WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION

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President's Letter—Provide Input

James Liggins Jr., President
Federal Bar Association, W.D. Michigan

The term "civic engagement" refers to both formal political practices and informal organizational activities that promote democracy by expanding citizen participation in problem solving and broadening access to social and political capital. There is a strong argument that without civic engagement and educational opportunities, democracy suffers and, at its most extreme, crumbles. As indispensable components of the judiciary, attorneys play a crucial role in promoting, encouraging, and facilitating engagement within the communities in which we live and serve. The West Michigan Chapter of the Federal Bar Association understands that responsibility and strives to be a resource of civic engagement and education for everyone.

Our educational institutions appear to vary in the core topics they emphasize depending on the trends and cycles of the day. There was a time where civic education and engagement held a prominent place in the curriculum throughout our schools. While science, technology, engineering, and math appear to be the dominant focus today, I wonder how the state of our public discourse would be impacted if civic engagement and education were also viewed as high priorities. It takes no sociological or philosophical juggernaut to observe that our public discourse suffers from a lack of understanding of our systems and how to engage, listen, and communicate on sensitive topics. That is not to say that there have never been similarly charged periods within our history where emotions, tensions, and belief systems collide. One need only recall Vietnam, the civil rights movement, and other political and cultural eras to see prime examples of strained discourse and public engagement.

As attorneys, it is important that we facilitate consistent opportunities for the public to engage with our systems of government during times of high volatility but more importantly during less emotionally heightened time frames. It seems a logical conclusion that when people are more engaged, they are better informed and knowledgeable on how to navigate periods of heightened intensity. It also follows that people see more efficacy within our systems when they understand how the systems are designed to function, including their avenues and opportunities for influence within those systems.

Those who receive civic education and are intentionally engaged are more likely to feel a sense of civic responsibility and to participate more actively in their communities. It provides people with an understanding of

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the mechanics of democracy, our rights and freedoms, and why it is important to exercise one's rights. Civic education also teaches individuals about their local and national government structures, the principles of democracy, as well as a person's civic responsibilities.

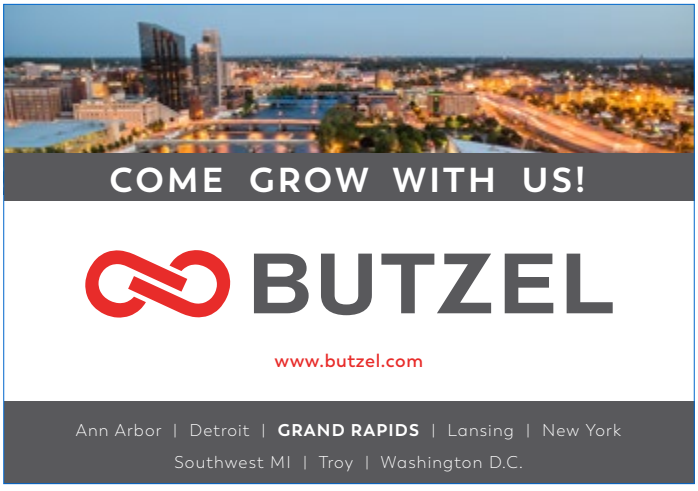
By teaching people about the principles of democracy and engaging them within our systems of government, they become more informed and knowledgeable about the issues facing their country. People are more likely to understand the importance of voting and participating in the political process. A well-informed populace allows for the possibility of a thriving democracy in which every individual citizen's opinion can be heard and respected.

When individuals understand the significance of their nation's past (the good, bad, and ugly), they are more likely to participate in its future. Civic engagement and education equips individuals with the tools they need to contribute to the development of their nation in meaningful ways. The skills and knowledge people gain through civic engagement and education can be used to engage in political discourse, support candidates and policies, and participate in civic activities. These activities help to build a sense of connection creating a sense of belonging.

Civic engagement and education are a focus of our chapter of the Federal Bar Association. This year, there is a renewed effort by our organization to be a resource of civic engagement and education for our community. Many of our attorneys participate in various civic educational programs such as We The People and the High School Mock Trial Program, both of which are sponsored by the Michigan Center for Civic Education. We hope that our members will take full advantage of the opportunities available to promote and encourage civic engagement with the judiciary in meaningful ways. As we do so, we believe that our society as whole will be supported, strengthened, and enriched.



James Liggins Jr. *is the 2024 President of the West Michigan Chapter of the FBA. He is an attorney at Warner Norcross + Judd LLP, where he has a multifaceted litigation practice.*



Recap of Recent Events

By Rachel Frank

Supreme Court Year in Review—February 7

We held our Supreme Court Year in Review program on February 7. This program is a favorite for our members, and we were pleased to have John Bursch of Bursch Law PLLC and Jennifer McManus of the United States Attorney's Office to present and discuss the notable civil and criminal decisions from last term. A big thank you to Warner Norcross + Judd for hosting the event, and to John and Jennifer for providing such enlightening presentations.

