TORT LAW

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I. INTRODUCTION

The purpose of this Article is to review significant developments in tort law during the *Survey* period of June 1, 2012 to May 31, 2013. During this period, Michigan's appellate courts created and explained definitive rules of law involving governmental immunity, medical malpractice, the Racketeer Influenced and Corrupt Organizations Act (RICO),[1] breach of fiduciary duty, aiding and abetting tortious conduct,

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1. 18 U.S.C.A. §§ 1961(1)(B), 1962(c), 1964 (West 2002).

the Natural Resources and Environmental Protection Act,[2] defamation, premises liability, tortious interference with a contract, and damages.

The United States District Court for the Western District of Michigan also decided two issues of first impression: (1) when and how Michigan should apply the due care exception to the Federal Tort Claims Act, and (2) how the discretionary function and the law enforcement proviso interact when both are applicable to a specific fact pattern.[3]

II. GOVERNMENTAL IMMUNITY

A. No-Fault Act

During the period under review, Michigan courts struggled with the proper interpretation and interplay between the Governmental Tort Liability Act[4] and Michigan's No-Fault Law.[5] To understand the confusing and sometimes inconsistent opinions of the courts, it is helpful to begin with an overview of the relevant statutory scheme.

Michigan's Governmental Tort Liability Act provides that, unless a specific exception to governmental immunity is applicable, governmental agencies are "immune from tort liability" when "engaged in the exercise or discharge of a governmental function."[6] One specific exception that creates liability for governmental bodies is the motor vehicle exception to governmental immunity. It provides, "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ."[7] Michigan's No-Fault Law provides, in relevant part, as follows:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
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> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

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2. MICH. COMP. LAWS ANN. § 324.73301 (West 2007).
3. Moher v. United States, 875 F. Supp. 2d 739 (W.D. Mich. 2012).
4. MICH. COMP. LAWS ANN. § 691.1401-.1419 (West 2012).
5. MICH. COMP. LAWS ANN. § 500.3101-.3179 (West 2005).
6. MICH. COMP. LAWS ANN. § 691.1407(1).
7. MICH. COMP. LAWS ANN. § 691.1405.

> (a) The issues of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> > (*i*) There is no factual dispute concerning the nature and extent of the person's injuries.
> >
> > (*ii*) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement. . . .
>
> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle . . . is abolished except as to:
>
> > (a) Intentionally caused harm to persons or property. . . .
> >
> > (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).
> >
> > (c) Damages for allowable expenses, work loss, and survivor's loss . . . .[8]

In its January 17, 2013 opinion of *Hannay v. Department of Transportation*,[9] the Michigan Court of Appeals explained the interplay between the motor vehicle exception to governmental immunity and Michigan's No-Fault Act. The plaintiff in that case was a motorist who suffered personal injuries as a result of a "collision with a state-owned salt truck being driven by a state employee."[10] It was established at trial that the plaintiff suffered a serious impairment of a bodily function, thus meeting the threshold for an award of noneconomic damages under Michigan's no-fault laws.[11] The trial court also held that the plaintiff was entitled to economic damages under MCL section 500.3135(3), the

8. MICH. COMP. LAWS ANN. § 500.3135 (West 2012).
9. 299 Mich. App. 261; 829 N.W.2d 883 (2013).
10. *Id.* at 263.
11. *Id.* at 264.

section of the No-Fault Act that specifically allows "the award of damages for allowable expenses, work loss, and survivor's loss."[12]

On appeal, the state argued that the "trial court erred by awarding plaintiff economic damages for work loss and loss of services" because the motor vehicle exception to governmental immunity only allows damages for "bodily injury" or "property damage."[13] The state argued that the Michigan Supreme Court defined "bodily injury" in *Wesche v. Mecosta County Road Commission*[14] as a "physical or corporeal injury to the body," and, thus, it does not include damages for work loss or loss of services.[15]

The court of appeals distinguished *Wesche* in the following manner:

> The issue in *Wesche* was whether loss of consortium is recoverable against a governmental entity under the motor vehicle exception. Applying a definition of bodily injury as being "a physical or corporeal injury to the body," the Court held that a loss-of-consortium claim is not recoverable because a loss of consortium is not a physical injury to the body, nor is a loss of consortium an item of damages derivative from the underlying bodily injury because loss of consortium has long been recognized as a separate, independent cause of action.
>
> In this case, it is clear, and defendant does not argue otherwise, that damages for work loss and loss of services are not independent causes of action, but are merely types or items of damages that may be recovered because of the bodily injury plaintiff sustained. Further, there is no dispute that plaintiff in this case sustained a bodily injury. Consequently, the holdings in *Wesche* are inapplicable to the issue in this case.[16]

The court went on to state that "work-loss and loss-of-services damages are items of damages that arise from the bodily injuries suffered by plaintiff."[17] Also, "[t]o hold otherwise would conflate the actual-bodily-injury requirement for maintaining a motor vehicle cause of action against a governmental entity with the types of damages

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12. *Id.* at 265.
13. *Id.* at 265-66.
14. Wesche v. Mescota Cnty. Rd. Comm'n, 480 Mich. 75, 85; 746 N.W.2d 847 (2008).
15. *Hannay*, 299 Mich. App. at 268-69 (citing *Wesche*, 480 Mich. at 85).
16. *Id.* (citations omitted).
17. *Id.* at 270.

recoverable as a result of the bodily injury."[18] In summary, the court held that a tort action against a governmental entity arising from a motor vehicle accident is subject to the No-Fault Act. The two must be read in conjunction. Furthermore, the No-Fault Act specifically allows for the recovery of economic damages for work loss and loss of services. Therefore, "the trial court did not err by awarding those economic damages to the plaintiff in this case."[19]

In April 2013, a somewhat similar issue confronted the court of appeals in *Hunter v. Sisco*.[20] This time, however, the court used a seemingly different analysis to reach its decision.

In *Hunter*, the plaintiff was injured when his vehicle was side-swiped by a city dump truck being driven by a city employee.[21] As a result of his physical injuries, the plaintiff alleged that he could no longer "work at his job as a custodian at a barber shop."[22] He also claimed that he could no longer perform chores around the house, sit or stand for long periods, drive, bend, or lift more than five to ten pounds.[23] In addition, he said that he "could no longer play softball or basketball with his son or the young people he mentored."[24] Plaintiff brought suit against the city and the employee seeking both economic and noneconomic damages.[25] The city "filed a motion for summary disposition and argued that, under the motor vehicle exception to governmental immunity, the plaintiff could only recover for bodily injury and property damage and that the plaintiff's no-fault insurer [was] liable for his economic damages, including medical expenses."[26] The city maintained that it was not liable for emotional damages because those are not covered in the motor vehicle exception.[27]

As previously noted, in 2008, the Michigan Supreme Court examined what the phrase "bodily injury" means under the motor vehicle exception and opined that the term "bodily injury" encompasses only "a physical or corporeal injury to the body."[28] After exploring this definition and various dictionary definitions of the phrase "bodily injury," the court

