MICHIGAN DEFENSE
QUARTERLY

Volume 35, No. 3 - 2019

IN THIS ISSUE:

ARTICLES

- Insurance Considerations in Employment Practice Liability Defense
- Is Your Brief Conversational? It Should Be

REPORTS

- Appellate Practice Report
- Legal Malpractice Update
- Legislative Report
- Insurance Coverage Report
- Municipal Law Report
- No-Fault Report
- Supreme Court Update
- Court Rules Update
- Amicus Report

PLUS

- Schedule of Events
- Member News
- Meet the MDTC Leaders—Jeremy S. Pickens
- MDTC Member Victories—Chelsea E. Pasqualli
- Member to Member Services
- Welcome New Members

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

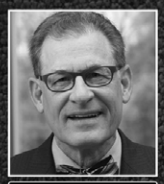
MICHIGAN CHAPTER

www.MichiganMediators.org

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

Larry ABRAMCZYK
Dearborn



Fred DILLEY
Grand Rapids

Gene ESSHAKI
Detroit

Lee HORNBERGER
Traverse City

Hon. Barry HOWARD
Bloomfield Hills

Richard HURFORD
Troy

William JACK, Jr.
Grand Rapids

Alan KANTER
Bloomfield Hills

Paula MANIS
Lansing

Jon MARCH
Grand Rapids

Paul MONICATTI
Troy

Bruce NECKERS
Grand Rapids

Ed PAPPAS
Troy

Robert RILEY
Dearborn

Sheldon STARK
Ann Arbor

Martin WEISMAN
Bingham Farms

Robert WRIGHT
Grand Rapids

Check available dates or schedule appointments online directly with Academy Members - for free.

Visit www.MichiganMediators.org/dateselector

NADN is proud creator of the DRI Neutrals Database
www.DRI.org/neutrals

dri™
The Voice of the Defense Bar

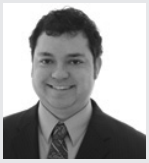
The National Academy of Distinguished Neutrals is an invitation-only association of the top-rated mediators & arbitrators throughout the US, and proud partner of the national defense and trial bar associations. For more info, visit www.NADN.org/about

MDTC
Promoting Excellence in Civil Litigation
P.O. Box 66
Grand Ledge, Michigan 48837
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Editor's Notes

Editor:
Michael James Cook
michael.cook@ceflawyers.com

Associate Editors:
Thomas D. Isaacs
thomas.isaacs@
bowmanandbrooke.com



Matthew A. Brooks
mbrooks@smithbrink.com

Katharine Gostek
katharine.gostek@kitch.com

Victoria L. Convertino
vconvertino@jrsjlaw.com

MICHIGAN DEFENSE
QUARTERLY

Volume 35, No. 3 - 2019

Cite this publication as 35-3 Mich Defense Quarterly

President's Corner 4

Articles

Insurance Considerations in Employment Practice Liability Defense
Margaret Grisdela, *Legal Expert Connections, Inc.* 6

Is Your Brief Conversational? It Should Be
Michael J. Cook, *Collins Einhorn Farrell PC* 8

Reports

Appellate Practice Report
Phillip J. DeRosier and Trent B. Collier 10

Legal Malpractice Update
Michael J. Sullivan and David C. Anderson 13

Legislative Report
Graham K. Crabtree 14

Insurance Coverage Report
Drew W. Broaddus 17

Municipal Law Report
Lisa A. Anderson 21

No-Fault Report
Ronald M. Sangster, Jr. 24

Supreme Court Update
Daniel A. Krawiec 27

Michigan Court Rules Update
Sandra Lake 29

Amicus Report
Anita Comorski 31

PLUS

Schedule of Events 12
Member News 28
Meet the MDTC Leaders—Jeremy S. Pickens 33
MDTC Member Victories—Chelsea E. Pasquali 34
Member to Member Services 35
Welcome New Members 39

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

President's Corner

By: Joshua Richardson, *Foster Swift Collins & Smith PC*
jrichardson@fosterswift.com

Joshua K. Richardson is a shareholder in the Lansing office of Foster, Swift, Collins & Smith, P.C., where he concentrates his practice primarily on commercial litigation, employment litigation, and insurance regulatory law.

Mr. Richardson is admitted to practice law in Michigan, the U.S. District Court for the Eastern and Western Districts of Michigan and the Eastern District of Wisconsin, the U.S. Sixth Circuit Court of Appeals, and the U.S. Supreme Court. Mr. Richardson earned his B.A. from Michigan State University in 2004 and his J.D. from Indiana University School of Law - Bloomington in 2007.

Mr. Richardson is a member of the State Bar of Michigan, the American Bar Association, the Ingham County Bar Association, the Federal Bar Association, the Defense Research Institute, and is a Barrister member of the American Inns of Court. Mr. Richardson also sits on the Board of Directors for the Boys & Girls Club of Lansing, where he served as Chair of the Board in 2015 and 2016.

A Profession to Be Proud Of

From time to time, each of us has heard or received criticisms and negativity toward the legal profession, usually by non-lawyers. It would be easy to say that our profession is not always projected in the best light. But, as attorneys, we also regularly see the good. We see it in those lawyers who treat the practice of law as a worthy profession (not a job), who donate their time and talents to meaningful (but not always billable) causes, who zealously advocate for their clients without losing sight of the lawyer's oath to maintain respect and professionalism, and who strive to better themselves and the practice of law on a daily basis. While there are many examples, very few are formally or publicly recognized.

As an organization, the MDTC makes an effort to ensure that at least some of these examples of hard work, skill, and civility are brought to the forefront and recognized on a larger scale. This recognition is important not only because the individuals awarded are so deserving (they are), but also because they serve as a reminder to us and the broader public of the good work being accomplished in our profession.

This year, the MDTC is proud to honor three of those individuals who best exemplify these traits, and I hope that you will join us in honoring them at the MDTC Legal Excellence Awards on March 14, 2019, at the Gem Theater in Detroit.

Cheryl L. Chandler, Managing Shareholder of the Ann Arbor office of Smith, Haughey, Rice & Roegge, embodies the qualities we should all strive for as practicing attorneys. Ms. Chandler will be receiving the MDTC's Excellence in Defense award, which is given to those attorneys who have demonstrated themselves as skilled advocates for their clients, but who also maintain a high level of integrity and civility in the practice of law and have, throughout their careers, promoted that integrity in and outside of the courtroom. The award has been presented to some of the most accomplished civil litigators across the state, and Ms. Chandler continues that tradition.

Over her 37-year career as a civil litigator, Ms. Chandler has tried numerous cases to verdict in state and federal courts, has gained a deserved reputation as one of the best medical-malpractice-defense attorneys in Michigan, and has received far more awards and accolades than can reasonably be mentioned here. In addition to serving her clients, Ms. Chandler also devotes her time to speaking on a number of relevant legal topics and has served in a variety of capacities for several legal and community organizations, including the State Bar of Michigan Character and Fitness Committee, Metro Health Foundation, Dawn Farms, and the Michigan Society of Hospital Risk Managers. As has been attested to by many, Ms. Chandler has, throughout her career, demonstrated the type of good judgment, creativity, intelligence, and civility that the Excellence in Defense Award was created to recognize.

Samantha J. Orvis similarly exemplifies the characteristics and traits worthy of recognition as the recipient of the MDTC's Golden Gavel Award, which is given each year to an attorney in practice for less than ten years who has demonstrated

significant achievements in the practice of law, and has made a notable and meaningful impact on the profession through leadership, professionalism, and community involvement. As an active trial attorney in the Grand Blanc office of Garan Lucow Miller, Ms. Orvis has tried numerous cases to verdict across the state. Ms. Orvis also dedicates herself to improving the practice of law and the community at large by working in various capacities for a wide variety of organizations, including among others: the Women Lawyers Association of Michigan, Oakland region; the Young Lawyers Sections of the State Bar of Michigan and the America Bar Association; New Gateways, Inc.; and the Great Lakes Environmental Law Center. Ms. Orvis is a skilled and respected advocate who demonstrates integrity and civility in and out of the courtroom.

Honorable Denise Langford Morris, of the Oakland County Circuit Court, is the very deserving recipient of the MDTC's Judicial Award. The Judicial Award is presented annually to a member of the judiciary who exhibits the highest standards of judicial excellence, while exemplifying courtesy, integrity, wisdom and impartiality. The award recognizes judges who bring honor, esteem, and respect to the judicial system and practice of law. Judge Langford Morris is such a jurist. Judge Langford Morris has served as an Oakland County Circuit Court judge since her appointment to the court in 1992. Before taking the bench, Judge Langford Morris gained valuable experience as a former county and federal prosecutor and civil litigator in private practice. In addition to serving the residents of Oakland County, Judge Langford Morris has contributed in various capacities to many legal and civic organizations, including, among many others, the National Bar Association Judicial Council, the Michigan Supreme Court Historical Society, the Michigan Judges Association, the D. Augustus Straker Bar Association, and the Women Lawyers Association of Michigan.

It is no secret that judges are often the most visible of jurists, who are required to make difficult decisions with real-world and lasting consequences, and whose careers and livelihoods can be most impacted by ever-changing public opinion. In the face of these realities, however, Judge Langford Morris's commitment to justice and the promotion of civility have never wavered. She works hard to ensure that all who appear in her courtroom are shown respect and are treated fairly, while similarly requiring attorneys and litigants to exhibit that same level of respect to others. Judge Langford Morris's attributes best represent the purpose of the MDTC Judicial Award.

Each of the above individuals represents a positive example of the good that we should seek to maintain and project in our profession, and their recognition is well-deserved. But, we all share in the endeavor, and the most powerful and lasting impact on the profession comes from the daily hard work by each of us to protect the integrity of the profession. After all, that integrity is scrutinized daily by clients, adversaries, and the public, which gets only the occasional glimpse into the inner workings of our industry as a whole.

We should all be proud of the legal profession, and it is incumbent upon each of us to keep up the good work and to continue to promote our best attributes.

MDTC E-Newsletter
Publication Schedule

Publication Date, Copy Deadline
December, November 1
March, February 1
June, May 1
September, August 1

For information on article requirements, please contact:

Alan Couture
ajc@runningwise.com, or

Scott Holmes
sholmes@foleymansfield.com

Michigan Defense Quarterly
Publication Schedule

Publication Date, Copy Deadline
January, December 1
April, March 1
July, June 1
October, September 1

For information on article requirements, please contact:

Michael Cook
michael.cook@ceflawyers.com

Insurance Considerations in Employment Practices Liability Defense

By Margaret Grisdela, *Legal Expert Connections, Inc.*

Executive Summary

Many corporate clients, especially those with a large number of employees, may be insured by an employment practices liability insurance (EPLI) policy, which could preclude the client's law firm from representing them in litigation matters. It is important to inquire into your client's EPLI policy to see if your firm is one of the pre-approved law firms to represent your client's litigation matters. If your firm is not named in the EPLI policy, there are a few ways in which your firm may still be able to represent your insured employer client.

Margaret Grisdela is president of Legal Expert Connections, Inc. a national legal marketing agency that concentrates in the insurance defense market. She is a native of Detroit and a graduate of Wayne State University. She also holds an MBA in Finance from The George Washington University. Ms. Grisdela can be reached at 866-417-7025 or mg@legalexpertconnections.com.

Introduction

Imagine not being able to defend your own client in a litigated matter. This is the situation many employment-defense law firms find themselves in when one of their corporate clients, insured by an employment practices liability insurance (EPLI) policy, is named as a defendant in an employment action. The first reaction on the part of the law firm is likely to be surprise, or even disbelief.

Frequently, the insured employer is required under the EPLI policy to be represented by "panel" counsel, meaning an outside law firm that has been pre-approved by the insurance carrier to handle cases at a certain negotiated rate. If the employer's law firm of choice is not on the insurer's EPLI panel of pre-approved defense counsel, the law firm may lose the right to represent their own client.

Since litigation is typically one of the most lucrative parts of employment law, the loss hurts financially. Additionally, it is embarrassing and frustrating for the employer's law firm to have to turn the matter over to a competing law firm that may not handle the case as well.

Seeking EPLI Panel Recognition

Being a pre-approved panel member with the carrier that provides EPLI coverage to your client is clearly an ideal situation. Getting on an employment practices liability panel, however, can be quite difficult and may or may not be an option.

One way to minimize this risk is to be named as counsel of choice in the client's EPLI policy. This is frequently accomplished through some type of endorsement to the policy and may require the insured employer to pay an additional fee. The benefit to the insured employer (the client) is that they are then defended by the law firm that knows them well and understands their long-term strategies.

If a choice of counsel provision is not in place, the employer can also ask the insurer to appoint their employment-defense law firm for a specific claim. This is often known as an "accommodation" and may be facilitated by the insurance agent or broker. Approval of an accommodation is at the discretion of the insurer and may be granted inconsistently. An approved accommodation, however, is not the same as being on the EPLI panel.

Employment-defense law firms, particularly those that are not traditional "insurance defense" firms, should be aware that an accommodation, endorsement, or panel appointment is subject to hourly rates that are negotiated by the insurance carrier. These rates are often significantly less than a law firm's standard corporate rates, so

an understanding of pricing practices in advance of the appointment is advised.

The best time to be named in a client's EPLI policy is: (a) when the policy is initially bound, or (b) when the policy is up for renewal. As such, the worst time to seek panel appointment is after litigation has been initiated.

In the author's experience, very few employment-defense law firms track the EPLI policies that their clients have in force or planned. Starting the request for approval process in advance of a claim gives the carrier sufficient time to review the law firm's credentials and educate the firm on applicable litigation guidelines. This back-door route to EPLI policy inclusion can be time consuming but effective.

The primary reason law firms don't track their clients' EPLI policies may simply be due to a lack of time and resources. In fairness, it can be a tedious process. A complicating factor can be that the person or department who purchases insurance within the client organization is removed from the law firm's contacts within the HR department. For example, a chief financial officer (CFO) or risk manager of an insured employer may coordinate insurance coverage without much input from the HR director and/or the law firm. An additional challenge can occur when an employer moves its EPLI coverage to a new insurance company.

Starting to track client EPLI policies early can help a law firm to maximize EPLI representation opportunities within the client firm over time. As you survey clients about their EPLI carriers and brokers, patterns will begin to emerge in regard to the leading local providers. Use the insight you gain to seek out EPLI seminar partners from local insurance carriers and/or agencies.

Traditional Legal Marketing Channels for EPLI Visibility

Insurance-defense law firms that demonstrate thought leadership on topics and situations that could trigger an EPLI claim may strengthen their chances for panel approval. Successful marketing campaigns can include article publication, blog posts, client alerts, continuing education seminars, social media visibility (especially on LinkedIn), speaking engagements, videos, and website content.

An Average Employment-Related Claim is $160,000

Hiscox Insurance Company Inc. reports that the average cost of all types of employment-related cases resulting in a payment was $160,000 in 2017. This number is up by $35,000 since 2015. Hiscox also revealed that the average employment-related case takes nearly a year to resolve.