To Kill a Mockingbird Programs—April 26

Recently, the critically acclaimed national tour of *To Kill a Mockingbird*, a play by Aaron Sorkin and based on Harper Lee's classic novel, came to Grand Rapids. The FBA organized two programs for members on April 26: a lunchtime panel to discuss the role of race and bias in the criminal justice system, and an outing for members to attend a performance that evening.

The panel was presented by Professor Catherine Grosso from the Michigan State University College of Law, and by Dean Tracey Brame from WMU-Cooley Law School. Members discussed how the themes and lessons of *To Kill a Mockingbird* are still relevant in today's criminal justice system, and how the system can work to overcome racial stereotypes and biases. Thank you to Warner Norcross + Judd for hosting the event.

That evening, members attended a performance of the play, led by Emmy Award-winning actor Richard Thomas as Atticus Finch. The performance was moving, and our members greatly enjoyed this event.

"Anatomy of a Trial" with The American College of Trial Lawyers and Young Lawyer's Division Summer Mixer—June 20

The FBA, in partnership with The American College of Trial Lawyers, presented "Anatomy of a Trial," an all-day demonstration event, at the Gerald R. Ford Federal Courthouse on June 20, 2024. We held this program for the first time last year, and it was so well-received that we did it again! Thank you to Chief Judge Hala Jarbou, Judge Robert Jonker, Judge Paul Maloney, Judge Jane Beckering, and Magistrate Judge Sally Berens, along with the ACTL and FBA trial lawyers who provided tips, insight, and demonstrations of four trial components: opening statements, direct examination, cross examination, and closing arguments.

Following the program, the Young Lawyers Division held its annual summer mixer at Varnum, which was well attended by FBA members young and young-at-heart. Thank you, Varnum, for hosting the happy hour.



***Rachel Frank** is the 2024 Vice President of Programs of the West Michigan Chapter of the FBA. She is the founder of Rachel Frank Law, PLLC in Grand Rapids, a criminal defense law firm.*

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Discovery Case Updates

By Jay Yelton and Ken Treece

Attorney Supervision and Monitoring of Custodian Self-Collection of ESI Is Essential

Lyman v. Ford Motor Company
Case No. 2023 WL 4231713 (E.D. Mich. June 28, 2023)

Plaintiffs filed a putative class action against Ford Motor Company, alleging breach of contract and consumer protection claims. The lawsuit concerned a certain engine's inability to maintain the correct level of engine oil, as outlined in the owner's manual. Plaintiffs requested electronic searches of records related to four custodians. The district court granted plaintiffs' motion to compel Ford to undertake electronic searches of records associated with the specified custodians.

First, the Court emphasized that attorneys cannot simply rely on custodian self-collection of ESI. Instead, the Court stated that counsel must ensure the accuracy of the client's response to document requests, ensuring that all appropriate sources of data were searched, and that responsive ESI has been collected, reviewed, and eventually produced. Proper oversight and testing of the accuracy of self-collected ESI are essential in the discovery process.

Next, the Court noted the importance of cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. The Court held that a party's search protocol is not privileged and rejected the notion that a party's search methodology is protected by the attorney-client privilege or work-product doctrine. "It would go against reason to find that the steps a party takes to identify responsive documents are privileged when those steps result in an evasion of discovery obligations by not collaborating on their discovery and ESI search strategies."

Based on Ford's vague description of its search methodology and limited document production from key custodians, the Court ordered the parties to engage in transparent and cooperative discussions about search terms and methodology, with the expectation that responsive documents would be produced.

PRACTICE TIP: Self-collection without proper supervision typically leads to trouble. Counsel needs to oversee the preservation, collection, and production of ESI to accurately represent that "reasonable steps" have been taken to fulfill their client's discovery obligations.

Motion to Compel Denied Where Party Serving Rule 45 Subpoena Failed to Take Reasonable Steps to Avoid Imposing Undue Burden or Expense

Ozark Interest v. Arch Insurance Company, Inc.
2023 WL 2264462 (E.D. Mich. Feb. 28, 2023)

Plaintiff sued Arch Insurance Company and Camp Assure, LLC, in the Southern District of Texas in relation to Arch's decision to rescind plaintiff's bulk purchase of Deluxe Plan insurance with "cancel for any reason" (CFAR) coverage during the COVID-19 pandemic. CampDoc, a non-party in the Texas action, maintained a website on which campers could opt into the Deluxe Plan, is alleged to have colluded with Ozark and CampAssure to market the Deluxe Plan as free insurance, leading to campers opting into the plan en masse within the three-day period before CampDoc removed the plan from the website.