18. *Id.*
19. *Id.*
20. 300 Mich. App. 229; 832 N.W.2d 753 (2013).
21. *Id.* at 231.
22. *Id.* at 232.
23. *Id.*
24. *Id.*
25. *Id.* at 232-33.
26. *Hunter*, 300 Mich. App. at 232.
27. *Id.*
28. Wesche v. Mescota Cnty. Rd. Comm'n, 480 Mich. 75, 85; 746 N.W.2d 847 (2008).

held that the Michigan Supreme Court's definition in *Wesche* was correct, regardless of whether the phrase was considered to be a legal term of art or accepted for its commonly understood meaning.[29] According to the court, damages for pain and suffering and shock and emotional damage "simply do not constitute physical injury to the body and do not fall within" the purview of the motor vehicle exception to governmental immunity.[30]

The court went on to explain that in order for the plaintiff to make a successful tort claim for excess damages involving "bodily injury" or "property damage" under the motor vehicle exception, the plaintiff must, "as a threshold, show a serious impairment of a body function" under the No-Fault Act.[31] Because the plaintiff had "raised a genuine issue of material fact about whether he sustained" a serious impairment of a body function, the trial court had correctly denied the defendant's motion for summary disposition.[32]

Seldon v. Suburban Mobility Authority[33] involved another immunity issue reviewed by the court of appeals during this time in review. The plaintiff in this case was a wheelchair-bound passenger on a Suburban Mobility Authority for Regional Transportation (SMART) bus who was injured when defendant Perry, the bus driver, applied the brakes at a yellow light, causing her to be ejected from her wheelchair.[34] The plaintiff argued that defendant SMART owed her "a duty to advise of the availability of a shoulder restraint."[35] The court held that pursuant to the Americans with Disabilities Act,[36] defendant SMART could not require passengers in wheelchairs to use the shoulder restraints if it did not require all its passengers to do so.[37] Likewise, it opined that requiring operators to inform handicapped passengers of the availability of shoulder restraints when those devices are unavailable for passengers not using wheelchairs "would impose a different duty on operators depending on whether a passenger"[38] is or is not handicapped. The court held that this would run contrary to the tenet that disabled and non-disabled passengers are to be treated the same.[39]

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29. *Hunter*, 300 Mich. App. at 238-39.
30. *Id.* at 240-41.
31. *Id.* at 241.
32. *Id.*
33. 297 Mich. App. 427; 824 N.W.2d 318 (2012).
34. *Id.* at 431-32.
35. *Id.* at 432-33.
36. *Id.* at 433.
37. *Id.*
38. *Id.*
39. *Seldon*, 297 Mich. App. at 433.

The court added that even if defendant SMART did owe the plaintiff a duty to inform her of the availability of a shoulder strap, its failure to do so did not implicate the motor vehicle exception to governmental immunity.[40] Specifically, the court held that "the failure to inform plaintiff that a shoulder restraint was available, without more, did not constitute the 'operation' of a motor vehicle" pursuant to the statute.[41]

B. Child Protection Law[42]

The court of appeals affirmatively cited its opinion in *Hannay* when deciding the *Jones v. Bitner*[43] case, holding that "[t]he mandatory reporting [provision of the Child Protection Law (CPL)] must be read in conjunction with, and is therefore limited by, the governmental immunity statute."[44] In *Jones v. Bitner*,[45] the estate of a deceased two-year-old child brought action against a police officer. The plaintiff alleged that the police officer knew that the decedent's mother, with whom she lived, was a drug dealer and sold drugs in the child's presence.[46] The plaintiff also alleged that the defendant knew that those drugs could be fatal if ingested by the child due to their strength and quality.[47] At trial, the plaintiff relied heavily on *Williams v. Coleman*[48] to support his position that the defendant's ability to claim governmental immunity was abrogated by the mandatory child abuse reporting provision.[49] Although the trial court agreed with this proposition, the court of appeals reversed and remanded.[50]

In reaching its decision, the court of appeals explained that *Williams* was decided under outdated law that only gave agencies governmental immunity, not individuals.[51]

The current applicable law reads, in pertinent part, as follows:

> (2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in

40. *Id.* at 435.
41. *Id.*
42. MICH. COMP. LAWS ANN. § 722.623 (West 2004).
43. 300 Mich. App. 65; 832 N.W.2d 426 (2013).
44. *Id.* at 67.
45. *Id.* at 68.
46. *Id.* at 64-71.
47. *Id.* at 70.
48. 194 Mich. App. 606; 488 N.W.2d 464 (1992).
49. *Jones*, 300 Mich. App. at 73.
50. *Id.* at 76-78.
51. *Id.* at 74.

> question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> > (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
> >
> > (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
> >
> > (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.[52]

The court explained that when analyzing the third element, it is important to distinguish between "the proximate cause" and "a proximate cause."[53] "'The proximate cause' means 'the one most immediate, efficient, and direct cause' of plaintiff's injuries."[54]

The CPL's standard for liability for failure to report is much lower than the governmental immunity standard. A person may be liable for failure to report under the Child Protection Law whenever the child's injuries are "proximately caused by" the failure to report.[55] In addition, the CPL does not use the strict gross negligence standard.[56] The court of appeals held that the stricter language in the governmental immunity statute is what dictates whether tort liability will exist, not the lower standard established in the mandatory reporting statute.[57] Therefore, the case was reversed and remanded for further proceedings.[58]

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52. MICH. COMP. LAWS ANN. § 691.1407 (West 2014).

53. *Jones*, 300 Mich. App. at 75 (citing Robinson v. Detroit, 462 Mich. 439, 468; 613 N.W.2d 307 (2000)).

54. *Id.*

55. MICH. COMP. LAWS ANN. § 722.633(1) (West 2014).

56. *Jones*, 300 Mich. App. at 76.

57. *Id.* at 77-78.

58. *Id.*

C. Qualified Immunity for Employees

In *Niederhouse v. Palmerton*,[59] the Michigan Court of Appeals held that an off-duty deputy for the Roscommon County Sheriff's Department was entitled to qualified governmental immunity when an airboat he was operating at a winter festival collided with the plaintiff, causing injuries. The court held that the defendant was acting within the course of his employment at the time the accident occurred, in part, because the defendant's employer was the one who originally asked him to give airboat rides at the festival while off duty.[60] It was not dispositive that the defendant's employer had not asked him to give the airboat rides specifically on that day, nor was it dispositive that the defendant's work was gratuitous.[61] According to the court, it was still in furtherance of his employer's purpose.[62]

In *Van Beek v. Robinson*,[63] a Canadian citizen brought action against the U.S. Customs and Border Protection (CBP) officers alleging violations of her Fourth Amendment rights as well as claims under the Federal Tort Claims Act.[64] The defendants moved for summary judgment on the grounds that they were shielded from liability by a qualified privilege.[65]

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[66] The plaintiff in this case claimed that she was subjected to an unreasonable search and seizure at the Canadian/Detroit international border when the CBP officers inappropriately fondled her breasts and genital area.[67] The court explained that while government officials are shielded from "liability under the doctrine of qualified immunity," this immunity does not protect them if their conduct violates a "clearly established statutory or constitutional right of which a reasonable person would have known."[68]

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59. 300 Mich. App. 625; 836 N.W.2d 176 (2013).
60. *Id.* at 633-34.
61. *Id.* at 635.
62. *Id.*
63. 879 F. Supp. 2d 707 (E.D. Mich. 2012).
64. *Id.* at 709-10.
65. *Id.* at 711-12.
66. U.S. CONST. amend. IV.
67. *Van Beek*, 879 F. Supp. 2d at 710.
68. *Id.* at 712.

