MICHIGAN DEFENSE
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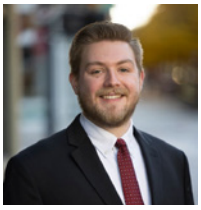

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Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

Past President's Corner

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

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

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

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

Dear Members of the Michigan Defense Trial Counsel,

As I conclude my tenure as President of MDTC, I want to take a moment to express my heartfelt gratitude to each one of you for your unwavering support, dedication, and commitment over the past year. Serving as your President has been one of the great honors of my professional career, and I am immensely proud of what we have accomplished together.

Throughout my presidency, it has been and will continue to be my goal to leave this organization in a better place than I found it. Together, we have strengthened our advocacy efforts, extended our philanthropic mission, and solidified our standing as a leading voice in the Michigan Bar. These achievements would not have been possible without your hard work, collaboration, and passion for our shared mission. These milestones are a testament to the strength of our organization and the collective effort of our remarkable members.

As I step down from this role, I am filled with confidence in the future of MDTC. Our incoming leadership, helmed by John Hohmeier and his executive team, is poised to build on our successes and navigate the challenges ahead with the same determination and excellence that have defined our organization. For those of you who do not know John, his passion and dedication to everything that he touches is remarkable. I can think of no one who works harder and cares more about this organization to lead us over the next twelve months. The executive committee that will be taking the reins in the 2024-2025 term are all exceptional attorneys, and more importantly, they are exceptional leaders. I am excited to see the innovative ideas and new directions that will shape our continued growth and impact.

I would also like to take this opportunity to extend my sincerest gratitude to Madelyne and her team. For those of you who are unaware, Madelyne's hard work and dedication to MDTC is invaluable and irreplaceable. Thank you, Madelyne!

While I will no longer be serving as your President, I remain deeply committed to MDTC and its mission, and I look forward to supporting our organization in new ways. I am eager to stay connected with all of you and to continue working towards our common goals.

Thank you once again for the privilege of serving as your President. Your support and trust have been the driving force behind our achievements, and I am grateful for the opportunity to have led such an extraordinary organization.

With heartfelt appreciation and best wishes,

Michael J. Jolet

Outgoing President

President's Corner

By: John C. W. Hohmeier, *Scarfone & Geen PC*
jhohmeier@scarfone-geen.com

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

First and foremost: I would like to thank all the people that threw every valid and legitimate concern that they have had about me aside when deciding that one day, John Hohmeier will be the President of the Michigan Defense Trial Counsel. Truly, I appreciate that you're all insane, but in a good way. Also, I cannot specifically name every person I should here in gratitude because there is an anthology of people who have had a positive influence on me, as well as supported me and ushered me to this position, but I am compelled to mention a few…

Madelyne Lawry is an absolute, certified beauty, and she can do no wrong and never does. Madelyne might be one of the most selfless people this world has ever known, and we should all stand in awe of her grace. Obviously, Mike Jolet: it's not a secret I'm a huge fan of Mr. Jolet, and we can talk anytime about it, I'm not shy. I'd make arrangements to dispose of a body for Jolet. Now, there is Fred Livingston, who will be your next president. People like Mr. Livingston are the future of this organization in mannerism, intelligence, and poise. Even before he was elected to the executive board, everyone knew Mr. Livingston was a superstar...now, being able to witness what he's been able to accomplish for this organization in the past year, he is a game changer. Also, a huge thank you to Lindsey Peck who has taken over responsibilities with the Quarterly (though we will never forget you Mike!).

Now for the rest of you…let this be known: things may get a bit weird for the next year. Not to worry though, as there is still some stellar MDTC programming on the books in 2024 including the Battle of the Bar in August, the annual golf outing at Mystic Creek in September, Meet the Judges at Detroit Golf Club in October, and the Winter Meeting at the Sheraton in Novi in November. There will also be some nontraditional programming along the way. The greatest American journalist of all time once said "when the going gets weird, the weird turn pro." We'll, I guess I'm a pro now, so all you can do is prepare for it, embrace it, and enjoy it.

MDTC **Schedule of Events**

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2024

Thursday, August 22	1:00 pm - 3:00 pm	MDTC/MAJ Battle of the Bar – *Corner Ballpark, Detroit*
Thursday, September 13	8:00 am - 3:00 pm	Golf Outing – *Mystic Creek Golf Club*
Tuesday, October 1		Award Nomination Deadline
Thursday, October 10	6:00 pm – 8:00 pm	Meet the Judges – *Detroit Golf Club*
Friday, November 1	8:00 am – 5:00 pm	Winter Meeting – *Sheraton Detroit Novi Hotel*

2025

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

The Blame Game in Legal Malpractice

Article was originally published at
https://maddinhauser.com/the-blame-game-in-legal-malpractice/

> "I've done enough wrong on my own, I don't want to get blamed for something I didn't do." – Dwight Gooden

If you hear the name Marie Antoinette, you probably think of the famous saying attributed to her, "let them eat cake." The quote captures the callousness of the royal family and their obliviousness to the conditions of ordinary people. Yet, there is no contemporary historical evidence that Marie Antoinette ever said anything like, "let them eat cake" (or "let them eat brioche" to be more accurate). The first time that the saying was attributed to her was fifty years after her death. Moreover, there are similar folk tales in other cultures such as the 16th-century German tale of the noble-woman who wondered why the hungry poor don't simply eat *Krosem*, a sweet bread. In short, while Marie Antoinette likely had many shortcomings, saying "let them eat cake" was not one of them.

In the legal malpractice world, it is common for attorneys to get blamed for the inactions of another attorney. However, unlike Marie Antoinette, attorneys have an opportunity in appropriate cases to correct the record and show that successor counsel had an opportunity to remedy any alleged malpractice.

Michigan Cases

The seminal Michigan case for this proposition is *Boyle v Odette*, 168 Mich App 737; 425 NW2d 472 (1988). In *Boyle*, the plaintiff believed that the defendant attorney failed to timely file suit against the host of a wedding reception, who allegedly furnished alcoholic beverages to an underage guest involved in a traffic accident that injured her. The Court held that the defendant attorney "cannot be held liable for failing to file a social-host action prior to expiration of the period of limitation where he ceased to represent plaintiff and was replaced by other counsel before the statutory period ran on her underlying action."

This rule applies to allegations other than a missed statute of limitations. For example, in *Melody Farms, Inc v Carson Fischer, PLC*, 2001 WL 740575, unpublished opinion *per curiam* of the Michigan Court of Appeals, issued 2/16/01 (Docket No. 215883), the Court applied these rules to a legal malpractice allegation that the defendant attorneys did not conduct sufficient discovery during the underlying litigation. Because the defendant attorneys were replaced by successor counsel four months before the discovery cutoff and a year before trial, the Court held as a matter of law that the alleged failure to conduct discovery could not be the proximate cause of the plaintiffs' asserted damages. See also *Laymon v Keckley*, 696 F Supp 299 (WD Mich, 1988) ("[a]t the time the defendants withdrew as counsel, plaintiffs' interests were adequately protected").

David M. Saperstein
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David M. Saperstein, shareholder, concentrates his practice on professional liability defense and appellate law, primarily defending attorneys, registered representatives and broker-dealers, insurance agents, accountants, and real estate agents. He joined Maddin Hauser in July 2001, and is admitted to practice law in Michigan, Ohio, and California.

Law of Other Jurisdictions

The same rule applies in other jurisdictions. In *Filbin v Fitzgerald*, 211 Cal App 4th 154, 171; 149 Cal Rptr 3d 422 (Cal App, 2012), the plaintiffs discharged their attorney in the underlying case shortly before trial due to a disagreement over the amount of a settlement demand. The underlying case settled two and a half months after the plaintiffs retained successor counsel. The subsequent legal malpractice case was brought on the theory that the defendant attorneys had misstated the law regarding the maximum amount required in a settlement demand. The Court dismissed the legal malpractice case, holding that the outcome of the underlying litigation was in the plaintiffs' own hands once the defendant attorneys were replaced:

> Therefore, when replacement counsel took over the case on August 3, it was with no lingering impairment at [defendant attorneys'] hands. When it came time for the [plaintiffs] to consider whether to settle the case some two and a half months later, in mid-October, they were free agents. No past decision by [defendant attorneys] hobbled them. Nothing prevented their new counsel from giving them impartial advice. No one would stop them from going to trial. Their decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from [defendant attorneys]. The consequences of that decision are likewise theirs alone.

One practical impediment is that legal malpractice counsel may be hesitant to sue successor counsel from the underlying case due to a referral relationship. Where that impediment is absent, a legal malpractice case against successor counsel may be viable. For example, in *Baum v. Becker & Poliakoff, P.A.*, 351 So. 3d 185 (Fla. App. 2022), the plaintiff brought a legal malpractice claim alleging that successor counsel failed to salvage her claims by correcting her previous attorneys' mistakes. When successor counsel argued that the underlying litigation was already "Black-Flag" dead before they got involved, the Court held that successor counsel's failure to attempt to prove good cause or excusable neglect created a dispute concerning whether the underlying court would have employed some sanction other than dismissal if successor counsel had made an argument to excuse the failure to serve process.

A leading legal malpractice treatise frames the causation issue as whether, after the discharge or termination of the attorney, sufficient time existed for the client or successor counsel to complete the task alleged to be malpractice:

> A recurring issue concerns where a lawyer's employment ends and ample time remains for the client or successor counsel to complete the task for which the lawyer is sued. Under causation analysis, the lawyer is not liable if there was sufficient time to complete the task. The courts usually decide this issue as a matter of law, though the adequacy of the time remaining or other circumstances can create an issue of fact. [Ronald E. Mallen, 4 Legal Malpractice § 33:12 (2023 ed).]

Practical Application

This defense can change the tenor of a case. A few years ago, we defended a medical malpractice attorney accused of turning down a birth trauma case after the statute of limitations had already expired. Birth trauma cases can be difficult for medical malpractice attorneys to win, but they produce some of the highest verdicts when successful. The plaintiff's counsel thought they had a slam dunk on the breach of the standard of care because our client had reported that the state law infancy statute tolled the medical malpractice claim until the child's tenth birthday. In fact, at the time, the Affordable Care Act had expanded the class of hospitals for which federal law applied, and federal law did not have such a tolling provision.

Despite this, federal law differed from state law not only regarding tolling for minors, but also regarding accrual. Whereas Michigan law provides for a strict accrual date based on the date of the alleged medical malpractice, federal law allows for a discovery period based on when the plaintiff knew or should have known of a possible claim of medical malpractice. When we were able to show that successor counsel had a viable opportunity to bring a timely medical malpractice action, the plaintiff's counsel in the legal malpractice case suddenly became interested in settlement possibilities.

