the procedure to create a recording sufficient to enable a transcript to be produced after the activity.

Administrative Order 2020-6 also requires all judgments to make a good faith effort to conduct proceedings remotely whenever possible.

Administrative Order 2020-6 went into effect immediately on April 7, 2020. Administrative Order 2020-6 was extended by Administrative Order 2020-7 and was further extended by Administrative Order 2020-12. Administrative Order 2020-19 reiterates that courts should continue to expand the use of remote participation technology (video or telephone) as much as possible.

Collection of Personal Information

Courts may collect personal information, including mobile phone numbers and e-mail addresses, from any party or witness to a case to facilitate scheduling of and participation in remote hearings or to facilitate case processing.

In order to further the objectives of Administrative Orders 2020-6 and 2020-9, Administrative Order 2020-13, issued on April 29, 2020, authorized courts to collect personal information, including mobile phone numbers and e-mail addresses, from any party or witness to a case in order to facilitate scheduling of and participation in remote hearings or to facilitate case processing. Administrative Order 2020-13 further authorized the collection of that information using a SCAO-approved form. Administrative Order 2020-19 clarified that the form used to collect information is to be nonpublic and confidential.

General Court Operations

Courts must adhere to the phased return to operations as determined by the policy guidelines established by the State Court Administrative Office, which requires Courts to maintain their current level of operations until the SCAO approves a Court's plan to expand in-court proceedings. In other words, most courts will continue to conduct remote proceedings until they formulate a phased return to operations plan, which is then approved by the SCAO. The Michigan Supreme Court has issued Return To Full Capacity: COVID-19 Guidelines For Michigan's Judiciary[1] to assist courts in developing their plan.

Administrative Order 2020-14, issued May 6, 2020, directs courts to adhere to the phased return to operations as determined by policy guidelines established by the State Court Administrative Office. Those policies include:

- Continued use and expansion of remote hearings as practicable and increase of the court's capacity to conduct business online, including increased remote work by employees.
- Continued limited access to courtrooms and other spaces to no more than 10 persons, including staff.
- Imposition of social distancing practices of at least 6 feet for both employees and visitors.
- Limited in-person court activity to essential functions that cannot be conducted remotely.
- In accordance with CDC guidelines,
  - Adoption of policies that ensure appropriate cleaning and sanitation.
  - Adoption of policies that appropriately protect vulnerable individuals.
  - Adoption of policies to safely screen employees and the public for potential cases of illness.

Administrative Order 2020-14 also directs courts to maintain their current level of operations until SCAO approves a court's plan to expand in-court proceedings. Courts are currently operating under the requirements of Administrative Order 2020-2, which remains in effect.

The Michigan Supreme Court has issued Return To Full Capacity: COVID-19 Guidelines For Michigan's Judiciary to assist courts in developing a plan to return to in-person proceedings.

Administrative Order 2020-19, issued on June 26, 2020, reiterates the requirements of Administrative Order 2020-14.

Conclusion

While many of the restrictions placed on courts and litigants by Gov. Whitmer's Executive Orders and the Michigan Supreme Court's Administrative Orders have or will come to an end, many remain in place. It is crucial for litigants and their attorneys to understand the impact of the various Executive and Administrative Orders and how they impact the timing requirements, deadlines and other issues in their cases.

Endnotes

1 https://courts.michigan.gov/News-Events/Documents/ReturntoFullCapacityGuide.pdf

Michigan's New No-Fault Fee Schedule for Fools (*Like Me)

By: Matthew S. LaBeau, *Collins Einhorn Farrell PC*

Executive Summary

As of July 2, 2021, charges for medical benefits will be subject to a fee schedule. The amount payable under the fee schedule for these charges depends on the nature of the medical care provided and whether the service has a rate payable under Medicare.

The statute also provides other limitations and restrictions on benefits. A neurological rehabilitation clinic must be accredited, and in-home, non-professional attendant care is now limited to 56 hours per week. There is also a new administrative process for challenging the overutilization of services. There is a pending constitutional challenge to these new limitations, and likely more to follow. That being said, here is what we know now….

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Introduction

Since the Michigan no-fault act was passed in 1973, the only limitation on the amount of a medical provider's charge arising out of a motor vehicle accident was that it had to be "reasonable." A large body of case law was created over the years addressing what information could be considered when determining whether a charge or a payment of that charge, if less than the full amount, was reasonable.

That all changed with the reform legislation passed on June 11, 2019. As of July 2, 2021, a physician, hospital, clinic, or another person that renders treatment or training for injuries arising out of a motor vehicle accident will be subject to a fee schedule. The amount payable under the fee schedule for these charges depends on the nature of the medical care provided. Also, providers will be entitled to a different reimbursement rate if the service has a rate payable under Medicare.

The statute also provides other limitations and restrictions on benefits. A neurological rehabilitation clinic is not entitled to payment or reimbursement unless accredited by an approved organization. In-home, non-professional attendant care, previously unlimited, is now subject to the 56 hours per week limitation found in the Michigan Worker's Compensation Disability Act. There is also a new administrative process for challenging the overutilization of services.

There is a pending constitutional challenge to the new fee schedule, and we can expect further challenges as parties attempt to implement this new law. That being said, here is what we know now:

The Current "Reasonable" Standard

The current standard for claims covered by personal injury protection benefits remains in effect through July 1, 2021. That standard is as follows:

> "A physician, hospital, clinic, or other person or institution lawfully rendering treatment … may charge a **reasonable amount** for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution **customarily** charges for like products, services and accommodations in cases not involving insurance."

Therefore, a provider's charges under the no-fault act have to be a reasonable amount and the amount customarily charged. These are two separate standards. A provider is barred from charging a no-fault patient, and thus the carrier, any amount more than the provider's customary fee.[1] Insurers, however, must determine in each circumstance whether a charge is reasonable in light of the service or product provided and may

independently review and audit medical charges to determine reasonableness.[2] As such, a provider's customary charge may be reasonable in one instance and not in another.[3] In addition, carriers can request information on the wholesale cost of stand-alone items that can be easily quantified, such as certain durable medical equipment.[4]

This undefined standard has resulted in endless litigation between medical providers and insurance carriers, with injured persons sometimes caught in the middle. For example, an MRI facility charges $5,400 and an insurance carrier pays $1,700 based on its audit of the charges. With no guidance on what charge is or is not reasonable, litigation ensues, resulting in a settlement or jury verdict somewhere between the two numbers.

The current law remains in effect through July 1, 2021, with the new fee schedule applying to treatment provided on or after July 2, 2021.[5] Until that time, the reasonable charge standard continues to apply.[6] A new lawsuit pending in the Ingham County Circuit Court, *Ellen Andary et al v USAA Casualty et al*,[7] currently is challenging the applicability of the new fee schedule, and other limitations set forth in MCL 500.3157, to persons injured in motor vehicle accidents occurring before June 11, 2019. It also seeks to invalidate the fee schedule and eliminate other limitations.

The Fee Schedule for Indigent Volume or Freestanding Rehabilitation Facilities

Even after the implementation of the amended statute, the above language of MCL 500.3157 largely remains intact, but the statute has been expanded to include a fee schedule that limits reimbursement rates. The fee schedule applies depending on the nature of the medical care provided.

A medical provider that has 20-30 percent indigent volume or is a freestanding rehabilitation facility is subject to the following fee amounts:[8]

- After July 1, 2021 and before July 2, 2022, 230% of the amount payable under Medicare (or 70% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).
- After July 1, 2022 and before July 2, 2023, 225% of the amount payable under Medicare (or 68% of charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).
- After July 1, 2023, 220% of the amount payable under Medicare (or 66.5% of charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).

The indigent volume requirement is determined pursuant to the methodology used by the Department of Health and Human Services in measuring eligibility for Medicaid disproportionate share payments.[9] To qualify for this fee schedule by indigent volume, documentation must be submitted to the director of the Department of Insurance and Financial Services ("DIFS"). The director will perform an annual review to certify whether a provider qualifies for reimbursement under this fee schedule.

Note that if the indigent volume for a provider is 30 percent or more of the total treatment or training, the above fee schedule is disregarded. Instead, the provider is entitled to 250 percent of the amount payable to the person for the treatment or training under Medicare, or 78 percent of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable.

The DIFS director will designate not more than two freestanding rehabilitation facilities that will qualify for payments under this specific fee schedule per year. A "freestanding rehabilitation facility" means an acute care hospital to which all of the following apply:

i. The hospital has staff with specialized and demonstrated rehabilitation medicine expertise.
ii. The hospital possesses sophisticated technology and specialized facilities.
iii. The hospital participates in rehabilitation research and clinical education.
iv. The hospital assists patients to achieve excellent rehabilitation outcomes.
v. The hospital coordinates necessary post-discharge services.
vi. The hospital is accredited by 1 or more third-party, independent organizations focused on quality.
vii. The hospital serves the rehabilitation needs of catastrophically injured patients in this state.
viii. The hospital was in existence on May 1, 2019.

The Fee Schedule for Level I or Level II Trauma Centers

Level I or level II trauma center hospitals have their own fee schedule.[10] A Level I or II trauma center is defined as a hospital verified as a level I or level II trauma center by the American College of Surgeons Committee on Trauma.[11] Those facilities are subject to the following:

- After July 1, 2021 and before July 2, 2022, 240% of the amount payable under Medicare (or 75% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).
- After July 1, 2022 and before July 2, 2023, 235% of the amount payable under Medicare (or 73% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).
- After July 1, 2023, 230% of the amount payable under Medicare (or 71% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).

To be subject to this fee schedule, the treatment must be for an emergency medical condition and rendered before the patient is stabilized or transferred. If the treatment is not for an emergency medical condition or is rendered after the patient is stabilized or transferred, this fee schedule would not apply.

The statute borrows the definition of "emergency medical condition" from the

Social Security Act.[12]. In that statute, the term "emergency medical condition" means:

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in--
  (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
  (ii) serious impairment to bodily functions, or
  (iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant woman who is having contractions--
  (i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or
  (ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

The terms "stabilized" and "transfer" also are defined through the Social Security Act.[13] "Stabilized" is defined to mean that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer from a facility, or in the instance of pregnancy, the woman has delivered. "Transfer" is defined to mean the movement (including discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or associated with) the hospital.

The Fee Schedule that Applies to All Other Providers

Medical providers that do not fall into either of the above categories are subject to a fee schedule that provides lower reimbursement rates.[14] A provider that renders treatment or rehabilitative occupational training is limited to payment or reimbursement as follows:

After July 1, 2021 and before July 2, 2022, 200% of amount payable under Medicare (or 55% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).

After July 1, 2022 and before July 2, 2023, 195% of amount payable under Medicare (or 54% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).

After July 1, 2023, 190% of amount payable under Medicare (or 52.5% of the charge description master/average charge as of January 1, 2019 if Medicare does not provide an amount payable).

Calculation of Charges with No Medicare Rate

As referenced above, when Medicare does not provide an amount of payment, providers are subject to a different reimbursement rate.[15] In that instance, the rate is calculated by taking a percentage of the amount payable for the treatment or training under the provider's charge description master in effect on January 1, 2019. If the provider did not have a charge description master on that date, then the percentage is taken from the average amount the provider charged for the treatment on January 1, 2019.

The amounts payable under Medicare refer to fees for service payments under parts A, B, and D of the federal Medicare program.[16] The fees do not consider, however, limitations unrelated to the rates in the fee schedule, such as limitation or supplemental payments related to utilization, readmissions, recaptures, bad debt adjustments, or sequestration.

A "charge description master" is a uniform schedule of charges represented by the person as its gross billed charge for a given service or item, regardless of payer type. There is no guidance on how the average amount charged by the provider is established, so that is left up to interpretation.