> In order to determine whether a defendant is entitled to qualified immunity, the Court performs a two-step analysis. The Court first must question whether the alleged facts "taken in the light most favorable to the party asserting the injury . . . show [that] the officer's conduct violated a constitutional right." The Court then must decide "whether the right was clearly established." To conclude that a right is clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[69]

The court went on to explain that what constitutes a reasonable search at an international border is different than what may constitute a reasonable search in the interior of our nation.[70] Routine searches at our borders do not require probable cause, reasonable suspicion, or a warrant.[71] Furthermore, standard pat-down searches over an individual's clothes, "including the person's breast or crotch area,"[72] constitute a routine, reasonable search. Non-routine searches, on the other hand, involve strip, body-cavity, and involuntary x-ray searches.[73] A search that requires someone to strip down to their underwear also counts as a strip search.[74] In addition, a pat-down search during which an officer reaches underneath a person's clothes, particularly in their private areas, is classified as a non-routine search.[75]

In the instant case, after informing the officers that she was not wearing a bra, the plaintiff was required to strip down to her camisole and yoga pants.[76] The court held that a reasonable jury could classify this as a non-routine strip search, requiring reasonable suspicion.[77] The defendants offered no evidence of reasonable suspicion.[78] The court, therefore, held that a reasonable jury could hold that the plaintiff's clearly established Fourth Amendment rights were violated, and, therefore, the defendants were not shielded by the qualified privilege.[79]

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69. *Id.* (citations omitted).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Van Beek,* 879 F. Supp. 2d at 712.
74. *Id.*
75. *Id.*
76. *Id.* at 710.
77. *Id.* at 713.
78. *Id.* at 713-14.
79. *Van Beek*, 879 F. Supp. 2d at 714.

Another case that raised both qualified immunity and Fourth Amendment rights issues was *Hescott v. City of Saginaw*.[80] In *Hescott*, the court held that the City's demolition of a dangerous building without notifying its owners did not violate the owners' Fourth Amendment rights.[81] Furthermore, the court held that the city inspectors were entitled to qualified immunity from the property owners' Fourth Amendment claims, and the City was immune from the property owners' trespass, common law conversion, and common law trespass claims under Michigan law.[82]

The court explained, and the parties agreed, that the destruction of the plaintiffs' property constituted "seizure" pursuant to the Fourth Amendment.[83] However, in order to successfully argue a violation of one's Fourth Amendment rights, the seizure must be deemed to be unreasonable.[84] The two recognized exceptions to the "'objective standard for reasonableness' [involve] special-need situations and administrative search cases."[85] If "the search or seizure is justified by 'special needs, beyond the normal need for law enforcement,'" a judicial warrant and probable cause are not required.[86] The defendants argued that a warrant was unnecessary in this case because the demolition of a dangerous building constituted a "special need."[87] However, the court clearly expressed its discomfort with this view and declined the opportunity to extend the special needs doctrine to what could be categorized as a "takings" case in which no criminal conduct or administrative warrant was involved.[88]

Assuming that the warrant requirement applied, the court then entertained arguments that would provide an exception to this rule.[89] The exigent circumstances exception to the warrant requirement applies to "situations where real, immediate, and serious consequences will certainly occur if action is postponed to wait for a warrant."[90] The court must review the totality of the circumstances when deciding if exigent

80. 894 F. Supp. 2d 977 (E.D. Mich. 2012), *vacated in part*, No. 10-13713, 2012 WL 5387889 (E.D. Mich. Oct. 17, 2012).

81. *Id.* at 989.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 989.

86. *Hescott*, 894 F. Supp. 2d at 990 (citing Veronica Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

87. *Id.*

88. *Id.* at 991.

89. *Id.*

90. *Id.* at 991 (citing United States v. Williams, 354 F.3d 497, 503 (6th Cir. 2003)).

circumstances exist. Relevant factors used to aid in its determination include the following: "1) whether immediate government action was required, 2) whether the governmental interest was sufficiently compelling to justify a warrantless intrusion, and 3) whether the citizen's expectation of privacy was diminished in some way."[91]

The court concluded that exigent circumstances existed in this case when city officials had an "objective belief that there was an immediate risk of injury or death."[92] Furthermore, any expectation of privacy that these plaintiffs had was diminished when they failed to make repairs or close the property off to others after learning of its initial dangers.[93] The court believed that its decision was reasonable and fair given its desire to balance the governmental and private interests at stake.[94]

Although the court held that demolition of the plaintiffs' property fell within the exigent circumstances exception, the court held that "[t]he re-entry onto the property two days later to remove the debris . . . constitute[d] a warrantless, non-consensual seizure that was not a continuation of the initial seizure" (i.e., demolition of the property).[95]

> The initial deprivation had been completed, and despite the fact that the house had been demolished, Defendants nonetheless re-entered Plaintiffs' property to remove what they characterize as debris, but what Plaintiffs considered valuable housing materials even in the demolished state. Summary judgment in Defendants' favor is not justified.[96]

As previously stated, the court also held that the city inspectors were entitled to qualified immunity from the property owners' Fourth Amendment claims, and the City was immune from the property owners' trespass, common law conversion, and common law trespass claims under Michigan law.[97]

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91. *Id.* at 991-92.
92. *Hescott,* 894 F. Supp. 2d at 993.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 994.
97. *Id.* at 1011-12.

D. Federal Tort Claims Act Due Care Exception and Discretionary Function

In *Moher v. United States*,[98] the United States District Court for the Western District of Michigan grappled with two issues of first impression: (1) when and how Michigan should apply the due care exception to the Federal Tort Claims Act, and (2) how the discretionary function and the law enforcement proviso interact when both are applicable to a specific fact pattern.[99]

The relevant facts of this case can be briefly summarized. The plaintiff owned 440 acres of land located at the international boundary between the United States and Canada.[100] The plaintiff used the land to harvest and sell timber.[101] Two United States Customs and Border Protection patrol officers employed by the United States Department of Homeland Security entered the plaintiff's land patrolling for illegal immigration.[102] The officers did not have a search warrant and did not have the plaintiff's consent to search.[103] The officers refused to leave the plaintiff's land when asked.[104] When the plaintiff tried to take pictures of them, the plaintiff alleged that one of the "officers 'gunned' the engine of his all-terrain motor vehicle (ATV) and drove it towards" the plaintiff, making contact.[105] This allegedly occurred a second time when the plaintiff tried to take another picture, but no contact was made during the subsequent attempt.[106] The plaintiff brought suit for trespass, assault, and battery against the United States pursuant to the Federal Tort Claims Act (FTCA) seeking compensatory damages and injunctive relief.[107] The United States then filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6).[108]

One of the defendant's arguments was that the plaintiff's assault and battery claims were barred by the due care exception.[109] The exception "prevents the United States from being held liable for the actions of its officers and employees undertaken while reasonably executing the