During discovery, Arch served CampDoc with two subpoenas under Federal Rule of Civil Procedure 45 that became the subject of a motion to compel. The subpoenas include a total of 45 requests for production of documents. Arch argued that CampDoc made improper objections to the discovery requests. The court agreed, noting that CampDoc made boilerplate and "without waiving" objections that did not specify whether documents were withheld based on the objections, but the court further noted that Arch failed to explain how its document requests were relevant nor did it address the Rule 26(b) proportionality factors incorporated into the subpoena provisions of Rule 45.

The scope of discovery for a subpoena under Rule 45 is the same as under Federal Rule of Civil Procedure 26(b)(1). Under Rule 26(b), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," except that a court must consider proportionality factors, including "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the bur-

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den or expense of the proposed discovery outweighs its likely benefit." Rule 26(b)(2)(C)(i) requires a court to limit proposed discovery that is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive."

The Court determined that CampDoc had the right to resist producing documents that Arch could have obtained from the parties in the Texas action. But CampDoc produced documents responsive to most of Arch's requests, though it did object to producing the full scope of some document requests. CampDoc's "without waiving" objections were improperly stated, but many of Arch's "any and all" document requests were facially overly broad.

Arch attempted to justify its non-party subpoenas by pointing to its answer to Ozark's complaint, where Arch described the alleged scheme between CampDoc, Ozark, and CampAssure. In its amended complaint, Ozark also claimed that CampDoc acted as Arch's agent. The court found that while CampDoc's actions were relevant to the Texas action, Arch had a duty to reduce the burden its subpoenas would impose on the non-party.

The court found that, in dereliction of that duty, Arch requested that CampDoc produce a wide swath of documents that were obtainable from the other parties in the Texas action. Moreover, Arch had also sued CampDoc directly over the same allegations in New York and served discovery requests replicating its subpoena requests. CampDoc represented to the court that it had already produced ample discovery in the New York action and Arch did not disagree.

The court explained that by failing to reduce the burden of its subpoenas, Arch ignored the central principle of the 2015 amendments to the discovery rules, which emphasized the need to rein in the exorbitant costs, protracted time, and contention that have strained the civil justice system. The Court noted that the Sixth Circuit had emphasized that the 2015 amendments aimed to crystallize the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality. In light of the discovery already provided to Arch, requiring CampDoc to produce more documents would be disproportionate to the needs of the Texas action.

PRACTICE TIP: Gamesmanship in discovery should be avoided, especially when the burden falls on a non-party. Rule 26 mandates that discovery be proportional to the needs of the case. Rule 45 mandates that a party issuing a subpoena refrain from imposing undue burdens on nonparties. Combined, these rules form a scissors that courts can use to pare down unreasonable discovery requests aimed at non-parties.

Attorney Needs to Assure Proper Preservation & Protection of Metadata

Hoehl Family Foundation v. Roberts
2023 WL 3271517 (D. Vt. Apr. 13, 2023)

This case involves a lawsuit initiated by the Hoehl Family Foundation against investment manager individuals and entities over a disputed $1 million transaction that resulted in alleged financial loss and a substantial tax penalty. Another lawsuit filed in New Hampshire state court by a related entity also concerned the same transaction and involved some of the same defendants. Both cases shared a joint discovery process. In the Vermont action, the Court addressed a motion to compel the production of metadata that had been partially altered due to changes in file locations, carried out in anticipation of litigation.

Plaintiffs asserted that defendants produced inaccurate or incomplete metadata for approximately 10,000 documents in its 400,000-page production. Defendants explained that changes to servers and file organization, along with movement of files in preparation for document production, caused discrepancies in metadata. Plaintiffs proposed that defendants provide screenshots of the relevant folder structure to help match documents with their source folders, but defendants declined due to confidentiality concerns. Instead, defendants provided partial screenshots and a file showing document file paths. However, these efforts were still insufficient to address the metadata issues, and certain metadata remained altered due to the movement of files.

Plaintiffs filed a motion to compel defendants to correct the defective production of documents lacking accurate metadata. The stipulated discovery order in the case required ESI to be provided in a text searchable format, preserving original formatting, file structure, and metadata. Defendants raised two arguments in opposition to the motion. First, they claimed that plaintiffs had waived their objections by not raising them promptly. Second, they argued that producing more metadata would be costly and unnecessary.