On other occasions, we have used this argument to defeat arguments brought by in pro per plaintiffs who have either fired their attorneys and proceeded without representation or had a revolving door of attorneys. Inevitably, when such unrepresented parties file a legal malpractice action, they argue that the pleading, strategy, or discovery practice of their original attorney caused the loss of the underlying litigation. In one such case, *Wigger v Attorney*, Muskegon County (Michigan) Judge Timothy G. Hicks held that the causation rule for successor counsel applied to plaintiffs who choose to represent themselves after firing their original attorney:

> Where there is successor counsel, his failure to remedy prior counsel's alleged errors constitutes superseding causation. Mallen, Legal Malpractice, § 33:12

(2016). There seems no reason not to apply this logic when clients choose to represent themselves.

Where there is successor counsel, his failure to remedy prior counsel's alleged errors constitutes superseding causation. Mallen, Legal Malpractice, § 33:12 (2016). There seems no reason not to apply this logic when clients choose to represent themselves.

Conclusion

Where attorneys make a mistake, it is critical that they acknowledge their mistake and attempt to remedy any error. At the same time, the existence of sufficient time for successor counsel to remedy the alleged error can be a complete defense in a subsequent legal malpractice case. In such cases, a different cake metaphor is appropriate: aggrieved parties cannot eat their cake and have it, too.

Remembering

Past President

James "Jim" Edward Lozier

Obituary link

Memorial video

"Jim was an outstanding attorney and a great friend for many years. He will be missed."

- Michael Fordney, *MDTC Past President '83-'84*

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E-Discovery Report

By: Ken Treece and B. Jay Yelton, III, *Warner Norcross + Judd LLP*
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Under Appropriate Circumstances Categorical Privilege Logs are Permissible

Consumer Financial Protection Bureau v. Carnes, 2024 WL 1195565 (D. Kan. Mar. 20, 2024)

U.S. Magistrate Judge Teresa J. James presided over a dispute regarding the adequacy of a privilege log provided by the Consumer Financial Protection Bureau (CFPB). The CFPB initiated legal action alleging fraudulent asset transfers aimed at obstructing an investigation. Among various points of contention during the discovery phase, one of the defendants argued that the CFPB's categorical privilege log was insufficient and requested a more comprehensive one.

Magistrate Judge James reviewed the defendant's objections and the CFPB's privilege log, which primarily addressed requests for documents related to the investigation, communications concerning the alleged fraudulent transfers, and exchanges with other government agencies. The CFPB's log categorized withheld documents providing descriptions, approximate date ranges, and information about authors, senders, recipients, and applicable privileges.

The defendant contended that the log failed to meet basic requirements, hindering its ability to assess the validity of the claimed privileges, particularly concerning its defense based on the statute of limitations.

In response, the CFPB defended its privilege log, arguing that it sufficiently objected to wholesale production of internal attorney-client communications and provided a declaration explaining its categorization process.

Magistrate Judge James considered Rule 26(b)(5) of the Federal Rules of Civil Procedure, which mandates a detailed description of withheld privileged information to allow parties to assess the claim without revealing protected information. While acknowledging the permissibility of categorical privilege logs in certain cases, she emphasized the need for specificity, especially when multiple privileges are invoked.

Ultimately, Judge James found the CFPB's log lacking in detail, making it difficult for the defendant and the court to evaluate the claimed privileges. She ruled that certain categories of documents on the log required further elaboration, particularly those relevant to the defendant's statute of limitations defense. However, she deemed some categories irrelevant to the defense and thus sufficient as listed.

B. Jay Yelton, III

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

Ken Treece

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

In summary, while the court acknowledged the legitimacy of using categorical privilege logs, it emphasized the importance of providing adequate detail to enable meaningful assessment of claimed privileges, particularly in complex cases involving multiple legal considerations.

PRACTICE TIP: The advisory committee notes accompanying the 1993 amendments to Rule 26 recognize that the level of detail a privilege log must contain is case specific. In cases where a significant number of relevant documents are likely to be privileged, categorical privilege logs are a topic that the parties should discuss as part of their discovery planning process because their use can save the parties significant time and expense. However, agreeing on a protocol for those logs before undertaking document review and production is essential.

Be Prepared to Disclose and Defend Your Discovery Compliance Plan

EmCyte Corp. v. XLMedica, Inc., 2024 WL 1328347 (M.D. Fla. Mar. 28, 2024)

Magistrate Judge Nicholas P. Mizell addressed the intricacies surrounding document production practices and potential spoliation of electronic evidence. The dispute originated from a trademark disagreement over EmCyte's blood-concentrating systems, with EmCyte alleging trademark infringement against Anna Stahl and her company, XLMedica. In response, the defendants counterclaimed, accusing EmCyte and its CEO, Patrick Pennie, of tortious interference.

Judge Mizell's opinion reflects that, from early in the legal proceedings, the parties were alleging that the other party was not providing relevant discovery, including ESI. In response to their motions to compel, the court ordered both parties to:

Exchange written descriptions of the search protocols employed to identify, collect, and produce documents responsive to document requests. These descriptions must identify with particularity the paper and electronic repositories searched and the custodians of same, any search terms or search strings used for searching voluminous files, the dates when searches were conducted, and who conducted each search.

The court found that the defendants: (a) failed to adopt a reasonable plan to identify, collect, and produce documents responsive to requests for production and (b) purposefully did not implement a discovery plan in good faith. The court advised the defendants that they would need to attend an evidentiary hearing to answer questions about their efforts to identify, collect, and produce responsive documents.

PRACTICE TIP: Historically, many, if not most, attorneys believed that their discovery compliance efforts were protected from disclosure under attorney-client privilege and/or work-product doctrine. That is certainly not the case today. There are numerous cases, including this one, reflecting: (a) that courts expect attorneys to communicate and cooperate during the discovery process and (b) that if problems are alleged with respect to your discovery compliance, be prepared to disclose the details of your plan and efforts.

Preservation Duty Not Triggered in Alleged Excessive Force Case

Chepilko v. Henry, 2024 WL 1203795 (S.D.N.Y. Mar. 21, 2024)

U.S. Magistrate Judge Stewart D. Aaron examined the circumstances under which police camera footage should be retained "in anticipation of litigation" to avoid spoliation penalties under Rule 37(e). The plaintiff alleged that the defendant, Lieutenant Henry of the New York Police Department (NYPD), used excessive force by pushing him across a street while he was attempting to seek information from Henry's sergeant. As a result of this incident, the plaintiff received a criminal summons for disorderly conduct, which was dismissed shortly thereafter. Nearly a year later, the plaintiff initiated legal action, including claims of excessive force, failure to intervene, and malicious prosecution, leading to a bench trial where Judge Aaron addressed both the merits of the case and a discovery dispute.

Central to the dispute was the preservation of NYPD camera footage capturing the incident. Although both parties acknowledged that the footage had been deleted due to the NYPD's 30-day retention policy, they disagreed on whether this deletion constituted appropriate conduct. The plaintiff filed a motion for sanctions under Rule 37(e), arguing that the defendants had a duty to preserve the footage when it was deleted. Conversely, the defendants contended that they were not obligated to preserve the footage as the lawsuit was filed almost a year after the incident, and they were not aware of any impending litigation at the time of deletion.

Judge Aaron considered several factors to determine whether the obligation to preserve the footage existed before the lawsuit was filed. He rejected the plaintiff's arguments that various events, including the incident itself, a 911 call made by the plaintiff, a public records request for the footage, and an investigation by the New York City Civilian Complaint Review Board, triggered a duty to preserve. Judge Aaron ruled that none of these factors triggered the defendants' duty to preserve evidence, thus denying the plaintiff's motion for sanctions under Rule 37(e).

In conclusion, Judge Aaron found that the defendants did not have a duty to preserve the footage before the lawsuit was filed and rejected the plaintiff's motion for sanctions.

PRACTICE TIP: Determining when the duty to preserve is triggered (when litigation is reasonably anticipated) is judged by an objective standard, not a subjective one. The court in this case concluded that under these facts an objective person standing in the shoes of the NYPD would not have believed that litigation was reasonably likely. Perhaps the presence of additional factors, such as a preservation letter from the plaintiff's attorney and/or had the plaintiff sustained serious injuries, the ruling might have been different.

Proposed Sample Size for Metadata Log Held to be Proportional

Ni v. HSBC Bank USA, N.A., 2024 WL 863699 (S.D.N.Y. Feb. 29, 2024)

Magistrate Judge Katharine H. Parker addressed the issue of proportionality concerning the plaintiff's request for a metadata log under Rule 26 in a collective wage and hour action under the Fair Labor Standards Act. The plaintiff alleged that personal bankers at the defendant's bank branches worked off-the-clock during lunch breaks and after hours without proper compensation. In discovery, the plaintiff sought a metadata log covering a six-year period to evaluate whether employees indeed worked during these times. The requested log would include email, text, and direct message activity for a sample of the putative class, with details such as sender and recipient names, message timestamps, and subject lines.

The defendant objected to the request, arguing that the sample size proposed by the plaintiff was disproportionate to the needs of the case and that pulling metadata for each individual in the sample would be burdensome. Additionally, the defendant sought to limit the log to only messages sent, excluding received messages.

Magistrate Judge Parker analyzed the request in light of Rule 26(b)(1), which outlines the scope of discovery, emphasizing the principle of proportionality. Considering factors such as the importance of the issues, the amount in controversy, and the parties' relative access to information, Judge Parker deemed the plaintiff's proposed sample size and scope of metadata reasonable. She noted that the plaintiff only sought metadata, not the content of the messages, reducing the burden on the defendant.

Judge Parker disagreed with the defendant's argument that only messages sent were relevant, reasoning that received messages could provide context regarding an employee's activities during lunch breaks or after hours. Thus, she ordered the defendant to produce metadata for both sent and received messages. Judge Parker was also critical of defendants for failing to provide "specific information about the monetary costs or the estimated hours involved in collecting the metadata."

However, Judge Parker clarified that her ruling did not set a precedent for future discovery requests, stating that different types of discovery might warrant smaller sample sizes. Overall, she found the plaintiff's proposal to be proportional to the needs of the case and ordered the defendant to comply with the request for metadata.

PRACTICE TIP: Courts are appreciative of, and often will approve, a requesting party's effort to limit the scope and burden of discovery via sampling. But, if you are the responding party and argue that the requested discovery is not proportional to the needs of the case, you will need to explain why and substantiate the alleged burden via affidavit(s) to have any chance of success before the court.

See, e.g., DR Distributors, LLC v. 21 Century Smoking, Inc. 513 F.Supp.3d 839, 957 (N.D. IL 2021).

Plaintiff's Duty to Preserve Triggered Upon Retention of Counsel

Linet Americas, Inc. v. Hill-Rom Holdings, Inc., 2023 WL 9119836 (N.D. Ill. Dec. 1, 2023)

U.S. Magistrate Judge Jeffrey T. Gilbert delved into the propriety of "discovery on discovery," specifically addressing Plaintiff's document retention policies and practices, and its retention of counsel concerning an antitrust suit against Defendant, a medical technologies supplier.