98. 875 F. Supp. 2d 739 (W.D. Mich. 2012).
99. *Id.*
100. *Id.* at 746.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Moher*, 875 F. Supp. 2d at 747.
105. *Id.* at 750.
106. *Id.*
107. *Id.* at 746-47 (citing 28 U.S.C. §§ 1346(b), 2671-2680).
108. *Id.*
109. *Id.*

mandates of a federal statute or regulation."[110] When deciding if something constitutes due care, the standard is one of reasonableness. When deciding *Welch v. United States*,[111] the Fourth Circuit created a two-part test to determine whether the due care exception bars a tort claim against the United States under the FTCA:

> First, the Court must determine whether the federal statute or administrative regulation in question specifically proscribes or mandates a course of action for an officer or employee of the United States government to follow. Second, if a specific action is mandated, the Court must determine whether the government officer or employee exercised due care, i.e., acted reasonably, in following the dictates of that federal statute or regulation. If due care (reasonable care) was exercised, 28 U.S.C. §2680(a) bars liability on that tort claim because the United States has not waived its sovereign immunity under the FTCA.[112]

The court acknowledged that the Sixth Circuit has not taken a position on the Fourth Circuit's two-part test articulated in *Welch*.[113] The court further stated that "[i]n the absence of any reported Sixth Circuit case law directly on point," it agreed with the test utilized by the Fourth Circuit and applied it to the facts presented in the instant case.[114] In doing so, the court held that while the first prong may be met by these facts, the second prong was not.[115] Therefore, the due care exception did not bar the plaintiff's tort claim against the United States.[116]

The United States further argued that the plaintiff's claims were barred by 28 U.S.C. § 2680(h), which provides that the government's waiver of sovereign immunity under the FTCA does not apply to

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter . . . shall apply to any

110. *Moher*, 875 F. Supp. 2d at 763 (citing Welch v. United States, 409 F.3d 646, 651 (4th Cir. 2005)).
111. *Welch*, 409 F.3d 646.
112. *Moher*, 875 F. Supp. 2d at 764 (citing *Welch*, 409 F.3d at 652).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*

> claim arising, on or after the date of enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.[117]

The court held that the United States may be sued under the FTCA for assault and battery because the border patrol officers were investigative or law enforcement officers who fell under the law enforcement proviso of this section.[118]

The United States then argued that regardless of the law enforcement proviso in 28 U.S.C. § 2680(h), which specifically waives sovereign immunity for the plaintiff's assault and battery claims, these claims are barred by the discretionary function exception in 28 U.S.C. § 2680(a). This exception "insulates the United States from liability for tort claims arising out of a federal employee's exercise of a discretionary function or duty."[119]

The court noted that "there is disagreement and split of authority amongst the federal circuit courts regarding" how the law enforcement proviso and the discretionary function interact and that the "Sixth Circuit has not yet decided the question."[120] Unpersuaded by the United States' argument, the court held that the law enforcement proviso trumps the discretionary function exception.[121]

> In the absence of a Sixth Circuit decision directly on point, this District Court adopts and follows the Eleventh Circuit's well reasoned opinion in *Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009). The cogent legal analysis in *Nguyen* is persuasive. When the discretionary function exception in § 2680(a) and the proviso in § 2680(h) both apply to a tort claim, the more specific statutory language in § 2680(h) takes precedence over and trumps the general language in the discretionary function exception. To the extent that there is any overlap and conflict between these two statutory provisions, the proviso in § 2680(h) wins. This is consistent with the plain

117. *Id.* at 765 (citing 28 U.S.C. § 2680(h)).
118. *Moher*, 875 F. Supp. 2d at 765.
119. *Id.* at 765.
120. *Id.* at 766.
121. *Id.*

> language of the proviso in § 2680(h), canons of statutory construction, and the clear purpose of Congress in enacting the proviso in § 2680(h).[122]

Therefore, the court held that the plaintiffs' claims were not barred by the discretionary function exception either.[123]

III. MEDICAL MALPRACTICE

A. Wrongful Death

In *Johnson v. Pastoriza*,[124] the Michigan Supreme Court held that the 2005 amendment to the wrongful death statute, MCLA section 600.2922, allowing a plaintiff to bring a wrongful death claim for the death of a nonviable fetus, does not apply retroactively.[125] Therefore, the plaintiff in that suit properly brought her claim under MCLA section 600.2922a alleging that her doctor's negligence caused her miscarriage.[126] MCLA section 600.2922a "is separate from the wrongful death statute and imposes liability for wrongful or negligent *acts* against a pregnant woman that result in the pregnant woman's miscarriage or stillbirth or 'physical injury' to the fetus."[127] Because the injury to her fetus occurred in November 2005 and MCLA section 600.2922a was not incorporated into the wrongful death statute until December 2005, the court held that the plaintiff's claim was brought under the correct statute.[128]

The court also held, however, that the statutory claim for a wrongful or negligent act against a pregnant individual pursuant to MCLA section 600.2922a requires the commission of an affirmative action rather than a mere omission.[129] "To read the phrase 'wrongful or negligent act' as including omissions would expand liability under MCLA section 600.2922a beyond the Legislature's intent."[130] The court further held that the physician's alleged refusal to perform a cerclage at the request of the pregnant mother was not enough to constitute an affirmative act.[131]

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122. *Id.* at 766 (citing Nguyen v. United States, 556 F.3d 1244, 1250-60 (11th Cir. 2009)).
123. *Id.* at 766 (citing *Nguyen*, 556 F.3d at 1250-60).
124. 491 Mich. 417; 818 N.W.2d 279 (2012).
125. *Id.* at 434.
126. *Id.* at 420.
127. *Id.* at 422-23.
128. *Id.* at 420.
129. *Id.* at 437.
130. *Johnson*, 491 Mich. at 436.
131. *Id.* at 439-40.

Of note is the fact that the majority opinion did not address whether a plaintiff may base a claim for the wrongful death of a nonviable fetus on a defendant's omission occurring after the date of the amendatory act. Therefore, as Justice Cavanagh pointed out in the concurring opinion, it seems logical to interpret the majority's holding as only applying to causes of action for the wrongful death of a nonviable fetus that occurred before December 15, 2005, which is when the wrongful death statute was amended to include MCLA section 600.2922a.[132]

B. Common Law Set-Off Rule

In *Velez v. Tuma*,[133] the Michigan Supreme Court examined the interplay between the common law set-off rule and MCL section 600.1483, which limits noneconomic damages in a medical malpractice claim. The court held that "[t]o the extent the Legislature has not abolished principles of joint and several liability, those principles and the common law set-off rule remain the law in Michigan."[134] The court further held that "when joint and several liability principles apply in medical malpractice cases, any settlement must be set off from the final judgment," not the jury's verdict.[135] In addition, this set-off from the final judgment is to occur "after application of the noneconomic damages cap and the collateral source rule."[136] To rule that any other calculation should take place in any other order, the court noted, could produce a result where the plaintiff could be compensated beyond the statutorily permissible limits.[137]

C. Intentional Misdiagnoses

Lucas v. Awaad[138] was a consolidated action in which parents of minor children brought multiple actions against a pediatric neurologist, his professional corporation, a billing company, and a hospital alleging that the doctor intentionally misdiagnosed his patients with epilepsy/seizure disorder in an effort to increase his billings. The court of appeals held that the plaintiffs' intentional infliction of emotional distress and fraud claims were really claims sounding in medical malpractice.[139]

132. *Id.* at 441 (Cavanagh, J., concurring).
133. 492 Mich. 1; 821 N.W.2d 432 (2012).
134. *Id.* at 445.
135. *Id.*
136. *Id.*
137. *Id.*
138. 299 Mich. App. 345; 830 N.W.2d 141 (2013).
139. *Id.* at 349.