Similarly, Chubb, a global insurance provider, reports that the average EPLI loss is $102,915. These averages differ due to variations in exactly how a claim is measured and whether defense costs are included, among other factors.

According to the Chubb 2018 Private Company Survey, the majority of all employment-related claims stem from harassment, bullying, retaliation, and discrimination. Between 2015 and 2018, more than a quarter of respondents experienced an EPL loss, with sexual harassment being the most common claim. While 65% of survey respondents are covered by an EPLI policy, one-third of those companies that were not covered assumed incorrectly that their other insurance policies covered such claims.

According to the Equal Employment Opportunity Commission (EEOC) data reviewed by the 2017 Hiscox Guide to Employment Lawsuits, charges of retaliation are made in half of all cases for sexual harassment or discrimination on some other basis, and retaliation is the most common finding of discrimination. More than 75 percent of all claims are unfounded and result in no payment by the insurance company. However, competent and careful representation is necessary to adequately help companies successfully reach the determination that a case is baseless.

An EEOC analysis underscores the magnitude and frequency of employment claims. The agency received 84,254 private sector workplace discrimination charges during the 2017 fiscal year. The EEOC obtained $355.6 million in settlements from private sector and state and local government employers in 2017. Therefore, due to the frequency of employment claims, being able to represent your client in such matters is financially beneficial to your firm.

Background on the Insured Market for EPLI Coverage

The companies most likely to purchase EPLI policies are in employee-intensive industries, including construction, hospitality, manufacturing, healthcare, employee leasing, professional services, restaurants, and transportation. Some industry sectors—such as gambling casinos, churches, or schools—however, may be excluded from EPLI coverage offered by certain carriers. Therefore, it is necessary to speak to your clients regarding their EPLI coverage.

Research conducted by Legal Expert Connections, Inc. indicates that more than 100 insurance carriers offer some form of employment practices liability insurance. Many of these include the expected national multi-line insurance carriers, but regional and niche-oriented insurers also offer some form of EPLI coverage.

Directors and officers are often included under an EPLI policy, recognizing that this remains separate from directors and officers liability insurance (D&O coverage). These features can vary however, and every employer (and employment-defense law firm) should understand what is included or excluded in a particular policy.

In Summary

Start now! Marketing for employment-defense success is a long-term process that benefits from a continuous focus on high visibility business development campaigns.

Is Your Brief Conversational? It Should Be

By: Michael J. Cook, *Collins Einhorn Farrell PC*

Executive Summary

Legal briefs are often written to sound non-conversational, filled with old dead words and phrases such as "henceforth" and "wherefore." By removing these dead words and phrases from your legal briefs, and making your brief sound more conversational, your argument will come across more clearly to your readers (i.e. judges and their law clerks).

Michael J. Cook is a shareholder at Collins Einhorn Farrell PC and co-chair of its appellate-practice group. His practice focuses on appellate litigation, including post-verdict and pretrial dispositive-motion practice. Before joining Collins Einhorn, Mike was a law clerk for Michigan Supreme Court Chief Justice Robert P. Young, Jr. from 2007 to 2009.

Introduction

My undergraduate major wasn't English.[1] I can't map a sentence. And I would probably split an infinitive. So I'm not about to drone on about dangling participles and other grammar rules. But I talk to people. I've been doing it my entire life—well, most of it anyways. Most attorneys have talked to other people too. Yet legal briefs are often written to sound non-conversational. They're stilted, stuffy, and hard to read. They don't need to be. If you can talk to people, then your writing can be conversational—even in legal briefs. And your readers (judges, clients, law clerks, and any other human) will appreciate it.

Plain ol' stuffiness

I cringe—literally cringe—when I see stuffy words. I don't mean those $10 words that some people learn at expensive colleges. I mean: henceforth, wherein, at bar, aforementioned, therein, and/or, wherefore, whereas, provided that. The list goes on. I know where lawyers learn those words. So do you. It wasn't in grade school, high school, or even college. It was law school.

Lawyers learn dead words and phrases when they're reading cases from 18-something-or-other. Yes, they are "dead." Where else do you see or hear them? Nowhere. Absolutely, positively nowhere. Lawyers learn them by reading old texts that they struggle to understand and, for psychological reasons beyond my understanding, insist on breathing life back into them. So these lifeless words lumber, lurch, and stagger around briefs. They terrorize text like the walking dead that they are.

Stop. Please stop. Let those terrible words rest in peace. You know their replacements. You hear and use them every day:

Herein = here
At bar = this case
Provided that = But

So spare the judges. Spare your clients. Spare your colleagues. Spare me, please! Let dead words be dead. Here's a simple, easy-to-follow rule (that I made up): If you wouldn't say it to your mother, don't write it in your motion or brief. That rule fails for people who would say things like "henceforth" when talking to their mother. But no one can help those people.

Contractions: Why don't you like "don't"?

I'm not going to tell you that "y'all" has a place in your brief. It doesn't. But "doesn't"

has a place. The reason is simple: when you write does not, it does not sound like a human. A colleague of mine put it best: Avoiding contractions is fine if your name is Commander Data.[2]

> Here's a simple, easy-to-follow rule (that I made up): If you wouldn't say it to your mother, don't write it in your motion or brief.

Read the New York Times. Or, if that isn't your cup of tea, read the National Review. Better yet, listen to yourself the next time you talk to someone.[3] The New York Times, National Review, and **you** use contractions (unless you're Commander Data).

Why do you use contractions? You're a normal person. People use contractions. We understand them. They flow. Don't you want your writing to be understandable? Don't you want it to flow?

Judges (and law clerks) regularly read hundreds of pages of motions and briefs. Don't you want your brief to be the smooth, understandable, and appreciated, easy-glide through all of that rough sledding? You want them to feel like they're having an informed conversation when they read a brief. Right?

Maybe not. Maybe you dislike the judge or the law clerk. Maybe you want them to slog through their day. But I doubt it. And I doubt that your client wants that.

> Judges (and law clerks) regularly read hundreds of pages of motions and briefs. Don't you want your brief to be the smooth, understandable, and appreciated, easy-glide through all of that rough sledding?

Capitalization: The hiccup in the lawyer's sentence.

The cold, hard truth is that lawyers have a capitalization addiction. It's an epidemic, actually. We capitalize things that have no Earthly business being capitalized. See what happened there? Earthly can be capitalized at the start of a sentence. But in the middle? You hesitated when you saw that, I'm sure.

I understand those who capitalize "Plaintiff," when referring to the particular plaintiff in their case (guilty, convicted, served my sentence). They're referring to a particular person who they have re-named "Plaintiff." They're wrong. But it's understandable.

> If it isn't someone's actual name or the formal title of something given to it by its author, Google it before capitalizing it.

Capitalization is a signal. It triggers something in your reader's brain. Do you want that trigger to Pull at random times Throughout your text? No, you don't. Did you feel it when you read Pull and Throughout? Exercise restraint. It's easier to read and retain a sentence that doesn't have capitalization popping up in the middle of it. So avoid it, if you can.

Here's a basic rule: If it isn't a formal name (Bill Jones, General Motors, Inc., etc.), don't capitalize it. And here's an even better rule: If it isn't someone's actual name or the formal title of something given to it by its author, Google it before capitalizing it. (I Googled whether to capitalize Google and The Chicago Manual of Style said, yes).[4]

So Defendant's Motion for Summary Disposition gets capitalization when you're referring to it by title. But the summary-disposition motion and the motion for summary disposition don't get capitalization because those aren't the full, formal titles; they're a generic reference to a particular document. And notice how much easier the sentence is to read without the capitalization muddying it up.

Conclusion: Why I'm right and that guy saying henceforth is wrong.

This is the secret that's at the root of this article: Judges and clients are real people, just like you and me. It's true. Judges and clients talk the same way that you and I do. They read the same magazines, newspapers, and blogs that you and I do. They are normal people. As a result, their brains work like normal-people brains. So write for them like they're normal people. Since they're lawyers, some judges will think, "hey, it's 'do not'" or "you can't write 'can't' in a brief." But the irony in that thought will be lost as they ease through your brief.

One last thing: I'm not perfect. Far from it. Anyone can pull my briefs from Michigan's appellate and trial courts and point out errors—grammatical or violations of what I've said in this article. I'm human. Like you, I have time constraints. I need sleep (occasionally). I love spending time with my family (more than occasionally). I have to figure out how to fix the bathroom sink (too specific?). But I endeavor. I try. I'll continue to try. And, for goodness sake, I'll let "henceforth" die the quiet, respectful death that it deserves.

Endnotes

1 My major was criminal justice, yet I practice civil litigation. Go figure.

2 Commander Data is a character from the television series, Star Trek: The Next Generation. He's an android.

3 Don't actually do this though; it's very distracting.

4 The Chicago Manual of Style Online, Registered Trademarks, available at http://www.chicagomanualofstyle.org/qanda/data/faq/topics/RegisteredTrademarks/faq0001.html.

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
pderosier@dickinsonwright.com; trent.collier@ceflawyers.com

Can There Be More Than One "Final Order" for Purposes of Appeal?

As a general rule, the Michigan Court of Appeals' jurisdiction is limited to appeals of right from a "final judgment or final order." MCR 7.203(A)(1). In most cases, that will be the "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). But the court rules also provide for other types of "final" orders, including:

- "[I]n a domestic relations action, a postjudgment order affecting the custody of a minor," MCR 7.202(6)(a)(iii);
- "[A] postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule," MCR 7.202(6)(a)(iv); and
- "[A]n order denying governmental immunity to a governmental party, including a governmental agency, official, or employee," MCR 7.202(6)(a)(v).

The possibility of more than one "final" order in a case can be a trap for the unwary because MCR 7.203(A)(1) provides that "[a]n appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right." That serves as an important limitation on the general rule that "[w]here a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Insurance Co,* 194 Mich App 462, 472; 487 N W2d 807 (1992).

A recent decision from the Court of Appeals illustrates the consequences of failing to appreciate the need to file separate appeals from different "final" orders in the same case. In *Davis v Wayne County Clerk*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2018; 2018 WL 4339583 (Docket No. 339200), the trial court entered orders in October 2016 imposing sanctions against the plaintiffs. When the plaintiffs failed to pay, the trial court conducted additional proceedings resulting in the entry of a judgment against the plaintiffs on June 21, 2017. The plaintiffs filed a timely appeal as of right from the June 21, 2017 judgment.

On appeal, the plaintiffs raised several issues concerning the award of sanctions, including the trial court's determination that their complaint was frivolous. The Court of Appeals, however, held that those arguments were not properly before it because they arose from the trial court's October 2016 orders, which the plaintiffs had previously appealed, but the appeal was dismissed for failure to pay the necessary entry fees. The Court of Appeals held that although it had jurisdiction "with respect to any issues related to the June 21, 2017 judgment," *id*. at *2, it could not consider any arguments concerning the October 2016 orders. The Court explained that the plaintiffs had not properly perfected an appeal from those orders, and that MCR 7.203(A)(1) precluded the Court from reviewing anything other than the June 21, 2017 judgment:

> Here, appellants are attempting to use the appeal of the June 21, 2017 judgment as a means of challenging the October 2016 orders. Those October 2016 orders were also final orders inasmuch as they were also postjudgment orders granting attorney fees and costs, including setting the amount of the awards. By arguing that the trial court erred in determining that the complaint was frivolous, appellants are in effect challenging the substance of the October 2016 orders. "When a final order is entered, a claim of appeal from that order must be timely filed. A party cannot wait until the entry of a subsequent final order

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

Trent Collier is a member of the appellate department at Collins Einhorn Farrell P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His e-mail address is Trent.Collier@CEFLawyers.com.

> to untimely appeal an earlier final order." *Surman v Surman*, 277 Mich App 287, 294; 745 NW2d 802 (2007). In an appeal from the subsequent final order, issues relating to the earlier order are not properly before this Court. *Id.* [*Id.* at *1 (some citations omitted).]

Davis is not the first time a party has filed a timely appeal from a "final" order, only to learn that its appeal did not extend to earlier orders because those too were "final." For example, in *Tacco Falcon Point, Inc v Clapper*, unpublished opinion per curiam of the Court of Appeals, issued Oct 23, 2008; 2008 WL 4684088 (Docket No. 273635), the defendant filed a timely appeal from the trial court's order imposing prevailing party costs in favor of the plaintiff under MCR 2.625. In challenging the award of costs, however, the sole basis for the defendant's argument was that the trial court erred in granting the plaintiff's motion for summary disposition. *Id.* at *1. The Court of Appeals held that it did not have jurisdiction to consider that argument because the defendant had not appealed from the summary disposition order itself:

> [B]ecause [the defendant's] appeal is from a postjudgment order awarding costs under MCR 2.625, see MCR 7.202(6)(iv), and because the scope of such an appeal is limited to the portion of the order with respect to which there is an appeal of right, MCR 7.203(A)(1), [the defendant] may not attack the underlying summary disposition order as part of this appeal." [*Id.*]

Similarly, in *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005; 2005 WL 1278478 (Docket No. 256144), the Court of Appeals held that the plaintiffs could not challenge the trial court's order granting summary disposition to the defendant because although the plaintiffs timely appealed from the trial court's postjudgment order awarding attorney fees and costs, the Court's jurisdiction was limited to that order and did not extend to the earlier summary disposition decision. *Id.* at *3.

Note that these cases all happened to involve situations in which a failure to appeal the first of two final orders prevented the Court of Appeals from entertaining an appeal from the earlier order. The same problem arises, however, if a party timely appeals the first order, but not the second one. In *B&S Telcom, Inc v Michigan Bell Tel Co*, unpublished opinion per curiam of the Court of Appeals, issued April 16, 2013; 2013 WL 1632006 (Docket No. 304030), the plaintiff appealed the trial court's order granting summary disposition to the defendant. On appeal, the plaintiff also sought to challenge the trial court's subsequent order awarding the defendant attorney fees and costs as sanctions. *Id.* at *5. The problem is that the plaintiff never filed a separate appeal from the sanctions order. As a result, the Court of Appeals' jurisdiction was limited to review of the summary disposition order:

> [P]laintiff asserts that the trial court erred in awarding defendant attorney fees and costs. However, plaintiff only appealed the trial court order granting summary disposition, and did not appeal the subsequent order awarding sanctions. . . . [B]oth orders are final orders; by failing to appeal from the order awarding costs and fees, plaintiff failed to invoke this Court's jurisdiction with respect to that order and we decline to address this aspect of plaintiff's argument. [*Id.*]

The lesson of these cases, and others like them, is that it is critical to carefully evaluate the issues to be raised on appeal and determine whether the existence of multiple "final" orders may require the filing of more than one claim of appeal.