The amount in effect on January 1, 2019 must be adjusted annually for inflation by the percentage change in the medical care component of the Consumer Price Index for the year preceding the adjustment. In this instance, the Consumer Price Index refers to the most comprehensive index of consumer prices available for Michigan under the United States Department of Labor, Bureau of Labor Statistics.

Attendant Care Limitations

Attendant care is an "allowable expense" under MCL 500.3107(1)(a) and, before reform, not subject to any specific limitations in amount or duration, to the extent the benefit was payable. The amended MCL 500.3157 incorporates the restrictions on attendant care provided in the Michigan Worker's Compensation Act, which limits certain attendant care to 56 hours per week.[17]

The limitation in section 3157(10) applies to "attendant care rendered in the injured person's home." It is unclear whether this limitation applies to attendant care provided in someone else's home. Additionally, this limitation only applies to attendant care provided directly, or indirectly through another person, by any of the following:

(a) An individual who is related to the injured person.
(b) An individual who is domiciled in the household of the injured person.
(c) An individual with whom the injured person had a business or social relationship before the injury.

The categories of people subject to this limitation are much broader than those contained under the Worker's Compensation Act, which only apply to the person's spouse, brother, sister, child, or parent. The categories in the amended no-fault act expand to any relative without limitation, any person (related or not) that is domiciled with the injured person, and anyone with a business or social relationship with the injured person before the injury. This most likely covers most, if not all, individuals providing attendant care outside of an agency or professional organization.

Moreover, an insurer is permitted to enter into a contract to pay benefits over the hourly limitations. This will likely occur when a catastrophically injured individual has a policy providing lifetime allowable expenses. It is anticipated that an attendant care agency or inpatient

facility would charge more for rendering care than a friend or family member, especially one without special training or licensure. If the injured person is receiving some, or all, of the attendant care from an agency or facility, an insurer may consider contracting with a family or friend to provide care in the home for long-term cost savings.

Neurological Rehabilitation Mandatory Accreditation

The amended statute introduces the concept of a neurological rehabilitation clinic.[18] A neurological rehabilitation clinic is defined as a person, including an institution, that "provides post-acute brain and spinal rehabilitation care."[19] A neurological rehabilitation clinic would likely fall within the general fee schedule, and it is fairly likely that the services provided would not have an amount payable under Medicare.

A neurological rehabilitation clinic is not entitled to payment or reimbursement unless accredited by the Commission on Accreditation of Rehabilitation Facilities or a similar organization recognized by the director of DIFS. This accreditation requirement does not apply if the clinic is in the process of becoming accredited on July 1, 2021, as long as three years have not passed since the beginning of that process, and the clinic is still not accredited.

Utilization Reviews

Pursuant to MCL 500.3157a, a new section under the no-fault act, medical providers must submit to utilization reviews if requested by an insurer or the Michigan Catastrophic Claims Association (MCCA). A utilization review is defined as the initial evaluation by an insurer or the MCCA of the appropriateness in terms of both the level and the quality of treatment, products, services, or accommodations provided based on medically accepted standards.[20]

An insurer or the MCCA may require a provider to explain the necessity or indication for treatment in writing. Such a review may be triggered where the medical provider provides treatment, products, services, or accommodations that (1) are not usually associated with, (2) are longer in duration than, (3) are more frequent than, or (4) extend over a greater number days than usually required for the diagnosis or condition for which the person is being treated.

If an insurer or the MCCA deems treatment to be over-utilized or inappropriate, or the cost of a treatment to be inappropriate, the provider may appeal the decision to DIFS. The use of the word "may" suggests that this is not a mandatory administrative process that needs to be exhausted before litigation; however, a dispute over that issue is anticipated. A provider who knowingly submits false or misleading documents or other information to an insurer, the MCCA, or DIFS, commits a fraudulent insurance act and is subject to criminal penalty.

Any provider who has rendered treatment to an injured person covered by no-fault insurance is considered to have consented to submit documentation for a utilization review and agreed to abide by any decision rendered by DIFS. This amendment applies to treatment, products, services, or accommodations provided after July 1, 2020. DIFS is in the process of implementing administrative rules providing the procedure for these utilization reviews, and we will know more about the process once that is finalized.

Conclusion

The intention of the new fee schedule is at least in part to limit the disputes over the amount of benefits, and it should help some. There are likely to be disputes over which fee schedule applies to a certain charge and whether a Medicare rate applies to the charge. Also, in the instance where there is no applicable Medicare rate available, the calculation of the charge using the charge description master or average charge is fraught with uncertainty.

Likewise, the accreditation requirement for neurological rehabilitation clinics is well-intentioned. However, the impact may depend on the quality of standards implemented by the accrediting body. The limitation on non-professional attendant care will undoubtedly limit that exposure but may lead to a proliferation of professional and agency provided care. The utilization review process has potential but is largely dependent on the strength of the yet to be established administrative rules.

And as if there wasn't enough uncertainty, we have no guidance at this time as to how these new limitations impact new medical providers entering the market after reform. When compared to the original law, the new statute provides more opportunities to keep medical expenses under control. As with the other aspects of reform, only time will tell whether the fee schedule and other limitations achieve their intended purpose.

Endnotes

1 *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365; 670 NW2d 569 (2003), aff'd by memorandum opinion, 472 Mich 91; 693 NW2d 358 (2005).

2 *Id.*

3 *Id.*

4 *Bronson Methodist Hosp v Home-Owners Ins Co,* 295 Mich App 431; 814 NW2d 670 (2012).

5 MCL 500.3157(14).

6 State of Michigan Department of Insurance Financial Services (DIFS), *Bulletin 2019-11-INS.*

7 Ingham County Circuit Court, Case No. 19-738-CZ.

8 MCL 500.3157(3); MCL 500.3157(7)(b).

9 MCL 500.3157(4)(a).

10 MCL 500.3157(6); MCL 500.3157(7)(d).

11 MCL 500.3157(15)(d).

12 MCL 500.3157(15)(c); 42 USC 1395dd(e)(1).

13 MCL500.3157(15)(i) & (j); 42 USC 1395(e)(3)(B); 42 USC 1395(e)(4).

14 MCL 500.3157(2).

15 MCL 500.3157(7).

16 MCL 500.3157(15)(f); 42 USC 1395 to 1395lll.

17 MCL 500.3157(10); MCL 418.315.

18 MCL 500.3157(12).

19 MCL 500.3157(15)(g) & (h).

20 MCL 500.3157a(6).

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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Raising Unpreserved Issues on Appeal

One of the more well established appellate doctrines in Michigan (and elsewhere) is that an issue that isn't preserved in the trial court won't be considered on appeal. But are there exceptions? Let's find out.

General Rule of Issue Preservation

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

This includes constitutional claims. In *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993), the Supreme Court observed that it had "repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims." *Id*. at 234 n 23. Applying that general rule, the Court declined to address the University of Michigan Board of Regents' argument that "application of the [Open Meetings Act] to governing boards of public universities in the manner prescribed by the Court of Appeals violates the autonomy vested in such bodies by the Michigan Constitution. Const 1963, art 8, § 5," because "the issue was neither presented to nor evaluated either by the trial court or the Court of Appeals." *Id*. at 234. See also *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010) (refusing to address various constitutional claims because they "were not raised before, addressed, or decided by the Court of Claims").

On the other hand, "appellate consideration is not precluded merely because a party makes a more developed or sophisticated argument on appeal." *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 585; 918 NW2d 545 (2018).

Can Unpreserved Issues Ever Be Raised?

Even when an issue hasn't been properly preserved for appeal, the Supreme Court has said that "the preservation requirement is not an inflexible rule; it yields to the necessity of considering additional issues when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011) (citations and internal quotations omitted). A good example of this was in *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002). One of the issues in *Mack* was whether the governmental tort liability act (GTLA), MCL 691.1407, preempted the Detroit City Charter, which purported to recognize a private cause of action for sexual orientation discrimination. *Id*. at 206. Although neither party had raised the preemption issue, the Supreme Court decided the case on that basis, holding that "[i]f the charter creates a cause of action for sexual orientation discrimination, then it conflicts with the state law of governmental immunity." *Id*. In response to the dissent's assertion that the Court shouldn't have decided the case on an issue that was never raised, the *Mack* majority said that it "absolutely oppose[d]" the notion that "although a controlling legal issue is squarely before this Court, in this case preemption by state law, the parties' failure or refusal to offer correct solutions to the issue limits this Court's ability to probe for and provide the correct solution." *Id*. at 207. "Such an approach," the majority reasoned, "would seriously curtail the ability of this Court to function effectively." *Id*.

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So, when is an unpreserved issue most likely to be considered? The Court of Appeals recently observed that "we may overlook the preservation requirements in civil cases 'if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019). Thus, in *Toll Northville, Ltd v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2006), vacated in part on other grounds 480 Mich 6 (2008), the Court of Appeals addressed whether the Michigan Tax Tribunal had jurisdiction or authority to grant the relief requested by the plaintiff. In *Fisher v WA Foote Mem'l Hosp*, 261 Mich 727; 683 NW2d 248 (2004), the Court of Appeals reached the unpreserved issue of whether MCL 333.21513(e) creates a private cause of action.

On the other hand, the Court of Appeals has declined to address issues that, although they involved questions of law, required further factual development. For example, in *Royce v Chatwell Club Apartments*, 276 Mich App 389; 740 NW2d 547 (2007), the defendant argued that it could not be held liable for a statutory violation relating to its alleged failure to keep its premises in reasonable repair because it had no actual or constructive notice of the black ice that caused the plaintiff's fall. *Id.* at 398. The Court of Appeals, however, declined to address the issue because it wasn't raised in the trial court and because the necessary facts hadn't been presented. *Id.* at 399.

Most rare would appear to be cases where "manifest injustice" would result if an unpreserved issue isn't addressed. The Court of Appeals has said that "a litigant in a civil case must demonstrate more than a potential monetary loss to show a miscarriage of justice or manifest injustice." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 194; 920 NW2d 148 (2018). Cf. *Mitchell v Mitchell*, 296 Mich App 513, 522; 823 NW2d 153 (2012) ("In this case, because the issue deals with child custody and parenting time for defendant, failure to consider it could result in manifest injustice, so this Court will overlook the issue of preservation.").

A final word of caution: timing matters when raising issues in the trial court. It can be tempting to use a motion for reconsideration to present a new issue—and sometimes, it may be the only option. That practice, however, is disfavored and runs the risk of the issue being disregarded on appeal. See *Vushaj v Farm Bureau General Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) ("Where an issue is first presented in a motion for reconsideration, it is not properly preserved.").

Conclusion

Seeking to raise an issue for the first time on appeal is always an uphill battle, but there is authority from both the Michigan Supreme Court and the Court of Appeals for considering unpreserved issues that go to the heart of the case and that do not require factual development, or where a miscarriage of justice would result if the issue isn't addressed.

Oral Argument in the Time of COVID-19

The conventional wisdom is that oral argument should be a conversation. The advocate makes an initial statement, begins their argument, and then judges shape the discussion by voicing their questions and concerns. Advocates respond to those questions the way they would respond to an inquisitive colleague: calmly, conversationally, explaining their position and reacting to their interlocutor's position. A good oral argument is a lively conversation.

This conversational format offers great benefits to litigants. When judges' questions lead the discussion, advocates gain insight into each judge's concerns and, as a result, have an opportunity to address them. When this exchange occurs in person, a good advocate can adjust their strategy based on nonverbal cues like facial expressions, posture, body language, and so on.

However, with the COVID-19 pandemic, the era of conversational arguments may be over—or at least on hiatus. Courts are holding many appellate arguments online—often via Zoom, a service that allows users to appear in individual boxes onscreen, with other participants in their individual boxes.

One of the primary effects of this new technology is a shift from conversational argument to a more rigid—and less interactive—procedure. An advocate speaks, largely uninterrupted, for a certain period of time. Then the chief judge asks each member of the panel if they have questions.