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Discovery Cases Updates

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The Court rejected both arguments. It found that plaintiffs had consistently and promptly raised metadata concerns and that the defendants' assertion of waiver was unfounded. Furthermore, the Court noted the importance of production of complete metadata, noting that it enhances the functionality of electronic documents and aids in efficient access, search, and sorting of large volumes of documents. It determined that the request for metadata was reasonable considering defendants created the situation by its initial approach to responding to requests. And, as only a portion of the produced documents were affected, the burden and expense of producing accurate metadata was reasonable.

The Court concluded that defendants had not fulfilled their discovery obligations by failing to provide documents with complete and accurate metadata and directed defendants to supply accurate metadata for the documents identified as lacking proper metadata.

PRACTICE TIP: Metadata has long been recognized as electronically stored information ("ESI") subject to a party's duty to preserve potentially relevant evidence once litigation has been filed or may reasonably be anticipated. Counsel needs to be sure that their client's preservation and collection efforts do not result in the spoliation of metadata. If internal resources are not available, counsel may need to engage an outside vendor to assist with preservation and collection efforts.

Redactions for Relevance are Permissible in Some Cases

Aluminum Warrick, LLC v. US Magnesium LLC
2023 WL 2482933 (S.D.N.Y. Feb. 27, 2023)

Plaintiff brought a lawsuit against defendant for failing to fulfill a supply contract to provide magnesium. Defendant relied on the defense of force majeure due to unexpected equipment failures that made complying with the contract impossible.

Plaintiff objected to defendant's production of redacted documents and requested unredacted reproductions, arguing that redactions for relevance are disfavored when a protective order is in place. Defendant contended that the redacted information was irrelevant and competitively sensitive.

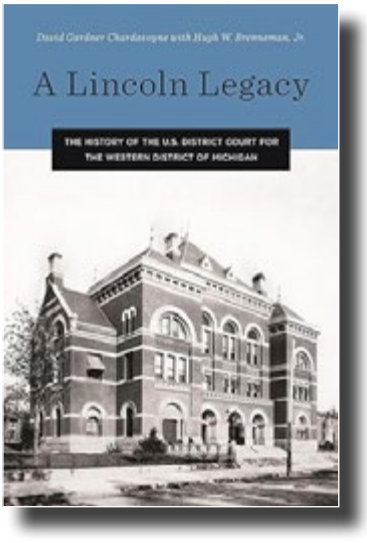
The Court denied plaintiff's motion in part and granted it in part. While defendant was not required to fully unredact the documents, it was directed to reveal certain information relevant to magnesium production, along with column headers, row descriptors, and graph titles to increase transparency regarding the redactions.

The Court discussed the use of relevancy redactions in discovery, recognizing that while they can be appropriate in some cases, they must be evaluated on a case-by-case basis. The Court highlighted that parties could voluntarily

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Interested in the Court's History?

A Lincoln Legacy: The History of the U.S. District Court for the Western District of Michigan by David Gardner Chardavoyne with Hugh W. Brenneman Jr. provides the first and only comprehensive examination of the history of the federal courts in the Western District of Michigan. Copies may be purchased in the Gerald R. Ford Presidential Museum Store in Grand Rapids.



Discovery Cases Updates

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undertake relevancy redactions if done in good faith and without impacting the discovery schedule or prejudicing the other party.

Defendant had previously redacted information about its lithium plant and finances, and the Court ruled it irrelevant to the force majeure defense. However, the Court noted that the redactions lacked column and row descriptors, making it difficult for plaintiff to understand the context of the redacted information.

Ultimately, the Court permitted defendant to maintain certain redactions, such as irrelevant bullet points, but required the reproduction of documents with relevant information about magnesium production, along with necessary column and row descriptors and graph titles. The Court instructed both parties to seek permission before redacting any future documents.

PRACTICE TIP: In this case, the parties had negotiated the terms of a protective order. However, the protective order did not address redactions for responsiveness. In commercial cases where documents oftentimes contain competitively sensitive information concerning both relevant and irrelevant matters, parties should address redactions for responsiveness. If an agreement cannot be reached, the Court can then establish the guidelines before either party incurs the expense associated with document redactions that may later need to be undone.



Jay Yelton *now is an Adjunct Professor at MSU College of Law and Cooley Law School after 30+ years as a litigator and manager of eDiscovery teams. He also serves as a special master and discovery mediator where he helps parties and courts solve disputes quickly and cost-effectively. Jay is Of Counsel at Warner Norcross + Judd.*



Ken Treece *is a staff attorney at Warner Norcross + Judd with 20 + years of experience conducting and supervising all phases of eDiscovery projects from collection and initial search terms preparation to data review and production. He also regularly writes and speaks to various groups on all things eDiscovery.*

Call for Articles

Interested in contributing to *Bar & Bench*? We invite you to draft an article on a subject of interest to federal practitioners in the Western District of Michigan. Please contact our editor, Charlie Quigg, at cquigg@wnj.com for more information.