One-Note Advocacy

The National Law Journal reported a telling moment from the U.S. Supreme Court's December 6, 2018 oral argument in *Gamble v United States*.[1]

Gamble concerned the "separate sovereigns" doctrine—the rule that federal and state authorities can prosecute the same person for the same crime without violating the prohibition against double jeopardy. Gamble's attorney argued that the separate-sovereigns doctrine "is inconsistent with the text and original meaning of the Double Jeopardy Clause."[2] And much of his argument focused on this question of original understanding. After Justice Gorsuch prodded Gamble's attorney to consider *stare decisis*, Justice Kagan pointedly directed Gamble's attorney away from original understanding:

> [M]y main question, which actually goes back to Justice Gorsuch's question, because Justice Gorsuch has been trying to lead you away from something, and I'm a little bit also confused as—as to why your argument seems, frankly, a little bit one note.
>
> You know, your—your brief and now your argument is just all about the original jurisdiction [sic; understanding]. And there are some people on this bench that think that that is the alpha and omega of every constitutional question.
>
> But there are other people on this bench who do not . . .[3]

The National Law Journal interpreted Justice Kagan's comment about "one note" arguments as a dig at "her originalist colleagues."[4] That's doubtful. Justice Kagan asked this question as a follow-up to inquiries from Justice Gorsuch—who is, by most accounts, one of "her originalist colleagues." And the key lesson from Justice Kagan's comment isn't that it invites speculation about internal Supreme Court drama. Rather, Justice Kagan was making an important point for appellate advocates.

Most appellate advocates have a guess before oral argument about what each judge is likely to think about the case. That's part of our job. Clients often hire appellate specialists precisely because these specialists know a court well enough to make educated guesses. And it would be foolish not to use these educated guesses in preparing arguments.

But educated guesses can be a trap, too. That's what Justice Kagan was getting at.

Educated guesses can trap lawyers in two ways. The first trap is the kind of "one note" advocacy that Justice Kagan cited in *Gamble*. Advocates spring this trap by coming up with a theory that seems to fit the judicial philosophy of a majority on the court. They focus so much on

selling an argument that fits the would-be majority's view that they forget about the other judges—the ones who don't share the majority's judicial philosophy. Once this trap is sprung, you may get the kind of pushback Justice Kagan expressed in *Gamble*—something to the effect of, "Hey, there are other justices on this Court, too."

Most attorneys could live with comments like Justice Kagan's "one note" remark if it meant winning their cases. But offending judges in the minority isn't the only risk. One-note advocacy poses a second trap: undermining the complexity of a putative majority's judicial philosophies.

Justice Gorsuch may be an originalist but he was clearly interested in *stare decisis* and judicial humility in *Gamble*. Counting a majority too soon can mean over-simplifying the majority's approach and missing these other concerns. In its worst form, this second trap leads to the dreaded Argument Only a Lawyer Could Love—a construction of a statute or court rule or case so focused on technical issues that it misses major conceptual and contextual points.

There's a way to avoid these traps: approaching every argument with every judicial tool available. Have a winning plain-text argument? Great. Make sure you put in the context of a compelling story. Have a powerful take on caselaw? Fine—but don't forget about relevant statutory schemes. Think you know the original understanding of the controlling constitutional clause? Consider *stare decisis,* too. The best arguments work on multiple levels, speaking to judges with varied judicial philosophies and inviting judges to consider an issue from different angles.

Aside from avoiding conceptual traps, there's a very practical reason to approach appellate arguments this way. At intermediate appellate courts, you don't know which judges are assigned to your panel until briefing is complete. So you might have a slam-dunk argument for textualists, only to discover your case is assigned to judges who can say "textualism" only with a wrinkle of the nose.

This article isn't meant to be a criticism of Gamble's attorney. Justice Kagan's characterization may or may not have been fair, and Gamble's original-understanding argument may yet carry the day. We've all gotten questions that seem harsh, only to learn that the court ruled in our client's favor. If we're honest, we've all fallen into the trap of one-note advocacy sometimes.

Still, Justice Kagan's comment about one-note advocacy is a reminder that it's not enough to hit the right notes. We need melody, too.

Legal Malpractice Update

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell, P.C.*
michael.sullivan@ceflawyers.com; david.anderson@ceflawyers.com

Statute of Limitations Bars Claim by Tractor Thief

Houthoofd v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2018 (Docket No. 340514); 2018 WL 3551943.

Facts:

Attorney Defendant represented Houthoofd, who had been charged with false pretenses arising out of the theft of a tractor, witness intimidation, and obstruction of justice. Houthoofd was ultimately convicted and sentenced to several years in prison. The trial court granted Attorney Defendant's motion to withdraw as counsel on October 21, 2004, the day trial was scheduled to begin, and appointed substitute counsel. On November 21, 2016, Houthoofd filed a legal malpractice claim, alleging that Attorney Defendant negligently failed to seek suppression of the evidence collected by law enforcement officers during warrantless searches of his vehicle and home in violation of the Fourth Amendment. Attorney Defendant filed a summary-disposition motion based on the expiration of the statute of limitations, and the trial court granted it. Houthoofd appealed.

Ruling:

On appeal, Houthoofd argued that the two-year statute of limitations had not expired before the filing of his November 21, 2016 complaint because a written order was never entered allowing the Attorney Defendant to withdraw as counsel. The appellate court was not persuaded. It noted that the trial court made a clear statement on the record granting Attorney Defendant's motion to withdraw as counsel. As a result, Attorney Defendant's last day of professional service, and the date of accrual of the legal-malpractice claim, was on October 21, 2004. The court also explained:

> Even if the trial court's oral rulings had been ineffective, [Attorney Defendant's] representation would not extend indefinitely, as plaintiff maintains. Rather, this Court has held that "in cases in which counsel is not dismissed by the court or the client, in which no substitute counsel is retained, and in which the attorney fails to send affirmative notification of withdrawal from service, MCR 2.117(C)(1) likely extends the attorney's service in the matter until 'the time for appeal of right has passed.'" *Kloian v. Schwartz*, 272 Mich. App. 232, 238 n. 2.

Houthoofd also argued that he neither discovered nor should have discovered his potential legal-malpractice claim arising out of the warrantless searches until October 2016. However, the court held that Houthoofd actually discovered his claim as early as December 2004, when he filed a separate court action challenging the allegedly warrantless and unconstitutional searches. Therefore, the court affirmed summary disposition.

Practice Note:

While it was not necessary to a successful defense in *Houthoofd*, it may be beneficial to have a written order entered whenever you are granted leave to withdraw as counsel.

Michael J. Sullivan and **David C. Anderson** are partners at Collins Einhorn Farrell, P.C. in Southfield. They specialize in the defense of professional liability claims against lawyers, insurance brokers, real estate professionals, accountants, architects and other professionals. They also have substantial experience in product and premises liability litigation. Their e-mail addresses are Michael.Sullivan@ceflawyers.com and David.Anderson@ceflawyers.com.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
gcrabtree@fraserlawfirm.com

Those of us who have not been immersed in the practice of law to the exclusion of all other stimuli have not failed to notice that there have been a lot of very interesting developments in Lansing since my last report at the beginning of September. The general election has come and gone, and although the much-anticipated "blue wave" did not qualify as a genuine tsunami, it did rise to a sufficient level to bring about some considerable discomfort and scurrying for higher ground. The Republicans lost some seats but retained their control of both houses of the Legislature. In the Senate, the Republican edge was eroded from its supermajority of 27 to 11 Democrats to a lesser advantage of 22 to 16. In the House, Republican control was diminished from a majority of 63 to 47 Democrats to a more modest but still sufficient majority of 58 to 52. In the new Legislature poised to convene in January, Senator Mike Shirkey will serve as the new Majority Leader. In the House, Representative Lee Chatfield will be the new Speaker. In the U.S. Congress, the Republican advantage of 9 seats to 5 will be reduced to an even 7 - 7 split in the next session.

Democratic candidates were elected in the statewide races for Governor, Secretary of State and Attorney General. Thus, as of New Year's Day at noon, we have Gretchen Whitmer as our new Governor, Jocelyn Benson as Secretary of State and Dana Nessel as Attorney General. And each of the three statewide ballot proposals – Proposal 1 to legalize recreational use of marijuana, Proposal 2 amending the Constitution to prevent future partisan gerrymandering of state legislative and congressional election districts, and Proposal 3 amending the Constitution to "promote the vote" – were all passed by comfortable margins, suggesting a degree of bipartisan approval.

The shift of power at the top of the executive branch and the changes effected by voter initiative have served to bring about a particularly active and volatile lame-duck session. For those who may be unfamiliar with the lingo, the lame-duck session is a phenomenon that occurs in Michigan after the general election in every even-numbered year, when the expiring Legislature is winding up its work in the three or four weeks before the Christmas holiday. It generally involves a frenetic push by retiring legislators to secure the final passage of initiatives that have been in the works beforehand, and efforts to secure the enactment of legislation that is unlikely to be approved if reintroduced in the next session for one reason or another. This year's lame duck session was all of this and much more, as it also featured spirited discussion of a variety of bills which were introduced after the election for the purpose of limiting the authority of the incoming administration and altering the impact of some of the approved voter initiatives.

As I mentioned in my last report, the stage was set for a part of the lame-duck drama in September, when the Legislature passed legislation to raise the minimum wage and require employers to provide paid sick leave proposed by voter initiatives supported by ample petition signatures (2018 PA Nos. 337 and 338) – an action that was taken while the Republican leadership freely acknowledged that this was being done in order to prevent the submission of those questions to the voters with the intent to repeal or modify the newly-created provisions in the lame-duck session when it would be possible to do so by a simple majority vote instead of the generally unattainable three-quarters vote required to repeal or amend an initiated law approved by the voters at the polls. In accordance with that plan, Republican Senators Hildenbrand and Shirkey introduced **Senate Bills 1171 and 1175** on the Thursday after the election to scale back the voter-initiated reforms enacted in September. Those bills (now **2018 PA Nos. 368 and 369**) were quickly passed over strenuously voiced objections, and subsequently approved by Governor Snyder on December 13th. Supporters of the minimum-wage initiative have promised to sue, so it remains to be seen whether this action will be reversed or upheld.

Graham K. Crabtree is a Shareholder and appellate specialist in the Lansing office of Fraser Trebilcock Davis & Dunlap, P.C. Before joining the Fraser firm, he served as Majority Counsel and Policy Advisor to the Judiciary Committee of the Michigan Senate from 1991 to 1996, and as an Assistant Prosecuting Attorney in the Appellate Division of the Oakland County Prosecutor's Office from 1980 to 1991. He can be reached at gcrabtree@fraserlawfirm.com or (517) 377-0895.

[T]he lame-duck session is a phenomenon that occurs in Michigan after the general election in every even-numbered year, when the expiring Legislature is winding up its work in the three or four weeks before the Christmas holiday.

The lame-duck session was finally completed after a marathon session in the morning hours of December 21st. As I complete this report on that same day, there are 434 Public Acts of 2018, and there are a great many bills now enrolled, or to be enrolled shortly, for presentation to the Governor, who will be very busy reviewing legislation in the final days of his term. Some of the recently introduced bills have already become public acts of 2018 as of this writing, while others await the Governor's review.

Other initiatives fell by the wayside for lack of time or inability to garner the required support. Legislation proposing no-fault insurance reform fizzled once again, as it did in the lame-duck session of 2016. Six new public acts **– 2018 PA Nos. 370 through 375 (House Bills 5794, 5661, 5660, 5658, 5539 and 5798) –** will amend provisions of Penal Code, the Code of Criminal Procedure, the Student Safety Act and the Crime Victim's Rights Act to address issues brought to light by the Dr. Larry Nassar debacle, but the Senate ran out of time to consider several other House Bills passed by the House in May as additional parts of that initiative.

A final listing of this year's pertinent legislative accomplishments must be deferred until my next report, but it is instructive to review a few of the more important bills that did, and did not, survive the dash to final passage. They include:

2018 PA No. 359 – Senate Bill 1197 (Casperson – R), which has amended 1952 PA 214 to create a new Mackinac Straights Corridor Authority, empowered to enter into agreements for construction, maintenance and operation of a utility tunnel connecting the upper and lower peninsulas at the Straights of Mackinac. The authority provided by this legislation, passed and approved with immediate effect on December 11th, has been quickly deployed to finalize an agreement previously negotiated between Governor Snyder and Enbridge Energy allowing Enbridge to drill a tunnel through the bedrock beneath the lake bed to house a new pipeline to replace its existing Line 5 pipeline, which has been used for transportation of oil and propane between the upper and lower peninsulas since 1953.

Senate Bill 1250 (Robertson - R), which proposed amendment of the Michigan Campaign Finance Act to transfer enforcement authority from the Secretary of State to a new "Fair Political Practices Commission," an autonomous entity which would have been housed within, but would have operated independently from, the Department of State; and **Senate Bill 1254 (Pavlov - R)**, which proposed a new act prescribing duties of the Secretary of State relating to the new Independent Citizens Redistricting Commission established by the voters' approval of Proposal 18-2, including a requirement that the secretary promulgate rules and procedures governing the application and selection process for commission members. This legislation also proposed statutory standards of questionable constitutionality for determining political party affiliation or non-affiliation of prospective commission members and would have precluded individuals affiliated with any political party from providing legal, accounting and other services to the commission. These bills were passed by the Senate but were shelved in the House in the face of intense opposition and constitutional objections.

House Bill 1238 (Kowall - R), which proposes numerous amendments of the Michigan Election Law to establish new procedures for implementation of the constitutional amendments adopted by the voters' approval of Proposal 18-3. These include, most notably, a new requirement that persons registering to vote within 14 days prior to an election must do so and provide proof of residency at the office of the clerk of the city or township where they reside. This bill was passed and ordered enrolled for presentation to the Governor on December 20th.

House Bill 6553 (VerHeulen – R), proposing an amendment of 1846 RS 2 – "Of the Legislature" – to add a new section MCL 4.83a, which would provide statutory authority for the Legislature, and each house of the Legislature, to intervene in any action commenced in any state court, whenever the Legislature, or either house thereof, deems such intervention necessary in order to protect any right or interest of the legislative body because a party to the action has challenged the constitutionality of a state statute, the validity of legislation, or any action of the Legislature. If approved by the Governor, this new provision will allow intervention at any stage of the proceedings, and the legislative intervenor would have the same right to prosecute an appeal, apply for rehearing, or take any other action that could be taken by the parties to the litigation. This legislation was proposed to guarantee the Legislature a voice in any litigation challenging legislative enactments that our new Governor and Attorney General might decline to defend, and has been decried by some as an effort to interfere with the performance of their duties. It was given final approval by both houses on party-line votes with immediate effect, and was ordered enrolled for presentation to the Governor in the early morning hours of December 21st.

House Bill 6595 (Lower – R), which proposes amendments of the Michigan Election Law to create new more restrictive procedural requirements governing voter initiatives proposing initiated laws and constitutional amendments. Most notably, this legislation would provide that no more than 15% of the petition signatures used to determine the sufficiency of support for a petition could be provided by voters in any single congressional election district. The legislation would also require that the Board of State Canvassers make its official determination of the sufficiency or insufficiency of an initiative petition at least 100 days before the election in which the proposal would be submitted and establish a new limited procedure and timeframe for reviewing determinations of the board with respect to the sufficiency or insufficiency of a petition. Under this new provision, a party aggrieved by the board's determination would be required to seek review in the Supreme Court

within 7 business days after the date of the board's declaration, but not less than 60 days prior to the election in which the proposal would be submitted. This bill was passed by both houses on party-line votes over vigorous dissent and ordered enrolled for submission to the Governor on December 21st.