The advocate responds to those questions serially—sometimes subject to time limits—before yielding the floor. This process can work very well. And it is certainly a welcome device for keeping cases moving while social distancing remains a necessary public-health measure. But it should prompt some changes in oral-argument strategy, especially for those used to active benches.

Zoom challenges the pre-COVID wisdom that advocates should avoid making speeches. Advocates find that they have lengthy periods of uninterrupted time to fill and they cannot count on judges' questions to steer the discussion. In other words, they have to give something very much like a speech.

With a period of speaking time to fill, it can be tempting to simply repeat the arguments in one's brief. After all, those are presumably the strongest arguments for a favorable ruling. That temptation, however, is one to resist. Apart from brief introductory comments to orient the discussion, telling the court what it already read in your brief is a wasted opportunity, even on Zoom. Similarly, raising issues that were *not* in one's brief is likely to produce unhappy judges. In the Court of Appeals, the usual adage is: "If it was in your brief, we don't need to hear it. And if it wasn't in your brief, then it's not properly before the court." Those restrictions pose few problems with an active bench. But they can be more difficult when an advocate cannot count on the bench for direction.

One way to use this time well is to think about what's missing on Zoom: questions that probe the weak parts of one's case. Judges may have a few minutes to ask questions at the end of one's argument. But briefly addressing weak areas in response to a series of short questions is rarely a good substitute for the kind of deep-dive that occurs during in-person oral arguments. But each advocate can accomplish the same goal by anticipating and addressing the court's likely concerns.

Instead of simply rehashing the strong arguments that judges have already read, an advocate can dig into the issues that might bother the judiciary. Attacking these issues may turn a Zoom argument from a rote exercise into a forum for speaking directly to a court's likely concerns.

This strategy does more than just assist the court in thinking through all the angles. For an appellant, it is a way to take the wind out of the appellee's sails. Think of the final rap battle between Eminem and his rival in *8 Mile,* where Eminem anticipates everything his opponent is likely to say about him, addresses those shortcomings, and leaves his opponent speechless. (The lyrics are a bit too spicy for the Michigan Defense Quarterly, but they're available online.) That, in a nutshell, is the idea.

An appellee cannot tackle their opponent's arguments in the same *8 Mile* fashion, since the appellant argues first. But the appellee can respond to the appellant's actual arguments *and* address the court's likely questions about those arguments. With enough care, an appellee often anticipates the appellant's arguments before the discussion even begins. Arguing in this manner turns a Zoom argument from a perfunctory exercise in repeating one's brief into an opportunity to clear obstacles to a favorable ruling.

There is risk here, of course. In theory, one could raise problems that the court or an opponent would never have perceived on their own. That is the common refrain from advocates who hope to avoid addressing the weaknesses in their case: "I don't want to help the opposition by acknowledging weaknesses." But a skilled advocate would never raise a potential problem in their case without having a plan for resolving it. And acknowledging weaknesses builds credibility. Noting obvious problems and offering solutions can strengthen one's case and increase the odds of a favorable ruling.

Legal Malpractice Update

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No Liability for Alleged Malpractice in the Absence of Causation

Ashen v Lawyer-Defendant, unpublished per curiam opinion of the Court of Appeal, issued April 30, 2020 (Docket No. 347291); 2020 WL 2096047

Facts and Procedural History:

Lawyer-defendant represented plaintiff in a property dispute. The plaintiff's sister owned the property in dispute between 1989 and 2013. In 2013, the plaintiff's sister sold the property to Scott and Stacy Assink. The plaintiff sued the Assinks, claiming he held title to the property through adverse possession. The plaintiff filed construction liens on the property, acknowledging under oath that the property belonged to someone else.

The Assinks filed a motion for summary disposition, challenging the plaintiff's claim to the property based on the construction liens. The trial court found that the construction liens defeated any claim under adverse possession because the liens demonstrated the plaintiff's possession of the property was not hostile. Therefore, the trial court granted summary disposition in favor of the Assinks and quieted title in their favor.

The plaintiff appealed. The Court of Appeals noted that the lawyer-defendant submitted affidavits and several witnesses to support the plaintiff's claim to the property, including testimony that he stored his personal items on the property, maintained the property, and made improvements to the property. The lawyer-defendant even argued that the construction liens were not dispositive. Yet, the trial court found that the constructive liens were critical. The Court of Appeals affirmed.

The plaintiff then filed this legal-malpractice suit. The Court of Appeals explained that the material questions in dispute were: (1) whether the lawyer-defendant was negligent and, if so, (2) whether the negligence was a proximate cause of an injury to plaintiff. The plaintiff claimed that the lawyer-defendant's negligence led to his defeat in the underlying lawsuit.

The plaintiff raised several tactical and procedural issues to support his claim. First, he claimed the lawyer-defendant should have done more to prove he owned the property. Next, he claimed the lawyer-defendant erred regarding a number of procedural matters. He contended that the lawyer-defendant failed to object to the denial of the stay, the case reassignment, modification of the scheduling order, the elimination of mediation, and removal from case evaluation; and inform him of a status conference. Finally, the plaintiff claimed that the lawyer-defendant engaged in serious misconduct. He claimed the lawyer-defendant concealed evidence, lied to him and the trial court about the case and evidence, engaged in unspecified fraud and perjury and colluded with the Assinks.

The plaintiff raised other arguments separate from the legal-malpractice claim, which the Court found meritless.

Holding:

The Court of Appeals held that simply because the lawyer-defendant was unsuccessful in defeating a summary-disposition motion, it does not automatically elevate a lawyer's performance to malpractice. The Court found that the plaintiff failed to show how any of the alleged professional defects would overcome the construction liens. Without other evidence, altering the outcome in the plaintiff's favor, he could not show that the lawyer-defendant performed unreasonably by failing to present "nothing more than unnecessary and superfluous evidence."

The Court of Appeals held that the majority of the plaintiff's allegations fail to state a claim upon which relief can be granted. The allegations of serious misconduct were

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conclusory. And because his procedural arguments were addressed on appeal, collateral estoppel prevented the plaintiff from re-litigating these claims. Ultimately, the court stated that even if there were professional errors, given the construction liens, the plaintiff could not show that those errors were the proximate cause of the summary dismissal.

Practice Note:

Without evidence that the client would have obtained a better outcome in the absence of the alleged professional negligence, a claim for legal malpractice may not be maintained.

Malpractice Claims Judicially Estopped

Andrus v. Lawyer-Defendant, unpublished per curiam opinion of the Court of Appeals, issued April 9, 2020 (Docket No. 345824); 2020 WL 1816008

Facts and Procedural History:

Lawyer-defendant represented the plaintiff in a divorce proceeding. The underlying plaintiff and defendant were husband and wife, who were married in 1972. In 2011, the plaintiff filed a divorce, and they reached an agreement in 2013. In the settlement agreement, they agreed to submit certain issues to arbitration, specifically a villa in St. Martin. The arbitrator ruled that the villa in St. Martin "to be sold forthwith [ ]" with net sales divided equally between the parties. The arbitration award was merged into the judgment of divorce. The parties reserved on spousal support.

On May 15, 2015, the court held a hearing for spousal support, and the terms of the settlement agreement were placed on the record. The husband agreed to pay the plaintiff $1.35 million in exchange for her forfeiting her interest in the St. Martin property and claim for spousal support. At the conclusion of the hearing, the plaintiff testified that she was satisfied with her counsel. The plaintiff's counsel submitted a proposed order, which the court entered on July 21, 2015. But the court vacated the order after defendant-husband's counsel filed an objection.

Soon after, the plaintiff's counsel filed a motion to withdraw due to a breakdown in the attorney-client relationship. The court held a hearing on the motion to withdraw and the objections to the July 21, 2015 order. At the end of the hearing, the court granted the motion to withdraw and entered defendant-husband's order. The August 11, 2015 order was the same in all respects as the July 21, 2015 order, except it did not allow certain collection remedies, such as receivership. The August 11, 2015 order directed defendant-husband to pay the plaintiff:

(1) $1.35 million on or before August 15, 2015, with no interest;
(2) If not paid on or before August 15, 2015, defendant-husband shall pay 5% interest per annum for the period of August 16, 2015 to November 15, 2015; and
(3) If not paid on or before November 15, 2015, defendant-husband shall pay 8% interest per annum until paid.

The plaintiff's new counsel filed a motion to compel compliance with the August 11, 2015 order, which included requests for a money judgment, relief from the order, and attorney's fees. The plaintiff argued that the defendant-husband did not pay by August 15, 2015, as required in the August 11, 2015 order. The court denied the plaintiff's motion. The plaintiff then filed a delayed application for leave to appeal, but the Court of Appeals denied it for lack of merit. Other motions to enforce the settlement agreement followed.

The plaintiff filed a legal-malpractice suit against the lawyer-defendant contending that the terms of the settlement agreement rendered it unenforceable because the time of payment was at defendant-husband's discretion. The plaintiff alleged three errors:

(1) failing to secure terms to ensure the enforcement of the settlement agreement;
(2) abandoning plaintiff by abruptly withdrawing; and
(3) failing to counsel the plaintiff on the right to spousal support.

The plaintiff claimed that because of the lawyer-defendant's errors, she experienced damages due to the unavailability of settlement funds, attorneys' fees, costs, and loss of interest income. The lawyer-defendant counterclaimed and sought unpaid legal fees.

The plaintiff and the lawyer-defendant filed competing summary dispositions, and the court granted summary disposition in favor of the lawyer-defendant. The trial court ruled that the plaintiff was judicially estopped from pursuing a malpractice claim because of her testimony at the August 15, 2015 hearing, where she testified that she was satisfied with her counsel's performance.

The plaintiff filed three different appeals based on the underlying divorce proceeding and the legal-malpractice suit. Two of the appeals were based on the underlying divorce action. The other appeal, and the one relevant here, was for the grant of summary disposition in favor of the lawyer-defendant.

Holding:

The Court of Appeals affirmed the summary disposition and remanded on the counterclaim for attorney's fees.

The Court stated that the plain language of the order was "inadequate as a matter of law," and the plaintiff could not show that she was damaged because the order was enforceable. It specifically required defendant-husband to pay the plaintiff $ 1.35 million on or before August 15, 2015, and the trial court's incorrect interpretation of the agreement was not due to the lawyer-defendant's conduct. Accordingly, the Court of Appeals held that any damages the plaintiff may have suffered were not caused by the lawyer-defendant's representation because there was no legal malpractice when the lawyer-defendant negotiated the settlement agreement.

The Court of Appeals also held that because it previously dismissed the plaintiff's application for leave to appeal "for lack of merit" based on the same order, it was bound by the law of the case doctrine. Therefore, because the trial court found that the settlement agreement did not create a mandatory obligation for the defendant-husband to pay the $1.35 million by August 15, 2015, that is the law of the case.

Practice Note:

Having your client agree to the terms of a settlement on the record may protect you from meritless claims later.

Endnote

1 The authors would like to thank Crinesha Berry for her work on this article.

Medical Malpractice Update

By: Richard Stokan, *Kerr Russell*
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***Vernon Bowman v. St. John Hospital and Medical Center et al,* unpublished per curiam opinion of the Court of Appeals, issued August 13, 2019 (Docket No. 341640 and 341663); 2019 WL 3812542.**

An action sounding in medical malpractice must be filed within two years of the alleged misconduct. MCL 600.5805(6). That deadline is extended by the "discovery rule" which provides for a tolling period of six months for claims that are discovered or should have been discovered. MCL 600.5838a(2). Specifically, the discovery rule contained in MCL 600.5838a(2) provides:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period . . . or within 6 months after the plaintiff discovers or *should have* discovered the existence of the claim, whichever is later.[1]

Factual disputes as to when discovery of a medical malpractice claim occurred is a question of fact for a jury.[2] However, if the relevant facts regarding the discovery of the alleged malpractice are undisputed, the Michigan Supreme Court held in *Moll v Abbott Laboratories* that it is a question of law for resolution by the court and are ripe for a dispositive motion.[3] Determining when the plaintiff asserts that the alleged malpractice occurred is key to the defense.