The crux of the matter lay in the disposal of Electronically Stored Information (ESI) from former employees, potentially relevant to the litigation. Defendant sought discovery from Plaintiff to ascertain when the duty to preserve this ESI arose, arguing it coincided with Plaintiff's retention of counsel (which occurred two years prior to when the lawsuit was filed). Plaintiff countered, claiming the ESI disposal followed standard business practice and preceded counsel retention.

Magistrate Judge Gilbert acknowledged the validity of "discovery on discovery" under specific circumstances, notably when a party's compliance with discovery is in question. Given the discarded ESI and the timing of counsel retention, Defendant's request was deemed justifiable. The duty to preserve, per Rule 37(e), is typically triggered upon anticipation of litigation, not merely at its commencement. Therefore, the timing of counsel retention was pivotal.

Plaintiff's contention that counsel retention wasn't determinative of anticipating litigation didn't sway the court, as such retention is often indicative of such anticipation. Consequently, the court ordered the production of documents relating to counsel retention and communication logs, along with the relevant document retention policies from December 2019 to April 2020, crucial in determining the duty to preserve evidence. However, the request for policies predating December 2019 was denied, as mere awareness of alleged misconduct didn't warrant discovery of older policies.

PRACTICE TIP: Magistrate Judge Gilbert's decision underscores the importance of meticulous handling of ESI and the relevance of counsel retention in determining when the duty to preserve has been triggered. It also emphasizes the courts' prerogative to delve into discovery matters to ensure fair proceedings and preservation of evidence.

Case Dismissal for Intentional Spoliation Affirmed on Appeal

Jones v. Riot Hospitality Group LLC, 95 F.4th 730 (9th Cir. 2024)

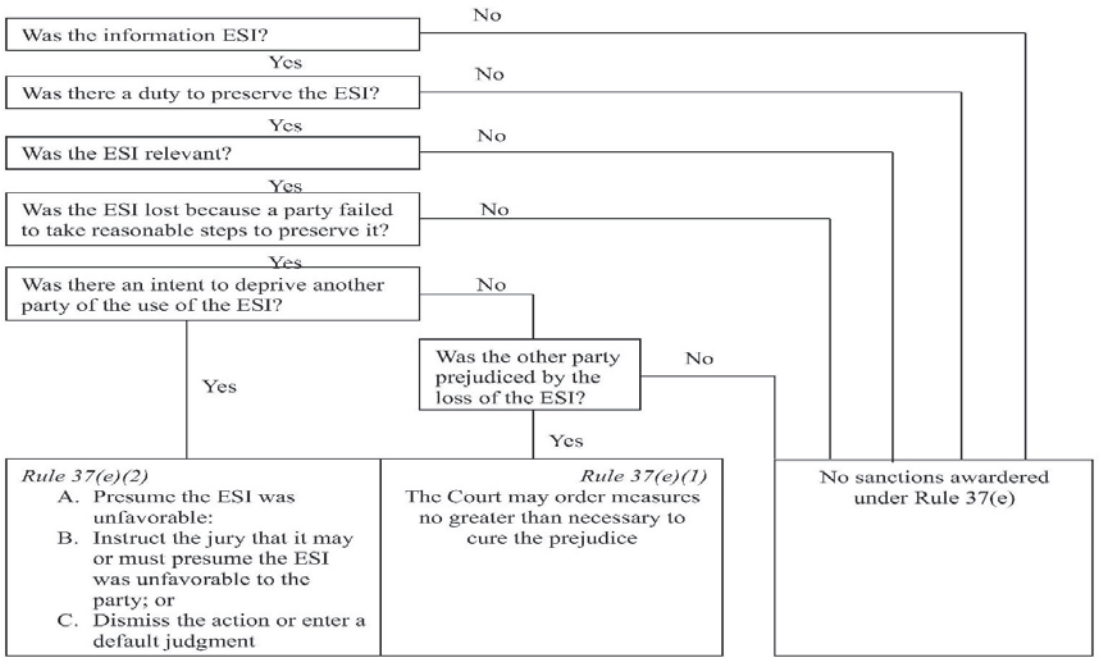
The U.S. Court of Appeals for the Ninth Circuit, through an opinion authored by Judge Andrew D. Hurwitz, addressed an appeal concerning a district court's order granting dismissal based on spoliation of text messages in a Title VII case. The case involved allegations under the Fair Labor Standards Act, where the plaintiff claimed off-the-clock work by personal bankers at the defendant's bank branches. During discovery, it was discovered that certain text messages relevant to the case had been deleted. Despite court orders to produce these messages, the plaintiff failed to comply. Subsequently, a forensic specialist appointed by the court found evidence suggesting the intentional deletion of messages. Based on this, the district court dismissed the case with prejudice.

Judge Hurwitz explained that Rule 37(e) applies when Electronically Stored Information (ESI) that should have been preserved for litigation is lost due to a party's failure to take reasonable steps to preserve it. In this case, the district court found that the plaintiff had intentionally deleted relevant text messages and collaborated with witnesses to do so, intending to deprive the defendants of their use in litigation. Judge Hurwitz disagreed with the plaintiff's argument that her conduct was neither willful nor prejudicial, emphasizing that Rule 37(e) only requires findings that the prerequisites were met and the spoliating party acted with the requisite intent.

The appellate court found ample circumstantial evidence supporting the district court's conclusion that the plaintiff intentionally destroyed text messages. Despite the inability to confirm every intentional deletion, the court considered factors such as the timing of destruction and affirmative steps taken to delete evidence. The plaintiff's repeated violations of court orders and the imposition of monetary sanctions further supported the district court's decision to impose terminating sanctions.

Ultimately, Judge Hurwitz upheld the district court's dismissal, finding it to be a reasonable measure given the circumstances and the plaintiff's intentional conduct. The court's decision highlighted the importance of preserving evidence and the serious consequences of spoliation in litigation.

PRACTICE TIP: The most recent amendment to FRCP 37(e) occurred in 2015 in hopes to provide greater clarity and fairness when dealing with situations where a party has failed to preserve relevant ESI. When a court is presented with a motion for sanctions under FRCP 37(e), many different factors can come into play. Some courts have found the following flowchart to be useful when analyzing FRCP 37(e) motions.



Insurance Coverage Report

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

***Covington Specialty Insurance Company v Sweet Soul, Inc*, unpublished opinion of the U.S. Court of Appeals for the Sixth Circuit, issued May 8, 2024 (Docket No. 23-1480).**

In recent months, the duty to defend has been the subject of multiple federal decisions, applying Michigan law in diversity. Here, Covington Specialty Insurance ("Covington") filed a declaratory judgment action, asserting that it had no duty to defend or indemnify its insured, Sweet Soul Bistro, for a wrongful death action that arose out of a shooting outside the restaurant. The insurer joined the underlying plaintiff/Estate as a defendant to the declaratory judgment action. The District Court held that an assault and battery exclusion in the restaurant's policy barred coverage, so there was no duty to defend or indemnify. The insured restaurant did not appeal, but the Estate did. On appeal, the Sixth Circuit agreed that the assault and battery exclusion applied, but found that the District Court erred by adjudicating the duty to defend *as to the Estate* (it wasn't an insured so the duty to defend simply was not relevant).

In June 2019, Ronald Anderson was shot and killed outside Sweet Soul Bistro in Detroit. His Estate later sued Sweet Soul under Michigan's Wrongful Death Act. At the time of the shooting, Sweet Soul held a commercial general liability ("CGL") policy with Covington. While that policy generally "covered bodily-injury damages that Sweet Soul became legally obligated to pay," it also "contained an assault and battery exclusion…."[1] In that exclusion, Covington disclaimed any duty to defend or indemnify Sweet Soul for "any claim or suit to recover damages from an actual or alleged 'assault' and/or 'battery.'"[2] This exclusion defined "battery" as "harmful or offensive contact between or among two or more persons." The exclusion further specified that "battery" included "harm arising out of the ... use of firearms."[3]

In July 2022, Covington filed this declaratory judgment in the Eastern District of Michigan, based on the assault and battery exclusion. Covington joined the Estate as a necessary party, "so that the Estate may be bound by the judgment entered."[4] Covington later prevailed on a motion to dismiss, the District Court finding that the policy's assault and battery exclusion precluded coverage. The District Court explained that the underlying wrongful death action was "clearly a suit to recover damages for bodily injury arising from a battery – i.e., the harmful contact between Anderson and the shooter arising from the use of a firearm."[5] The District Court held that Covington had no duty to defend Sweet Soul in that suit, since the suit did not "arguably come within the policy coverage."[6] And because an insurer who has no duty to defend necessarily has no duty to indemnify under Michigan law,[7] the District Court granted all of the relief requested by Covington.

Drew W. Broaddus

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

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

Again, only the Estate appealed, not the insured. Covington argued that the Estate lacked standing to appeal – which prompted the panel to consider whether Covington properly joined the Estate to the suit in the first place. After some twists and turns, the panel found that this threshold question was controlled by *Safety Specialty Ins Co v Genesee Cnty Bd of Comm'rs*, 53 F4th 1014, 1021 (CA 6, 2022). In *Safety Specialty*, the insured (Genesee County) was named in two class actions accusing a multitude of Michigan counties of retaining surplus proceeds from tax-foreclosure sales of private property. The insurers brought a declaratory judgment action against both their insured and the class representatives, seeking a declaration that it owed no duty to defend or indemnify from the class actions. The District Court had held that the insurer had no duty to defend or indemnify the County from the class actions, but dismissed the case against the class representatives for lack of standing.[8] The Sixth Circuit affirmed that part of the decision because the duty to defend "does not involve" third-party claimants – an insurer's duty to defend is a "right affecting only the obligations of the insurer vis-a-vis the insured."[9] The same reasoning applied here, at least as to the duty to defend.[10] "…Covington's alleged duty to defend Sweet Soul does not create an injury in fact traceable to the Estate."[11]

"But the duty to indemnify" was a "closer question."[12] This was because "Covington may have to pay the Estate's damages if the latter prevails in its state-court suit against Sweet Soul – for here, Sweet Soul *is* the alleged tortfeasor" in the state-court suit.[13] Citing *Maryland Casualty Co v Pacific Coal & Oil Co,* 312 US 270; 61 S Ct 510 (1941), the panel found that the duty to indemnify was "ripe for adjudication" vis-à-vis the Estate b*ecause "M*ichigan law allows the Estate to proceed against Covington to satisfy any unpaid judgment against Sweet Soul,"[14] there was "no sign that the policy will lapse for lack of notice," and there was a potential for the state and federal courts to "reach opposite interpretations of Sweet Soul's policy with Covington."[15]

Once the panel determined that the duty to indemnify was properly before it, it had little trouble affirming the District Court on the substantive coverage question. "The exclusion disclaims any duty by Covington to defend or indemnify Sweet Soul in any claim or suit for damages arising from an actual or alleged 'assault' and/or 'battery.'"[16] "Further on, the exclusion's definition provides that: '[b]attery' is defined as the harmful or offensive contact between or among two or more persons and includes, but is not limited to, contact of a physical or sexual nature."[17] "Battery" includes harm arising out of the distribution, demonstration, accidental discharge, gunsmithing, ownership, maintenance or use of firearms or "weapons."[18] *The underlying wrongful death action fit this definition because it was a* "suit is for damages from an 'actual or alleged' battery: the shooting of Ronald Anderson."[19] "And Anderson's fatal shooting is undoubtedly a 'harmful or offensive contact' resulting from the 'use of firearms.'"[20]

Ultimately, this was a simple case made complicated by the insurer not being precise in its request for relief. As a practical matter, third-party tort claimants are not owed a defense and are not going to be asking for one. But in the end, the insurer obtained the relief it really wanted – a declaration that it would not have to pay any judgment that the Estate might obtain against the insured.