Senate Bill 100 (Casperson – R) and **Senate Bill 101 (Robertson – R)**, which would amend the Revised Judicature Act and the Administrative Procedures Act to expand the circumstances in which fees and costs must be awarded to a prevailing party other than the state in civil actions brought by or against the state, and a prevailing party other than a state agency in contested cases. These bills were passed and ordered enrolled for presentation to the Governor on December 19th.

Online Resources

Our readers are again reminded that copies of legislative materials, including bills, resolutions, legislative analyses, the House and Senate Journals, and a detailed history of each bill and resolution, may be found on the Legislature's very excellent website. The website includes copies of all public acts and the official compilation of Michigan statutory law. The available bills and resolutions include the versions as originally introduced and as passed by each house, and also includes links to bill substitutes which have been reported from the House and Senate Committees or adopted in proceedings before the full House or Senate. Copies of the ballot proposals submitted on the general election ballot in November may be found on the Secretary of State's website, and the new and amended constitutional provisions approved by the voters may also be found on the Legislature's website.

Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
dbroaddus@secrestwardle.com

DKE, Inc v Secura Ins Co, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2018 (Docket No.s 333497 & 337834) ("*DKE II*").

This appeal arose out of a 2004 fire at a two-story commercial building in Southfield. Secura denied coverage on the grounds "that the fire was a result of arson by a person" – specifically Patrick Winter, the son of DKE owner, William Winter – "whose actions would exclude the loss from coverage under the policy …." The corporate insured sued Secura for breach of contract. The central issue in the suit was whether the arsonist had a degree of control over the corporation that would justify applying the policy's "dishonest and criminal acts" exclusion. *Id.* at 2. After a lengthy procedural history – which included a prior appeal form a partial summary disposition ruling, *DKE, Inc v Secura Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued September 16, 2008 (Docket No. 278032) (hereafter "*DKE I*") – the case went to trial, resulting in a no-cause verdict and sanctions against the insured.

The insured appealed, arguing "that the trial court failed to follow the law of the case doctrine" as it relates "to the control that must have been exercised by Patrick Winter over the affairs of plaintiff in order for defendant's policy exclusion to apply." Specifically, the insured asserted that in *DKE I*, the Court of Appeals had directed the trial court to answer whether Patrick Winter had exercised "complete" dominion and control over the affairs of DKE, Inc., in order to impute his actions to the plaintiff. But on remand, "the trial court instead improperly instructed the jury and submitted verdict forms indicating that the jury could impute Patrick Winter's actions to DKE if it found that he exercised 'sufficient' or 'requisite' control."

The Court of Appeals agreed that the trial court did not properly follow the prior panel's remand instructions. *DKE I* directed the trial court to decide "whether Patrick was an authorized representative or an individual to whom the property was entrusted," which was to "include a determination of whether Patrick had complete dominion and control over the affairs of the corporation." The trial court initially followed this ruling when, after remand, it denied Secura's motion for summary disposition. But after a 4 ½ year stay and a new trial judge, the jury instructions ended up deviating from the *DKE I* holding. The jury instructions asked whether Patrick Winter exercised "sufficient" or "requisite" control over the corporate plaintiff – not "complete dominion and control" as *DKE I* found to be necessary in order for the exclusion to apply.

The panel placed particular emphasis on *United Gratiot*.[1] In *United Gratiot,* a fire destroyed the United Gratiot building and United Gratiot's insurer, Michigan Basic Property Insurance, refused to pay under the commercial fire insurance policy it had issued on the building because it determined that Samuel Goldberg, United Gratiot's president and largest shareholder, set the fire or directed someone else to set it. United Gratiot sued its insurer and a jury entered a verdict of no cause, finding that the insurer had shown that Goldberg had been involved in setting the fire and that "Goldberg's control in the corporation was so extensive that his actions should be imputed to the corporation and the corporation's claim of coverage should be denied." On appeal, United Gratiot argued that the corporation was the insured, not Goldberg, and that denying coverage to the corporation unfairly penalized the corporation's other shareholders, who had nothing to do with the fire.

The *United Gratiot* panel framed the issue as: "In what situations should an insurance company be allowed to deny payment to a corporation for a fire loss when evidence demonstrates that a shareholder willfully set the fire?" The answer turned on the "degree of control which the [arsonist] has exerted over the affairs of the corporation." The

Drew W. Broaddus is a partner at Secrest Wardle's Grand Rapids office and chair of the firm's Appellate and Insurance Coverage practice groups. He has been named to Super Lawyers Magazine's list of Rising Stars for 2012–2017. He has received an AV Preeminent® Peer Review Rating by Martindale-Hubbell and is a member of the State Bar's Appellate Practice Section Council. He can be reached at dbroaddus@secrestwardle.com.

panel held that "an insurance carrier may assert arson as a defense against a corporation's claim of fire loss if it is factually demonstrated that the individual who set or procured the setting of the fire exercised complete dominance and control over the affairs of the corporation." The *DKE II* panel therefore concluded that, "under *United Gratiot*, the standard of control is that of 'complete' dominance and control – not 'sufficient' control as the trial court instructed the jury in this case."

Therefore, the Court of Appeals remanded for a new trial: "[t]his entire case hinged upon whether Patrick Winter was an authorized representative of DKE and whether he exercised complete dominion and control over DKE such that defendant's policy exclusion could apply and the jury instructions went to the crux of the entire case." "Without being instructed on the correct legal standard (that it must find that Patrick Winter exercised complete dominion and control), the jury in this matter was not in a position to properly decide the case and this Court cannot determine if the jury would have reached the same conclusion had it been properly instructed with the correct legal measure."

Westfield Ins Co v Jenkins Construction, unpublished opinion per curiam of the Court of Appeals, issued September 6, 2018 (Docket No. 337968).

Here, the Court of Appeals affirmed two summary disposition rulings in a declaratory judgment action relating to damage to the Taylor (Pelham) Basin in Taylor, Michigan. The basin was damaged when a heavy rainstorm caused it to overflow shortly after it had been upgraded. Westfield provided Commercial General Liability ("CGL") coverage to Doublejack, a subcontractor on the upgrade project. Although the factual and procedural history is complex – resulting in a decision that is largely case-specific – the opinion contains a noteworthy discussion into the meaning of "property damage" under a CGL policy.

The Ecorse Creek Pollution Abatement Drain No. 1 Drainage District ("ECPAD") hired Wade Trim Associates, Inc. ("Wade Trim"), an engineering firm, to provide engineering and construction services for the design, bidding process, and construction management of a project to upgrade the basin. ECPAD hired Jenkins to serve as the general contractor for the basin improvements designed by Wade Trim. Jenkins contracted with Doublejack to perform the electrical work on the project. Doublejack, in turn, contracted with Commerce Controls, Inc. ("Commerce Controls") to design, install, and test the instrumentation and controls. A few weeks after completion of the basin improvements, but before Jenkins received final payment from ECPAD, a heavy rainstorm caused the basin to overflow. Computerized controls failed to function, which resulted in catastrophic structural damage to the basin and released sewage onto nearby property. Commerce Controls worked with Wade Trim on the design and installation of the computerized controls that were intended – but failed – to prevent this type of failure.

> The central issue in the suit was whether the arsonist had a degree of control over the corporation that would justify applying the policy's "dishonest and criminal acts" exclusion.

Jenkins initially filed a lawsuit against ECPAD, seeking final payment. Numerous parties subsequently entered the suit, filing various counterclaims and crossclaims. While this was ongoing, Westfield brought a separate lawsuit for declaratory relief, relative to its insurance obligations. Westfield's suit was eventually combined with Jenkins's suit, which ended up in front of the Court of Appeals on two issues: (1) the trial court's ruling that Westfield was not obligated to indemnify Jenkins for certain damages or for Jenkins's liability on a professional-services claim; and (2) the trial court's ruling that Doublejack was not obligated to indemnify Jenkins under their separate indemnity agreement for claims not covered by Westfield. Jenkins was seeking liability coverage from Westfield because Doublejack's policy with Westfield covered Jenkins as an additional insured.

The Court of Appeals affirmed that Jenkins was not entitled to indemnification under Westfield's CGL policy for damages and expenses Jenkins incurred in resolving the other claims. Westfield, as part of the various settlements, covered ECPAD's claims of property damage, including claims for damage that was attributable to Jenkins. Westfield not only covered ECPAD's claims of property damage against Jenkins, but it also assumed Jenkins's defense of those claims because Doublejack's policy with Westfield covered Jenkins as an additional insured. As a result of Westfield's involvement, ECPAD's claims for property damage were resolved through case evaluation. Jenkins was also involved in case evaluation as a separate party, and, for its part, agreed to pay ECPAD $100,000 in liquidated damages.

Even though Westfield had already covered the property damage claims, Jenkins argued that Westfield was also required to indemnify Jenkins's liability to ECPAD for the agreed-upon liquidated damages, as well as other expenses incurred by Jenkins, including a "$140,000 Bond expense," "$160,268.32 in legal fees and expenses," and "the potential claims of other sub-contractors for legal expenses in the amount of $194,598.25." Jenkins asserted that Westfield was responsible for these damages and expenses under the CGL policy because – although not labeled "property damages" – they were nonetheless property damages involving both physical and intangible consequential damages resulting from the "occurrence." However, "focusing on the cause of the injury and not the terminology used in Jenkins's pleadings," the panel unanimously found that "Jenkins's claimed damages [were] simply not covered by the terms of the CGL policy…." The panel found "no basis to conclude" that the $100,000 in "liquidated damages" – or the other expenses Jenkins incurred – represented "property damage" sustained as a result of the loss of use of the basin.

Jenkins also sought indemnity from Westfield "for any liability Jenkins had to Wade Trim for ECPAD's professional-negligence claim against the engineering firm [Wade Trim]." *Id.* Jenkins had agreed to indemnity Wade Trim, and Jenkins' theory appears to have been that this was covered under the Westfield policy's definition of an "insured contract." See *id.* at 5. Again, the trial court and

the Court of Appeals rejected Jenkins' argument, this time based upon an exclusion endorsement.[2] The panel noted that ECPAD had sued Wade Trim for property damages caused by engineering errors and omissions in the performance of two different engineering contracts, and also for failure to supervise the contractors to ensure compliance with its engineering designs. *Id.* But "Westfield had no duty to indemnify Jenkins for Wade Trim's professional negligence based on the professional-services exclusion in the CGL policy's endorsement, which unambiguously denied coverage to additional insureds" for property damage caused by "supervisory, inspection, architectural, or engineering activities." "Thus, to the extent that Wade Trim had any claim to recover part of its $600,000 settlement with ECPAD from Jenkins, Jenkins had no basis to seek indemnity from Westfield under the CGL policy."

The panel found "no basis to conclude" that the $100,000 in "liquidated damages" – or the other expenses Jenkins incurred – represented "property damage" sustained as a result of the loss of use of the basin.

On appeal, Jenkins also sought indemnity from Westfield's insured, Doublejack. Jenkins argued that "under either a theory of express contractual indemnity or implied contractual indemnity, Doublejack was required to cover all of Jenkins's damages and expenses that … Westfield [was] not responsible for." As to express contractual indemnity, Article XXII of the subcontract was dispositive. Under Article XXII, Doublejack's "responsibility and liability" to Jenkins was for "any act and all damages or injury of any kind or nature" "to any persons … and to all property." "The damages Jenkins sought are not tort-based and simply [did] not fall into the category of personal injury or property damage covered under Article XXII." And Jenkins' implied contractual indemnity claim failed due to Jenkins' inability to identify any supporting legal authority.

Rochlani v Pioneer State Mut Ins Co, unpublished opinion per curiam of the Court of Appeals, issued September 4, 2018 (Docket No.s 336651, 336768 & 336786).

This action arose out of a homeowners' insurance claim relating to "the freezing and sudden bursting of water pipes in the home, and the entry of raccoons into the garage." Pioneer, the homeowners' insurer, denied the claim on the grounds "that plaintiff intentionally concealed or misrepresented material facts relating to the claim, thereby voiding the policy, and that she also did not report the loss to Pioneer in a timely manner, thereby extinguishing any rights and obligations under the policy." The trial court granted Pioneer's motion for summary disposition on this issue, and the Court of Appeals affirmed.

The opinion makes for unusually compelling reading because the first-party claim was combined with the insured's "breach of fiduciary duty, breach of contract, and negligence" claims against her own public adjuster – which were ultimately deemed frivolous and are not relevant here. As to the first-party claim, the panel noted that "[t]he homeowner's insurance policy that plaintiff held with Pioneer contained duties imposed on plaintiff after a loss, including the duties to give prompt notice of the loss to Pioneer, protect the property from further damage, make reasonable and necessary repairs to protect the property and keep an accurate record of repair expenses." The policy provided that no suit may be brought against Pioneer unless the plaintiff complied with policy provisions. The policy also contained provisions allowing Pioneer to void the policy under certain conditions. In particular, the policy provided: "The entire policy will be void if, whether before or after a loss, an insured has: a. intentionally concealed or misrepresented any material fact of circumstance; b. engaged in fraudulent conduct; or c. made false statements; relating to this insurance."

On May 20, 2014, plaintiff reported a loss due to water damage and raccoons that had occurred sometime in February 2014. In support of its motion for summary disposition, Pioneer submitted a report dated August 19, 2014, detailing the results of an inspection conducted on plaintiff's home just two days after the reported loss. The report noted that, on first inspection, there were "many questionable issues" relative to plumbing repairs purportedly completed by a handyman, and there was no wet carpet or standing water anywhere but in the basement where water was still entering from an unknown source. The report noted possible coverage issues regarding "a lack of prompt notice of the loss, plaintiff's failure to prevent or minimize mold from developing or to mitigate mold once it was discovered, plaintiff's failure to provide documentation or records concerning purported plumbing repairs, and a lack of evidence of frozen plumbing lines."

Pioneer also proffered plaintiff's examination under oath, where the plaintiff testified that she may have had one other insurance claim "a long time back" due to a tree falling. She testified that when she and her husband were in Chicago in February 2014, a friend of their son's had gone into the home to water the plants. He notified them that there was water leaking in the house. Plaintiff and her husband returned from Chicago a short time later to find ice in the garage and water in the kitchen, on the porch, in her son's bathroom, and in the basement. Plaintiff's husband went down to the basement and discovered the sump pump switch was not working. He changed the switch and water started draining from the basement. Plaintiff testified that she had never noticed any mold in the home. She further testified that she and her husband had a handyman named "Mike" come four or five times after the loss at issue and start performing some plumbing repairs. Plaintiff testified that there was a hole in her garage roof that was tarped off, perhaps sometime in the October or November of 2013, and that there was no prior water damage to the house.

This was in sharp contrast to her deposition testimony, where the plaintiff testified that her home had been damaged when a pipe broke in the summer of 2008. When asked about a January 2009 claim relating to a sump pump failure and resulting water damage, plaintiff stated that she could not remember. Plaintiff testified that there was no water damage

in the garage when she left for Chicago in February 2014, nor was there any water damage on the second or first floor of the home or in the basement. Yet, she also testified that there had been previous damage in her son's bathroom (located above the garage) due to a broken shower head – but that it had been repaired.