Under the Michigan Supreme Court's decision in *Solowy v Oakwood Hospital*, the leading Supreme Court case on the discovery rule, the Court affirmed the use of the "possible cause of action" standard.[4] In *Solowy*, the plaintiff alleged a failure to diagnose cancer stemming from a lesion, initially discovered in 1986.[5] Following treatment, the plaintiff was advised that the cancer was gone with no chance of returning.[6] In early 1992 the plaintiff noticed a similar lesion in the same location and was advised in March 1992 that the lesion was potentially cancerous. The cancer diagnosis was confirmed on April 9, 1992 and the medical malpractice lawsuit was filed on October 5, 1992. The question before the court was whether the plaintiff's cause of action arose when she discovered the lesion had returned or when the diagnosis was confirmed.[7] [8] Affirming the use of the "possible cause of action" standard, the Michigan Supreme Court held that the plaintiff was aware of the potential claim for purposes of the discovery rule no later than March when she was "armed with the requisite knowledge to diligently pursue her claim." [9] Utilizing a flexible approach and considering the totality of the information available to the plaintiff, the decision relied upon the fact that the plaintiff's symptoms were identical to those from her previous cancer diagnosis. The ruling affirmed the principle in *Moll v Abbott Laboratories* that a cause of action arises from the discovery of the injury, not subsequent damage caused as a result of the injury.[10]

Following the decision in *Solowy,* defendants have obtained mixed results in the Court of Appeals on motions involving the period of limitations and the discovery rule. Recent rulings, including the Michigan Supreme Court's decision to grant leave in *Bowman v St John Hospital,* have raised the prospect that the success of a dispositive motion on behalf of defendants may depend on the how the courts interpret the phrase "should have discovered" and the burden on the plaintiff to discovery their claim.[11]

Jendrusina v Mishra

In *Jendrusina*, the plaintiff filed a cause of action against his internist for his failure to refer him to a specialist he alleged could have prevented irreversible kidney failure.[12] The plaintiff was first diagnosed with renal insufficiency in 2007 and subsequently underwent regular testing. In January 2011, the plaintiff was hospitalized with flu-like symptoms, where he was advised he had acute end-stage renal failure and began regular dialysis.

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The claim was not initiated until March 18, 2013, when plaintiff served a notice of intent to sue. The plaintiff alleged that he was not aware, nor should he have been aware, of the malpractice until September 20, 2012 when his nephrologist informed him that an earlier referral and treatment could have prevented the condition. The Michigan Court of Appeals, in a two-to-one published decision, agreed, holding that the six-month discovery period commenced on September 20, 2012.[13] In so ruling, the majority specifically distinguished facts from those in *Solowy,* holding that the law did not require that a plaintiff investigate a potential claim. The *Jendrusina* court further clarified that "[a] n objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know."[14] While the defendant presented sufficient evidence that the plaintiff *could* have discovered his cause of action, relying on the plain language of MCL 600.5838a(2), the *Jendrusina* court held that the six-month discovery period is triggered only when a plaintiff *should* have discovered the cause of action.

The more probable action is a change or clarification in the defining of a plaintiff's burden to discover their claim. This would give lower courts more direction in applying the possible cause of action standard from *Soloway*.

A limited oral argument was granted before the Michigan Supreme Court before the application was reconsidered and denied. In a dissenting opinion, Justice Markman would have reinstated the trial court's order granting summary disposition in favor of the defendants finding that the limitations period began in January 2011 when the plaintiff was diagnosed with kidney failure or, at the latest, when a kidney transplant was recommended.[15] Justice Markman points out that under *Solowy*, a plaintiff does not need to know that a claim exists, but only that a *possible* cause of action exists in order for the limitations period to begin running.

Hutchinson v Ingham Co Health Dept

In *Hutchinson*, the Court of Appeals applied *Solowy* and *Jendrusina* to a failure to diagnose breast cancer claim.[16] The plaintiff had a mammogram on September 4, 2014, which the defendants interpreted as benign. Despite being informed by plaintiff that the lump was growing, the defendants continued to advise plaintiff that it was benign. After moving to Arkansas, the plaintiff obtained a second opinion and mammogram, which raised the possibility of cancer. On June 15, 2015, a biopsy confirmed a diagnosis of cancer. A notice of intent was filed on December 4, 2015. While the defendants successfully argued to the trial court that the plaintiff should have discovered her cause of action by at least 2014, relying upon *Jendrusina*, the Court of Appeals disagreed, holding that the statute of limitations did not bar the claim. The opinion was based on the fact that, unlike *Solowy*, the plaintiff had no reason to be aware of potential cancer, specifically in light of being advised that the lump was benign by her medical providers. For this reason, the Court of Appeals held that the date of the plaintiff's cancer diagnosis was the key to determining whether the case was filed within the statute of limitations. In an interesting choice of words, the Court of Appeals stated that this was the time the plaintiff "could have surmised" that the defendants were negligent in their treatment.[17] Leave to appeal to the Michigan Supreme Court was denied.[18]

Bowman v St John Hospital

Following the ruling in *Hutchinson*, the Court of Appeals addressed the issue in *Bowman v St John Hospital.*[19] In *Bowman*, the plaintiff's decedent underwent a mammogram and ultrasound on June 12, 2013, which were interpreted as benign. Following the tests, annual mammograms were recommended for the discovered mass. A 2014 mammogram and ultrasound noted the mass remained present. On April 21, 2015, another mammogram and ultrasound were performed, which stated the lump had increased in size. An April 29, 2015 biopsy revealed that the lump was cancerous, resulting in a bilateral mastectomy on May 18, 2015. A biopsy conducted on July 28, 2016 revealed that the breast cancer had metastasized to bone marrow.

On December 10, 2016, plaintiff's counsel served a notice of intent under MCL 600.2912b. Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that the plaintiff failed to file the complaint, or serve the notice of intent within the two-year statute of limitations or within the discovery rule contained in MCL 600.5838a(2).[20] The defendants argued that the claim should have been discovered no later than April 2015 when her cancer was diagnosed and filed within six months. In response, the plaintiff argued that she was unaware of the misinterpreted 2013 mammogram until August 2016 when another treating physician advised her that the 2013 mammogram had been misread. The plaintiff relied heavily on the decision in *Jendrusina v Mishra* arguing that she had no duty to actively discover her claim. The trial court agreed with the plaintiff, holding that although a reasonable person could have concluded that the cancer diagnosis in 2015 meant that the 2013 mammogram was misread, the trial court could not conclude that a reasonable person *should* have reached that conclusion.

On appeal, the Court of Appeals reversed the trial court, holding that the facts of the case were more closely aligned with *Solowy* than *Jendrusina*. The majority opinion cites *Hutchinson* in support of the decision holding that the cancer diagnosis on April 29, 2015, and the bilateral mastectomy performed on May 18, 2015, where two cancerous tumors were removed, were both sufficient events to place the plaintiff on notice, and commence the running of the six-month discovery period. In so doing, the majority opinion directly quotes language in *Hutchinson* that, based on the diagnosis, the plaintiff "could have surmised that the defendants were negligent".[21] Because the notice of intent was not served until December 10, 2016, more than six months after the diagnosis, the majority agreed with the defendants that the NOI was untimely.

In dissent, Judge Amy Ronayne Krause argues that the trial court correctly applied the *should have discovered* language of the "discovery rule" to the facts of the case and that the majority misread *Hutchinson*. Judge Krause's analysis begins with the specific language of the discovery rule

contained in MCL 600.5838a(2), which requires that a claim must be filed within six months after a plaintiff "discovers or should have discovered the existence of a claim." Relying on the language in *Hutchinson*, Judge Krause cites the requirement that "any triggering of the discovery rule must be based on the reasonable perceptions and understanding of a layperson, not a medical or legal expert." She continues by citing that *Hutchinson* reaffirmed that a plaintiff is not placed on notice of a potential claim merely because a recent diagnostic test differs from prior test results. Instead, the dissent points out that a new diagnosis must be considered "*along with the totality of the circumstances*."[22] Applying these principles to the specific facts of the case, Judge Krause concludes that the trial court applied the correct standard and denied the defendants' motions for summary disposition.

The *Jendrusina* court further clarified that "[a]n objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know."

Supreme Court Order issued May 22, 2020 (Docket No. 160291-2); 943 NW2d 107 (2020); 2020 WL 2613352.

The application for leave to appeal to the Michigan Supreme Court was granted on May 22, 2020. In granting leave, the parties were asked to address three questions:

(1) Whether the decision in *Solowy v Oakwood Hosp Corp*,[23] adopted the correct standard for application of the six-month discovery rule set forth in MCL 600.5838a(2);

(2) If not, what standard should be adopted?

(3) Whether the plaintiff timely served her notice of intent and filed her complaint under MCL 600.5838a(2).

Analysis

The different results in *Jendrusina*, *Hutchinson*, and *Bowman*, and the acceptance of leave by the Supreme Court, could be the result of a difference in the interpretation of the facts. The third question the Supreme Court requested be answered by the parties leaves open the possibility that any decision may be limited to the specific facts of the *Bowman* case. Another possibility is a shift away or clarification of the "possible cause of action" test outlined in *Soloway*. As the Court of Appeals in *Hutchinson* points out, the plain language of MCL 600.5838a(2) is "should have" discovered which denotes a probability versus the alternative "could have" discovered which reflects a possibility.[24] Counsel for the plaintiff will raise this distinction in the Supreme Court. In the absence of a heightened standard from the state Legislature, the prospect of a comprehensive shift in the discovery rule "should have discovered" standard to a stricter "could have discovered" standard is unlikely. The more probable action is a change or clarification in the defining of a plaintiff's burden to discover their claim. This would give lower courts more direction in applying the possible cause of action standard from *Soloway*. If the Supreme Court broadens interpretation of the "should have discovered" language in MCL 600.5838a(2), the impact on the defense would be a greater likelihood of success on motions challenging the timeliness of claims filed under the discovery rule. This would fall in line with the Legislature's concern for finality and encourage plaintiffs to diligently pursue potential causes of actions.[25] However, if the Supreme Court takes action to lessen the burden on a plaintiff to discover a potential claim, assistance from the Legislature will be required to return the burden and require plaintiffs to timely bring their causes of action.

Endnotes

1 MCL 600.58838a(2) (emphasis added).

2 *Kermizian v Sumcad*, 188 Mich App 690; 470 NW2d 500 (1991).

3 *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993).

4 *Solowy v Oakwood Hosp Corp,* 454 Mich 214, 216; 561 NW2d 843 (1997).

5 *Solowy,* 454 Mich at 216.

6 Solowy, 454 Mich at 216-217.

7 *Solowy*, 454 Mich at 215-216.

8 The plaintiff in *Solowy* did not raise the issue of a question of fact regarding the timing of when she discovered the alleged malpractice. As a result, the issue was not before the trial court or the Court of Appeals.

9 *Solowy*, 454 Mich at 224-225.

10 *Moll,* 444 Mich at 18.

11 *Bowman v St John Hospital & Med Ctr*, unpublished per curiam opinion of the Court of Appeals, issued Aug. 13, 2019 (Docket No. 341640); 2019 WL 3812542, at *1, lv grt'd, 943 NW2d 107; 2020 WL 2613352 (Mich. May 22, 2020).

12 *Jendrusina v Mishra*, 316 Mich App 621, 625; 892 NW2d 423 (2016).

13 *Jendrusina*, 316 Mich App at 626-627.

14 *Jendrusina*, 316 Mich App at 631.

15 *Jendrusina v Mishra*, 501 Mich 958; 905 NW2d 231, 232, *reconsideration denied*, 501 Mich 1027 (2018).