This is because in order to prove that those separate torts existed, the plaintiffs would have to prove the falsity of the diagnosis, which is a medical question.[140] The court also held that the defendant doctor did not owe a duty to the patients' parents to disclose his alleged history of fraud.[141] Specifically, the court provided,

> It is established that physicians do not have a duty to disclose their success rates to patients in order to obtain informed consent for particular medical procedures. While Lucas is not suggesting that defendants had a duty to disclose Awaad's "success rates," Lucas maintains that defendants had a duty to disclose Awaad's alleged history of fraud related to his prior seizure disorder diagnoses. We conclude that this is a distinction without an appreciable difference . . . .[142]

IV. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)[143]

In *Jackson v. Segwick Claims Management Services*,[144] former employees of Coca-Cola Enterprises (Coca-Cola) filed a class action lawsuit against Coca-Cola and its third party administrator alleging that they engaged in a fraudulent scheme involving the mail to avoid paying valid worker's compensation benefits. Clifton Jackson, one of the plaintiffs, injured his back while at work in September 2007.[145] Jackson was treated by a back specialist who determined that the work-related injury rendered him disabled.[146] In 2009, Segwick, Coca-Cola's third party administrator for worker's compensation claims, requested a second opinion by an expert paid for by the defendants.[147] On two separate occasions, this doctor also determined that Jackson was disabled from a work-related injury.[148] After obtaining three reports from two different doctors confirming Jackson's disability, Segwick sent him to see another doctor.[149] Plaintiffs allege that this third doctor was hired by

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140. *Id.*
141. *Id.* at 365-66.
142. *Id.* at 153 (citation omitted) (citing Wlosinski v. Cohn, 269 Mich. App. 303, 306-11; 713 N.W.2d 16 (2005)).
143. 18 U.S.C.A. §§ 1961(1)(B), 1962(c), 1964(c) (West 2014).
144. 699 F.3d 466 (6th Cir. 2012), *vacated*, 731 F.3d 556 (6th Cir. 2013).
145. *Id.* at 473.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

Segwick to provide false medical reports so that Coca-Cola employees would be deprived of their statutory benefits under the Michigan Worker's Disability Compensation Act (WDCA).[150] This third doctor mailed a report to Segwick that included statements about Jackson's pain that Jackson claims he never made. This report also stated that Jackson was not disabled. Segwick relied on this to terminate Jackson's benefits.[151]

Another plaintiff, Christopher Scharnitzke, also alleged that he was wrongfully denied benefits by Segwick despite numerous medical records establishing that he suffered from a work-related injury.[152]

The plaintiffs filed suit under RICO, and the district court granted the defendants' motion to dismiss on the following grounds: "(1) RICO does not provide a remedy that is functionally an "'end run' around the exclusive procedures and remedies" provided for under the WDCA; (2) the plaintiffs' claims were not ripe; and (3) the plaintiffs failed to state a cognizable RICO claim."[153]

While reviewing this case on appeal, the Sixth Circuit Court of Appeals explained and applied its recent *Brown II* decision.[154] When addressing the relationship between RICO and WDCA, the court explained that in *Brown II*[155] it held that the Michigan legislature is preempted by the Supremacy Clause from eliminating a RICO remedy merely because its worker's compensation scheme is held to be exclusive of federal remedies.[156] It affirmatively quoted its decision in *Brown II* by stating,

> "[T]he predicate offense for the RICO action is mail fraud, not the denial of worker's compensation." It is therefore irrelevant whether the WDCA provides a state administrative remedy for addressing the fraudulent denial of worker's compensation benefits. Nor does the existence of a state administrative scheme that does not provide for such a right of action trump the availability of remedies under RICO as it might in the context of a parallel federal administrative scheme. "The fact that a scheme may violate state laws does not exclude it from the proscriptions

150. MICH. COMP. LAWS ANN. § 418.301 (West 2014).

151. *Jackson*, 699 F.3d at 473.

152. *Id.* at 474.

153. *Id.* at 475 (citing Jackson v. Sedgwick, No. 09-11529, 2010 WL 931864, at *14 (E.D. Mich. Mar. 11, 2010)).

154. Brown v. Cassens Transp. Co., 675 F.3d 946 (6th Cir. 2012), *overruled by* Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 557 (6th Cir. 2013).

155. *Id.*

156. *Jackson*, 699 F.3d at 476.

> of the federal mail fraud statute." This is because "enabling statutes for state agencies, passed by state legislatures, say nothing about Congress's intent with regard to RICO." Simply put, "Michigan cannot limit the scope of a federal RICO cause of action."[157]

In response to the district court's second reason for granting the defendants' motion to dismiss, the court explained that Michigan employees have a ripe RICO claim once a fraudulent denial of worker's compensation benefits occurs.[158] This fraudulent denial causes harm to the employee's readily ascertainable property interest in the worker's compensation benefits they were entitled to receive.[159] While a state court judgment may change the *amount* of damages one might receive, it is the *existence* of damages that establishes a cause of action under RICO.

In reaching its decision, the court declined to adopt the Second Circuit's view that RICO claims are not ripe "until the amount of damages becomes clear and definite."[160] After citing various Sixth Circuit cases that directly contradict the Second Circuit's view, the court held that it was "not at liberty to depart from" this compelling precedent.[161]

Finally, the court went on to analyze whether the plaintiffs in this case had properly stated a cause of action for RICO and held that they did.[162]

V. BREACH OF FIDUCIARY DUTY

In *Local Emergency Financial Assistance Loan Board v. Blackwell*,[163] the Michigan Court of Appeals affirmed the Wayne County Circuit Court's judgment against the former emergency financial manager (EFM) for the city of Highland Park in the amount of $332,837.11.[164] The plaintiff brought claims against the former EFM alleging breach of contract, common law conversion, statutory conversion, and breach of fiduciary duty.[165] "The jury determined that . .

157. *Id.* (citations omitted) (quoting *Brown*, 675 F.3d at 954-55).
158. *Id.* at 477.
159. *Id.*
160. *Id.* at 478.
161. *Id.* at 479.
162. *Jackson*, 699 F.3d at 479.
163. 299 Mich. App. 727; 832 N.W.2d 401 (2013).
164. *Id.* at 742.
165. *Id.* at 731.