At the time of the shooting, Sweet Soul held a commercial general liability ("CGL") policy with Covington. While that policy generally "covered bodily-injury damages that Sweet Soul became legally obligated to pay," it also "contained an assault and battery exclusion…."

***Great American Fidelity Ins Co v Stout Risius Ross, Inc*, unpublished opinion of the U.S. Court of Appeals for the Sixth Circuit, issued April 8, 2024 (Docket No. 23-1167).**

Here, Great American sought a declaration that it had no duty to defend Stout Risius Ross ("Stout") – a financial planning firm – in lawsuits related to financial valuations for a bankrupt company and its retirement plan. The District Court held that Stout's policy obligated Great American to defend Stout in the underlying litigation until only claims falling within an exclusion provision remained, and that Stout had to reimburse Great American for defending Stout after the exclusion applied. The Sixth Circuit affirmed.

Stout's policy obligated Great American to pay, in excess of the deductible, sums that "the Insured becomes legally obligated to pay as Damages and Claim Expenses as a result of a Claim first made against the Insured...by reason of an act or omission...in the performance of Professional Services by the Insured or by any person for whom the Insured is legally responsible."[21] The policy also obligated Great American "to defend any Claim against the Insured...even if any of the allegations of the Claim are groundless, false or fraudulent."[22] The policy contained an exclusion – "Exclusion F" – which excluded from coverage any claim "based on or arising out of actual or alleged violation of: (1) The Employee Retirement Income Security Act of 1974; (2) The Securities Act of 1933; (3) The Securities Act of 1934; (4) Any state Blue Sky or Securities law."[23]

Stout sought coverage under this policy for two civil actions against it: the *Appvion ESOP* and *Halperin* actions. Both stemmed from Stout's professional services for Appvion, Inc., a

paper manufacturing company owned by Paperweight Development Corp. ("PDC"). These complaints alleges that Appvion operated an Employee Stock Ownership Plan ("ESOP"), which owned all of PDC's stock and was governed by the Employee Retirement Income Security Act ("ERISA"). The ESOP's trustees hired Stout to serve as a financial advisor and value PDC's stock price from December 2004 through 2017. According to these actions, Stout overvalued PDC's stock and induced Appvion employees to invest their retirement savings in the ESOP. When Appvion ultimately declared bankruptcy in October 2017, PDC's stock price collapsed, resulting in hundreds of millions of dollars in losses of funds invested in the ESOP.

Great American agreed to defend Stout in these two actions under a reservation of rights. Specifically, Great American "reserved the right to seek a judicial declaration regarding its rights and obligations under Stout's policy and to seek reimbursement if it had no duty to defend or indemnify Stout."[24] Great American later brought this declaratory judgment action in the Eastern District of Michigan. Great American then moved for summary judgment, arguing that Exclusion F precluded coverage for the underlying claims because they were based on actual or alleged violations of ERISA or securities laws.[25] The District Court found that "Exclusion F did not preclude coverage for the common law claims asserted in the *Appvion ESOP*'s first amended complaint (fraud and negligent misrepresentation)."[26] "Likewise, the district court determined that Exclusion F did not apply to the claims asserted in the underlying *Halperin* action."[27] But the *Appvion ESOP* litigation was later narrowed to "asserting only federal securities law … claims," prompting Great American to file a new motion for partial summary judgment, which the District Court granted.[28] The District Court declared that "because Exclusion F applied to federal securities law claims, Great American no longer had a duty to defend or indemnify Stout."[29]

> The suits alleged that an individual – not employed or associated with the tanning salon – "installed cameras in the salon's private rooms to video-record and livestream customers while they were getting undressed and unclothed during tanning sessions."

Great American did not renew its motion for partial summary judgment as to the *Halperin* action. But it did seek "reimbursement for expenses it incurred in defending the *Appvion ESOP* litigation…" The defense costs at issue exceeded $600,000.[30] The District Court ruled that Great American was entitled to its defense costs, but only after the date that the *Appvion ESOP* litigation was narrowed down to alleged violations of federal securities laws. This knocked out about 90% of Great American's claim.[31] Both sides appealed. Great American argued that it had no duty to defend either suit at any point, and that all of its defense costs should be reimbursed. Stout argued that it was entitled to a defense in the *Appvion ESOP* action (even after the claims were narrowed down to alleged violations of federal securities laws), and that none of Great American's costs should be recoverable.

The panel found that Great American's duty to defend Stout turned on how broadly the phrase "based on or arising out of" extends under Michigan law.[32] "[S]uch language requires a causal connection that is more than incidental."[33] "Something that 'arises out of,' or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen."[34] And while Michigan case law did not define the phrase "based on" in the insurance context, the panel looked to Black's Law Dictionary which defines the verb "base" as "[t]o use (something) as the thing from which something else is developed."[35]

"With this understanding," the panel affirmed the District Court with minimal fuss: the common law claims in the *Appvion ESOP* action required Great American to defend Stout, but once the common law claims went way, the remaining claims in that suit fell squarely within Exclusion F. So, Great American had a duty to defend that suit, but only while the common law claims were still in play. In contrast, the *Halperin* action's "sole live claim against Stout" was "a state law breach of fiduciary dut[y]" which did not trigger Exclusion F.[36] So, Great American had a duty to defend that entire suit.

Finding no error as to the duty to defend, the panel turned to **Stout's obligation to reimburse Great American. Here, the panel made an "*Erie* guess"** about whether the Michigan Supreme Court would require an insured to reimburse an insurer "for defending claims that the insurer had no duty to defend…."[37] The panel predicted that Michigan's Supreme Court would recognize such a claim under a "implied-in-fact contract" theory.[38] This is consistent with both Michigan contract law and the "majority of jurisdictions" that have considered the issue in the liability insurance context.[39] The key to making such a claim is issuing "a timely reservation of rights letter providing notice of the specific possibility of reimbursement and defends an insured after the policy no longer obligated it to do so"[40] – which Great American did here.

Insurers do not often try to recover defenses costs from their insured after a court finds no duty to defend (as reflected in this panel's inability to find controlling Michigan precedent).

This decision serves as a reminder that this cause of action exists, although the situations where it can be asserted are – both practically[41] and as a matter of law – limited.

***West Bend Mut Ins Co v CPT Next Gen, Inc,* unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued March 30, 2024 (Docket No. 21-10387).**

Here, West Bend sought a declaration that it was not required to defend or indemnify its insured from at least sixteen lawsuits arising out of hidden cameras in the insured's tanning salon. The suits alleged that an individual – not employed or associated with the tanning salon – "installed cameras in the salon's private rooms to video-record and livestream customers while they were getting undressed and unclothed during tanning sessions."[42] West Bend raised several coverage defenses. The District Court found "some possibility of coverage when considering the nature of alleged injuries and policy definitions, exclusions, and endorsements," so West Bend had "the duty to defend and indemnify" its insured.[43]

Judge Terrence Berg first considered West Bend's argument that the underlying suits did not allege "bodily injury" within the policy. The District Court acknowledged that most of the underlying plaintiffs alleged mental anguish or emotional distress, and Michigan law requires "some physical manifestation of mental anguish and humiliation" to trigger liability coverage.[44] However, at least one of the underlying plaintiffs seemed to attribute digestive problems to the incident. Judge Berg noted that the record was sketchy and, "[u]nless verified physical manifestation of mental anguish is presented, West Bend would not need to cover the claims under the policy's 'bodily injury' definition."[45] However, the record was not sufficient for the District Court to "conclude one way or the other at this stage whether the plaintiffs experienced bodily injuries for purposes of determining coverage."[46]

Judge Berg next addressed West Bend's argument that the underlying suits were not based on an "occurrence," i.e., an "accident." According to West Bend, placing the cameras was "intentional, tortious, and felonious conduct."[47] The problem with this argument was that, although *someone* intentionally placed the cameras, the incident was accidental *from the perspective of the insured*. The claim was ultimately one for negligence against the tanning salon for failing to detect the hidden cameras.[48] So, assuming "plaintiffs could show that they suffered bodily injuries," the claims triggered liability coverage.[49]

West Bend also asserted an "expected or intended injury exclusion." "Along similar lines" to his analysis of "occurrence" and "accidents," Judge Berg found that this exclusion did not apply because the injury had to be expected or intended *by the insured*.[50] The insured could not have "reasonably expected that a third-party would plant surreptitious cameras in its changing areas and invade customers' privacy..."[51] West Bend also asserted a **"**willful violation of a penal statute" exclusion. The problem, again, was that the person who violated the "penal statute" by placing the cameras had no apparent connection to the insured.[52]

According to these actions, Stout overvalued PDC's stock and induced Appvion employees to invest their retirement savings in the ESOP. When Appvion ultimately declared bankruptcy in October 2017, PDC's stock price collapsed, resulting in hundreds of millions of dollars in losses of funds invested in the ESOP.

West Bend's policy also contained an a**buse and molestation liability endorsement.**[53] **This endorsement extended liability coverage to "**sums the insured becomes legally obligated to pay as damages because of...'mental injury'...arising out of the negligent…employment" or "supervision...of any person for whom the insured is legally responsible."[54] To invoke this provision, Judge Berg found that it was "not necessary for [the insured] to be legally responsible for" the person who actually placed the cameras."[55] Rather, the insured could be held liable "if it can be shown that its employees were negligently supervised, resulting in their failure to find the hidden cameras for nearly two years."[56] "Therefore, the endorsement triggers coverage for this incident and the liability and damages arising from it..."[57]

This is a case that we will keep an eye on, as the District Court's opinion left open the possibility that further factual development could negate coverage. And, given the number of claimants involved, the case may very well end up in front of the Sixth Circuit.