16 *Hutchinson v Ingham Co Health Dept,* 328 Mich App 108; 935 NW2d 612 (2019).

17 *Hutchinson*, 328 Mich App at 629.

18 *Hutchinson v Ingham Co Health Dep't*, 937 NW2d 687; 2020 WL 583897 (Mich Feb. 5, 2020)

19 The opinion in *Hutchinson* was issued following oral argument in *Bowman*.

20 The parties did not dispute that the claims were not filed within the two-year period of limitations or the facts surrounding the discovery of the claim.

21 *Hutchinson*, 328 Mich App at 629.

22 *Bowman*, slip op at 5 (Krause, J., dissenting).

23 *Solowy v Oakwood Hosp Corp*, 454 Mich 214; 561 NW2d 843 (1997).

24 *Hutchinson*, 328 Mich App at 624.

25 See *Bowman,* unpub op at *5, citing *Solowy,* 454 Mich at 222; *Moll,* 444 Mich at 24.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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The events transpiring in Lansing and elsewhere since my last report in March have been both monumental and unprecedented, to say the least. Like many others, I have followed those events from home in obedience to Governor Whitmer's executive orders, which have generated a great deal of controversy in light of the significant hardships that they have imposed in an effort to reduce Michigan's death toll from the Covid-19 pandemic and prevent a catastrophic failure of our health care systems. Many of Michigan's citizens have complied despite the hardships, but their patience is wearing thin, leading to several demonstrations at the Capitol in which protesters, some of them armed, have expressed their dissatisfaction.

That dissatisfaction has generated many lawsuits challenging the Governor's authority to direct Michigan's response to the pandemic by executive order and prompted an unsuccessful legislative effort to limit that authority. The judicial challenges presenting several statutory and constitutional arguments concerning the scope and exercise of the Governor's authority have been raised in both state and federal courts, and our Supreme Court has expressed its intention to address those questions on an expedited basis in two separate Orders entered on June 30, 2020 – *House of Representatives, et al., v Governor* (Supreme Court No. 161377) and *In re Certified Questions from the United States District Court, Western District of Michigan* (Supreme Court No. 161492).

There have also been a number of well-attended protest demonstrations at the Capitol in May and June by diverse groups of people demanding reform of police practices and advocating for adoption of a variety of changes to bring about an end to racism and racial inequality, one of which started peaceably but devolved into a riot causing damage to buildings in the area. These and similar demonstrations across the country and around the world have identified those issues as matters that must be addressed. Thus, it is likely that our Legislature will debate some of the proposed changes before the November election.

This year's election promises to be an election like no other. The state Senate seats are not up for election this year, but all of the seats in the House are up for grabs. With President Trump falling behind in the latest polls, many of the Republican members are feeling nervous, and it may be expected that this will produce an especially spirited campaign leading up to this election, which will present the last opportunity for Republican candidates to benefit from the gerrymandered election districts created by the Legislature in 2011. The Republican constitutional challenges to the new Citizens Redistricting Commission created by amendment of the state Constitution in 2018 have been rejected by the U.S. District Court for the Western District of Michigan and the U.S. Court of Appeals for the Sixth Circuit. *Daunt, et al. v Benson,* 425 F Supp 3d 856 (2019), *affirmed,* 956 F 3d 396 (2020). The Sixth Circuit has recently denied the Republican Party's Petition for Rehearing *en banc,* and thus, absent a successful effort to seek further review in the U.S. Supreme Court, Michigan's state legislative and congressional election districts will be drawn by the new Citizens Redistricting Commission – a Commission that supposedly cannot be dominated by any single political party – in the elections of 2022 and beyond.

Public Acts of 2020

As of this writing on July 3rd, there are 129 Public Acts of 2020 – 73 more than when I last reported in March. The few that may be of some interest to our members include:

2020 PA 63 – Senate Bill 253 (Lucido – R), which has amended the statute of frauds, MCL 566.132, to add a new subsection (3) providing that, "A person shall not bring an action to enforce an agreement, promise, or contract to pay a commission for or

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upon the sale of an interest in real estate against the owner or purchaser of the real estate unless the agreement, promise, or contract is in writing signed by the party to be charged." The bill analyses reveal that the introduction of this legislation was prompted by an unpublished decision of the Court of Appeals that reversed a trial court order granting summary disposition of the plaintiff's promissory-estoppel claim, based upon the Supreme Court's decision in *Opdyke Investment Co. v Norris Grain Co.*, 413 Mich 354; 320 NW2d 836 (1982). The Supreme Court denied leave to appeal in that case after hearing oral argument on the property seller's application for leave to appeal, stating that its decision in *Opdyke* was binding authority that the Court of Appeals was obliged to follow and the Supreme Court was not inclined to overrule. This legislation was intended to preclude future claims based upon promissory estoppel in actions seeking payment of real estate commissions based upon unwritten promises or agreements.

2020 PA Nos. 92-94 – House Bill 5541 (Liberati – D); Senate Bill 278 (Barrett – R); Senate Bill 279 (Hertel – D) This bipartisan package of legislation will allow applicants for driver's licenses, vehicle registrations and state identification cards to request a designation of a communication impediment in the records maintained concerning those applications and allow electronic access to such designations by law enforcement agencies. As used in these acts, a "communication impediment" is defined as deafness or hearing loss or an autism spectrum disorder.

Old Business and New Initiatives

The Legislature has continued in session during the public emergency declared in response to the ongoing Covid-19 pandemic, with lighter schedules on some days. Many of the initiatives considered measures of various kinds proposed to address problems and alleviate burdens resulting from the pandemic. Supplemental appropriations were passed for the current fiscal year. Work continued on the budget for the next one beginning on October 1st – a task made especially difficult this year by extraordinary costs and reduced revenues. And despite a spirited turf battle over the authority of the Legislature and the Governor to take emergency action, the work on the budget continued.

We were pleased to hear an announcement on June 29th that the Governor and legislative leadership had reached an agreement on the FY 2020-21 budget which would close the projected 2.2 billion dollar shortfall with 950 million dollars of federal coronavirus relief funding, a withdrawal of 350 million dollars from the state Budget Stabilization Fund, a state hiring freeze, layoffs of some state employees, and several significant budget cuts.

Other legislative initiatives of interest introduced or given further consideration since my last report include the following:

> The events transpiring in Lansing and elsewhere since my last report in March have been both monumental and unprecedented, to say the least.

Senate Bill 686 (Barrett – R), proposes the creation of a new single-section act providing new whistleblower-type protection for classified civil service employees of state departments and agencies and nonpartisan legislative staff for communications with a legislator or a legislator's staff. The new section would prohibit disciplinary action by a state department or agency or a member or office of the Legislature for such communications, unless the specific communication at issue is prohibited by law and the disciplinary action is taken in accordance with authority otherwise provided by law. This bill was enrolled for presentation to the Governor on June 25th and presented for her approval on June 30th.

House Bill 4372 (Glenn – R) and **House Bill 4373 (Rendon – R)**, which would amend the Public Health Code to require permanent revocation of a health care provider's license upon conviction of an offense involving sexual penetration made under the pretext of medical treatment. These bills were passed by the House on September 4, 2019, and subsequently referred to the Senate Government Operations Committee, where legislation is sometimes sent to die. On June 9, 2020, they were re-referred to the Senate Committee on Judiciary and Public Safety, which suggests that they may be taken up for consideration before the end of the year.

House Bill 5600 (Afendoulis – R), which would amend the Governmental Liability Act, MCL 691.1401, *et seq*., to limit governmental immunity from tort liability for political subdivisions which have designated themselves as "sanctuary cities" protecting undocumented immigrants against immigration enforcement. This limitation would be accomplished by a new section 691.1407d, providing that a "sanctuary city" is liable for personal injury, property damage or death directly resulting from the commission of a felony within the "sanctuary city" by an individual who is not a citizen of or lawfully present in the United States, subject to limited exceptions. Actions against a political subdivision under the new section 1407d could be brought within ten years after the commission of the felony or ten years after the death of an individual whose death was directly caused by its commission. HB 5600 was introduced on March 10th and referred to the House Committee on Local Government and Municipal Finance but has not yet been scheduled for hearing.

Senate Bill 857 (Barrett – R) would repeal 1945 Public Act 302, often referred to as the Emergency Powers of the Governor Act. The 1945 act has been regularly cited as authority for Governor Whitmer's various Emergency Orders issued in response to the Covid-19 pandemic, together with her separate but limited authority to take emergency action under the Emergency Management Act, 1976 PA 390, as amended. SB 857 was passed by the Senate on April 24th and referred to the House Government Operations Committee but has not been scheduled for hearing in the House committee. It appears highly unlikely that there will be any further action on this legislation in light of the Governor's contemporaneous veto of **Senate Bill 858 (Barrett – R),** which would have limited her authority to take emergency action under the Emergency Management Act.

On June 12th, a group calling itself "Unlock Michigan" filed a proposed

Initiative Petition to repeal the 1945 act with the Bureau of Elections for its preliminary approval. If the required number of valid petition signatures can be obtained, the voter-initiated repeal will be submitted to the Legislature. If passed, the Governor will then have no power to veto it.

House Bill 5751 (Sheppard – R), which would amend the Emergency Management Act, MCL 30.411, to expand the immunity from tort liability provided under subsection 411(4) for physicians and hospitals rendering service during a declared state of disaster to include all health care professionals and facilities rendering services during a state disaster or emergency declared under the Emergency Management Act or 1945 PA 302 in response to the Governor's declaration. Curiously, the new language would limit the immunity provided to health care professionals and facilities under subsection 411(4) due to the state's response to the Covid-19 pandemic, providing that this immunity would remain in effect through September 30, 2020. HB 5751 was introduced on April 30th and referred to the House Judiciary Committee but has not yet been scheduled for a hearing.

Senate Joint Resolution G (Runestad – R) proposes an amendment to Const 1963, art 1, § 11, which would extend the state constitutional protections against unreasonable searches and seizures to specifically include searches and seizures of electronic data and electronic communications. This joint resolution has been passed with overwhelming support in both Houses and was enrolled on June 25th for presentation to the voters in the November general election.

Do you love legislation?

Are you a political junkie like me? If so, the sound you hear now may be the sound of opportunity knocking. I have enjoyed observing and reporting on Michigan's legislative proceedings since 1991 during my five years of employment with the Michigan Senate and my subsequent employment in private practice at Fraser Trebilcock, across the street from the Capitol Building. I began writing the Legislative Report for the *Quarterly* in 2001, and although my performance of that duty has always been fascinating, entertaining, and immensely rewarding, I have recently come to the conclusion that the time has come for me to pass the baton to someone new – someone who will be willing to take over this wonderful job when the One Hundred First Legislature convenes in January of next year. If you think you might be that person, the editors of the *Quarterly* would like to hear from you. And if you should need any information or encouragement to help you decide, I would be delighted to hear from you as well.

Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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Sea Land Air Travel Service, Inc v Auto-Owners Insurance Company, **Wayne County Circuit Court, Case No. 20-005872-CB (Hon. Lita Popke).**

Since our last report, the effects of COVID-19 (and various government responses to it) have been inescapable. The world of insurance coverage is no exception. In particular, several business interruption claims relating to the pandemic are already in litigation, with more on the horizon. While this column usually focuses on appellate decisions relating to insurance coverage, these kinds of suits are too new to result in any holdings. Therefore, this quarter, we will take a look at some of the more notable COVID-19-related filings.

On May 1, 2020, Sea Land Air Travel Service, Inc. ("Sea Land") filed suit "individually and on behalf of all others similarly situated" against Auto-Owners Insurance Company ("Auto-Owners"). Sea Land is a family owned and operated travel agency that has seen its business nearly disappear during the pandemic. Sea Land sought business interruption coverage in a policy that included a Special Property Coverage Form. According to Sea Land, the policy affords "all risk" coverage.[1] Sea Land avers that the policy does not contain an exclusion for viruses or pandemics.[2] Sea Land claims that "[d]amage caused by the physical presence of the COVID-19 Virus to property at and around Plaintiffs insured premises triggered the Business Income and Extra Expense coverages provided by the Special Property Coverage Form."