District Court Roundup

By C.J. Schneider and Richard Perez

Agee v. Benson
No. 1:22-cv-272, 1/12/2024

After the finding that state redistricting commission violated Equal Protection Clause by drawing 13 state legislative districts, seven house districts, and six senate districts predominantly based on race, the Court enjoined the state from holding further elections in those districts. Plaintiffs, African American residents who lived in racially gerrymandered districts, requested an order for special election in current election cycle for senate districts, in which an election would not ordinarily be held for another two years.

The Court denied Plaintiffs' request for a special election. The Court reasoned that the special elections in the unconstitutional districts would inflict almost as much harm as it would remedy. The Court further reasoned that the relief sought by Plaintiffs would require special elections to be conducted in every district—not use the unconstitutional ones—and would shorten terms of senators in districts that were no adjudicated to be unconstitutional. The Court concluded that the remedy would be disproportionate to the constitutional violations and would not respect "the need to act with proper judicial restraint when intruding on state sovereignty."

Amia Banks, James J. Fleming, Michael J. Pattwell, Ronald A. King, Jennifer K. Green, Magy Shenouda of Clark Hill and John J. Bursch Bursch Law PLLC represented the plaintiffs.

AAGS Erik Alexander Grill and Heather S. Meingast represented Defendant Jocelyn Benson.

David H. Fink, Nathan Joshua Fink of Fink Bressack and Dima Atiya, E. Mark Braden, Katherine McKnight, Richard Bryan Raile, Erika Prouty, and Patrick T. Lewis of Baker & Hostetler LLP represented Defendants Michigan Independent Citizens Redistricting Commission, Douglas Clark, Juanita Curry, Anthony Eid, Rhonda Lange, Steven Terry Lett, Brittni Kellom, Cynthia Orton, M. C. Rothhorn, Rebecca Szetela, Janice Vallette, Erin Wagner, Richard Weiss, and Dustin Witjes.

Frost v. Nessel
1:23-cv-1226, 1/18/2024

A presidential elector brought a § 1983 action seeking to enjoin the Michigan Attorney General's alleged bad faith prosecution of him for numerous election-related forgery charges. Specifically, the elector asserted that the allegations against him the criminal complaint did not amount to a crime.

The Court concluded that it must abstain from exercising jurisdiction under *Younger v. Harris*, reasoning that "bad faith prosecution" exception did not apply in this case and that Plaintiff's version of the exception would swallow the rule and effectively extend it every instance in which a defendant has a good faith argument that his alleged actions do not satisfy the elements in the charging statute.

The Court dismissed the case, concluding that *Younger* established the principle that in cases seeking to enjoin ongoing state criminal proceedings, federal courts should not exercise jurisdiction but instead should dismiss the cases in their entirety.

Gregory David Hanley and Edward Kickham, III of Kickham Hanley PLLC and Kevin Dean Kijewski of KDK Law Office PLLC represented the plaintiff.

AAGs Erik Alexander Grill and Mark E. Donnelly represented the defendants.

Ashton as Next Friend of E.B. v. Okemos Public Schools
1:22-cv-819, 2/9/2024

A mother, as next friend of a public high school student, brought an action against city public schools, its school board, school board members, the superintendent, the school principal, and assistant principals, asserting claims for First Amendment violation and retaliation, violations of due process, and *Monell* liability after her daughter was disciplined and served a time-limited expulsion from her high school after she lied to her parents and to the police about her interaction at school with an administrator. Plaintiff argued that this was not a school discipline case but rather a case about the school bathroom privacy policies, unconstitutional search policies, and the school's retaliatory actions towards the student and her parents who complained about those policies.

The Court granted Defendants' summary judgment concluding that the student's untruthful statements to the police allowed Defendants to regulate the student's speech and discipline the student because the speech materially disrupted classwork and involved substantial disorder or invasions of the rights of others. The Court further concluded that the search of the student did not violate the Fourth Amendment

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as students have a less robust expectation of privacy than is afforded to the general population and the Defendants' search of the student and spot check of bathrooms did not invade the already diminished expectation of privacy.

Eric Sheppard represented the plaintiff.

Annabel Shea, Timothy J. Mullins, and Travis M. Comstock of Giarmarco Mullins & Horton PC represented the defendants.

Tooker v. BlueJay Solutions, Inc.
1:22-cv-455, 2/2/2024

Employees brought a collective action wage-and-hour case against their employer and the limited liability company (LLC) that acquired it. The employees moved for corrective notice to reopen the opt-in period after Defendants sent an email stating that employers are prohibited from retaliating against any employee for participating in an Fair Labor Standards Act ("FLSA") lawsuit. Plaintiffs moved for partial summary judgment.