. the defendant made unauthorized payments to himself from the [c]ity . . . ."[166] The former EFM alleged that the lower court erred by granting summary disposition in the Board's favor on his counter allegations of breach of contract, unjust enrichment, and fraud against the Board.[167] The court of appeals affirmed the lower court's dismissal of all three claims.[168]

With regard to his breach of contract claim against the Board, the defendant argued that former Governor Granholm directed the Board to pay him, thus modifying his contract.[169]

The court of appeals explained that Michigan law does not give the governor authority to contract with an EFM.[170] MCLA section 141.1218(1) governs the authority of a state official to contract with an EFM, and it reads, in part, as follows:

> If the governor determines that a financial emergency exists ..., the governor shall assign the responsibility for managing the local government financial emergency to the local emergency financial assistance loan board created under the emergency municipal loan act.... *The local emergency financial assistance loan board shall appoint an emergency financial manager.* ... The emergency financial manager shall be entitled to compensation and reimbursement for actual and necessary expenses from the local government *as approved by the local emergency financial assistance loan board.*[171]

Thus, because the alleged agreement he had with the former governor was without legal effect, it did not create a valid question of fact regarding the defendant's breach of contract claim and summary disposition was proper.[172]

The defendant also "argued that the jury's determination that he did not breach his contract with the Board [by making payments to himself] is legally and logically inconsistent with its findings that he breached his fiduciary duty and converted the City's funds."[173] Therefore, he asserted that the trial court erred by denying his motion for judgment

166. *Id.*
167. *Id.* at 781.
168. *Id.*
169. *Blackwell*, 299 Mich. App. at 733.
170. *Id.* at 733.
171. *Id.* (alterations in original) (quoting MICH. COMP. LAWS ANN. § 141.1218(1)).
172. *Id.* at 735.
173. *Id.* at 739.

notwithstanding the verdict.[174] In affirming the lower court's decision, the court of appeals explained that just because a contract does not *prohibit* certain conduct does not mean that that conduct is *authorized.*[175] "Whether defendant's compensation was *authorized* was the core issue of the breach-of-fiduciary and conversion claims."[176] Therefore, the jury's findings were not legally or logically inconsistent.

VI. AIDING AND ABETTING TORTIOUS CONDUCT

In *El Camino Resources Ltd. v. Huntington National Bank*,[177] the Sixth Circuit Court of Appeals addressed the issue of aiding and abetting the conversion of funds.[178] The plaintiffs were defrauded out of millions of dollars by Cyberco Holdings, Inc., a corporation that was held out to be a computer sales and consultant business, and its shell company, Teleservices Group, Inc.[179] Defendant Huntington National Bank accepted funds for deposit that Cyberco fraudulently received from the plaintiffs.[180] The district court granted summary judgment in favor of the defendants on the plaintiffs' aiding and abetting fraud, aiding and abetting conversion, and conversion claims, holding that the plaintiffs could not establish the requisite level of knowledge.[181] About a year after the district court's decision, the bankruptcy court found that defendant Huntington "did not accept in good faith" the checks it received from Teleservices.[182] The district court subsequently denied the plaintiffs' motion to reconsider its previous summary judgment decision in favor of Huntington.[183]

On appeal, the Sixth Circuit Court of Appeals explained that although the Michigan Supreme Court has never expressly recognized a common law claim for aiding and abetting tortious conduct, the Michigan Court of Appeals has done so on numerous occasions.[184] The court then opined that "the Michigan Supreme Court, if faced with the opportunity to do so, would adopt the approach of aiding and abetting as set forth in § 876(b) of the Restatement (Second) of Torts," which reads,

174. *Id.*
175. *Blackwell,* 299 Mich. App. at 739.
176. *Id.* at 739-40.
177. 712 F.3d 917 (6th Cir. 2013).
178. *Id.* at 919.
179. *Id.*
180. *Id.*
181. *Id.* at 921.
182. *Id.*
183. *El Camino*, 712 F.3d at 919.
184. *Id.* at 922.

in pertinent part, as follows: "'[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . .'"[185]

The court went on to state that to successfully bring a claim for aiding and abetting, there must be proof of "1) knowledge of wrongful conduct by the aider/abettor; and 2) substantial assistance of the wrongful conduct by the aider/abettor."[186]

The Michigan Supreme Court has never ruled on the issue of the level of knowledge required to prove aiding and abetting tortious conduct under Michigan law.[187] Therefore, the Sixth Circuit Court of Appeals had to examine all relevant data when reaching its decision.[188] This included "decisions from the Michigan Court of Appeals, dicta from the Michigan Supreme Court, cases from other jurisdictions, and secondary sources."[189] The court thus held that actual knowledge is required to prove a claim for aiding and abetting tortious conduct pursuant to Michigan law, which can be proven through direct or circumstantial evidence.[190]

Applying this rule to the facts before it, the court held that although Huntington Bank may have had a strong suspicion of Cyberco's wrongdoing, that was not enough to rise to the level of "actual knowledge" required by Michigan law.[191] Furthermore, the bankruptcy court's finding that Huntington acted in bad faith was preliminary and non-binding on the district court.[192] Regardless, the court explained that the issue of whether someone acted in good faith is separate and distinct from the issue of actual knowledge.[193] Therefore, the court affirmed the decision by the United States District Court for the Western District of Michigan.[194]

185. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 876(b) (1979)).
186. *Id.*
187. *Id.*
188. *Id.*
189. *El Camino*, 712 F.3d at 922.
190. *Id.* at 922-23.
191. *Id.* at 924.
192. *Id.*
193. *Id.*
194. *Id.*

VII. NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT[195]

In *Duffy v. Irons Area Tourist Ass'n*,[196] the Michigan Court of Appeals explained whom the Natural Resources and Environmental Protection Act protects from liability. The act reads, in pertinent part, as follows:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.[197]

In this case, the plaintiff suffered serious injuries while driving her all-terrain vehicle on a path located on state land.[198] The State of Michigan had contracted with the defendants to grade and maintain the trail, and the plaintiff alleged that it was the defendants' negligence in doing so that caused her crash and injuries.[199] The court held that protections afforded by the recreational land use act apply only to landowners, tenants, and lessees of the land.[200] Furthermore, the court held that the defendants did not qualify as owners, tenants, or lessees because there was no evidence of a transfer of ownership interest in, or exclusive possession or control over, the land at issue.[201]

The defendants relied heavily on *Kruse v. Iron Range Snowmobile Club*,[202] a strikingly similar case, to support their position that they were protected from liability by the recreational land use act.[203] The *Kruse* court held that the recreational land use act applied to an entity that contractually agreed to groom trails even though the entity did not own

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195. MICH. COMP. LAWS ANN. § 324.73301 (West 2007).
196. 300 Mich. App. 542; 834 N.W.2d 508 (2013).
197. MICH. COMP. LAWS ANN. § 324.73301.
198. *Duffy*, 300 Mich. App. at 544.
199. *Id.*
200. *Id.* at 547.
201. *Id.* at 549.
202. 890 F. Supp. 681 (W.D. Mich. 1995).
203. *Duffy*, 300 Mich. App. at 547-50.

or lease the land at issue.[204] However, the court of appeals declined to follow *Kruse* and explained that because the legislature specifically limited the recreational use act's protection to land owners, tenants, and lessees, it was required to enforce that limitation.[205] When referring to the *Kruse* opinion, the court of appeals explained,

> [O]ur Supreme Court has disavowed this type of "legislative decision-making" by courts when interpreting the recreational land use act. [cite omitted] Instead, our Supreme Court has held that the recreational land use act should be enforced *as written* and not given a judicial gloss designed to promote what the court believes to be the Legislature's policy goal in enacting the statute.[206]