This averment seems to foreshadow a dispute over whether Sea Land has experienced a "direct physical loss." Generally, a direct physical loss, resulting from a covered cause of loss, is a precondition to business interruption coverage. See *St. Mary's Foundry, Inc v Employers Ins of Wausau,* 332 F3d 989, 993–994 (CA 6, 2003), gathering cases and noting that, under Michigan law, "business interruption insurance coverage only applied when property damage covered under the subject policy caused the business interruption loss…." "[T]he word 'direct' signals immediate or proximate cause, as distinct from one that is remote or incidental…." *Universal Image Productions, Inc v Chubb Corp,* 703 F Supp 2d 705, 709 (ED Mich, 2010).[3] "Physical" is defined as something which has a "material existence: perceptible especially through the senses and subject to the laws of nature." *Id.* In *Universal,* 703 F Supp 2d at 709 the U.S. District Court – applying Michigan law in diversity – found that even though mold and bacteria had permeated the floor of an office building, because the entire premises did not need to be vacated, the insured could not meet its burden to show it suffered any structural or any other tangible damage to the property. Therefore, there was no direct physical loss to property. See also *Mastellone v Lightning Rod Mut Ins Co,* 175 Ohio App 3d 23, 40–41; 884 NE2d 1130 (2008) (holding that dark staining from mold did not constitute "physical loss" where plaintiff's expert testified that the mold could be removed from the wood surface by bleaching and chemically treating affected areas). Whether the virus was present on the insured's premises, and whether that presence alone constitutes physical damage, are going to be disputed issues in many of these claims.

Auto-Owners had not filed its answer at the time of our editorial deadline (under Michigan Supreme Court Administrative Order No.s 2020-3 and 2020-18, the deadline for filing initial responsive pleadings was suspended until June 20, 2020). A status conference is scheduled for July 31, 2020.

Gavrilides Management Co, LLC, et al v Michigan Insurance Company, **Ingham County Circuit Court, Case No. 20-258-CB-C30 (Hon. Joyce Draganchuk).**

In this case,[4] Gavrilides Management Co, LLC ("Gavrilides") operates two Michigan restaurants, "The Bistro" in Williamston and "The Soup Spoon Cafe" in Lansing. These restaurants have been limited to carry-out services only, as a result of various COVID-19

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related Executive Orders issued by the Michigan Governor, starting on or around March 23, 2020. Gavrilides "closed The Bistro in Williamston on March 23, 2020 because … Plaintiffs could not sustainably operate the business" under the terms of the Executive Orders. Gavrilides has continued to operate "The Soup Spoon Cafe" as "take-out only," but its revenue has allegedly "dropped precipitously."

In contrast to *Sea Land*, Gavrilides' Complaint does not suggest that the virus was ever present, or suspected of being present, on the insured's premises. Indeed, the Complaint seems to expressly say that the alleged business interruption losses were due to the government's mitigation efforts and not the virus itself. Michigan Insurance Company ("MIC") denied the claims, noting that the policy does not afford business interruption coverage in the absence of "direct physical loss of or damage to property." MIC also denied the claims based on the following exclusion: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

In particular, several business interruption claims relating to the pandemic are already in litigation, with more on the horizon.

Gavrilides claims that the virus exclusion is "void for vagueness" and "is against public policy." It was not yet known, at the time of our editorial deadline, how Gavrilides plans to address the direct physical loss issue. A court must first determine whether "the policy provides coverage to the insured" before it "ascertain[s] whether that coverage is negated by an exclusion." *Hunt v Drielick,* 496 Mich 366, 372–373; 852 NW2d 562 (2014).

Gavrilides' challenge to the "Virus or Bacteria" exclusion is noteworthy because this is a widely used ISO form specifically crafted to address both the direct and indirect economic consequences flowing from the outbreak of contagious diseases like COVID-19. White & Breen, *The Impact of the Global COVID-19 Pandemic on the Insurance Industry,* 62 No. 4 DRI For Def. 22, 31 (April 2020). "Significantly, when ISO submitted the exclusion to state regulators … its circular LI-CF-2006-175 expressly identified SARS – *the virus from which COVID-19 mutated* – as a type of virus that the exclusion is designed to address." *Id.* (emphasis in original). "The ISO circular stated: [e]xamples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella, and anthrax. The universe of disease-causing organisms is always in evolution." *Id.* See also Biser, et al., *COVID-19: Construction Contracts and Potential Claims Under Business Interruption, Civil Authority, and Other Insurance Policies and Endorsements,* Practical Law Practice Note w-025-0046 (Westlaw 2020), noting that such exclusions were "written in response to the 2003 worldwide spread of SARS (see ISO Form CP0140 (0706)…." "These exclusions began appearing in BI policies to avoid coverage for something like COVID-19." *Id.*

Gavrilides filed this suit on May 1, 2020. On June 9, 2020, MIC filed a motion for summary disposition in lieu of an answer that was scheduled for hearing on July 1, 2020.

***Social Life Magazine, Inc ("Social Life") v Sentinel Ins Co ("Sentinel"),* United States District Court for the Southern District of New York, Case No. 1:20-cv-03311 (Hon. Valerie Caproni).**

This case is one of the few (and perhaps the only, at the time of our editorial deadline) COVID-19 related business interruption claims that has resulted in any kind of appealable ruling. On May 14, 2020, the district court denied Social Life's motion for preliminary injunction. Social Life, a New York-based culture magazine, sought an order requiring that Sentinel immediately cover the publication's financial losses because of government-mandated closures during the COVID-19 pandemic. The district court found that Sentinel's policy was "unlikely" to cover the claim (as this was a motion for preliminary injunction, not summary disposition). On May 19, 2020, Social Life filed an interlocutory appeal to the Second Circuit, Docket No. 20-1587. But three days later, Social Life agreed to withdraw the appeal. Social Life apparently intends to continue the fight in the district court; at the same time it withdrew its appeal, Social Life filed a "motion to reopen the record in the hearing on May 14, 2020."[5]

This averment seems to foreshadow a dispute over whether Sea Land has experienced a "direct physical loss."

The key to the district court's preliminary ruling was the apparent absence of any direct physical loss. Social Life, which launched in 2004 and describes itself as the "premier luxury publication for the Hamptons," sued Sentinel in New York federal court on April 28, 2020, claiming the insurer wrongfully refused to cover its lost revenues since it shut down operations in mid-March in accordance with state-wide restrictions on nonessential businesses. Sentinel took the position that the spread of COVID-19 did not cause any "direct physical loss or damage" to Social Life's Manhattan office, as required for coverage to apply. Within days of filing suit, Social Life moved for a preliminary injunction, arguing that it was financially strapped and would be unable to print its next planned issue unless Sentinel immediately paid out $197,000 in insurance proceeds. Social Life pointed out that its policy does not contain the above-referenced "Virus or Bacteria" exclusion. Social Life also argued that the virus can attach to surfaces and cause physical damage to its office building and equipment.[6]

As reflected in the May 14, 2020 transcript of the preliminary injunction hearing,[7] the district court was not convinced that the presence of COVID-19 physically damages property. The hearing involved a discussion of the nuances of New York's state and local mitigation orders, but ultimately turned on Judge Caproni's reading of *Roundabout Theatre Co v Contin Cas Co,* 302 AD 2d 1, 3; 751 NYS 2d 4 (2002). In *Roundabout Theatre*, the scaffolding of a midtown building collapsed, causing New York City to order the closure of certain surrounding blocks. As a result, a Broadway theater that was

not itself damaged "became inaccessible to the public" and "was forced to cancel performances of Cabaret." *Id*. The trial court had interpreted the coverage language – "direct physical loss or damage to the property" – expansively to include "loss of use" of the property. *Id.* But the appellate panel reversed, finding that the trial court had "completely ignore[d]" the policy's plain language, which was "limited to losses involving physical damage to the insured's property." *Id.* The panel explained: "The plain meaning of the words 'direct' and 'physical' narrow the scope of coverage and mandates the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." *Id.* at 7.

The district court saw no evidence that COVID-19 could cause physical damage to property, as opposed to making individuals ill. "It damages lungs," Judge Caproni noted, "[i]t doesn't damage printing presses."[8] The district court further suggested that the insured's losses were caused by the Governor's stay-home order and not by any particular damage to the insured's property.[9] Judge Caproni concluded: "I feel bad for your client. I feel bad for every small business that is having difficulties during this period of time. But New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going. You get an A for effort, you get a gold star for creativity, but this is just not what's covered under these insurance policies."[10]

***Prime Time Sports Grill, Inc d/b/a Prime Time Sports Bar ("Prime Time") v DTW1991 Underwriting, Ltd, a Certain Interested Underwriting at Lloyd's London ("Lloyd's"),* United States District Court for the Middle District of Florida, Case No. 8:20-cv-00771 (Hon. Charlene Honeywell).**

Florida received media attention for shutting down "late" and reopening "early," but the situation was bad enough long enough for this Tampa restaurant to suffer a significant loss of business. "On March 17, 2020 … Governor Ron DeSantis ordered all bars and restaurants in the state of Florida, including Prime Time, to close for 30 days in response to the COVID-19 pandemic." (Complaint, ¶ 6.) "This governmental suspension of business had a devastating effect on Prime Time's business." (*Id.*) "On April 1, 2020, Governor DeSantis further ordered a state-wide 'stay at home' order for the entire state of Florida in response to the COVID-19 pandemic for an additional 30 days, which further harmed Prime Time's business." (*Id.*)[11] Prime Time sought coverage for these alleged losses under its policy from Lloyd's. Lloyd's denied the business interruption claim based on the lack of a direct physical loss.

Prime Time filed suit on April 2, 2020, and on May 4, 2020, Lloyd's filed a motion to dismiss instead of an answer. Lloyd's motion argued that under Florida law, a business income loss "must be caused by direct physical loss of or damage to property" at the insured premises. *Nat'l Union Fire Ins Co of Pittsburgh, Pa v Texpak Group NV,* 906 So 2d 300, 302 (Fla App 2005) ("business interruption and extra expense losses are covered only if they are 'resulting from' damage or destruction of real or personal property caused by a covered peril"). Lloyd's motion quoted 10A Couch, Insurance, 3d, § 148.46: "The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude losses that are intangible or incorporeal, and, thereby to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (Case 8:20-cv-00771, Doc 13, Page ID 242.) Lloyd's further explained that, if business interruption coverage is not conditioned on a direct physical loss, then the policy's terms limiting business interruption coverage to the "period of restoration" become unworkable. (*Id.*, PageID 233-235.)[12]

Multiple *amicus curiae* briefs have been filed regarding Lloyd's motion. As of our editorial deadline, the district court had not yet scheduled a hearing.

Endnotes

1 "All-risk insurance" – also known as "open risk" – "covers all risks that are not specifically excluded in the terms of the contract, and takes the opposite approach of traditional polices, sometimes called 'named perils' or 'specific perils' polices, which exclude all risks not specifically named." *Frank Coluccio Constr Co, Inc v King County,* 136 Wash App 751, 757 n 1; 150 P3d 1147 (2007). But even "with all-risk coverage, … the insured still has the basic burden of proving his right to recover…." *Coastal Hardware and Rental Co v Certain Underwriters at Lloyds, London,* 120 So 3d 1017, 1024 (Miss App 2013). "The label 'all risk' is essentially a misnomer. All risk policies are not 'all loss' policies; all risk policies ... contain express written exclusions and implied exceptions which have been developed by the courts over the years." *GTE Corp v Allendale Mut Ins Co,* 258 F Supp 2d 364, 373 (D NJ, 2003).