The Court held that the employees were not entitled to a corrective notice based on Defendants' e-mail; employees were production workers and the FLSA's administrative exception to overtime wage requirements did not apply; and genuine issues of material fact precluded summary judgment on the amount of overtime damages employees were due. The Court reasoned that Plaintiffs did not meet their burden of showing the communication was coercive, misleading, or improper, reasoning that pre-certification communications with potential collective action members are generally permitted.

Helen Coleman and Rachhana Srey of Nichols Kaster & Anderson PLLP represented the plaintiffs.

Alan Lin, Desiree Brutocao, and Edward Mason Smith of Cornell Smith Mierl Brutocao Burton, LLP and Michael D. Almassian of Keller & Almassian PLC represented the defendants.



C.J. Schneider *is a member at Miller Johnson in Grand Rapids. He practices in commercial crisis counseling and litigation, helping businesses and nonprofit organizations successfully navigate high-profile matters, including mass tort claims, high-stakes contract disputes, global supply chain emergencies, and corporate governance reform.*



Richard Perez *formerly practiced at Miller Johnson in Grand Rapids and recently relocated to Florida.*





Appellate Roundup

Noteworthy Cases from the Sixth Circuit

By Ashley Yuill and Adam Ostrander

Grainger v. Ottawa County
90 F.4th 507 (6th Cir. 2024)

This case involved an interlocutory appeal of the Western District of Michigan's denial of a motion to intervene as a new putative class representative in a tax foreclosure action. In 2019, Frederick Grainger Jr.—whose home had been foreclosed and sold in 2013 due to his failure to pay property taxes—filed a putative class action asserting constitutional claims against various counties, including Ottawa County, for selling homes to repay back taxes and keeping the surplus. Due to the six-year delay in bringing the action, Judge Maloney declined to certify the class. Additionally, Judge Maloney dismissed Grainger's claims against all counties but Ottawa County, because only Ottawa County had caused Grainger's injury.

Brian Behovitz, whose home was sold at a tax foreclosure auction in 2018, moved to intervene both permissively and as a matter of right to serve as the class representative. Judge Maloney denied the motion, and the Sixth Circuit affirmed in a published decision. In an opinion authored by Judge Clay, the Sixth Circuit held that Behovitz did not have a substantial interest in the case because his interest was in the procedural mechanism of the case itself, not in "the property or transaction that is the subject of the action"—Grainger's home. The Court further held that his interests were not impaired because Behovitz could still pursue his own lawsuit and, as a result, had no need to intervene in Grainger's.

Philip L. Ellison of Outside Legal Counsel PLC represented Mr. Behovitz. Matthew T. Nelson of Warner Norcross + Judd LLP represented Defendant-Appellee Ottawa County.

Parker v. Battle Creek Pizza, Inc.
95 F.4th 1009 (6th Cir. 2024)

These consolidated cases brought under the Fair Labor Standards Act by pizza delivery drivers against their employers arose from the alleged insufficient reimbursement for the use of the drivers' personal vehicles for deliveries, driving the drivers' pay below minimum wage as a result. These actions, presided over by Judge Neff of the Western District of Michigan and Judge Barrett of the Southern District of Ohio, involved federal regulations requiring wages to be paid free of any "kick-back" to the employer and providing that if an employer requires a minimum-wage employee provide their own "tools" for work, the employer must reimburse them for 100% of the costs of doing so.

The delivery drivers, who were paid minimum wage and a small additional fee for deliveries, argued they should have been compensated using the IRS standard-mileage rate for business deductions, while the restaurants maintained that a "reasonable approximation" of the drivers' expenses was sufficient. In a unanimous opinion authored by Judge Kethledge, the Sixth Circuit held that both the drivers *and* the restaurants were wrong. Finding that any approximation of vehicle costs was inadequate, the Court reasoned that the possibility that "even 'reasonably approximate' reimbursements might be inadequate ones for some employees" is a risk that must fall solely on the employer. Employers must pay employees at least the minimum wage to the penny—not a "reasonable approximation" thereof. But the Court held that the drivers' solution was no better because its one-size-fits-all approximation of vehicle costs could over- or under-pay drivers depending on their state's gas taxes or the vehicles driven. Ultimately, the Court remanded the cases to the respective district courts to find an arrangement that would result in the drivers' actual costs being assessed and paid, suggesting the lower courts consider a burden-shifting regime like those used in Title VII cases.