***State Farm Fire & Cas Co v Giannone,* unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued February 26, 2024 (Docket No. 22-13075).**

This declaratory judgment action involved liability coverage under a homeowners' policy for a fatal shooting. Kim Mollicone ("Kim") was killed during a shootout between her husband Matt Mollicone ("Matt") and Daniele Giannone ("Daniele"). Kim's Estate sued Matt and Daniele for negligence and assault and battery. In that case, the Estate alleged that Matthew drove to Daniele's house on July 12, 2022, with Kim in the car, so Matt could confront Daniele about a suspected extramarital affair between him and Kim.[58] Upon arrival, Matt allegedly be-

gan shooting at Daniele, who returned fire and then retreated inside his house to retrieve another firearm or ammunition.[59] Daniele came back outside and resumed exchanging gunfire with Matt as the Mollicones were pulling out of the driveway.[60]

At the time of the shooting, Daniele's home was insured by State Farm, and he sought a defense under that policy. State Farm sought a declaration that Daniele's intentional conduct caused Kim's death and therefore, the underlying suit did not arise from an "accident," *i.e.,* a covered "occurrence" under the insurance policy.[61] State Farm moved for summary judgment on that basis. The District Court (Hon. Laurie Michelson) granted State Farm's motion, finding "that the policy unambiguously precludes coverage…"[62]

Judge Michelson noted that under Michigan precedent, an "accident" means "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected."[63] "The definition of accident should be framed from the standpoint of the insured, not the injured party."[64] "Importantly, the appropriate focus of the term 'accident' must be on both the injury-causing act or event and its relation to the resulting property damage or personal injury."[65] "What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident."[66] "On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured."[67]

In the underlying suit, there was no dispute that "the event or act that caused" Kim's death was intentional – "that is, Daniele intentionally and knowingly pulled the trigger of his firearm while aiming at the Mollicone's vehicle and struck Kimberly."[68] "State Farm argue[d] the inquiry should end there," and Judge Michelson ultimately agreed, although she first addressed the Estate's arguments for coverage.[69]

The Estate argued that "the consequences of Daniele's intentional act were *unintended* – that Daniele intended to discharge his weapon but was only returning fire at Matthew and did not intend to strike Kimberly."[70] Put another way, the Estate emphasized that Daniele did not intend to shoot or kill Kim, nor did he have a reasonable expectation that Kim would be shot when he fired at the Mollicones' vehicle.[71] Instead, according to the Estate, the underlying suit was a "simple negligence case whereby [Daniele] was negligent in shooting at Matthew Mollicone and accidentally hit Kimberly Mollicone."[72] This argument, the District Court found, was not supported by Michigan law. This was not a situation like *McCarn* where a firearm believed to be unloaded was accidentally discharged.[73] Here, "Daniele knew his gun was loaded, he knew Kimberly was in the car with Matthew, and he intentionally fired numerous shots at the Mollicone's occupied vehicle."[74] "In fact, he took time to ensure he had a loaded gun when he retreated into his house after the first exchange of fire."[75] After that, he returned fire multiple times.[76] This was "intentional conduct resulting in an intentional or, at the very least, reasonably expected consequence – firing bullets at a moving vehicle to injure one of the occupants and injuring the other."[77]

Judge Michelson found the case to be analogous to *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000), where the insured tripped the plaintiff while the two were fighting, breaking the plaintiff's ankle.[78] "Although the insured undisputedly did not intend to break the plaintiff's ankle, the Michigan Supreme Court ruled that the insured's act was not 'accidental' as defined in the policy because he should have reasonably expected that the plaintiff could suffer a broken ankle from being tripped."[79] "So too here. Even if Daniele did not intend to strike and kill Kimberly, he admittedly intended to discharge his weapon at the Mollicones' vehicle. And he reasonably should have expected the outcome given the risk of harm he created by this conduct."[80]

"In sum, … [t]he plain and common meaning of the term 'accident' does not include intentional conduct resulting in consequences that reasonably should have been expected by the insured given the direct risk of harm created by his actions."[81] So, "State Farm has no duty to defend – and thus no duty to indemnify – Daniele in the state case."[82] This is another case that we will keep an eye on, as the Estate has appealed to the Sixth Circuit, Case No. 24-1264.

Endnotes

1 *Sweet Soul,* unpub op at 2.
2 *Id.*
3 *Id.*
4 *Sweet Soul,* unpub op at 3.
5 *Id.*
6 *Id.*
7 *American Bumper & Mfg Co v Hartford Fire Ins Co,* 452 Mich 440; 550 NW2d 475 (1996).
8 *Safety Specialty*, 53 F4th at 1018.
9 *Id.* at 1021 (citation omitted).
10 *Sweet Soul,* unpub op at 7.
11 *Id.*
12 *Id.*
13 *Id.* (cleaned up).
14 Citing MCL 500.3006.
15 *Sweet Soul,* unpub op at 7-8.
16 *Id.,* unpub op at 9.
17 *Id.*
18 *Id.,* unpub op at 9-10.
19 *Sweet Soul,* unpub op at 10.
20 *Id.*
21 *Stout,* unpub op at 1-2.

22 *Id.* unpub op at 2.
23 *Id.*
24 *Id.*
25 *Id.* unpub op at 3.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Stout,* unpub op at 3.
30 *Id.*
31 *Id.*
32 *Stout,* unpub op at 6.
33 *Id.,* quoting *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006).
34 *Stout,* unpub op at 6-7, quoting *Johnson*, 474 Mich at 96.
35 *Stout,* unpub op at 7.
36 *Id.* at 7-8.
37 *Id.* at 9, citing *Brown Jug, Inc v Cincinnati Ins Co,* 27 F4th 398, 402 (CA 6, 2022) and *Erie R Co v Tompkins,* 304 US 64; 58 S Ct 817 (1938).
38 *Stout,* unpub op at 9 (citations omitted).
39 *Id.* (citations omitted).
40 *Id.* (citations omitted).
41 The practical problem for insurers is that insureds will often be insolvent in this situation, as they are facing exposure in the underlying suit which the policy does not cover.
42 *CPT Next Gen,* unpub op at 1.
43 *Id.,* unpub op at 11.
44 *Id.,* unpub op at 8, citing *Tobin v Aetna Cas & Surety Co*, 174 Mich App 516; 436 NW2d 402 (Mich App 1988); *Farm Bureau Mut Ins Co v Hoag,* 136 Mich App 326; 356 NW2d 630 (1984).
45 *CPT Next Gen,* unpub op at 8.
46 *Id.*
47 *Id.*
48 *Id.,* unpub op at 9.
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.,* unpub op at 10. This made the case distinguishable from *State Farm Fire & Casualty Company v Couvier*, 227 Mich App 271; 575 NW2d 331 (1998).
53 "[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).
54 *CPT Next Gen,* unpub op at 10.
55 *Id.,* unpub op at 11.
56 *Id.*
57 *Id.*
58 *Giannone,* unpub op at 1.
59 *Id.*
60 *Id.*
61 *Id.,* unpub op at 2.
62 *Id.*
63 *Giannone,* unpub op at 7, citing *Frankenmuth Mut Ins Co v Masters,* 460 Mich 105; 595 NW2d 832 (1999) and *Auto Club Grp Ins Co v Burchell,* 249 Mich App 468; 642 NW2d 406 (2001).
64 *Giannone,* unpub op at 7 (cleaned up).
65 *Giannone,* unpub op at 7 (cleaned up).
66 *Giannone,* unpub op at 8, quoting *Allstate Ins Co v McCarn,* 466 Mich 277, 282; 645 NW2d 20 (2002).
67 *Giannone,* unpub op at 8, quoting *McCarn,* 466 Mich at 282-283.
68 *Giannone,* unpub op at 8.
69 *Id.*
70 *Id.*, unpub op at 9 (emphasis in original).
71 *Id.*
72 *Id.*
73 *Id.*, unpub op at 10.
74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.*
78 *Giannone,* unpub op at 11.
79 *Id.*, citing *Nabozny*, 461 Mich at 480-481.
80 *Giannone,* unpub op at 11.
81 *Id.*
82 *Id.*

Vendor Profile:
Nate Kadau, LCS Record Retrieval

Where are you originally from?
Grand Rapids, Michigan

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

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

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

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

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

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

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

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

Nate Kadau,
Regional Account Manager

3280 N. Evergreen Drive N.E.
Grand Rapids, MI 49525
(877) 949-1119
nkadau@teamlcs.com

LCS RECORD RETRIEVAL

Vendor Resource Bank

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(Must be logged in to the website)

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

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

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

Legal Malpractice Update

By: James J. Hunter, *Collins Einhorn Farrell PC*
james.hunter@ceflawyers.com

Long v Defendant Attorneys, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2023 (Docket Nos. 363259; 363406); 2023 WL 8663653.

Out-of-Court Statement Used as Evidence Against Attorney in Later Malpractice Suit.

Facts

Defendant attorneys represented plaintiffs in a negligence lawsuit involving an electrocution and drowning death of one individual and serious personal injury to another. In the early stages of the proceedings, defendant attorneys issued a press release stating as follows:

Our investigation reveals, without question, that the water around the floating dock area was electrified as a result of improper electrical wiring. The shoddy wiring and the danger of electrocution created by it appear to have been well known by the Marina prior to [Plaintiff]'s death. A horrifying death of a child could easily have been prevented with just a little care.

During a press conference held the following day, defendant attorneys stated that the negligence lawsuit was worth $50 million.

Plaintiffs' claims against several municipal entities were later dismissed based on governmental immunity. Plaintiffs, alleging that their tort claims against the municipal entities were dismissed because of a legal mistake committed by defendant attorneys, sued defendant attorneys for legal malpractice. Specifically, plaintiffs alleged that their tort claims would not have been barred by governmental immunity if they had been pled under federal admiralty law.

Defendant attorneys filed a motion in limine to preclude plaintiffs from referencing the press release and press conference during trial. Defendant attorneys contended that the evidence was irrelevant under MRE 401 and therefore inadmissible under MRE 402. They alternatively argued that the evidence was inadmissible under MRE 403. Plaintiffs responded that that evidence was relevant and admissible. Plaintiffs also argued that the statements constituted admissions of a party-opponent under MRE 801(d)(2) and thus did not constitute hearsay.

The appellate court further concluded that the statements made in the press release and during the press conference were admissible under MRE 403.

James J. Hunter

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

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> During a press conference held the following day, defendant attorneys stated that the negligence lawsuit was worth $50 million.

The trial court denied defendant attorneys' motion in limine. It concluded that the statements were admissible as admissions of a party-opponent under MRE 801(d)(2) and relevant to the issue of damages, as well as the defendant attorneys' belief as to the liability of the municipal entities. It also noted that defendant attorneys' arguments focused on the weight of the evidence, rather than the admissibility of the evidence. Defendant attorneys appealed.

Ruling

The appellate court affirmed the trial court's denial of defendant attorneys' motion in limine. It concluded that the statements made in the press release and during the press conference were relevant for three reasons. First, the statements pertained to the adequacy of defendant attorneys' investigation of the underlying claims, which was relevant to the alleged breach of duty. Next, the statements pertained to defendant attorneys' valuation of the underlying claims, which was relevant to the alleged damages. Last, the statements were relevant to defendant attorneys' credibility because there was little doubt that they planned to argue that the underlying claims lacked merit despite their prior assertions to the contrary. The appellate court also noted that although defendant attorneys made the statements as advocates for plaintiffs, their advocacy was relevant to the weight of the evidence, rather than the admissibility of the evidence.