VIII. DEFAMATION

In *360 Construction Co. v. Atsalis Bros. Painting*,[207] the United States District Court for the Eastern District of Michigan held that the qualified shared interest privilege to defamation claims does not apply to statements made by a business operator about a competitor contending for the same contract.[208]

In that case, the Michigan Department of Transportation (MDOT) was accepting sealed bids for a contract to clean and paint an eight-tenths-mile span of the Mackinac Bridge.[209] The plaintiff, 360 Construction Company, was the low bidder.[210] The defendant, Atsalis Brothers Painting, submitted the second lowest bid.[211] According to the bid rules, if the plaintiff became disqualified, then the job would go to the defendant, the second lowest bidder.[212] The plaintiff alleged that the defendant sought to have it disqualified by, among other things, making defamatory statements about it and intentionally interfering with its business expectancy.[213] Through a variety of emails and letters, the defendant tried to link the plaintiff to another construction company

204. *Kruse*, 890 F. Supp. at 685-85.
205. *Duffy*, 300 Mich. App. at 547-50.
206. *Id.* at 548 (citations omitted) (citing Neal v. Wilkes, 470 Mich. 661, 667; 685 N.W.2d 648 (2004)).
207. 915 F. Supp. 2d 883 (E.D. Mich. 2012).
208. *Id.* at 897.
209. *Id.* at 898.
210. *Id.*
211. *Id.*
212. *Id.*
213. *360 Constr. Co., Inc.*, 915 F. Supp. 2d at 886.

against which the Mackinac Bridge Authority had a $1 million lawsuit.[214] The defendant alleged that the plaintiff was basically the exact same company doing business under a different name.[215]

MDOT asked the Office of Commission Audits to investigate the allegations, and, after a lengthy review, the investigator determined that the allegations were without merit.[216] The Bridge Authority ultimately awarded the contract to the plaintiff in January 2011.[217] This left the plaintiff in the position of having only twenty-two months to complete a twenty-eight-month cleaning and painting job, which it said caused it substantial damages.[218]

The defendant alleged that its defamatory statements were protected by the qualified shared interest privilege and that in order to be held liable, the plaintiff would have to prove that those statements were made with malice.[219] The court traced the origin of the shared interest privilege in Michigan back to *Bacon v. Michigan Central Railroad Co.*,[220] in which it held,

> The great underlying principle upon which the doctrine of privileged communications stands, is public policy.... Qualified privilege ... extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty.[221]

The court further explained that the purpose of the privilege is to terminate the rights of the plaintiff only when silence would lead to public harm.[222] It is, therefore, not to be used for the personal benefit of the defendant.[223]

The court listed the elements of a qualified privilege in Michigan as follows: "'1) good faith, 2) an interest to be upheld, 3) a statement

214. *Id.* at 887-92.
215. *Id.* at 887.
216. *Id.* at 892.
217. *Id.* at 886.
218. *Id.*
219. *360 Constr. Co., Inc.*, 915 F. Supp. 2d at 894.
220. 66 Mich. 166; 33 N.W. 181 (1887).
221. *360 Constr. Co., Inc.*, 915 F. Supp. 2d at 894-95 (alterations in original) (quoting *Bacon*, 66 Mich. at 169-72).
222. *Id.* at 895.
223. *Id.*

limited in its scope to this purpose, 4) a proper occasion, and 5) publication in a proper manner and to proper parties only.'"[224]

When applying these elements to the facts at hand, the court said that the defendants could not prove they acted in good faith because their conduct was motivated by their own financial incentive.[225] In addition, the assertions made by the defendants were baseless and objectively false.[226]

When addressing the plaintiff's claim of interference with a business expectancy, the court explained that under Michigan law, the plaintiff must plead and prove the following: (1) "the existence of a valid business relationship or expectancy," (2) "knowledge of the relationship or expectancy on the part of the defendant," (3) "an intentional and improper interference by the defendant inducing or causing a termination of the relationship or expectancy," and (4) "resultant damage to the plaintiff."[227]

While reaching its decision to deny the defendants' motion for summary judgment, the court held that "making demonstrably false statements about a business competitor for the purpose of dissuading prospective customers from doing business with the target of the defamatory statements amounts to an 'improper' act of interference."[228]

IX. PREMISES LIABILITY

In *Hoffner v. Lanctoe*,[229] the supreme court held that ice on the sidewalk in front of the only entrance to a fitness center was "an avoidable open and obvious danger." This was, in large part, because the plaintiff admittedly saw the accumulation of ice and made a conscious decision to confront the danger in an effort to enter the building so that she could take part in a recreational activity.[230]

The supreme court noted that the issue of whether the open and obvious doctrine applies to wintry conditions is "unremarkable both in its simplicity and its frequent occurrence in Michigan."[231] The court also took great care in pointing out that it was not supporting the notion that

224. *Id.* at 895-96 (emphasis omitted) (quoting Prysak v. R.L. Polk Co., 193 Mich. App. 1; 483 N.W.2d 629 (1992)).

225. *Id.* at 896-99.

226. *Id.* at 898.

227. *360 Constr. Co., Inc.*, 915 F. Supp. 2d at 899 (quoting Dalley v. Dykema Gosset PLLC, 287 Mich. App. 296, 323; 788 N.W.2d 679 (2010)).

228. *Id.* at 900.

229. 492 Mich. 450, 473; 821 N.W.2d 88 (2012).

230. *Id.* at 454.

231. *Id.* at 455.

ice and snow hazards should be obvious to everyone and, therefore, never gave rise to liability.[232] In the instant case, it was undisputed that the ice on which the plaintiff fell and injured herself was objectively open and obvious.[233] At issue was whether that danger was effectively unavoidable, thus making it part of the "special aspects" exception to the open and obvious doctrine.[234]

> The "special aspects" exception to the open and obvious doctrine for hazards that are effectively unavoidable is a limited exception designed to avoid application of the open and obvious doctrine only when a person is subjected to an unreasonable risk of harm. Unavoidability is characterized by an *inability to be avoided*, an *inescapable result*, or the *inevitability* of a given outcome. . . . Accordingly, the standard for "effective unavoidability" is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so.[235]

The plaintiff's argument was that the danger was effectively unavoidable because she had to encounter it in order to gain access to the fitness center.[236] Furthermore, she had a contractual right to enter the fitness center as a paid member.[237] The lower courts agreed with the plaintiff's argument, holding that the contractual relationship constituted a business interest that qualified the plaintiff as an invitee, thus preventing the courts from relieving the defendants from their duty of care.[238]

In its opinion, the Michigan Supreme Court explained why the lower courts' rulings were incorrect. "The law of premises liability in Michigan provides that the duty owed to an invitee applies to any business invitee, regardless of whether a preexisting contractual or other relationship exists, and thus the open and obvious rules similarly apply with equal force to those invitees."[239] The court opined that the most troubling thing about the plaintiff's argument was that, if upheld, it would create a

232. *Id.*
233. *Id.* at 465.
234. *Id.* at 468.
235. *Hoffner*, 492 Mich. at 468-69.
236. *Id.* at 469.
237. *Id.*
238. *Id.*
239. *Id.* at 470.