2 There is an Insurance Services Office ("ISO") form, CP 01 40 07 06 "Exclusion of Loss Due to Virus or Bacteria," which this policy apparently did not contain. This exclusion will be further discussed below.

3 Aff'd, 475 Fed Appx 569 (CA 6, 2012).

4 The insurer is represented by this author's firm.

5 <https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Social%20Life%205-21-20%20Letter.pdf> (accessed June 15, 2020).

6 Jeff Sistrunk, law360, *Magazine Turns To 2nd Circ. In Coronavirus Coverage Fight* <https://www.law360.com/articles/1274622/magazine-turns-to-2nd-circ-in-coronavirus-coverage-fight> (posted May 18, 2020) (accessed June 15, 2020).

7 <https://www.crowell.com/files/Social-Life-v-Sentinel-Transcript.pdf> (accessed June 15, 2020).

8 *Id.*, p 5.

9 *Id.*, p 8.

10 *Id.*, p 15.

11 Prime Time was still able to offer food and drinks (including alcoholic beverages) to go, as Lloyd pointed out in its motion. (Case 8:20-cv-00771, Doc 13, PageID 237n 4.)

12 Such an argument would also make sense under Michigan law because Michigan courts must "give effect to every word, clause, and phrase" in a policy, and will not read a policy so as to "render any part of the contract surplusage or nugatory." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 715; 706 NW2d 426 (2005).

Municipal Law Report

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First Amendment: Regulations of Signs Based on their On-Premises or Off-Premises Character are Content-Based.

Thomas v. Bright, 937 F.3d 721 (6th Cir. 2019).

On September 11, 2019, the U.S. Court of Appeals for the Sixth Circuit issued an opinion in *Thomas v. Bright*, 937 F.3d 721 (6th. Cir 2019), through which it recognized that the U.S. Supreme Court's decision in *Reed v. Town of Gilbert,* ---U.S.---, 135 S.Ct. 2218 (2015) has effectively overruled its prior decision in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987). *Wheeler* had stood for the proposition that regulations of signs based on their on-premises or off-premises character are not impermissible content-based regulations.

Thomas is significant because *Reed* left open the possibility that regulations distinguishing between on-premises and off-premises signs may not be content-based. *Reed* held that, where a sign regulation, on its face, subjects signs to different restrictions based on the content of the sign, the regulation is content-based and subject to strict scrutiny, regardless of the government's justification.[1] Thus, in *Reed*, where the Town of Gilbert asserted its interests in promoting aesthetics and traffic safety in defense of regulations establishing different dimensional requirements and different time limits for the display of ideological signs, political signs, and temporary directional signs, the regulations were content-based and failed strict scrutiny.[2] However, in a concurring opinion joined by two justices, Justice Alito offered a listing of "some rules that would not be content based," including "rules distinguishing between on-premises and off-premises signs."[3]Some have interpreted Justice Alito's concurrence as indicating that *Reed* should not be read as indicating that on-premises/off-premises regulations are automatically content-based, thus setting the stage for the dispute in *Thomas*.

Facts:

Thomas involved a challenge to Tennessee's Billboard Act, which required any person seeking to display a sign on a Tennessee roadway to obtain a permit unless the sign qualified for an exemption. An exemption existed for "on-premises" signs; that is, signs relating to the use or purpose of the real property on which the sign is located, including signs advertising goods and services available at that site. Mr. Thomas owned a billboard on a vacant lot. Tennessee ordered him to remove the billboard because he had been denied a permit and there was nothing on the premises to which the sign could relate.

Mr. Thomas sued, alleging that the state's application of the Billboard Act violated the First Amendment. Citing *Reed*, the District Court held that the on-premises exception was content-based, failed strict scrutiny, and was not severable from the rest of the Act because there was no clear evidence of the legislature's intent for the Act to be severable and/or at what point the line would be drawn to sever.[4] The Sixth Circuit affirmed.

Ruling:

The Sixth Circuit held that "it is neither a close call nor a difficult question" that the Billboard Act's on-premises exemption is a content-based regulation of speech.[5] It observed that "the Tennessee official must read the message written on the sign

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and determine its meaning, function, or purpose" to determine whether the on-premises exception applies.[6] Likewise, it rejected Tennessee's argument that the regulation was location-based, as opposed to content-based, since on-premises signs themselves are limited in their content, and the Act did not limit signs from or to locations without respect to their messages. Alternatively, the regulation constituted speaker-based discrimination, which the Sixth Circuit observed is equally content-based and subject to strict scrutiny.

Responding to Tennessee's citation to *Wheeler,* the Sixth Circuit held that *Wheeler's* conceptualization of off-premises sign restrictions was premised on reasoning that a regulation can be content-neutral if the government's justifications for the regulation are content-neutral. The Sixth Circuit observed that *Reed* directly rejected this reasoning in stating that a facially content-based law is content-based regardless of justifications, and therefore *Wheeler* is overruled.[7]

To the extent that Tennessee invoked Justice Alito's concurring opinion in *Reed* to argue that the Supreme Court would find off-premises restrictions as content-neutral, the Sixth Circuit rejected this argument as "speculative vote counting."[8] It approved of the District Court's treatment of this argument, whereby it held that the concurring opinion must be read "in harmony" with the majority, such that Justice Alito's reference to "on-premises/off-premises" distinctions relates only to distinctions based on the sign's physical location or other content-neutral factor.[9] While the Sixth Circuit opined that there are "many formulations" of such distinctions, none were before the Court in *Thomas*.[10]

Having rejected Tennessee's content neutrality arguments, the Sixth Circuit engaged strict scrutiny analysis. It concluded that, even if the state's interests were deemed compelling, the exemption was underinclusive and thus not narrowly tailored, in part because it has the effect of prohibiting the display of "highly protected" noncommercial ideological messages unrelated to the premises.[11] Finally, the Sixth Circuit declined to question the District Court's determination that the on-premises exemption was severable from the Act bec ause Tennessee failed to preserve the issue on appeal.[12]

Practice Note:

At the time of preparing this report, *Thomas* was pending on a petition for writ of certiorari to the U.S. Supreme Court. If certiorari is granted, practitioners are advised to monitor the status of the case and carefully preserve any arguments rejected by *Thomas* in the event that it is overturned. However, unless *Thomas* is overruled, it advises that the Sixth Circuit is not inclined to read Justice Alito's concurring opinion generously, which could have consequences for cases involving other types of regulations enumerated in his concurrence. Cases challenging regulations of off-premises signs should be evaluated for the presence of applicable alternate content-neutral regulations that would prohibit the sign, and to determine whether the off-premises regulation is subject to a severability clause that may provide a clearer basis than existed in *Thomas* for determining that the plaintiff lacks a redressable claim.

Zoning Appeals: The Aggrieved Party Standard Applies to Appeals of Planning Commission Decisions and Appellants Must Show a Greater Impact than their Neighbors.

Ansell et. al. v. Delta County Planning Commission et. al., ---Mich App--- (June 4, 2020).

Facts:

Appellants were a group of residents who had attempted to pursue a circuit court appeal of a decision of the Delta County Planning Commission granting the request of windmill operators for conditional use permits to construct 36 wind turbines in Delta County. Appellants claimed that the Planning Commission erroneously applied provisions of Delta County's Zoning Ordinance, and that these errors would cause them to suffer injuries related to noise, vibrations, light pollution, property values, aesthetics, and environmental concerns. Under Delta County's Zoning Ordinance, decisions of the Planning Commission were not appealable to the Zoning Board of Appeals.

The County moved to dismiss the appeal on the basis that appellants lacked standing under the "aggrieved party" standard for zoning appeals as articulated in MCL 125.3605 and *Olsen v. Chikaming Twp.,* 325 Mich App 170 (2018). Appellants argued that the "aggrieved party" standard did not apply to planning commission appeals where, as in the case of Delta County's Zoning Ordinance, the contested decision was made by a planning commission as opposed to a zoning board of appeals, and the decision was not otherwise appealable to a zoning board of appeals. The circuit court agreed with the County that the "aggrieved party" standard was applicable in such cases, and that it lacked jurisdiction over the appeal because appellants lacked "aggrieved party" status due to their failure to prove special damages uncommon to other property owners.[13] The Court of Appeals affirmed.

Ruling:

The Court of Appeals observed that the question of whether the "aggrieved party" standard applies to appeals of zoning decisions for which there is no appeal to the zoning board of appeals was one of first impression.[14] It held that the "aggrieved party" standard does extend to direct appeals of planning commission decision (as well as decisions of general boards such as township boards). It reasoned that the plain language of the Michigan Zoning Enabling Act and applicable court rules provide that only an "aggrieved party" may appeal a final determination under a zoning ordinance, without respect to the specific body that made that determination.[15] Appellants offered no valid case law challenging this interpretation.

The Court, therefore, evaluated whether the appellants were "aggrieved parties," with reference to *Olsen's* standard requiring that a party "must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated."[16] (As compared to the inquiry for general standing, requiring a plaintiff to show special damages different from the community at large.) Appellants recited the same claims to standing as they raised in the circuit court. The Court

of Appeals opined that their concerns "do not show that appellants stand to suffer any greater negative impacts from the proposals than do their neighbors or others in the community."[17]

Appellants additionally claimed that they were sufficiently close to the turbines to be affected by levels of noise and flicker that exceeded Zoning Ordinance limitations. However, their claimed proximity to the turbines was not enough, and none of them specifically proved how they would uniquely experience such effects. The Court of Appeals observed that, if such concerns were to materialize, they might support a future claim of standing to abate a nuisance, but they otherwise do not provide a private right of action. Most importantly, these concerns merely alleged the type of commonly-experienced "anticipated inconvenience and aesthetic disappointment" held by *Olsen* to be insufficient to support "aggrieved party" status for purposes of appealing a zoning decision.[18]

Practice Note:

It is now clear that the "aggrieved party" standard applies to appeals of final determinations under a zoning ordinance, regardless of whether the decision is made by or appealable to a zoning board of appeals. To satisfy the aggrieved party standard, it is not sufficient for the appellant to speculate that it will suffer a harm from the decision, or to allege that its proximity to the property involved in the decision makes its alleged harm different from that of other property owners. Likewise, mere conclusory allegations that a harm is specific are not enough to satisfy the appellant's burden of proving a specific harm. Closely scrutinizing an appellant's claim to "aggrieved party" status may reveal grounds for an early motion to dismiss that could facilitate clients' implementation of often time-sensitive zoning decisions.

Endnotes

1 *Reed v. Town of Gilbert,* 135 S.Ct. 2218, 2227 (2015).
2 *Id.,* at 2231-2232
3 *Id.,* at 2223, Alito, J., Concurring..
4 *Thomas v. Bright,* 937 F.3d 721, 727-728.
5 *Id.,* at 729.
6 *Id.,* at 730-731.
7 *Id.,* at 732.
8 *Id.*
9 *Id.,* at 733.
10 *Id.,* at 733.
11 *Id.,* at 736-737.
12 *Id.,* at 728-729.
13 *Ansell v. Delta County,* ---Mich App---, at 1-3 (June 4, 2020)
14 *Id.,* at 3.
15 *Id.,* at 3-4.
16 *Id.,* at 4-5, citing *Olsen v. Chikaming Twp,* 325 Mich App 170, 185 (2018).
17 *Id.,* at 5.
18 *Id.*

Supreme Court

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Supreme Court Clarifies Principles of Conflict Preemption in a Case Involving Medical Marijuana Growth and Cultivation

Despite all of the delays, confusion, and uncertainty the world has faced since March 2020, the Michigan Supreme Court remained quite busy issuing over ten opinions this past quarter. In one of its most interesting and timely opinions, the Court clarified the scope of a local government's power to regulate matters of local concern in medical marijuana cultivation. While the use and cultivation of both medical and recreational marijuana are rising throughout the state, local governments are still able to establish appropriate restrictions without conflicting with state law permissions. This case highlights the basic principles of conflict preemption and reminds attorneys to remain aware of the detailed nuances of laws, statutes, and ordinances at the federal, state, and local levels. *DeRuiter v Twp of Byron*, ___ Mich ___; 2020 WL 2029592 (Apr 27, 2020).