Matthew W. H. Wessler of Gupta Wessler PLLC represented the plaintiffs. Jeffrey C. Gerish of Plunkett Cooney represented Defendant Battle Creek Pizza, Inc. Lauren S. Kuley of Squire Patton Boggs (US) LLP represented Defendant Team Pizza, Inc.

Anderson-Santos v. Kent County
94 F.4th 550 (6th Cir. 2024)

This § 1983 action resulted in a published opinion from the Sixth Circuit reaffirming the well-established rule that interlocutory qualified immunity appeals may only be taken on purely legal issues. This case arose from an incident where a Kent County corrections officer pushed a juvenile detainee, causing the juvenile to fall and injure his head. Although the parties agreed on those basic facts, they disputed the officer's

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state of mind and level of force used in the incident—issues that would become relevant to the juvenile's Eighth Amendment claim. After the juvenile filed suit, the corrections officer moved to dismiss the action on qualified immunity grounds. After Judge Beckering denied the motion based on the existence of questions of fact, the officer attempted to pursue an interlocutory appeal by right from that decision.

The Sixth Circuit dismissed the appeal in a published opinion written by Judge Clay. While the Supreme Court has recognized that a district court's denial of a claim of qualified immunity is an appealable "final decision" for appellate purposes, this does not allow officers to appeal a district court's denial of qualified immunity based on genuine issues of material fact. An appealing officer may, however, concede the plaintiff's version of facts in order to invoke the Sixth Circuit's appellate jurisdiction. In this appeal, the corrections officer purported to accept the juvenile's version of the facts but continued to characterize his action as a "joking" push—the exact fact in dispute. The Sixth Circuit, holding that "a concession in name only is no concession at all," dismissed the appeal for lack of jurisdiction.

Randall J. Groendyk of Varnum LLP represented the defendant-appellant officer. Jonathan A. Abent of of Christopher Trainor & Associates represented the juvenile plaintiff-appellee.



Ashley Yuill *focuses on litigation and dispute resolution, including appeals, at Warner Norcross + Judd LLP.*



Adam Ostrander *litigation attorney at Warner Norcross + Judd LLP whose interdisciplinary practice encompasses commercial, criminal, civil and property dispute resolution.*

Help Wanted—Pro Bono Trial Attorneys for Prisoner Civil Rights Cases



Each year, members of our chapter represent prison inmates whose civil rights claims have survived summary judgment and are headed to trial. The district court is again looking for attorneys to accept pro bono appointments in this worthwhile program. The Western District's prisoner civil rights pro bono program presents an excellent opportunity for trial work, without lengthy discovery. We encourage our members—and especially our young lawyers, for whom trial experience can be hard to find—to participate. The link to the Court's Pro Bono Plan is: https://www.miwd.uscourts.gov/sites/miwd/files/Pro%20Bono%20Guidelines.pdf.

If you would like to learn more or volunteer, please email stephanie_carpenter@miwd.uscourts.gov, and either Stephanie Carpenter or Judge Ray Kent can tell you about the process.

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2023 Jury Trial Verdicts

United States District Court for the Western District of Michigan

VERDICT DATE	CASE NUMBER/NAME/TYPE	JUDGE	ATTORNEYS	JURY VERDICT
2/17/23	1:19-cr-181d USA v Underwood (Possession with intent to distribute methamphetamine, possess stolen firearm, possess firearm in furtherance of drug trafficking)	Jonker	Timothy VerHey, Dan Mekaru – USA Mary Chartier, Marisa Vinsky – D	Guilty
3/15/23	1:21-cv-868 Glowacki v OReilly Auto Enterprises (Civil rights; employment discrimination)	Jarbou	Brian Farrar, Gerald Wahl, Raymond Sterling – P Suzanne Bartos – D	For Plaintiff: Punitive: $1 million Compensatory: $1.939 million
4/12/23	1:22-cr-180 USA v. Brown (Possession of fentanyl, distribution of fentanyl)	Jonker	Austin Hakes, Patrick Castle – USA Joshua Blanchard, Melissa Freeman – D	Ct 1. – Guilty Ct. 2 – Not Guilty
4/13/23	1:22-cr-164 USA v. Chan (Abusive sexual contact)	Beckering	Erin Lane, Jonathan Roth – USA Julia Kelly – D	Guilty
5/10/23	1:21-cv-487 Misane v. City of Bangor, et al. (Civil rights; employment discrimination)	Jarbou	Caitlin Malhiot, Jonathan Marko – P John Gillooly – D	For Plaintiff: Economic: $157,500 Non-economic: $1.05 million
5/11/23	1:22-cr-169 USA v. Henderson (Possession with intent to distribute controlled substances; felon in possession of firearm; possession of firearm in furtherance of drug trafficking crime; forfeiture)	Maloney	Joel Fauson, Austin Hakes – USA Geoffrey Upshaw – D	Cts 1 & 2 – Guilty Ct 3 – Not Guilty
5/18/23	1:21-cr-90 USA v. Meeks (Felon in Possession of Firearm)	Maloney	Erin Lane, Lauren Bilsacky – USA James Fisher – D	Guilty