The appellate court went on to conclude that the statements made in the press release and during the press conference were party-opponent admissions and thus non-hearsay statements within the meaning of MRE 801(d). It reasoned that defendant attorneys were parties to the case as representatives of the firm. It rejected defendant attorneys' attempt to characterize the statements as statements of plaintiffs rather than "admissions" of defendant attorneys, as contemplated by MRE 801(d)(2).

The appellate court further concluded that the statements made in the press release and during the press conference were admissible under MRE 403. Defendant attorneys failed to convince the appellate court that the statements were unduly prejudicial. By the same token, defendant attorneys failed to convince the appellate court that the probative value of the statements was substantially outweighed by the danger of unfair prejudice or jury confusion. The appellate court expressed the belief that admission of the statements was not contrary to the public policy of maintaining a vigorous adversarial system.

Practice Note

An attorney's out-of-court statements regarding a case may be used as evidence against the attorney in a subsequent legal-malpractice action. Consider whether the potential strategic advantage of out-of-court statements outweighs the potential risk that such statements may be utilized by an adverse party in a subsequent action arising out of the proceedings.

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright*
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Effect of Approving the "Form and Content" of Orders

It is well-established that consent judgments and orders are not appealable, so parties should always be cautious when stipulating to the entry of orders. *Cam Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 556; 640 NW2d 256 (2002) ("[O]ne may not appeal from a consent judgment, order or decree."). At the same time, merely approving the "form and content" of an order that embodies a trial court's ruling from the bench does not mean that the aggrieved party has waived appellate review unless the circumstances show that the parties actually consented to the order.

There was a time when an order approved as to "form and substance" was considered "unreviewable" as having been entered with "consent." *Trupski v Kanar*, 366 Mich 603, 607; 115 NW2d 408 (1962); see also *Wold v Jeep Corp*, 141 Mich App 476, 479; 367 NW2d 421 (1985) (finding order approved as to "content and form" to be "the equivalent of a consent judgment" such that it could not be "attacked or altered absent proof of a mistake, inadvertence, surprise or excusable neglect").

The Michigan Supreme Court, however, changed all of that in *Ahrenberg Mechanical Contracting, Inc v Howlett*, 451 Mich 74; 545 NW2d 4 (1996). There, the Court rejected the idea that merely using the words "content" or "substance" could convert a stipulated order prepared in accordance with "the announced decision of the court" into a "consent decree." *Id*. at 77 (cleaned up). The Court found the "better rule" to be that "[w]here there is no indication that the parties have stipulated to the outcome," approving an order as to "form and content" does not waive appellate review. *Id*. at 77-79. In other words, where a proposed order merely comports with a court's ruling, and the aggrieved party has "vigorously litigated its position . . . then acted promptly to perfect an appeal," it cannot be said that approval of the "form and content" of a trial court's order "signaled [the party's] agreement with the trial judge's ruling." *Id*. at 78.

Since *Ahrenberg*, the Michigan Court of Appeals has consistently rejected arguments that approval of an order's "form and content" constitutes "consent." For example, in *Trahey v City of Inkster*, 311 Mich App 582; 876 NW2d 582 (2015), the trial court found that the City of Inkster had overcharged residents for water and sewer services and ordered the city to issue a refund not only to the plaintiff, but also to other city residents. While the city's appeal was pending, the plaintiff filed

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

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a motion to show cause why the city was not complying with certain aspects of the trial court's judgment. The trial court determined that although the city had credited the plaintiff's own water and sewer account, it did not "issue the appropriate credits to the city's residents in light of the reduced water and sewer rates previously ordered by the court." *Id.* As a result, the trial court ordered the city "to credit each of the 8,425 resident water and sewer accounts at issue $303.78, based on a total credit amount of $2,559,321.63," and entered a postjudgment order that the City approved for "form and content." *Id.* at 590, 592. The city sought leave to appeal, and in the meantime issued the credits required by the trial court's order.

Though the Court of Appeals granted the city's application for leave to appeal the trial court's postjudgment order, the plaintiff argued that the city's appeal was moot because the city had approved the order's "form and content," and had also complied with it. The Court of Appeals disagreed. The Court acknowledged the city's "form and content" approval of the order, but concluded that it "[did] not signal the city's agreement with the trial court's finding of unreasonableness or its decision that residents were entitled to refunds." *Id.* at 592. Presumably this was because the entire case and appeal centered on those issues, such that it would not have been reasonable to conclude that the city had consented to the trial court's order. As for the city's issuance of the refunds while its appeal was pending, the Court of Appeals held that this did not preclude the city's appeal either because the city issued the refunds "only after [the] plaintiff sought to invoke the trial court's contempt power." *Id.* at 592-593. The city's satisfaction of the order was thus "compelled," and not voluntary. *Id.* at 593.

There was a time when an order approved as to "form and substance" was considered "unreviewable" as having been entered with "consent."

The Court of Appeals reached the same result in *Sulaica v Rometty*, 308 Mich App 568; 866 NW2d 838 (2014). In that case, after the trial court awarded attorney fees to the defendant, the parties submitted an order that was approved "as to content and form." *Id.* at 587. When the plaintiff sought to challenge the attorney fee award on appeal, the defendnat argued that the plaintiff's approval of the order "as to 'content and form' was the equivalent of the parties entering into a consent decree." *Id.* Citing *Ahrenberg*, the Court of Appeals disagreed. The Court observed that the plaintiff had both challenged the trial court's decision to award fees at the hearing and then moved for rehearing. As a result, there was "no indication that the parties stipulated with regard to an outcome regarding the attorney fees," and thus "nothing to suggest that plaintiff's counsel's approval of the order at issue as to 'content and form' illustrated counsel's intent to enter into a consent order." *Id.* at 588.

There, the Court rejected the idea that merely using the words "content" or "substance" could convert a stipulated order prepared in accordance with "the announced decision of the court" into a "consent decree." *Id.* at 77 (cleaned up).

Of course, while these cases confirm that approving an order's content or substance is not necessarily fatal to its appealability, the easiest way for a party to avoid uncertainty may be to simply indicate approval of an order's "form" only, or to note in the stipulation that the party is not consenting to the relief being ordered.

Unsubstantiated Anchoring: Paintings and Jets and Baseball Contracts, Oh My!

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

Noneconomic damages are inherently difficult to quantify. There's no set method, metric, baseline, or formula. They serve a compensatory purpose, but they're entirely made up from case-to-case and person-to-person, which leaves them ripe for abuse and manipulation.

Many things have huge price tags. Famous paintings, military jets, and celebrity contracts, for example, can cost over a hundred million dollars. What do those high-price items have to do with noneconomic damages? Nothing. Yet, they are frequently referenced during closing arguments.[1] It's a psychological ploy called, unsubstantiated anchoring. And it can drastically increase noneconomic damages awards.

There are ways to prevent the effect of unsubstantiated anchoring. They start with preventing unsubstantiated anchoring, which starts with educating courts. Unsubstantiated anchoring isn't harmless commentary that falls within the wide-latitude generally given for closing argument. If educating the court proves unsuccessful, fighting fire with fire (counter-anchoring) may be the best alternative. Interjecting yet more unsubstantiated argument (counter-unsubstantiated anchoring), though, is risky. New-trial and remittitur motions are the last line of defense.

What is anchoring?

Anchoring is "the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant number."[2] It's a known phenomenon that has been studied in both court and non-court scenarios.

In the original study on anchoring, after participants spun a wheel rigged to land on ten or 65, they were asked the percentage of African countries in the United Nations.[3] The participants whose wheel landed on 65 generally gave higher estimates.

Another study had judges roll a pair of dice rigged to yield a three or a nine before giving a hypothetical sentence for a shoplifter.[4] The judges who rolled a nine tended to give higher sentences.

Studies have confirmed that anchoring results in higher damages awards, too.[5] Study participants have been given fact patterns or watched mock trials that differ only in whether and how much the plaintiff asks for in damages. The studies consistently show that the higher the demand, the higher the award. While jurors generally adjust away from the initial anchor, their adjustment is often insufficient because the initial anchor has a significant influence.[6]

A traditional anchor is a lump-sum or time-unit-based (day, hour, minute, etc.) amount that the plaintiff asks the jury to award.[7] Shoot for the moon, land among

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the stars. That is the basic premise behind anchoring.[8] If the goal is $5 million, asking for $15 million makes it more likely the jury will award $5 million (or more). Better, ask for $25 million and the jury is more likely to go higher still.

Why does anchoring work?

Anchoring works, but, why? Stripped of sophisticated psychological analysis, the answer is, human nature.

The anchoring studies involving non-legal matters demonstrate that it's a phenomenon unrelated to the uniqueness of valuing damages. Arbitrary and irrelevant numbers skew estimates. And there's a positive correlation, meaning higher numbers skew the estimates upward.

Jurors' general lack of experience with valuing noneconomic damages plays a role, too.[9] Without past experience, human nature is to give the first piece of information disproportionate weight.[10] And the amount suggested by the plaintiff's attorney, who jurors presume has experience with such valuation, is often the first piece of information they receive on the amount of damages.[11] So it gets disproportionate weight.

What is unsubstantiated anchoring?

Plaintiff attorneys don't want to come off as absurd[12]—a $1 trillion request is reserved for Bond villains. This is where unsubstantiated anchoring comes in. Unsubstantiated anchoring is "a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case."[13] It's a species or extension of anchoring.

With few exceptions, paintings, jets, and baseball contracts have nothing to do with a personal-injury case. There's no testimony or evidence about them. So, references to valuable art, jets, and baseball contracts are unsubstantiated. Their purpose is to prepare the jury for a request similar to or below their hundred-million-dollar price tag; a request in the tens of millions, perhaps.

Unsubstantiated anchors up the proverbial ante. They set an anchor for the traditional anchor. They climatize the jury. Exposing jurors to the concept of hundreds of millions makes a traditional anchor in the tens of millions seem more plausible.

What can be done about unsubstantiated anchoring?

There are several arguments against traditional anchoring.[14] While many courts have agreed with those arguments against anchoring, many haven't.[15] Michigan is among those that haven't,[16] though subsequent studies and changes in the law may merit revisiting the issue.

Unsubstantiated anchoring is a different animal entirely. While attorneys generally have wide latitude during closing arguments, they're still limited to arguing reasonable inferences from the evidence.[17] Arguments unsupported by evidence are improper.[18] Referencing comparable verdicts during closing argument is also impermissible.[19] So, how could an even more inapt analogy to art, jets, or baseball contracts that have no evidentiary basis be appropriate? It's not.[20]

Pretrial motions educating the court about anchoring and unsubstantiated anchoring are particularly important. Despite numerous scientific studies on the effect of anchoring, courts are often quick to dismiss arguments concerning unsubstantiated anchoring as harmless.[21] So it's best to get out in front of the issue and prevent the error from occurring.