Facts: Plaintiff and counter-defendant Christie DeRuiter is a licensed qualifying medical marijuana patient and a registered primary caregiver to qualifying patients. In early 2016, DeRuiter began growing marijuana on rented commercially zoned property because she did not want to grow marijuana at her residence. According to state law, DeRuiter properly grew the marijuana in an "enclosed, locked facility." However, after learning of DeRuiter's cultivation of medical marijuana on the commercially zoned property, defendant and counter-plaintiff Byron Township determined that DeRuiter's actions violated the local Byron Township Zoning Ordinance. Under this ordinance, primary caregivers are permitted to cultivate medical marijuana, but only as a "home occupation." Under this "home occupation" restriction, the primary caregiver's use and cultivation of marijuana must be conducted "entirely within a dwelling" or attached garage in a residentially zoned area. The ordinance also required primary caregivers to obtain a permit to grow medical marijuana, which DeRuiter did not have. In March 2016, Byron Township sent DeRuiter's landlord a letter, directing the landlord to cease and desist DeRuiter's cultivation of medical marijuana and remove all marijuana and related equipment.

In May 2016, DeRuiter filed a complaint, seeking a declaratory judgment that the Michigan Medical Marihuana Act (MMMA) preempted Byron Township's zoning ordinance and that the ordinance was therefore unenforceable. She claimed the ordinance's permit requirement and locational restriction directly conflicted with the MMMA as the MMMA prohibits penalizing qualifying patients and primary caregivers who comply with the Act. DeRuiter was in compliance with the MMMA, as she cultivated marijuana in an enclosed, locked facility, and the MMMA did not have a "home occupation" or permit requirement. Both the trial court and Court of Appeals agreed with DeRuiter and held that a direct conflict exists between the local ordinance and the MMMA. Specifically, the courts noted that the ordinance improperly imposed regulations and penalties upon persons engaged in MMMA-compliant medical use and cultivation of marijuana.

Ruling: In a unanimous opinion, the Michigan Supreme Court reversed the lower courts' judgments and held in favor of Byron Township. The Court referred to well-established law regarding conflict preemption and noted that in the context of conflict preemption, a direct conflict exists when "the ordinance permits what the statute prohibits, or the ordinance prohibits what the statute permits." It also noted that local governments may control and regulate matters of local concern when such power is conferred by the state. Here, the Court recognized the protections granted to qualified individuals and primary caregivers under the MMMA but explained that

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local ordinances may place limitations and/or restrictions on where and how primary caregivers can cultivate marijuana by "add[ing] to the conditions" of the MMMA.

The Court addressed the Court of Appeals' reliance on a case involving a preempted and unenforceable ordinance that resulted in a total ban on the medical use and cultivation of marijuana despite the MMMA's authorization. In contrast, here, the local ordinance does not result in a complete prohibition of the use or cultivation of medical marijuana. Instead, the ordinance adds to the conditions of the MMMA by explaining where marijuana may be grown (the home requirement) and how to obtain authorization to grow it (the permit requirement). It does not conflict with the MMMA's provisions, nor does it effectively prohibit the medical use of marijuana, but instead merely complements the limitations imposed by the MMMA. Therefore, the Court held Byron Township's ordinance did not directly conflict with the MMMA and remanded to the trial court for further proceedings.

Practice Pointer: The Court's decision reminds us that a direct conflict between state and local law may be difficult to find, but important to analyze. State and local governments are permitted to impose greater restrictions that add or complement current laws as long as they do not result in a complete prohibition of the activity at issue. When defending cases, it may be easy to become complacent after reviewing a law that allows a certain activity, and attorneys may fail to conduct further research. However, more restrictive laws may exist that can make or break your case. It is important to examine the laws, statutes, and ordinances at issue at the federal, state, and local levels to ensure awareness of all the factors in play. Determining whether a conflict exists is not an easy task, as shown by the disagreement between the lower courts and the Michigan Supreme Court, yet engaging in careful research and analysis can ease this burden. As we all know, and as confirmed by this case, the practice of law is quite nuanced, and knowledge is power.

Court Rules Report

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

PROPOSED AMENDMENTS

2020-11 – Responsive Pleading Deadline when Motion for More Definite Statement Denied

Rule affected:	MCR 2.108
Issued:	June 10, 2020
Comment Period:	October 1, 2020
Public hearing:	Not set

The proposed amendment provides a timeframe for a responsive pleading when a motion for more definite statement is denied. A responsive pleading would be due within 21 days after notice of the denial or if an application for leave to appeal is filed, within 21 days after denial of the application.

2002-37 – New Rule Clarifying the Process for Change of Venue and Transfer Orders

Rule affected:	MCR 2.226
Issued:	May 20, 2020
Comment Period:	September 1, 2020
Public hearing:	Not set

The proposed new rule would clarify the process for change of venue and transfer orders. The new rule would require a transferring court to enter all orders necessary for transfer on a form approved by the State Court Administrative Office. If the receiving court does not obtain the required information, the receiving court can refuse to accept the transfer until the required information is provided.

Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*
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Several cases in which Michigan Defense Trial Counsel participated by filing amicus briefs continue to work their way through the appellate system. Specifically, two cases in which MDTC was invited to participate as amicus have had oral argument before the Supreme Court and are now awaiting decision.

Oral argument on the application in *Scola v JP Morgan Chase Bank* was held on December 11, 2019.[1] Jonathan B. Koch of Collins Einhorn Farrell PC authored MDTC's brief in this case. Primarily at issue in this appeal is whether the claim sounds in premises liability or ordinary negligence. The plaintiff was injured when the car in which he was a passenger turned the wrong way out of the defendant's parking lot on to a one-way street and was involved in a head-on collision. The distinction between a premises-liability claim and an ordinary-negligence claim is significant due to the potential for application of the open-and-obvious doctrine to bar the plaintiff's claim. As the Supreme Court has previously held, the open-and-obvious doctrine only applies if the claim sounds in premises liability.

From the questions posed to both counsel, the Justices appeared concerned with the broader consequences of either definition, beyond the specific application to the plaintiff's claim. In particular, Justice Viviano questioned plaintiff's counsel regarding the implications of adopting an ordinary-negligence standard that requires a landowner to warn of hazardous traffic conditions and whether such would impose a duty on private landowners to warn visitors of known hazardous traffic adjacent to their property. Justice Bernstein questioned defense counsel regarding the impact of extending the definition of a premises-liability claim to an accident that occurred on a public road and off the defendant's premises. Similarly, Justice Cavanagh questioned how a premises-liability claim could be maintained if the defendant did not have possession and control of the area where the accident occurred.

The Supreme Court conducted its oral argument in *Griffin v Swartz Ambulance Service* on April 22, 2020.[2] MDTC's brief in this case was authored by Michael C. Simoni of Miller, Canfield, Paddock and Stone, PLC. This oral argument occurred during the court closures occasioned by the COVID-19 pandemic and, thus, the attorneys and Justices appeared via Zoom video conferencing. As a Zoom video conference call, the oral argument was conducted slightly differently from a normal Supreme Court argument. Rather than the usual open questioning by the Justices, after each attorney's initial argument, the Justices were individually asked in turn to pose their questions to counsel.

The plaintiff in *Griffin* was injured in an automobile accident and, while being transported to the hospital in the defendant's ambulance, was involved in a second accident. At issue in *Griffin* is application and interpretation of the immunity provision in the emergency medical services act (EMSA), MCL 333.20901 *et seq*. and, specifically, whether driving an ambulance constitutes "the treatment of a patient," where immunity would apply.

Plaintiff's counsel argued for a narrow definition of the statute's use of "the treatment of a patient," essentially arguing that "treatment" should be synonymous with "medical treatment." Defense counsel, in turn, argued for a broader definition, noting that the EMSA does not use the term "medical treatment." Rather, "the treatment of a patient," as used in this statute should be interpreted to mean actions performed for the benefit of the patient and consistent with the first responder's license. The Justices' questions revealed that the Court was struggling with where between these two positions the "treatment of a patient" definition should fall, although there was little indication regarding how the individual Justices would rule on that issue.

Anita Comorski is a principal in the Appellate Practice Group at Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. With over fifteen years of appellate experience, Ms. Comorski has handled numerous appellate matters, obtaining favorable results for her clients in both the State and Federal appellate courts. Anita.comorski@tnmglaw.com

The Supreme Court maintains an archive of oral arguments on the Court's YouTube channel. Both of these arguments can be viewed in their entirety for free on that channel. Decisions in both of these cases are expected before the end of the Supreme Court's current term on July 31, 2020.

This update is only intended to provide a summary of the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC does maintain an amicus brief bank on its website accessible to its members. For a more thorough understanding of the issues addressed in these cases, members are encouraged to visit the brief bank to review the complete briefs filed on behalf of this organization.

Endnotes

1 Supreme Court Docket No. 158903.

2 Supreme Court Docket No. 159205.

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Vendor Profile

LCS RECORD RETRIEVAL

Nate Kadau
Regional Account Manager
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Grand Rapids, MI 49525 (877) 949-1119
nkadau@teamlcs.com

1. **Where are you originally from?**
   Grand Rapids, Michigan

2. **What was your motivation for your profession?**
   To provide personalized, innovative, and cost-effective record retrieval services geared toward legal, medical, and insurance communities.

3. **What is your educational background?**
   Bachelors of Business Administration, Western Michigan University

4. **How long have you been with your current company and what is the nature of your business?** I have been with LCS Record Retrieval (LCS) for eleven years. We offer nationwide record retrieval with personalized service to our clients.

5. **What are some of the greatest challenges/rewards in your business?** The most rewarding aspect of our business is the ability to provide services customized to meet the needs of each client. Providing these personalized services, as well as being able to deliver the information requested promptly, is truly gratifying.

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

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

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

8. **What do you feel the MDTC provides to Michigan lawyers?** The MDTC is an exceptional organization for attorneys to network and share best practices. It also provides numerous educational opportunities for its members to stay up to date on current events within the industry.

9. **What do you feel the greatest benefit has been to you in becoming involved with the MDTC?**
   The most significant benefit to me has been the relationships that I have been able to build with our clients and other vendors within the industry. Partnering with these prestigious groups allows me additional opportunities to learn how LCS can continue to grow and excel in our services.

10. **Why would you encourage others to become involved with MDTC?** Being involved with the MDTC is an excellent opportunity to connect with others within the legal community and learn the newest information litigating within the State of Michigan.

11. **What are some of your hobbies and interests outside of work?** I enjoy spending time with my family. When the weather allows it, I enjoy golfing, fishing, and being outdoors. I am also a big sports fan and follow all the major Detroit teams each season.

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Fourth Annual

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Wednesday, October 21 - October 24	DRI Annual Meeting – Washington DC
Friday, November 6	Winter Conference – Part 2, 12 noon - 1:30 pm
Friday, December 4	Winter Conference – Part 3, 12 noon -1:30 pm

2021

Friday, February 12	Future Planning – Marriott, Detroit ***TENTATIVE***
Friday, February 12	Meet and Greet – TBA, Detroit
Saturday, February 13	Board Meeting – Marriott, Detroit ***TENTATIVE***
Thursday, June 17 – Friday, June 18	Annual Meeting & Conference – Indigo, Traverse City
Thursday, March 18	Legal Excellence Awards – The Gem, Detroit
Friday, September 10	Golf Outing – Mystic Creek, Milford, MI

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Work, Life, and All that Matters

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MICHIGAN DEFENSE QUARTERLY

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Publication Date

July

October

January

April

For information on
article requirements, please contact:
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Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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