greater duty than that already owed to invitees.[240] This would expand what is supposed to be a very limited exception for dangerous, effectively unavoidable conditions into a broad, sweeping one that covers just about any condition existing on a premise where business is conducted.[241] "By providing that a simple business interest is sufficient to constitute an unquestionable necessity to enter a business, thereby making any intermediate hazard 'unavoidable,' plaintiff's proposed rule represents an unwarranted expansion of liability."[242]

X. TORTIOUS INTERFERENCE WITH A CONTRACT

In *Knight Enterprises, Inc. v. RPF Oil Co.*,[243] a gasoline supplier brought suit against another gasoline supplier for tortious interference with the fuel supply agreements it had with various gas stations.[244] Although the plaintiff specifically alleged tortious interference with a contract in its complaint, the trial court cited and decided the case based on the elements for tortious interference with a business relationship.[245] The court of appeals explained that, in Michigan, tortious interference with a contract is a separate and distinct cause of action from tortious interference with a business relationship or expectancy, and the lower court was incorrect in reframing the plaintiff's claim.[246] The court further explained that "'[t]he elements [for] tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant.'"[247]

In order to prevail on a tortious interference claim, the plaintiff must prove that the defendant intentionally engaged in a per se wrongful act or a lawful act with malice and intent to induce a breach of the agreement.[248] In this case, the court of appeals held that there was no evidence of misconduct or malice on the part of the defendant.[249] Therefore, the lower court erred when it awarded the plaintiff damages.[250]

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240. *Id.*
241. *Hoffner*, 492 Mich. at 470.
242. *Id.*
243. 299 Mich. App. 275; 829 N.W.2d 345 (2013).
244. *Id.* at 277.
245. *Id.* at 282.
246. *Id.* at 279-80.
247. *Id.* at 280 (quoting Health Call of Detroit v. Atrium Home & Health Care Servs. Inc., 268 Mich. App. 83, 89-90; 706 N.W.2d 843 (Mich. Ct. App. 2005)).
248. *Id.*
249. *Knight Enters.*, 299 Mich. App. at 281-83.
250. *Id.* at 282.

In *Gardner v. Heartland Industrial Partners*,[251] the Sixth Circuit Court of Appeals held that the plaintiffs' state-law tort claim for tortious interference with a contract, which happened to be a pension plan subject to the Employee Retirement Income Security Act (ERISA),[252] was not completely preempted by that Act.[253]

The relevant facts of *Gardner*[254] can be briefly summarized. The defendant Heartland was an investment firm that formerly held an ownership interest in Metaldyne Corporation, an automotive supplier in Michigan.[255] The defendants Leuliette and Tredwell were both co-founders of Heartland and board members of Metaldyne Corporation.[256] The plaintiffs were former Metaldyne executives who participated in its Supplemental Executive Retirement Plan (SERP), which was subject to ERISA.[257]

Heartland entered into an agreement with another investment firm, Ripplewood Holdings, to sell its ownership interest in Metaldyne.[258] Metaldyne subsequently submitted a "Schedule 14A and 14C Information" report to the SEC detailing the terms of the acquisition.[259] That report did not mention that as a result of the sale, Metaldyne would owe the plaintiffs $13 million.[260] This obligation arose under a change-of-control provision in the SERP.[261] When Ripplewood Holdings found out about this $13 million debt to the plaintiffs, it threatened to back out of the deal.[262] In an effort to keep the deal afloat, the defendants Leuliette and Tredwell convinced the other members of the Metaldyne board of directors to declare the SERP invalid.[263] The board did so without notifying the plaintiffs, and the Ripplewood Holdings deal closed shortly thereafter.[264] The plaintiffs filed suit in Wayne County Circuit Court alleging tortious interference with a contract based on the role the defendants played in invalidating the SERP.[265] The defendants removed the case to federal court where their motion to dismiss was granted on

251. 715 F.3d 609 (6th Cir. 2013).
252. 29 U.S.C.A. § 1132(a)(1)(B) (West 2012).
253. *Gardner*, 715 F.3d at 611.
254. *Id.* at 609.
255. *Id.* at 611.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Gardner*, 715 F.3d at 611.
260. *Id.* at 612.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Gardner*, 715 F.3d at 612.

the grounds that the plaintiffs' claim was preempted by ERISA.[266] The plaintiffs appealed.[267]

The Sixth Circuit Court of Appeals relied heavily on *Aetna Health, Inc. v. Davila*[268] when analyzing this case. According to *Davila*,[269] a claim falls within the scope of ERISA if two requirements are met: "(1) the plaintiff complains about the denial of benefits to which he is entitled 'only because of the terms of an ERISA-regulated employee benefit plan'; and (2) the plaintiff does not allege the violation of any 'legal duty (state or federal) independent of ERISA or the plan terms[.]'"[270]

The court explained that the plaintiffs' state-law tortious interference claim would be preempted by ERISA only if both prongs of the *Davila*[271] test were met.[272] When analyzing the second prong, the court held that Michigan tort law created the defendants' duty not to interfere with the plaintiffs' SERP agreement rather than the terms of the SERP itself.[273] Specifically, the court stated, "Defendants' duty is not derived from, or conditioned upon, the terms of the SERP. Nobody needs to interpret the plan to determine whether that duty exists. Thus, Plaintiffs' claim is based on a duty that is 'independent of ERISA [and] the plan terms[.]'"[274]

Despite finding that the second prong of the test had been met, the court held that the first prong was not.[275] Therefore, the district court's order was reversed and the case was remanded to Wayne County Circuit Court.[276]

XI. DAMAGES

In *Price v. High Pointe Oil Co.*,[277] the supreme court upheld the longstanding rule in Michigan that the proper measure of damages for the negligent destruction of property is the cost of replacement or repair, and noneconomic damages are not recoverable for the negligent

266. *Id.*
267. *Id.*
268. 542 U.S. 200 (2004).
269. *Id.*
270. *Gardner,* 715 F.3d at 613 (alteration in original) (quoting *Davila,* 542 U.S. at 210).
271. *Davila*, 542 U.S. 200.
272. *Gardner*, 715 F.3d at 613.
273. *Id.* at 614.
274. *Id.* (alteration in original) (quoting *Davila*, 542 U.S. at 210).
275. *Id.* at 615.
276. *Id.*
277. 493 Mich. 238; 828 N.W.2d 660 (2013).

destruction of property.[278] In supporting its decision, the court stressed the importance of using an objective measure to calculate damages for this type of loss.[279]

XII. CONCLUSION

Over the past year, Michigan appellate courts have created and explained definitive rules of law involving governmental immunity, medical malpractice, the Racketeer Influenced and Corrupt Organizations Act (RICO),[280] breach of fiduciary duty, aiding and abetting tortious conduct, the Natural Resources and Environmental Protection Act,[281] defamation, premises liability, tortious interference with a contract, and damages. Of these, it appears that the most heavily litigated area was that involving governmental immunities.

278. *Id.* at 240.
279. *Id.* at 264.
280. 18 U.S.C.A §§ 1961(1)(B), 1962(c), 1964(c) (West 2014).
281. MICH. COMP. LAWS ANN. § 324.73301 (West 2013).