In further support of its motion for summary disposition, Pioneer provided the deposition of Philip Gap, who was hired by plaintiff to perform a mold assessment on the home and write a protocol to remediate the mold. Mr. Gap inspected the home on June 24, 2016, and testified that water entered through the garage roof due to multiple impacts on the roof and affected a bathroom adjoining the garage. He further testified that a strong odor of mold emanated from the basement as soon as he opened the door and that the basement was extremely moldy. He testified that he was told that there had been a water leak from a refrigerator ice maker in the basement and his inspection led him to believe there had been water damage based on such an event.

The jury instructions asked whether Patrick Winter exercised "sufficient" or "requisite" control over the corporate plaintiff – not "complete dominion and control" as DKE I found to be necessary in order for the exclusion to apply.

Pioneer also proffered the deposition testimony of John David, president of Emergency Restoration. He testified that he met with plaintiff and her son at their home but they were not forthcoming with information and he did not believe what they said was actually going on in the home, so he did not want the job. Mr. David testified that mold growing in the basement did not happen in just a few weeks, and the hole in the garage roof where they said raccoons came in was "just odd" to him and made him uncomfortable. Mr. David testified that because of this, he gave them a list of public insurance adjusters and left. According to Mr. David, the damage he saw in plaintiff's home was not consistent with damage caused by one frozen pipe event.

Other evidence Pioneer proffered in support of its motion for summary disposition included documents showing that plaintiff had filed claims for water damage losses in 2008 and 2009 and that her policy was in danger of being cancelled in 2011 until she allowed Pioneer to inspect her home. A 2011 inspection showed "soffit deterioration in a corner of the garage which created openings into the attic space." This unprotected attic space was adjacent to the water pipes for the second and first floor bathrooms. Additionally, an April 17, 2015 report from WJE Architect and Engineer Specialists noted that "damage to the garage roof shingles was consistent with an abrupt exterior impact and that the damage was located directly beneath a large tree with overhanging limbs." The report also noted that a significant amount of work had been performed over the years on the basement sump pump and that the pump discharges water into a basement toilet (with evidence that it had been used in this fashion for a lengthy period of time). Mold was noted on a basement wall not connected with the walls near where the purportedly frozen and burst pipes were located, and the ceiling of the basement was noted to have "no damage consistent with water coming from above." WJE opined that, based on evidence and inspection, if any water loss occurred, it was minor and localized to the three bathrooms, with no structural damages having resulted from the water loss. WJE further opined that "although there is evidence of vermin in the garage attic space, there is no evidence that they caused any significant damage to the walls or ceiling that would make the pipes susceptible to freezing, and that the basement water damage is not related to any water coming from above but is instead due to bad grading and manipulations to the sump pump and pit over the years."

Based on this record, the Court of Appeals unanimously agreed with Pioneer and the trial court that summary disposition was proper. The panel found that "plaintiff did not notify defendant of the alleged loss until three months after it occurred, did not submit a sworn statement in proof of loss until nearly six months after the loss, and plaintiff testified that she did not have an accurate record of repair expenses." "In addition, documentary evidence established that if, in fact, a water loss occurred, plaintiff did not mitigate the loss." "These actions could be construed as violations of plaintiff's duties under the policy." The panel placed particular emphasis on policy language providing "that the entire policy is void if plaintiff makes false statements with respect to the insurance." "Though plaintiff testified that no prior water damage occurred in the home, and that she did not notice any mold in the home or any damage to the roof of the garage due to raccoons, the evidence clearly contradicts her testimony, as does her own later testimony." There were therefore no questions of fact regarding her "material false statements regarding prior water damage," and Pioneer "was entitled to void her policy."

Endnotes

1 United Gratiot Furniture Mart, Inc v Basic Property Ins Assoc, 159 Mich App 94; 406 NW2d 239 (1987).

2 "[E]ndorsements by their very nature are designed to trump general policy provisions, and where a conflict exists between the provisions of the main policy and the endorsement, the endorsement prevails." Besic v Citizens Ins Co of the Midwest, 290 Mich App 19, 26; 800 NW2d 93 (2010). See also Hawkeye-Security Ins Co v Vector Constr Co, 185 Mich App 369, 380; 460 NW2d 329 (1990).

Municipal Law Report

By Lisa A. Anderson

Multiple Family Housing and Historic Preservation Are Legitimate Governmental Interests in Substantive Due Process Analysis

CBC Joint Venture v City of the Village of Clarkston, unpublished opinion per curiam of the Court of Appeals, issued September 25, 2018 (Docket No. 337750); 2018 WL 4603858.

Facts:

In an unpublished opinion released on September 25, 2018, the Michigan Court of Appeals held that the City of the Village of Clarkston's refusal to rezone property to commercial use advanced several legitimate governmental interests, including the City's legitimate interests in providing multiple-family housing and preserving historic buildings.[1]

CBC Joint Venture owns property in the City's downtown commercial-core district, which is zoned for multiple-family residential use. For more than thirty years, CBC used the property as an apartment building. In February 2015, CBC applied to rezone the property from multiple-family residential to village commercial to allow for a restaurant and bar. The Planning Commission unanimously recommended approval of the rezoning application to City Council after a public hearing in March 2015. City Council discussed the application at its next regular meeting and voted to send the matter back to the Planning Commission for consideration of a conditional rezoning request.

Upon return to the Planning Commission, CBC proposed to specifically limit the commercial use of its property to a restaurant and bar under a conditional rezoning agreement. Unlike conventional rezoning, which allows a property to be used for any purpose permitted under the new zoning classification, a conditional rezoning ties the development of property to a specific use, or subjects the property to specific voluntary restrictions, subject to a written agreement between the property owner and the City.[2] As a condition of the rezoning, CBC offered to specifically limit use of its property for a restaurant and bar rather than permit the broader range of uses authorized in the village commercial zoning district. During public comment and debate by the Planning Commission, concerns were raised about parking and remarks were made about the need for a transitional zone between village commercial and the neighboring single-family residential properties. The Planning Commission recommended denial of the conditional rezoning request. In August 2015, City Council denied CBC's conditional rezoning application.

CBC filed suit, alleging that the City's refusal to rezone the property to village commercial deprived CBC of its constitutional rights to equal protection and substantive and procedural due process of law. CBC also alleged that the property's multiple-family zoning classification constituted a governmental taking of its property because it denied CBC economically viable use of its land. The circuit court agreed with CBC and found that the City's rezoning denial was arbitrary and not based on any legitimate rational reason. The circuit court granted summary disposition to CBC on the substantive-due-process claim.[3] The circuit court similarly found that the City singled the property out for different treatment in violation of CBC's equal-protection rights.[4] The court ordered the City to approve CBC's rezoning request and enjoined the City from preventing CBC from opening a restaurant and bar.[5] CBC's taking and procedural-due-process claims were dismissed. The City filed an appeal after its motion for reconsideration was denied. CBC filed a cross-appeal.

Lisa A. Anderson is an attorney in the Farmington Hills office of Rosati Schultz Joppich & Amtsbuechler, PC where she specializes in municipal law. She concentrates her practice primarily on zoning and land use law, constitutional and civil rights litigation, general municipal law, and appellate practice. She also provides general counsel services to government clients on a wide range of municipal issues. She can be reached at landerson@rsjalaw.com or at (248) 489-4100.

Ruling:

The Court of Appeals held that the City was entitled to summary disposition of all claims. On the issue of substantive due process, the Court began with the general principle that zoning ordinances are presumed valid. A person challenging an ordinance on substantive-due-process grounds must overcome the presumption of validity by proving that the ordinance in question is an arbitrary and unfounded restriction on the owner's use of the property. Overcoming the presumption of validity requires proof that there is no reasonable governmental interest being advanced by the present zoning classification or that the ordinance is a purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question.[6]

The Court held that the City's multiple-family zoning classification as applied to CBC's property was not arbitrary and served several legitimate governmental interests. First, the Court explained that providing multiple-family housing is a legitimate governmental interest in itself.[7] According to the City's Master Plan, multiple-family housing serves a diverse residential population and contributes significantly to the pedestrian activity and vitality of the downtown commercial center. In the case of CBC's property, the multiple-family zoning also provides a transitional buffer between single-family residential housing and more intensive commercial uses.[8] According to the Court, the City was not required to impose a similar transitional zone of multiple-family housing between every commercial and residential property. Thus, the fact that some commercial properties were not abutted by a transitional zoning district did not lessen the City's legitimate interest in maintaining the multiple-family zoning classification as to CBC's property.[9] Additionally, the fact that the City Planner recommended that the conditional rezoning be approved indicated only that there was a difference of opinion regarding the property's proper zoning classification and did not render the City's rezoning denial unreasonable.[10]

Next, the Court recognized that the City also has a legitimate interest in preserving the historic character of the apartment building, which was built in 1903.[11] Noting that the rezoning denial did not meet the "shocks the conscience" test of substantive due process, the Court held that the circuit court erred in granting CBC summary disposition of the substantive-due-process claim.

On the issue of equal protection, the Court found that CBC failed to identify properties that were similarly situated to CBC, and thus fell short of establishing a prima facie case for violation of the equal-protection clause.[12] The Court affirmed the circuit court's judgment dismissing CBC's taking claim with prejudice. Finally, since no constitutional violations had been found, the Court affirmed the dismissal of the claim under 42 USC 1983.[13] The case was remanded for entry of summary disposition in favor of the City on all counts.

Practice Note:

Multiple-family housing and historic preservation are legitimate governmental interests in substantive-due-process analysis for zoning ordinances.

Maximizing Tax Revenue Is a Legitimate Zoning Criterion Under the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA).

Tree of Life Christian Schools v City of Upper Arlington, Ohio, 905 F3d 357 (CA 6, 2018).

Facts:

On September 18, 2018, the Sixth Circuit Court of Appeals held that revenue maximization is a legitimate regulatory purpose which may be pursued through zoning regulations.[14]

Tree of Life Christian Schools ("TOL") is a private Christian school for children from pre-school through 12th grade. In 2009, TOL contracted to purchase an office complex in the City's Office and Research District ("ORC District"), contingent upon receiving the requisite zoning approvals from the City. The office complex served as the former corporate offices of AOL/Time Warner and was the largest office building in the City. Not surprisingly, the building had historically generated substantial property and income tax revenue for the City, at one-point accounting for almost one-third of the City's income tax revenues.

In 2001, the City adopted a Master Plan to guide its zoning decisions. The Master Plan emphasized the need to increase the City's revenue by attracting business development in the small portion of the City's land that is devoted to commercial use.[15] To further the Master Plan's goals, the City adopted an ordinance restricting the City's ORC District to uses that were primarily commercial. Religious and secular schools were prohibited in the City's ORC District.[16] Daycare centers were permitted in the ORC District as ancillary, complementary services in support of the principal office use.[17]

> On this issue, the Court concluded that maximizing revenue is a legitimate regulatory purpose and zoning criterion for purposes of an equal-terms RLUIPA claim.

Although the City advised TOL months before it entered into the purchase agreement with AOL/Time Warner that schools were not permitted for conditional uses in the ORC District, TOL applied to the City for a conditional use permit to allow the private school to operate in the ORC District. After the City denied the request, TOL sought an amendment to the zoning ordinance to permit private religious schools and churches in the district. When that request was denied, TOL filed an application to rezone the property to residential use, which would allow the school to operate as a permitted land use. The rezoning request was denied.

Despite knowing that schools were not permitted in the ORC District, TOL closed on the property and filed suit against the City. The lawsuit alleged that the City's ORC ordinance violated the "equal terms" provision of the RLUIPA[18] by treating the school less favorably than comparable nonreligious land uses. The lawsuit also alleged violations of TOL's constitutional rights. After a lengthy procedural history that included several Sixth Circuit Court appeals, the case was remanded back to the district court for further proceedings on the RLUIPA claim.

On remand, the parties filed cross-

motions for final judgment. TOL argued that daycares and partially used offices were similarly situated to the proposed school in terms of their minimal capacity to generate revenue for the City. The district court rejected TOL's arguments and dismissed the case, finding that the City's ordinance limiting the ORC District to primarily commercial uses was no more onerous to TOL than it was to nonreligious entities that generate comparably small amounts of revenue for the City. TOL filed an appeal.

CBC filed suit, alleging that the City's refusal to rezone the property to village commercial deprived CBC of its constitutional rights to equal protection and substantive and procedural due process of law. CBC also alleged that the property's multiple-family zoning classification constituted a governmental taking of its property because it denied CBC economically viable use of its land.

Ruling:

The Court of Appeals affirmed the judgment of the district court dismissing the case, finding that TOL failed to establish a prima facie case under RLUIPA's equal-terms provision. The equal-terms provision of RLUIPA states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[19] After recognizing that the statute is silent on the meaning of the phrase "equal terms," the Sixth Circuit looked to other circuit court decisions for guidance. The Sixth Circuit concluded that the concept of "similarly situated with regard to legitimate zoning criteria" provided the most reasonable interpretation of the phrase "equal terms."[20] The Court further concluded that the comparison required by RLUIPA's equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question. In other words, an equal terms RLUIPA claim requires proof that a religious use was treated less favorably than a nonreligious use in terms of the legitimate zoning criteria applicable to the zoning regulation at issue.

With the definition of the phrase "equal terms" decided, the Court turned to what constituted a legitimate zoning criterion. On this issue, the Court concluded that maximizing revenue is a legitimate regulatory purpose and zoning criterion for purposes of an equal-terms RLUIPA claim.[21] TOL argued that the City's revenue maximization was a pretextual explanation for the exclusion of schools from the ORC District. TOL took the position that the City allowed nonprofit uses like daycares in the ORC District despite their relatively limited ability to generate revenue, yet excluded schools. The Court rejected the argument, explaining that the City was not required to tailor its zoning regulations to squeeze every last dollar out of the permitted uses within the office district before it could credibly claim that it had structured the ORC District to generate more revenue than would be generated without the restrictions.[22] The Court held that the City's assertion of revenue maximization as its reason for excluding schools from the ORC District was not pretextual.

The Court found that the evidence clearly established that daycares generate far more revenue on a per-square-foot basis than TOL would.[23] As a result, TOL failed to establish that daycares are similarly situated to TOL's religious school in terms of the amount of revenue generated for the City. Since daycares were the only potentially valid comparator put forward, TOL failed to establish a prima facie case that the City's ordinance prohibiting schools from operating in the ORC District violated RLUIPA's equal terms provision.

Practice Note:

Maximizing tax revenue is a legitimate zoning criterion under the Federal Religious Land Use and Institutionalized Persons Act.

Endnotes

1 CBC Joint Venture v City of the Village of Clarkston, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 337750), p. 6-7; 2018 WL 4603858, at *6-7.

2 Conditional rezoning is authorized under the Michigan Zoning Enabling Act, MCL 125.3405.

3 CBC Joint Venture v City of the Village of Clarkston, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 337750), p. 2; 2018 WL 4603858, at *2.