If efforts to prevent unsubstantiated anchoring fail, the next best option is counter-anchoring—giving a much lower proposed damage award than the plaintiffs. While counter-anchoring doesn't completely counteract the plaintiff's anchor, it has the most significant effect on lowering awards (compared to ignoring the plaintiff's anchor or attacking it as outrageous).[22] For example, a defense attorney could ask jurors during voir dire whether they would be willing to award a large amount of money, like $25,000 or even $50,000. That would be a counter-anchor to a $1 million anchor from the plaintiff.

Defense attorneys can suggest a counter-anchor during closing argument, too. Many defense attorneys avoid discussing damages during closing arguments out of concern that jurors could mistake it as conceding liability.[23] One study has shown that the concern, while logical, is overstated, if not wrong.[24]

Counter-anchoring is one thing; counter-unsubstantiated anchoring is another. On the one hand, if a trial court is going to allow plaintiff's counsel to discuss art, jets, and baseball contracts, it seems fair to remind the jury of the cost ordinary life for ordinary people. On the other hand, interjecting error (particularly when your pretrial motion explains that it is, in fact, error) is seldom a good thing and could even be construed as waiver.

The last method for tackling unsubstantiated anchoring are post-verdict motions for either a new trial or remittitur. The Texas Supreme Court recently reversed a $16.8 million verdict in a case where the plaintiff used unsubstantiated anchoring.[25] The court observe that unsubstantiated anchoring did not "rationally connect the evidence to an amount of damages, [but] did just the opposite by encouraging the jury to base an ostensibly compensatory award on improper considerations that have no connection to the rational compensation of [the plaintiff]."[26] Notably, the court would have ordered remittitur but for other errors requiring a new trial.[27]

Conclusion

Modern society is awash in unfathomably large monetary sums. Government spending is hardly mentioned unless it reaches nine figures. Entire generations have grown up with celebrities routinely making multiple millions of dollars per year. It's desensitizing. Unsubstantiated anchoring exploits that effect.

Of course, multi-million-dollar paychecks aren't reality for the vast majority of the population. Monetary sums in the millions simply have no bearing on day-to-day life for all but a distinctly small minority. Most people, for example, would be distressed by an unexpected $1,000 bill. And, for many, a $1,000 bill would be financially crippling or disastrous, whether expected or not. Despite inflation and multi-million-dollar numbers splashed on seemingly every news report, $1,000 is *still* a lot of money.

Multi-million dollar art, jets, and baseball contracts have nothing to do with noneconomic damages. Nothing whatsoever. Yet, over the past decade, they have more-and-more frequently popped up in closing arguments, sometimes with profound effect. Pretrial motions, counter-anchors, and post-trial motions are the tools to prevent or at least mitigate those effects.

Endnotes

1 See, e.g., *Doe v Doe*, unpublished per curiam opinion of the Court of Appeals, issued Dec. 4, 2014 (Docket Nos. 307420 & 310019) (reference to Picasso painting and bombers); *Gregory v Chohan*, 670 SW3d 546, 551 (Tex, 2023) (references to fighter jets and artwork).

2 Chapman & Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psych 519 (1996).

3 Guthrie & Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 Vanderbilt L Rev 2017, 2026 (2006), discussing Tversky & Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci 1124 (1974).

4 Weber, *101: Understanding Anchoring*, 95 Wisconsin Lawyer 16-19 (2022)

5 Campbell, Chao & Robertson, *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash Univ L Rev 1 (2017); McAuliff & Bornstein, *All Anchors Are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 L & Human Behav 164 (2010); Hinsz & Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J Applied Soc Psych 991 (1995); Malouff & Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J of Soc Psych 491 (1989).

6 Guthrie & Rachlinski, 59 Vanderbilt L Rev at 2026.

7 There are more than a few arguments against those types of anchors. See Behrens, Silverman & Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 Am J of Trial Advocacy 321 (2021). While many courts have agreed with those arguments against anchoring, many haven't.

8 Rauch, *Reversing the Tide: Counter Anchoring and the Reverse Reptile*, 63 For the Defense 22, 24 (2021); Chapman & Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psych 519, 526 (1996).

9 See Rauch, 63 For the Defense at 24.

10 *Id.*

11 *Id.* Even those experienced at valuing noneconomic damages are susceptible to anchoring, though less so than lay jurors. See Guthrie & Rachlinski, 59 Vanderbilt L Rev at 2033.

12 Campbell, Chao, Robertson & Yokum, *Countering the Plaintiff's Anchor, Jury Simulations to Evaluate Damages Arguments,* 101 Iowa L Rev 543, 549 (2016).

13 *Gregory*, 670 SW3d at 557.

14 See Behrens, Silverman & Appel, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 Am J of Trial Advocacy 321 (2021).

15 Campbell, Chao & Robertson, , 95 Wash Univ L Rev at 34-48 (providing state-law survey).

16 *Yates v Wenk*, 363 Mich 311, 318-319; 109 NW2d 828 (1961) ("A lawyer's attempt in his jury argument to evaluate pain on a daily basis for purposes of illustration, we deem no more objectionable than his attempt to place a monetary value on the total pain and suffering experienced.").

17 *Dunn v Lederle Laboratories*, 121 Mich App 73, 90; 328 NW2d 576 (1982); *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

18 *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 513; 556 NW2d 528 (1996); *Wilson v WA Foote Mem Hosp*, 91 Mich App 90, 97 n. 1; 284 NW2d 126 (1979); *Randall v Evening News Ass'n*, 97 Mich 136, 146; 56 NW361 (1893).

19 See *Reese v Winn-Dixie of Louisiana, Inc*, 542 So 2d 68 (1989); *Sequoia Mfg Co v Halec Const Co*, 117 Ariz 11 (1977); *Klein v State Farm Mut Auto Ins Co*, 19 Wis 2d 507 (1963); *Salgo v Leland Stanford Jr Univ Bd of Trustees*, 154 Cal App 2d 560 (1957); *Reese v Winn-Dixie of Louisiana, Inc*, 542 So 2d 68 (1989); *Noble v City of Portsmouth*, 67 NH 183 (1892).

20 See *Gregory*, 670 SW3d at 559 ("It should go without saying that the cost of a painting, a military aircraft, or a percentage of a company's revenue are not 'evidence to which 'counsel shall be required to confine the argument.'").

21 See, e.g., *Doe*, unpub op, p. 17.

22 Campbell, Chao, Robertson & Yokum, , 101 Iowa L Rev at 543-544

23 Rauch, 63 For the Defense at 24; Campbell, Chao, Robertson & Yokum, , 101 Iowa L Rev at 543, 551.

24 Campbell, Chao, Robertson & Yokum, 101 Iowa L Rev at 565 ("We found no concession effects when defendants responded to the plaintiff's $250,000 anchor by suggesting the lower $50,000 number. In fact, quite the opposite was true. The defendant actually won more.").

25 *Gregory*, 670 SW3d at 550.

26 *Id.* at 551.

27 *Id.* at 565.

Medical Malpractice Report

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Despite more than four years passing since the beginning of the COVID Pandemic, the debate regarding COVID Tolling continued to rage on until very recently. Since the last update on this topic, the Michigan Supreme Court heard oral argument in *Armijo v Bronson Methodist Hosp*, and *Carter v DTN Mgt Co* and recently issued an opinion confirming that the Administrative Orders were constitutional and affected all "days" not just deadlines during the emergency stay-at-home orders. While those appeals were pending in the Michigan Supreme Court, the Court of Appeals continued to issue conflicting decisions regarding Covid Tolling in the context of medical malpractice. Although the battle regarding the method of calculation is over, the debate regarding the limits of the Michigan Supreme Court's rulemaking authority continues.

Before addressing the Michigan Supreme Court's holding in *Carter*, it is worth noting interim decisions by the Court of Appeals. On November 21, 2023, the Michigan Court of Appeals decided *Toman v McDaniels*, __ Mich App __, __ NW3d __, (November 21, 2023) (Docket No. 361655), 2023 WL 8101272. There, the medical malpractice plaintiff was seeking care in a hospital when she fell and fractured her left lower fibula on December 12, 2018. The usual two-year statute of limitations would expire December 12, 2020. However, on December 11, 2020, Plaintiff submitted a notice of intent thereby tolling the statutory filing deadline. But the Plaintiff did not file her lawsuit until September 21, 2021. The Plaintiff argued that on March 10, 2020, she had until December 12, 2020 to file the complaint and thus on June 20, 2020, 277 days were added, making the new COVID-tolled deadline Wednesday, March 24, 2021. The Plaintiff argued NOI tolling extended the filing deadline by 103 days (until September 22, 2020) while Defendants argued it expired June 12, 2021 (meaning NOI tolling afforded Plaintiff one extra day, not 103). The Court of Appeals noted the conflicts between *Armijo* and *Carter* but determined that *Armijo* was controlling, and that *Carter* was wrongly decided. In particular, the majority concluded *Carter* was incorrect because "the plaintiff in *Armijo* still faced an extended (by the NOI) statute of limitations that expired on September 4, 2020. Consequently, her December 14, 2020 complaint was untimely unless AO 2020-3 tolled the

In this medical malpractice action, the patient sought treatment on March 2, 2017 implying a normal statute of limitations deadline of March 2, 2019. However, the patient died before the normal statutory deadline thereby implicating the wrongful death savings provision.

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

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statute of limitations itself." The majority insists *Armijo* had "to address the impact of the AOs on the statute of limitations," while discounting the fact that (1) the original statute of limitations in *Armijo* expired before the Governor declared a state of emergency; and (2) AO 2020-3 did not "suspend or toll any time period that must elapse before the commencement of an action or proceeding," like a NOI wait period. The majority ultimately determined that it was bound by *Armijo* because it was the earlier horizontal precedent.

Judge Borrello wrote a dissenting opinion in *Toman* explaining that *Carter* was correctly decided because the at-issue passage from *Armijo* was dicta. The Court in *Armijo* did not address a deadline that fell between March 10 and June 20, 2020, thus the statement regarding "deadlines which took place during the state of emergency" was not necessary to the Court's holding. The dissent notes that *Compagner* acknowledged it was bound by *Carter*, and the Court declined to convene a conflict panel at that time. The dissent goes on to question the refusal by the *Toman* majority "to wait for a final ruling from our Supreme Court." The dissent concludes by warning that "any two members of this Court" can "overrule binding published precedent."

Understanding how to calculate COVID tolling will remain relevant for medical malpractice cases involving juveniles as well as cases implicating Michigan's wrongful death savings period.