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2023 Jury Trial Verdicts

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VERDICT DATE	CASE NUMBER/NAME/TYPE	JUDGE	ATTORNEYS	JURY VERDICT
6/2/23	1:22-cr-143 USA v. Anderson (Conspiracy to possess, transport, receive stolen medical equipment) (12 counts)	Jarbou	Patrick Castle, Andrew Hull – USA Peter VanGelderen, Charles Chamberlain – D	Guilty
6/27/23	2:21-cv-150 Long #349322 v. Munro, et al. (Prisoner civil rights)	Jarbou (MQT)	Juwaun Long #349322 – Pro Se P Jessica Pelto – D	After P rested: 1 Def – dismissed on motion 1 Def – settled $700.00
7/11/23	2:20-cv-162 McClaine-Bey #165012 v Bury et al. (Prisoner civil rights)	Vermaat	Lewis McClaine-Bey #165012 – Pro Se P Jessica Pelto – D	For Defendants
7/13/23	1:23-cr-43 USA v. Cassaday (Threatening to assault or murder federal official; interstate communications with threat to kidnap or injure)	Michelson (EDMI visiting)	Christopher Rawsthorne – USA (EDMI) Haralambos Mihas, Nicole Smith – D (EDMI)	Guilty
8/30/23	1:23-cr-42 USA v. Curtis, Hill, and Allen (Felon in possession of firearm)	Jarbou	Jonathan Roth, Patrick Castle – USA John Karafa – D1 Scott Graham – D2 Paul Mitchell – D3	Guilty
9/13/23	2:23-cr-2 USA v. Hendricks (Theft from Indian organization; wire fraud)	Jarbou (MQT)	Paul Lochner – USA Elizabeth LaCosse – D	Guilty
9/19/23	1:19-cv-1032 McCann v. Fuller (Civil rights/federal question)	Maloney	Anne Prossnitz, Frank Newell, Jonathan Loevy, Rachel Brady, Russell Ainsworth – P Eric Jamison, Mark Donnelly – D	For Plaintiff: Compensatory: $12.5 million Punitive: $2.0 million

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VERDICT DATE	CASE NUMBER/NAME/TYPE	JUDGE	ATTORNEYS	JURY VERDICT
10/18/23	1:21-cv-30 Smith #484290 v. Nevins, et al. (Prisoner civil rights)	Jonker	Paul Matouka – P O.G. Reasons, LeAnne Dao – D	For Defendants
10/25/23	1:19-cv-729 Sango #252200 v. Maus (Prisoner civil rights)	Kent	Joseph Gavin, Richard Perez, Robert Harding – P James E. Keathley – D	For Defendant
11/29/23	1:21-cv-1009 Smartrend Manufacturing Group Inc. v. Opti-Luxx Inc. (Patent infringement)	Jarbou	Thomas Cunningham, Dustin Zak, Emily Chambers Welch, John Rondini, Robert Lee, Matthew Jakubowski – P Donald Darnell, Joseph Carrier, William Hurley – D	For Plaintiff: $23,307.84
12/13/23	1:23-cr-91 USA v. Baker (Conspiracy to sexually exploit a child; coercion and enticement of a minor; penalties for registered sex offenders)	Maloney	Austin Hakes, Alexis Sanford – USA Geoffrey Upshaw – D	Guilty



Register for the 2024 Bench Bar Conference

You are cordially invited to the West Michigan Chapter of the Federal Bar Association Bench Bar Conference, to be held on **Wednesday, September 18 through Friday, September 20, 2024**, at **Crystal Mountain Resort**.

We are honored that the District and Magistrate Judges of the Western District of Michigan are committed to attend the Conference. We are very excited about the sessions at this year's conference, which will include Sixth Circuit and District Court judicial panels with Q&A; programs on artificial intelligence (AI); a writing workshop; a discussion of private VFM and court-sponsored mediation/ADR; a session on restrictive covenants and other employment law matters; and a mini-symposium on the POWER Act.

Highlights of this year's conference will be special keynote speakers Maury Nicely, author and historian, who will speak about his book on the Jimmy Hoffa trial; and returning by popular demand, *Washington Post* journalist and author Charles Lane, who will speak about the Colfax Massacre of 1873.

Please visit our website at https://westmichiganfederalbar.org/register-for-2024-bench-bar-conference/ to register online or access a paper registration form.

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