4 Id.

5 Id. at 3.

6 Id. at 6.

7 Id.

8 Id.

9 Id.

10 Id. at 7.

11 Id.

12 Id. at 4-5.

13 Id. at 8.

14 Tree of Life Christian Schools v City of Upper Arlington, Ohio, 905 F3d 357, 371-72 (CA 6, 2018).

15 The City is primarily a residential community, with roughly 1.1% of the land being reserved for ORC use.

16 Schools are a permitted use in the City's residential districts, which comprise 95% of the developed land in the City.

17 The City amended its ordinance during the litigation to prohibit daycares within the ORC District, and was subject to a permanent injunction prohibiting it from future amendments that would again permit daycares within the District.

18 42 USC 2000cc(b)(1).

19 Id.

20 Tree of Life Christian Schools, 905 F3d at 369.

21 Id. at 371-72.

22 Id. at 373.

23 Id. at 376.

No-Fault Report

Ronald M. Sangster, Jr., *The Law Offices of Ronald M. Sangster PLLC*
rsangster@sangster-law.com

The Curious Case of Snowbirds

Home-Owners Ins Co v Jankowski

Well, winter has just begun, and even though the weather has been relatively mild (I even saw motorcycles on the road on Saturday, January 5, 2019), we know that it is just a matter of time before the snow starts to fly, and we open our doors to 6-plus inches of snow on the ground. Many residents of this state have no doubt fled the cold weather to Florida and Arizona, seeking warmer weather. Many even have second homes in those states. Many may even have cars parked at those second homes. So what happens if a Michigan resident, staying at their winter home in Florida or Arizona, is injured while driving one of their vehicles garaged at their winter home?

The Michigan Supreme Court is considering this precise issue in *Home-Owners Ins Co v Jankowski*, 501 Mich 1079 (2018) (Docket No. 156240). Oral argument took place on the Jankowski defendants' application for leave to appeal on October 12, 2018, but as of the date this article is being prepared, the Supreme Court has yet to issue its opinion in this matter.

The underlying facts are not in dispute, and are probably familiar to anyone who is either a "snowbird" or has friends or relatives who are "snowbirds." The Jankowski defendants have two homes – one in Michigan and one in Florida. They consider themselves to be residents of the State of Michigan. The Jankowskis own multiple motor vehicles, which are insured through Home-Owners Insurance Company.

In late 2013, the Jankowskis traveled from Michigan to Florida in their Michigan-registered and Michigan-insured vehicle. In January 2014, they traded their Michigan-registered and Michigan-insured vehicle for a lease on a new vehicle. Instead of registering and insuring the new vehicle under their Michigan residence, they decide to purchase Florida nofault insurance through Allstate Insurance Company and to register this newly acquired vehicle in the State of Florida. There was no doubt that the Florida nofault policy, issued by Allstate Insurance Company, was less expensive than the Michigan nofault policy that the Jankowskis previously had on their old vehicle through Home-Owners Insurance Company. Four months later, while still in the State of Florida, the Jankowskis were involved in a motor-vehicle accident while utilizing their newly acquired vehicle. Not surprisingly, their Florida PIP benefits, which were capped at $10,000.00 were quickly exhausted. After returning to Michigan, they consulted with counsel and filed a claim for Michigan nofault insurance benefits on their Home-Owners Insurance Company policy covering one of the vehicles that stayed behind in the State of Michigan, while the Jankowskis traveled to Florida. Home-Owners Insurance Company denied their claim for Michigan nofault insurance benefits based upon MCL 500.3113(b), claiming that the Jankowskis were disqualified from recovering benefits because they were the owners of an uninsured motor vehicle. Home-Owners then instituted a declaratory-judgment action in the Ingham County Circuit Court.

The circuit court determined that Mr. Jankowski was disqualified as he was an "owner" of the Florida-registered and insured motor vehicle, which did not carry the insurance required under Michigan law. However, Mrs. Jankowski was determined to be a non-owner of the vehicle and, as a result, the circuit court ruled that she was entitled to benefits under the Michigan policy. On appeal, the Court of Appeals affirmed in part and reversed in part the decision of the circuit court and ruled that both Mr. and Mrs. Jankowski were "owners" of the motor vehicle that simply did not carry the necessary insurance coverages required under Michigan law. Therefore, both Mr. and Mrs. Jankowski were disqualified from recovering Michigan nofault insurance

Ron Sangster concentrates his practice on insurance law, with a focus on Michigan no-fault insurance. In addition to teaching Michigan no-fault law at Thomas J. Cooley Law School, Ron is a highly sought after speaker on Michigan insurance law topics. His e-mail address is rsangster@sangster-law.com.

benefits. The Jankowski defendants then filed an application for leave to appeal with the Michigan Supreme Court, and on May 25, 2018, the Supreme Court scheduled oral argument on whether to grant the Jankowski's application for leave to appeal.

The Jankowskis' argument is rather straightforward. MCL 500.3111 provides:

> Personal protection insurance benefits are payable for accidental bodily injury suffered in an accident occurring out of this state, if the accident occurs within the United States, its territories and possessions or in Canada, and the person whose injury is the basis of the claim was at the time of the accident a named insured under a personal protection insurance policy, his spouse, a relative of either domiciled in the same household or an occupant of a vehicle involved in the accident whose owner or registrant was insured under a personal protection insurance policy or has provided security approved by the secretary of state under subsection (4) of section 3101.

This statutory provision is an entitlement provision, not a priority provision. *Auto-Owners Ins Co v State Farm*, 187 Mich App 617, 468 NW2d 317 (1991). Because the Jankowskis are the named insured under the Michigan nofault policy covering their non-involved vehicles, the Jankowskis argue that they are clearly entitled to benefits under this provision.

Home-Owners Insurance Company, on the other hand, denied the claim based upon MCL 500.3113(b), which provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

In reply, the Jankowskis argued that, because their vehicle was never registered in the State of Michigan, it was not required to carry Michigan nofault insurance coverage. In this regard, the Jankowski defendants relied upon the first sentence of the NoFault Insurance Act, MCL 500.3101(1):

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance.

To sum up the Jankowskis' argument, because the vehicle was not "required to be registered in this state," it was not required to carry Michigan nofault insurance. Therefore, neither Mr. nor Mrs. Jankowski were disqualified from recovering benefits.

While Home-Owners Insurance Company argues that, by its own terms, this provision applies to a Michigan resident who operates a motor vehicle anywhere in the United States, the Jankowskis argued that, by reading this provision in conjunction with the preamble to the Michigan Vehicle Code, it only applies to vehicles "driven or moved on a street or highway" **in this state**.

The Motor Vehicle Code, MCL 257.216, sets forth what type of vehicles are required to be registered in this state, and are therefore required to carry nofault insurance. As noted therein:

> Every motor vehicle, recreational vehicle, trailer, semitrailer, and pole trailer, when driven or moved on a street or highway, is subject to the registration and certificate of title provisions of this act except the following ….

While Home-Owners Insurance Company argues that, by its own terms, this provision applies to a Michigan resident who operates a motor vehicle anywhere in the United States, the Jankowskis argued that, by reading this provision in conjunction with the preamble to the Michigan Vehicle Code, it only applies to vehicles "driven or moved on a street or highway" **in this state**. Under this interpretation, because the Jankowskis' Florida-registered and Florida-insured vehicle was not required to be registered in the State of Michigan, it was not required to be insured for Michigan nofault insurance benefits.

The Court of Appeals rejected this argument, relying upon its earlier decision in *Wilson v League Gen'l Ins Co*, 195 Mich App 705, 491 NW2d 642 (1992). In that case, the plaintiff was a Michigan resident who was attending college in Texas. While in Texas, she purchased a used vehicle but did not bother to obtain insurance on the vehicle. While traveling from Texas to Michigan, the plaintiff was involved in a motor-vehicle accident in the State of Tennessee. As she was domiciled with her mother in Michigan at the time of the accident, she filed a claim for nofault benefits with her mother's insurer, League General. League General denied the claim on the basis that the plaintiff was the owner of a motor vehicle that did not carry the three mandatory insurance requirements set forth in MCL 500.3101(1) – personal injury protection (PIP) benefits, property protection insurance benefits (PPI) benefits and residual liability insurance. Therefore, according to League General, the plaintiff was disqualified from recovering benefits pursuant to MCL 500.3113(b). Like the Jankowski defendants, the plaintiff argued that because her vehicle was not required to be registered in the State of Michigan, it was not required to be insured for Michigan nofault benefits. In upholding League General's denial of the plaintiff's claim, the Court of Appeals rebuffed the plaintiff's argument:

> We reject plaintiff's interpretation of §3113(b) and MCL §257.216.
>
> ...
>
> The language of §3113(b) clearly and unambiguously states that the

> owner of a vehicle involved in an accident, where the vehicle had no security required by §3101 at the time of the accident, is not entitled to personal protection insurance benefits. See *Coffey v State Farm Mut'l Automobile Ins Co*, 183 Mich App 723, 730, 445 NW2d 740 (1990); *Childs [v American Comm'l Liability Ins Co*, 177 Mich App, 589, 592, 443 NW2d 173 (1989)]. MCL§257.216 does not specifically limit the requirements of §3113(b) of the NoFault Act only to cars driven on Michigan highways. Because the language of §3113(b) is unambiguous, we will not read additional provisions into the language. *Wilson*, 491 NW2d at 644

This very holding is being reviewed by the Michigan Supreme Court, as noted in the order granting oral argument on the Jankowskis' application for leave to appeal:

> The appellants shall file a Supplemental Brief within 42 days of the date of this Order addressing whether, to be eligible to receive personal protection insurance (PIP) benefits, they were required to register, in Michigan, the vehicle involved in the accident, and were thus obligated to maintain security for the payment of PIP benefits pursuant to MCL 500.3101 or be precluded from receiving such benefits by MCL 500.3113(b).

The author respectfully suggests that instead of focusing on whether or not the vehicle was required to be registered in this state, the Court should focus on the language of MCL 500.3113(b) and simply determine whether or not the motor vehicle or motorcycle involved in the accident carried "the security required by section 3101 or 3103."

Many even have second homes in those states. Many may even have cars parked at those second homes. So what happens if a Michigan resident, staying at their winter home in Florida or Arizona, is injured while driving one of their vehicles garaged at their winter home?

As previously noted, there are three mandatory components for any Michigan nofault insurance policy – personal protection insurance (PIP) coverage, property protection insurance (PPI) coverage, and residual liability coverage. The absence of any one of these three components is fatal to a claim for nofault benefits. *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 298 Mich App 192, 826 NW2d 197 (2012). Arguably, MCL 500.3113(b) simply mandates **what** type of insurance is required to be on the vehicle involved in the accident, and not **when** it is required to be insured. After all, for purposes of triggering the disqualification provision of MCL 500.3113(b), **it is the vehicle itself** that must have the three mandatory components of a valid Michigan nofault policy – not the person or persons who may "own" the vehicle. *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 748 NW2d 574 (2008). In this case, the involved vehicle clearly did not have the three mandatory coverages necessary under Michigan law. Therefore, because "the security required by §3101 . . . was not in effect" on the involved vehicle, the Jankowskis should be disqualified from recovering nofault benefits. In retrospect, the Jankowskis got what they paid for – Florida nofault benefits at a far lesser premium than what they would have paid for a Michigan nofault insurance policy.

Should the Michigan Supreme Court rule in favor of the Jankowskis, one can easily imagine a scenario wherein individuals who have a residence in Michigan, and another state, will garage one vehicle in Michigan and obtain the least expensive nofault policy available on that single vehicle. They will then purchase, register and insure vehicles through their second home, at a far less expensive premium, with the understanding that, if they are injured while driving any of those other vehicles, they can still make a claim for Michigan nofault insurance benefits under the policy covering the "clunker" principally garaged at their Michigan residence. Surely, this cannot be what the Legislature intended when it drafted MCL 500.3113(b) and, at least as an interpreted by the *Iqbal* court, tied the insurance requirement to the vehicle involved in the accident. Again, it will be interesting to see how the Michigan Supreme Court ultimately resolves this issue.

Supreme Court Update

By: Daniel A. Krawiec, *Clark Hill PLC*
dkrawiec@clarkhill.com

Cases to Watch in 2019

The Michigan Supreme Court has not released any new decisions since the last quarterly review. However, several pending cases which may be decided in 2019 are worth watching. Readers are encouraged to also review the Supreme Court's website, which contains additional information and summaries of these and other pending cases at: https://courts.michigan.gov/courts/michigansupremecourt/oral-arguments/pages/default.aspx.

Walker v Underwood – Case No. 156651 – Contractual Limitation of Remedies

The parties signed an agreement that provided that Underwood, a building owner, would buildout the premises for a new spa business and, as part of the agreement, use all reasonable efforts to obtain a final occupancy permit. Nine months later no permit was obtained and the Walkers filed suit alleging breach of contract and fraudulent misrepresentation. The trial court granted Underwood summary disposition, holding that the contract, which stated that a non-breaching party could "declare a default and terminate this preliminary agreement to lease or other remedy that may be agreed to by the parties," limited the Walkers' remedy only to declaring a default and terminating the lease. The Court of Appeals reversed, finding that, as drafted, the language was not exclusive and that imposing a limitation on remedies was unfounded. The Supreme Court ordered oral argument on the applicability of the cannon *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) to the interpretation of this contractual language.

Home-Owners Ins Co v Jankowski – Case No. 156240 – PIP Benefits

The Jankowskis are Michigan residents who live in Florida in colder months. While in Florida, the couple leased a new automobile, registered it in Florida, and insured it through a Florida policy. The couple also owns two other vehicles on which they maintain insurance through Home-Owners. The couple sought PIP benefits from Home-Owners after suffering serious injuries while driving the new leased automobile in Florida when another driver ran a red light. Home-Owners denied on the basis the vehicle was registered in Florida, not Michigan, and MCL 500.3113(b) excludes a person from receipt of PIP benefits if, at the time of the accident, she "was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 . . . was not in effect." Home-Owners then filed a declaratory judgment action. While the trial court ruled that Mr. Jankowski was not entitled to PIP benefits, it held that Mrs. Jankowski could not be excluded from PIP benefits as an "owner by use." The Court of Appeals affirmed as to Mr. Jankowski but reversed as to Mrs. Jankowski, noting the focus must be on "the nature of the person's right to use the vehicle," and Mrs. Jankowski qualified as an owner by use because she had her own set of keys, did not need permission to drive the vehicle, and had this right for a period of longer than 30 days. The Supreme Court ordered oral argument on whether eligibility for PIP benefits required registration in Michigan of the vehicle involved in the accident, and whether the Jankowskis were obligated to maintain security for the payment of PIP benefits or be precluded by MCL 500.3113(b) from receiving such benefits.

Daniel A. Krawiec is a senior attorney in the Labor and Employment practice group in Clark Hill PLC's Detroit office. A member of the state bars of Michigan and Florida. Dan counsels employers in both states on all facets of labor and employment law. Dan additionally represents employers and other business clients in all manner of employment and commercial litigation and arbitration, as well as before administrative agencies. He also served as a law clerk to the Honorable Jonathan Goodman, United States District Court for the Southern District of Florida from 2010-2012. Dan can be reached at dkrawiec@clarkhill.com or (313) 309-9497.