Then on April 11, 2024, the Michigan Court of Appeals decided *Olds v Ambulatory Surgery Assoc, LLC*, unpublished opinion of the Court of Appeals, issued April 11, 2024 (Docket No. 360780), 2024 WL 1594617. In this medical malpractice action, the patient sought treatment on March 2, 2017 implying a normal statute of limitations deadline of March 2, 2019. However, the patient died before the normal statutory deadline thereby implicating the wrongful death savings provision. Letters of authority were issued on December 27, 2018, thus the wrongful death savings period would expire December 27, 2020. But the lawsuit was not filed until February 26, 2021. The case therefore hinged on whether COVID tolling provided an additional 102 days for filing the lawsuit. *Olds*, 2024 WL 1594617, p *2. The trial court determined COVID tolling only applied to deadlines that expired between March 10 and June 20, 2020. On appeal, Plaintiff argued she had an additional 102 days, until April 8, 2021 to file the complaint. The majority of the Court of Appeals panel agreed and further held that the administrative orders were constitutional as stated in *Carter v DTN Mgt Co*.

The Plaintiff argued NOI tolling extended the filing deadline by 103 days (until September 22, 2020) while Defendants argued it expired June 12, 2021 (meaning NOI tolling afforded Plaintiff one extra day, not 103). The Court of Appeals noted the conflicts between *Armijo* and *Carter* but determined that *Armijo* was controlling, and that *Carter* was wrongly decided.

Judge Redford dissented and noted his agreement with the majority in *Toman v McDaniels*. The dissent reiterates the argument that the Michigan Supreme Court lacks authority to alter the statute of limitations for a claim and that *Carter* was wrongly decided. The dissent turns to *Merriam-Webster's Collegiate Dictionary* (11th ed.) and Black's Law Dictionary (11th ed.) to define the word "deadline" in AO 2020-3 to reach the conclusion that "our Supreme Court plainly intended that AO 2020-3 applied to the dates by which the specified filings must be done by litigants." Even though AO 2020-3 states "any *day* that falls during the state of emergency . . . is not included for purposes of MCR 1.108(1)" (emphasis added), the dissent insists the order only applied to "deadlines that 'fall during the state of emergency.'"

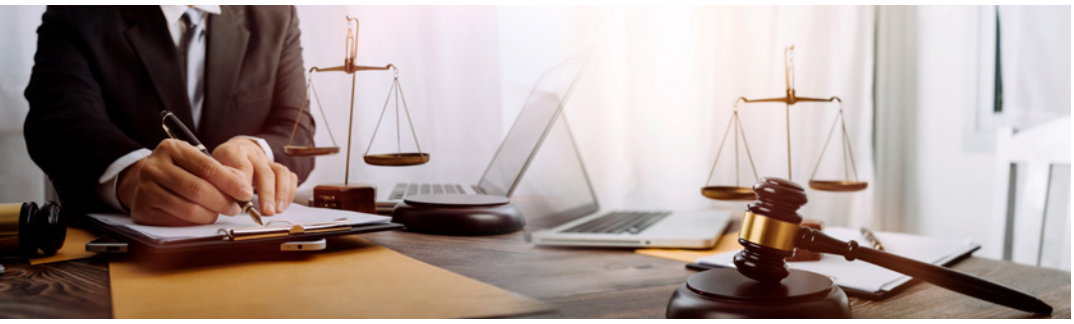
Following these Court of Appeals decisions, the Michigan Supreme Court concluded that the Administrative Orders were a constitutional exercise of the Court's authority and that the orders affected all "days" (not just deadlines) during the stay-at-home emergency. Justice Bolden, writing for a majority of the Court in *Carter v DTN Mgt*, found that the Administrative Orders were a constitutional exercise of the Court's superintending control (and power to establish and modify practice and procedure) and further found that the Administrative Orders "clearly" affect all "days" not just deadlines. *Carter* acknowledges the intersection of the legislature's power to set the statute of limitations for a claim and the Court's power to make rules of practice and procedure and exercise superintending control over lower courts. Instead of parsing out the limits of the Court's power to establish practice and procedure, the majority concludes that the Administrative Orders on their face only modified the computation of days under MCR 1.108 and did not modify the statute of limitations for any specific type of claim. The majority states in a conclusory fashion that "The language could not have been clearer" even though the Court's orders have been the subject of half a dozen conflicting Court of Appeals decisions. *Carter*, 2024 WL 3573516, at *10.

While the Michigan Supreme Court's decision on the method of counting was not unexpected, the majority's refusal to meaningfully address the limits of the Court's powers of super-

While the Michigan Supreme Court's decision on the method of counting was not unexpected, the majority's refusal to meaningfully address the limits of the Court's powers of superintending control (and to set policy and procedure) is troubling.

intending control (and to set policy and procedure) is troubling. The *Carter* decision seems to suggest the Court has unfettered ability to exercise superintending control and modify policy and procedure even when those modifications have impacts on substantive law. The majority in *Carter* treats the 102-day COVID extension as being no different than the Court's ability to extend deadlines by one day when the final day in the period is a Sunday or legal holiday. But an extension of time by one day is considerably different than a three-month extension. As Justice Viviano notes in his dissent from *Carter*, the Court could create an administrative order stating, "any day that falls during the first 365 days after the claim accrued is not included for purposes of MCR 1.108(1)," which would have the practical effect of extending all limitations periods by one year.

In the end, for claims accruing before March 10, 2020, practitioners must calculate the number of days remaining in the period of limitations on March 10, 2020 and then add that number of days to June 20, 2020 to determine the new statute of limitations deadline. Fortunately, the number of cases which are subject to the COVID Administrative Orders continues to diminish as time marches on. Understanding how to calculate COVID tolling will remain relevant for medical malpractice cases involving juveniles as well as cases implicating Michigan's wrongful death savings period.



Legislative Update

By: Zach Larsen, Member of *Clark Hill PLC,*
on behalf of the MDTC Public Policy Committee
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It's summer in an election year. So, while the courts are tied up deciding candidate or referendum mandamus challenges, see, e.g., *Nielson v Bd of State Canvassers*, __ Mich App __ (Docket No 371526), issued June 17, 2024; *Beydoun v Bd of State Canvassers*, __ Mich App __ (Docket No 371167), June 7, 2024; and *Committee for Marshall – Not the Megasite v City of Marshall, et al*, __ Mich App __ (Docket No 369603), issued June 18, 2024,[1] and candidates (including incumbents) are busily electioneering, the Legislature has just a few more session days before breaking to campaign. But significant bills still loom large—awaiting either a Fall pre-election push for those incumbents who feel a bill may boost their popularity or possibly lurking until lame duck when the electorate's views will matter much less.

Here are a few of the bills in the pipeline that may affect MDTC litigators and their clients:

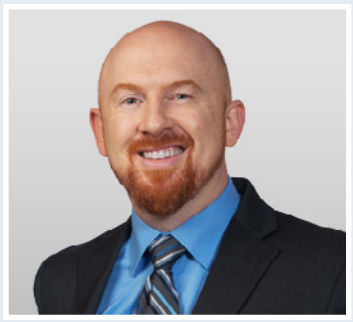
Some pending proposals aim to change judicial process around the margins.

Insurance Changes

Insurance changes include **P.A. 52 of 2024** which was recently signed into law, providing that insurers "shall not require a health care professional to provide services for a patient through telemedicine" unless doing so is both "contractually required" in agreements with an affiliated provider or third-party vendor and "clinically appropriate as determined by the health care professional." The law also requires that "[i]f a service is provided through telemedicine . . . the insurer shall provide *at least the same coverage* for that service as if the service involved face-to-face contact between the health care professional and the patient." (Emphasis added). Some bills that seek coverage changes are on their second readings, such as **H.B. 5168** (requiring coverage for blood pressure monitors for pregnant or postpartum women) and **H.B. 5170** (requiring coverage for mental health screening for new mothers).

Tort Proposals

A few bills propose tort updates. **H.B. 5743** would enact a statutory "Good Samaritan" liability defense for "[a]n individual who, having no duty to do so, in a good-faith response to an emergency medical situation, voluntarily" undertakes certain actions except when that "act or omission that constitutes gross negligence or willful and



Zach Larsen

Zachary Larsen represents companies in regulatory and environmental litigation and counsels industrial and agricultural businesses through compliance and permitting concerns.

From defending disaster-related lawsuits like the Flint Water and Edenville Dam class actions to filing industrywide administrative challenges or bringing remediation cost recovery actions, Zach has litigated some of Michigan's largest environmental disputes. Zach served for eight years as an Assistant Attorney General for the State of Michigan, including in the Environment, Natural Resources, and Agriculture Division, so he knows what businesses can expect from a state enforcement proceeding and who to connect with to achieve a prompt resolution. Having successfully litigated billion-dollar claims and statewide regulatory challenges and negotiated multi-million-dollar consent judgments, Zach's experience will help him solve a variety of matters.

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wanton misconduct." **H.B. 4181** would create a cause of action for individuals "injured by a false representation in assisted reproduction," and allow for economic and non-economic damages, punitive damages, and recovery of costs and attorney fees.

> The law also requires that "[i]f a service is provided through telemedicine . . . the insurer shall provide at least the same coverage for that service as if the service involved face-to-face contact between the health care professional and the patient." (Emphasis added).

Changes to the Judicial Process

Some pending proposals aim to change judicial process around the margins. **H.B. 5784** proposes to allow limited liability companies to be represented in summary proceedings by a member of the LLC "if the member has direct and personal knowledge of the facts alleged in the complaint." **S.B. 0409** would update exemptions from a bankruptcy estate by increasing the value of exempt properties and adding exemptions for money paid to a crime victim or property held "as payment of any means-tested assistance." **H.B. 5755** would allow courts to seal records of summary eviction proceedings for a variety of reasons, including where settlements occur or where an eviction proceeding results from medical problems or the loss of a job. And **S.B. 0514** proposes to raise substantially the costs for circuit court transcripts (from $1.75 per page to $3.75) and then tie such charges to inflation moving forward.

Expanding Statute of Limitations

Notably, **H.B. 4482** seeks to extend the statute of limitations for any "action to recover damages sustained because of criminal sexual conduct" until the latter of "ten years after the time the claim accrues" or seven years following discovery. And it would eliminate the limitations period altogether if there is a criminal prosecution brought as a result of the conduct that results in a conviction" for CSC. **H.B. 5243** similarly proposes to extend the statute of limitations on claims brought under Part 201 of the Natural Resources and Environmental Protection Act, MCL 324.20101, *et seq.*, for "an action seeking natural resources damages or recovery of response activity costs related to a hazardous substance *that was not regulated by this state or the federal government as a hazardous substance on or before July 1, 1994.*" Such claims will accrue "within 6 years after initiation of physical on-site construction activities." *Id.*

Are They Still Out There?

Finally, some significant, previously reported on bills remain pending without action. A proposal to create a state-level False Claims Act for both the Attorney General and private *qui tam* actions (**H.B. 4398**) has not moved. **H.B. 4973**, which proposes to ban certain confidential settlement terms for some claims under ELCRA, has not been acted upon. And **H.B. 4900**, which exempts money received as public assistance from certain collection procedures, remains pending.

Endnotes

1 In full disclosure, Clark Hill PLC served as counsel for the City of Marshall in the latter case.

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