Stacker v Lautrec, Ltd – Case No. 155120 – Statutory Negligence/ Fit for Intended Use

Stacker's decedent, Hendrix, lived in an apartment maintained by Lautrec. Each tenant had an individual garage with side-by-side driveways between the apartments. These driveways were common areas. Hendrix slipped and fell on ice while walking across an adjacent driveway. The ice had unnaturally accumulated due to pooling from a downspout into an area of depressed pavement. Stacker asserted a negligence claim under both common-law premises liability and a statutory claim. The trial court dismissed both claims, concluding Stacker failed to plead the common-law claim in avoidance of the open-and-obvious doctrine and the statutory claim failed because she had not established the driveway could not be used for its intended mixed purpose while icy. The Court of Appeals affirmed as to the common-law claim. Hendrix had acknowledged that it was cold and snowy at the time of her fall and that the ground appeared damp and glossy. This, and in light of the conclusion that a reasonable person who had lived at the premises would be aware of the downspout and its runoff, rendered the condition objectively open and obvious. The Court of Appeals reversed as to the statutory claim, concluding the connected driveways were more akin to sidewalks then parking lots and therefore a question of fact existed as to whether the driveways were unfit for pedestrian use. The Supreme Court ordered oral argument to address whether genuine issues of material fact precludes summary disposition on the claim the driveway was not "fit for the use intended by the parties" under MCL 554.139(1)(a).

MEMBER NEWS

Work, Life, and All that Matters

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

Court Rules Report

By: Sandra Lake, *Hall Matson PLC*
slake@hallmatson.law

PROPOSED AMENDMENTS

2016-05 – Oral recitation of jury instructions

Rule affected: 2.513
Issued: September 27, 2018
Comment Period: January 1, 2019

This proposal would modify MCR 2.513(A) and (N) to require the court to orally provide the jury with preliminary and final jury instructions. The modified rule would also clarify that the jury is to be provided a written copy of the instructions as well. This modification is submitted to conform to the ruling in *People v Traver*.

2002-37 – E-Filing rules

Rule affected: Numerous
Issued: September 27, 2018
Comment period: January 1, 2019

These comprehensive amendments are designed to conform the court rules to a statewide e-filing system, including the requirement that attorneys "must" electronically file documents in courts where electronic filing has been implemented. The majority of the amendments are non-substantive in nature and merely modify terminology to reflect that documents are being filed electronically. There are some substantive changes, however, such as requiring a jury demand to be filed in a separate document (as opposed to being included in a pleading); requiring the party, not the clerk, to serve a default judgment on the parties; and modifications to service requirements given electronic serve.

2018-04 – Disclosure requirements for amicus briefs

Rule affected: 7.212 and 7.312
Issued: October 17, 2018
Comment period: February 1, 2019

This amendment would require amicus briefs to include disclosures regarding preparation of the brief and monetary contributions.

ADOPTED AMENDMENTS

2017-12 – Transferring a case to the Court of Claims

Rule affected: 2.228
Issued: September 20, 2018
Effective: January 1, 2019

The addition of this rule requires a defendant to transfer a case to the Court of Claims at or before the time the defendant files an answer. This proposed addition arose from the case of *Baynesan v Wayne State University* (Supreme Court Docket No. 154435), where the defendant sought transfer a month before trial.

2017-20-Clarification of what constitutes a postjudgment order in a domestic relations case

Rule affected: 7.202
Issued: September 20, 2018
Effective: January 1, 2019

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.

This proposal would modify MCR 2.513(A) and (N) to require the court to orally provide the jury with preliminary and final jury instructions.

The amendment modifies the definition of a final order in a domestic-relations action by removing the "order affecting the custody of a minor" language and redefining it as an "order that, as to a minor, grants or denies a motion to change legal custody, physical custody, or domicile. (Note that the original proposal also included orders regarding parenting time, grandparenting time, school enrollment or religious affiliation, or orders that authorize or deny medical or mental health treatment." These categories are not included in the adopted rule.)

Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*
Anita.comorski@tnmglaw.com

The MDTC's most recent amicus contribution was in the case of *W.A. Foote Memorial Hospital v Michigan Assigned Claims Plan*.[1] The MDTC's amicus brief was authored by Irene Bruce Hathaway of Miller Canfield and Peter J. Tomasek of Collins Einhorn Farrell, PC. This case follows the Supreme Court's prior decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017) and primarily concerns the issue of whether *Covenant* applies retroactively.

In a matter of first impression, the Supreme Court in *Covenant* held that the no-fault statutory scheme did not allow for healthcare providers to directly sue no-fault insurers for recovery of no-fault benefits. Before the *Covenant* decision, healthcare providers had regularly and routinely filed direct actions seeking no-fault benefits from insurers. The *Foote* case represents one such direct action, which was pending on appeal before the Court of Appeals when *Covenant* was decided. After the release of *Covenant*, the parties in *Foote* filed supplemental briefing, addressing the impact of that decision. In a published decision, the Court of Appeals ultimately held in *Foote* that *Covenant* would apply retroactively. In so holding, the Court of Appeals found that the Supreme Court's remand of at least two cases for reconsideration in light of *Covenant* indicated that the Supreme Court intended *Covenant* to apply retroactively. Further, the Court of Appeals held that the Supreme Court, in other decisions addressing retroactivity, had "effectively repudiated" its prior decision in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), which provided a framework for determining the retroactive application of cases which announce a new rule of law.

The Supreme Court granted oral argument on the plaintiff's application for leave to appeal in *Foote*, directing the parties to brief three issues: (1) whether the Court's decision in *Covenant* should apply in *Foote*; (2) whether the Court of Appeals correctly concluded that the Supreme Court's prior decision in *Pohutski* had been "effectively repudiated" in the context of judicial decisions of statutory interpretation; and (3) if *Pohutski* has not been effectively repudiated, whether the *Pohutski* framework should have been applied in prior cases addressing retroactive application of Supreme Court decisions.

With that background in mind, MDTC's amicus brief focused primarily on the first issue – whether the *Covenant* decision should apply retroactively. In arguing that retroactive application was appropriate, MDTC submitted that there was no legal authority that would allow the courts to create what would be, essentially, a "temporary" cause of action allowing healthcare providers with pending cases to pursue a direct cause of action against a no-fault insurer. As the no-fault act never allowed direct healthcare provider suits, *Covenant* did not announce a new rule of law and there is no legal basis to conclude that prospective application would be appropriate.

MDTC further submitted that the Court of Appeals in its decision in *Foote* did not actually hold that *Pohutski* had been "effectively repudiated." While the Court of Appeals did make this comment, it did not rely on the supposed repudiation in reaching its decision. In addition, the Court of Appeals held that its conclusion that *Covenant* applied retroactively would remain unchanged, even if the *Pohutski* framework were applied. This is so because the *Pohutski* framework first requires a change in the law and, as set forth above, *Covenant* did not announce a new rule of law.

It is expected that the *Foote* case will be argued sometime during the Supreme Court's current term.

As an update to prior amicus reports on the case of *Yu v Farm Bureau General Insurance Company of Michigan*, the Supreme Court has now resolved this case through an order issued on November 21, 2018.[2] The facts of the *Yu* case, and the arguments

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.

contained in MDTC's amicus brief in support of the defendant's position, were covered in some detail in prior issues of the *Quarterly*. Primarily at issue was whether the Court of Appeals properly applied the doctrine of equitable estoppel to avoid the express terms of an insurance policy. The *Yu* case was argued before the Supreme Court on October 10, 2018. In a brief but unanimous order, the Supreme Court reversed the Court of Appeals judgment. The Court held that the plaintiffs did not have "clean hands," that the plaintiffs had misrepresented their residency to the defendant, and that the defendant had relied on those misrepresentations in renewing the plaintiff's policy. Given such facts, the Supreme Court held that the "Court of Appeals therefore erred by holding that the defendant was equitably estopped from denying coverage under the facts of this case."The Court remanded the matter to the Court of Appeals for consideration of the remaining issues raised by the parties and not previously addressed by that court.

In a published decision, the Court of Appeals ultimately held in *Foote* that *Covenant* would apply retroactively.

This update is only intended to provide a brief summary of the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC maintains 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 Michigan Supreme Court Docket No. 156622.

2 Michigan Supreme Court Docket No. 155811.

Meet the MDTC Leaders

A key component of MDTC's mission is facilitating the exchange of views, knowledge, and insight that our members have obtained through their experiences. That doesn't happen without interaction. And interaction doesn't typically happen until you've been introduced. So, in this section, we invite you to meet the new (and, possibly, some not-so-new) MDTC leaders who have volunteered their time to advance MDTC's mission.

MEET: Jeremy S. Pickens
Regional Chair - Upper Peninsula
MDTC Member since 2010
O'Dea, Nordeen, Burink and Pickens, PC, Attorney
MSU College of Law – 12 years of experience.

Q: *Why did you become involved in MDTC?*
A: I wanted to stay better connected with colleagues practicing civil litigation and stay on top of current legal developments.

Q: *What inspired you to become an MDTC Leader?*
A: MDTC has afforded me access to practitioners and resources that have helped further my career. Serving as the Upper Peninsula representative for MDTC has allowed me give back to the organization in some small role, as well as help other local practitioners stay engaged despite geographic concerns.

Q: *How would you describe your leadership style?*
A: My leadership style is direct, collaborative, and supportive.

Q: *How has your MDTC involvement enhanced your personal/professional life?*
A: Having access to some of the best of civil litigators and up-to-date resources has helped me in my practice and given me the confidence to take on complex litigation for clients.

Q: *Why would you encourage other MDTC members to seek leadership roles?*
A: Just as in any organization: the more you put in, the more you receive in return.

Q: *Are you involved in other organizations or activities?*
A: Yes:
Adjunct Law Professor, Northern Michigan University;
Northern Michigan University Alumni Board of Directors, Frm. Chair;
Marquette County Bar Association, Treasurer;
Marquette City, Board of Parks and Rec., Frm. Chair;
My other interests include mountain biking, hiking, and bonsai.

Q: *If you weren't a legal professional, what type of career would you choose?*
A: As strange as it sounds, I would probably be a farmer.

Q: *What advice do you have to new MDTC members? To new attorneys?*
A: My advice to new members and/or new attorneys is to accept that you don't know it all and seek out resources and counsel from someone who is more experienced.

Meet the MDTC Member Victories

MDTC members are among the best and most talented attorneys in Michigan. In this section, we highlight significant victories and outstanding results that our members have obtained for their clients. We encourage you to share your achievements. From no-cause verdicts to favorable appellate decisions and everything in between, you and your achievements deserve to be recognized by your fellow MDTC members and all of the *Michigan Defense Quarterly's* readers.

MEET: Chelsea E. Pasquali
MDTC Member since 2018
Collins, Einhorn, Farrell P.C., Associate Attorney
University of Detroit Mercy Law – 5 years of experience.

Collins Einhorn attorney, Chelsea Pasquali, recently obtained a jury verdict of "no cause of action" in a third-party automobile negligence lawsuit brought under Michigan's No-Fault Insurance Act (M.C.L. § 500.3101 *et seq.*).

Unlike a first-party claim, which is based on the contractual relationship between the plaintiff and his or her insurer, a third-party claim is based on common-law tort principles. Third-party claims can only be brought under limited circumstances and allow for limited recovery: a plaintiff may only recover damages for pain, suffering, and other noneconomic losses, provided that the injured party suffered death, permanent serious disfigurment, or serious impairment of a body function. M.C.L. § 500.5135(1), (2).

Ms. Pasquali's clients' case arose from a 2014 automobile accident, for which the plaintiff claimed the defendants were responsible. The plaintiff not only argued that the defendant driver was negligent under Michigan's No-Fault Act, but that the driver's father – the owner of the vehicle – was liable under Michigan's owner-liability statute (M.C.L. § 257.401 *et seq.*). The plaintiff cited extensive injuries, including herniated disks and mental issues. He claimed that these injuries resulted in his inability to work or lead his normal life.

Judge Muriel Hughes of the Wayne County Circuit Court presided over the two-day jury trial. After just ten minutes of deliberation, the jury unanimously concluded that the defendant driver was not negligent, meaning that none of Ms. Pasquali's clients were liable.

Would you like to share your recent success – or that of an MDTC colleague – with MDQ readers?

Please contact MDQ Associate Editor, Victoria L. Convertino – vconvertino@jrsjalaw.com

Michigan Defense Trial Counsel, Inc.
The Statewide Association of Attorneys Representing the Defense in Civil Litigation

MEMBER-TO-MEMBER SERVICES

Be a part of a forum, exclusively for members, in which you can make your expertise available to other MDTC members!

1. ***Who can place a notice?***

Because this is a members-only benefit, only MDTC members can place a notice. Notices must identify an individual who is a member of MDTC and cannot solely identify a law firm.

2. ***What does it cost?***

Only $75 for a single entry and $200 for four consecutive entries.

3. ***Format:***

The format is reflected in the sample to the right. You will have to use 11 point Times New Roman font and set your margins to equal the size of the box.

4. ***Artwork***

Photos are allowed in digital format.

INDEMNITY AND INSURANCE ISSUES

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.

MDTC
Info@mdtc.org
PO Box 66
Grand Ledge MI 4887
517-627-3745

Please send notices and any suggestions to Michael Cook, Editor, at info@mdtc.org. Checks should be made payable to "Michigan Defense Trial Counsel."

MEMBER-TO-MEMBER SERVICES

___Yes, we would like to reserve space. ___Single Entry $75 ___Four Consecutive Entries $200

Name:_____

Company Name:_____

Address:_____

City/ State /Zip:_____

Phone:_____ Fax: _____ E-Mail: _____

___I am enclosing a check. ___A check will be mailed.

O Visa O Mastercard #_____

Authorized Signature:_____ Exp. Date:_____

Please complete form and mail to: MDTC / PO Box 66 / Grand Ledge, MI 48837 / (517) 627-3745 Fax 517-627-3950
10/17/12 mcl

MEMBER TO MEMBER SERVICES

This section is reserved for the use of MDTC members who wish to make services available to other members.
The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email Michael.Cook@ceflawyers.com**.

ALTERNATIVE DISPUTE RESOLUTION

- Negligence
- Professional Liability
- Commercial
- Contract Disputes

Peter Dunlap, PC
68 N. Plymouth Street
Pentwater, MI 49449
Phone: 517-230-5014
Fax: 517-482-0087
Offices in Lansing, MI
www.PeterLDunlap.com
pdunlap65@gmail.com

ADR - ARBITRATION/ MEDIATION/FACILITATION

Thomas M. Peters has the experience, background and ability to assist you in the arbitration, mediation and resolution of your litigation or claim disputes.

- Indemnity and insurance
- Construction
- Trucking
- Commercial and contract disputes
- Employment

Thomas M. Peters
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2800
tmp-group@VGPCLaw.com

MDTC LEADER CONTACT INFORMATION

Officers

Joshua K. Richardson
Vice President
Foster Swift Collins & Smith PC
313 S. Washington Square
Lansing, MI 48933
517-371-8303 • 517-371-8200
jrichardson@foSuiterswift.com

Irene Bruce Hathaway
Vice President
Miller Canfield Paddock & Stone, PLC
150 West Jefferson Suite 2500
Detroit, MI 48226
313- 963-6420 • 313- 496-8453
hathawayi@millercanfield.com

Terence P. Durkin
Treasurer
Kitch Drutchas Wagner Valitutti & Sherbrook
1 Woodward Ave Suite. 2400
Detroit, MI 48226
313-965-6971 • 313-965-7403
terence.durkin@kitch.com

Deborah L. Brouwer
Secretary
Nemeth Law PC
200 Talon Centre Drive Suite 200
Detroit, MI 48207-5199
313-567-5921 • 313-567-5928
dbrouwer@nemethlawpc.com

Richard Paul
Immediate Past President
Dickinson Wright PLLC
2600 W. Big Beaver Road Suite 300
Troy, MI 48084
248-433-7532 • 248-433-7274
rpaul@dickinsonwright.com

Madelyne C. Lawry
Executive Director
MDTC
P.O. Box 66
Grand Ledge, MI 48837
517-627-3745 • 517-627-3950
info@mdtc.org

Board

Daniel Cortez
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road Suite 300
Livonia MI 48152-2660
734-742-1819 • 734-521-2379
dcortez@fbmjlaw.com

Conor Dugan
Warner Norcross & Judd LLP
111 Lyon Street NW Suite 900
Grand Rapids, MI 49503
616-752-2127 • 616-222-2127
conor.dugan@wnj.com

Gary S. Eller
Smith Haughey Rice & Roegge PC
213 S. Ashley Street Suite 400
Ann Arbor, MI 48104
734-213-8000 • 734-332-0971
geller@shrr.com

Kimberlee A Hillock
Willingham & Coté PC
333 Albert Ave Suite 500
East Lansing, MI 48823
517-324-1080 • 517-351-1195
khillcok@willinghamcote.com

John C.W. Hohmeier
Scarfone & Geen, P.C.
30680 Montpelier Drive
Madison Heights, MI 48071
248-291-6184 • 248-291-6487
jhohmeier@scarfone-geen.com

Michael J. Jolet
Hewson & Van Hellemont PC
25900 Greenfield Rd Suite 650
Oak Park, MI 48237
248-968-5200 • 248-968-5270
mjolet@vanhewpc.com

Richard J. Joppich
Kitch Drutchas Wagner Valitutti & Sherbrook
2379 Woodlake Drive Suite 400
Okemos, MI 48864
517-381-7182 • 517-381-4427
richard.joppich@kitch.com

John Mucha, III
Dawda, Mann, Mulcahy & Sadler PLC
39533 Woodward Avenue Suite 200
Bloomfield Hills, MI 48304
248-642-3700 • 248-642-7791
jmucha@dmms.com

Dale A. Robinson
Rutledge Manion Rabaut Terry & Thomas PC
333 W. Fort Street Suite 1600
Detroit, MI 48226
313-965-6100 • 313-965-6558
drobinson@rmrtt.com

A. Tony Taweel
Ottenwess, Taweel & Schenk, PLC
535 Griswold Street Suite 850
Detroit, MI 48226
313-965-2121 • 313-965-7680
ttaweel@ottenwesslaw.com

Carson J. Tucker, JD, MSEL
Law Offices of Carson J. Tucker
117 N. First Street Suite 111
Ann Arbor, MI 48104
734-629-5870 • 734-629-5871
cjtucker@lexfori.org

R. Paul Vance
Cline Cline & Griffin PC
503 S. Saginaw Street Suite 1000
Flint, MI 48502
810-232-3141 • 810-232-1079
pvance@ccglawyers.com

MDTC LEADER CONTACT INFORMATION

Regional Chairs

Flint: Megan R. Mulder
Cline, Cline & Griffin, P.C.
503 Saginaw Street, Suite 1000
Flint, MI 48502
810.232.3141 • 810.232.1079
mmulder@ccglawyers.com

Grand Rapids: Charles J. Pike
Smith Haughey Rice & Roegge PC
100 Monroe Center Street NW
Grand Rapdis, MI 49503
616-458-5456 • 616-774-2461
cpike@shrr.com'

Lansing: Michael J. Pattwell
Clark Hill PLC
212 E. Cesar Chavez Avenue
Lansing, MI 48906
517-318-3043 • 517-318-3082
mpattwell@clarkhill.com

Marquette: Jeremy S. Pickens
O'Dea Nordeen and Burink PC
122 W. Spring Street
Marquette, MI 48955
906-225-1770 • 906-225-1764
jpickens@marquettelawpc.com

Saginaw: Robert Andrew Jordan
O'Neill, Wallace & Doyle P.C.
300 Street Andrews Road Suite 302
Saginaw, MI 48638
989-790-0960
djordan@owdpc.com

Southeast Michigan: Joseph E. Richotte
Butzel Long PC
41000 Woodward Avenue
Bloomfield Hills, MI 48304
248-258-1407 • 248-258-1439
richotte@butzel.com

Traverse City: Matthew W. Cross
Cummings McClorey Davis & Acho PLC
400 W. Front Street Suite 200
Traverse City, MI 49684
231-922-1888 • 231-922-9888
mcross@cmda-law.com

MDTC 2018–2019 Committees

Meet The Judges:
Beth Wittman, Chair
Amber Girbach
Daniel Cortez
Olivia Paglia

Golf Committee:
Terry Durkin, Co-Chair
John Hohmeier, Co-Chair
Dale Robinson
Mike Patwell
Matt Zmijewski

Quarterly:
Michael J. Cook, Editor

Associate Editors:
Matthew A. Brooks
Victoria Convertino
Tom Isaacs
Katherine Gostek

Past Presidents Society:
Ed Kronk
Josh Richardson
Richard W. Paul

Legal Excellence Awards:
Rick Paul, Chair
Beth Wittman
John Mucha
Gary Eller
Charles J. Pike

Nominating Committee:
Rick Paul

Amicus:
Anita L. Comorski, Chair
Kimberlee A. Hillock
Carson J. Tucker
Irene Hathaway
Grant Jaskulski
Dan Beyer
Peter Tomasek
Robert Kamenec
Nathan Scherbarth

Winter Meeting 2018:
Tony Taweel, Co-Chair
Daniel Cortez, Co-Chair
Deborah Brouwer
Veronica Ibrahim

Annual Meeting 2019:
Paul Vance, Co-Chair
Charlie Pike, Co-Chair
Matt Cross
Scott Pawlak
Conor Dugan

Regional Chair Liaison:
Dale Robinson/ Mike Pattwell

Section Chair Liaison:
Paul Vance/Nicholas Huguelet

Sponsors (vendors/firm):
Deborah Brouwer
Mike Jolet
Terry Durkin

Government Relations:
Graham K. Crabtree

DRI State Representative:
D. Lee Khachaturian

Membership:
John Mucha, Co-chair
Jill Story, Co-chair
Clifford Hammond
Robyn Brooks
Jeremy Pickens
Jeremiah Fanslau
Mike Conlon

Awards:
Brian Moore, Chair
John Mucha, III
David Ottenwess
Beth Wittmann
Thad Morgan

E-Newsletter Committee:
Nathan Scherbarth
Amber Girbach

Future Planning:
Irene Hathaway

Social Media:
Kari Melkonian
Scott Pawlak

Veterans Committee:
Ed Perdue, Chair
Carson Tucker
Kimberlee Hillock
Larry Donaldson
Tom Aycock

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice
Nathan Scherbarth
Jacobs & Diemer, PC
500 Griswold Street Suite 2825
Detroit, MI 48226
313-965-1900 • 313-965-1919
nscherbarth@jacobsdiemer.com

Appellate Practice
Beth Wittmann
The Kitch Firm
One Woodward Ave Suite . 2400
Detroit, MI 48226
313-965-7405 • 313-965-7403
beth.wittmann@kitch.com

Commercial Litigation
Brian M. Moore
Dykema Gossett PLLC
39577 Woodward Ave Suite 300
Bloomfield Hills, MI 48304
248-203-0772 • 248-203-0763
bmoore@dykema.com

Commercial Litigation
Samantha Pattwell
Dickinson Wright PLLC
215 S. Washington Square Suite 200
Lansing, MI 48933
517-487-4776 • 517-487-4700
spattwell@dickinsonwright.com

General Liability
Shaina Reed
Fraser Trebilcock Davis & Dunlap PC
124 W. Allegan St Suite 1000
Lansing MI 48933
517-482-5800 • 517-482-0887
sreed@fraserlawfirm.com

General Liability
Anthony Pignotti
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road Suite 300
Livonia, MI 48152
734-742-1800 • 734-521-2379
apignotti@fbmjlaw.com

In House Counsel
Lee Khachaturian
The Hartford Financial Services Group, Inc
5445 Corporate Drive Suite 360
Troy, MI 48098
248-822-6461 • 248-822-6470
diana.khachaturian@thehartford.com

Insurance Law
Stephen C. Madej
Scarfone & Geen PC
30680 Montpelier Dr
Madison Heights, MI 48071-1802
248-291-6184 • 248-291-6487
smadej@scarfone-geen.com

Insurance Law
Olivia Paglia
Plunkett Cooney
38505 Woodward Ave Suite 2000
Bloomfield Hills, MI 48304
248-901-4058 • 248-901-4040
opaglia@plunkettcooney.com

Labor and Employment
Nicholas Huguelet
Ogletree Deakins Nash Smoak & Stewart PLLC
34977 Woodward Ave Suite 300
Birmingham, MI 48009
248.723.6164 • 248.593.2603
nicholas.huguelet@ogletree.com

Labor and Employment
Clifford Hammond
Foster Swift Collins & Smith PC
28411 Northwestern Hwy Suite 500
Southfield, MI 48034
248-538-6324 • 248-200-0252
chammond@foSuite rswift.com

Law Practice Management
Fred Fresard
Dykema Gossett PLLC
39577 Woodward Ave Suite 300
Bloomfield Hills, MI 48304
248-203-0593 • 248-203-0763
ffresard@dykema.com

Law Practice Management
Thaddeus Morgan
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan Suite 1000
Lansing, MI 48933
517-377-0877 • 517-482-0887
tmorgan@fraserlawfirm.com

Municipal & Government Liability
Robyn Brooks
City of Detroit Law Dept
2 Woodward Ave Suite 500
Detroit, MI 48226
313-237-3049 • 313-224-5505
broor@detroitmi.gov

Municipal & Government Liability
Veronica R. Ibrahim
Julie A. Taylor & Associates
20750 Civic Center Drive Suite 400
Southfield, MI 48076-4132
248-945-3838 • 855-847-1378
veronica.ibrahim.yot2@statefarm.com

Professional Liability & Health Care
Kevin Lesperance
Henn Lesperance PLC
40 Pearl Street NW Suite 1040
Grand Rapids, MI 49503
616-551-1611 • 616-323-3658
kml@hennlesperance.com

Professional Liability & Health Care
Daniel John Ferris
Kerr, Russell and Weber, PLC
500 Woodward Ave Suite 2500
Detroit, MI 48226
313-961-0200 • 313-961-0388
dferris@kerr-russell.com

Trial Practice
David Ottenwess
Ottenwess, Taweel & Schenk, PLC
535 Griswold St Suite 850
Detroit, MI 48226
313-965-2121 • 313-965-7680
dottenwess@ottenwesslaw.com

Trial Practice
Hannah Treppa
Butzel Long PC
150 W Jefferson Ave Suite100
Detroit, MI 48226-4452
313-983-6966 • 313-225-7080
treppa@butzel.com

Young Lawyers
Jeremiah Fanslau
Magdich & Associates
17177 N. Laurel Park Drive Suite 401
Livonia, MI 48152
248-344-0013 • 248-344-0133
jfanslau@magdichlaw.com

Young Lawyers
Amber Girbach
Hewson & Van Hellemont PC
25900 Greenfield Road Suite 650
Oak Park, MI 48237
248-968-5200 • 248-968-5270
agirbach@vanhewpc.com

Young Lawyers
Robert Murkowski
Miller Canfield Paddock & Stone, PLC
150 W. Jefferson Ave Suite 2500
Detroit, MI 48226
313-496-8423 • 313-496-8451
murkowski@millercanfield.com

MDTC Welcomes New Members!

Mary Aretha, *Maddin Hauser Roth & Heller PC*
Katherine Beres, *Rutledge, Manion, Rabaut, Terry & Thomas, PC*
Colleen Burke, *Collins Einhorn Farrell PC*
Stephanie Burnstein, *Segal McCambridge Singer & Mahoney Ltd*
Troy Clarke, *Willingham & Cote` PC*
Jackie Cook, *The Mike Cox Law Firm*
Jesse DePauw, *Kitch Drutchas Wagner Valitutti & Sherbrook*
Daniel Fleming, *Moblo Fleming & Watt, P.C.*
Bernard Fuhs, *Butzel Long*
Seth Gould, *The Miller Law Firm PC*
Christina Green, *Johnson & Wyngaarden PC*
Shelly Griffin, *Secrest Wardle*
Michelle Harrell, *Maddin, Hauser, Wartell, Roth & Heller, P.C.*
Andrew Harris, *Kitch Drutchas Wagner Valitutti & Sherbrook*
Matthew High, *Plunkett Cooney*
Daniel Krawiec, II, *Clark Hill PLC*
Nicole Lockhart, *Scarfone & Geen PC*
Hilary McDaniel, *Foster Swift Collins and Smith*
Andrew McKeachie, *Johnson & Wyngaarden PC*
Marcy Mierzejewski, *Anselmi Mierzejewski Ruth & Sowle PC*
Ann Miller, *The Miller Law Firm PC*
Jessica Mills, *Scarfone & Geen PC*
Brittany Mouzourakis, *Dykema Gossett PLLC*
Timothy Mulligan, *Cummings McClorey Davis & Acho PLC*
Sarah Nirenberg, *Kienbaum Hardy Viviano Pelton & Forrest PLC*
Chelsea Pasquali, *Collins Einhorn Farrell PC*
Lindsay Schmidt, *Secrest Wardle*
Ivonne Soler, *Butzel Long PC*
Jill Story, *Kitch Drutchas Aagner Valitutti & Sherbrook*
Angelique Thomas, *Angelique Chaiser Thomas PC*
Robert Tice, *Collins Einhorn Farrell PC*
Allan Vander Laan, *Cummings, McClorey, Davis & Acho, P.L.C.*
Melissa Wojnar-Raycraft, *The Mike Cox Law Firm*
Robert Wood, *Willingham & Coté PC*
Nicolette Zachary, *Ward, Anderson, Porritt, Bryant, Lord & Zachary*
Mitchell Zajac, *Butzel Long*
Jesse Zapczynski, *Scarfone & Geen PC*

MDTC
P.O. Box 66
Grand Ledge, MI 48837

MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far-reaching and well-respected Quarterly publication and through its timely and well received seminars. Membership in MDTC not only provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.