WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION
BAR & BENCH NEWSLETTER
VOL 34, NO 3
FALL 2022

Table of Contents

President's Letter..... 1
Welcoming Ann Filkins as Clerk of Court for the District Court.....3
What Constitutes "Good Cause" for a Juror's Removal? 3
In Memoriam: Bankruptcy Judge Jo Ann Stevenson.....5
Passing the Chief Judge's Gavel.....8
District Court Roundup 9
Appellate Roundup 11

President's Letter

Chris O'Connor, President
Federal Bar Association, W.D. Michigan

A lot has been written about our perception of the passage of time as we age. The clock moves at the same rate from birth to death, so why do we perceive it to speed up as we age? Is it the physics of neural signal processing that explains your mind's timekeeping, as suggested by recent research? Or is it simply that our life experiences are more fun and meaningful at the same time we are acknowledging our mortality? As the old saying goes, time flies when you are having fun. (And when you are preparing for trial.) Or in the words of Nathaniel Hawthorne, time flies over us, but leaves its shadow behind.

Indeed, this year has flown by as I complete my term as Chapter President. I am incredibly grateful for the opportunity to have served you and hope that our Executive Board has delivered on our goal of providing value to your membership in several different ways. As I write this column, I am excited for the Annual Meeting and Lunch we have planned at the City Flats Ballroom in Grand Rapids on October 12. We are thrilled that Sixth Circuit Chief Judge Jeffrey Sutton will join us this year and give a talk on the development of constitutional law, the balance of power, and Federalism issues. And we are honored that at least eight other judges from the federal Circuit, District, and Bankruptcy Courts will be attending our lunch this year along with about 100 of our members!

As we start a new FBA year, our chapter will be led by President Britt Cobb (Willey & Chamberlain); President-Elect James Liggins (Warner Norcross + Judd); Secretary Rachel Frank (Springstead Bartish Borgula & Lynch); Treasurer Amy Murphy (Miller Johnson); Vice President of Programs Sean Tilton (Federal Public Defender's Office); and Vice President of Operations Andrew Brege (Rosati Schultz). I will continue to serve the Board this year as our National Delegate, which is the traditional role for immediate past Presidents. Rebecca Strauss (Miller Johnson) filled that role this year and we thank her for her several years of service on the FBA Board.

I also want to publicly acknowledge and thank Britt, James, Amy, Sean, Andrew, Rebecca, and our Young Lawyers Division representatives, Rachel Frank and Emily Rucker (Warner Norcross + Judd), for their time and efforts this year. They were excellent stewards of our membership dues and planned

Continued on next page

WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION
www.westmichiganfederalbar.org

President's Letter

Continued from page 1

and executed interesting programming and networking events. Melissa Rabidoux, our Chapter Administrator, surely worked harder than all of us this year on many things big and small, including the details and execution of our Annual Meeting and Lunch and the Hillman trial advocacy program. This Chapter simply does not run without Melissa's contributions, and we are endlessly grateful for her dedication to the FBA. Finally, a special thank you is due to Charlie Quigg (Warner Norcross + Judd). Charlie volunteered to assume responsibility as our webmaster for our Chapter's website (https://westmichiganfederalbar.org/) and coordinates the publication of this excellent newsletter. Not only has Charlie done a remarkable job improving both communications platforms in his precious free time, he saved our Chapter a significant sum of money by avoiding the use of costly vendors. Thank you, Charlie, for all of your hard work, great attitude, and for making us look so good!

Finally, I sincerely thank the Board for their friendship and advice this year. As a token of my appreciation, I am providing each of them with a copy of Nina Totenberg's new book, *Dinners with Ruth: A Memoir on the Power of Friendships*, a compelling story of her career and 50-year friendship with Justice Ginsburg. Although we haven't known each other nearly that long, I genuinely cherish the relationships we have built while serving together. I look forward to enhancing the professional and personal connections we have made through the FBA. That is, after all, one of the most rewarding benefits of membership and participation in this great organization.

***Chris O'Connor** is the 2022 president of the West Michigan Chapter of the FBA, an Assistant United States Attorney in the Western District of Michigan, and a Deputy Chief of the Criminal Division, supervising the Financial Crimes and National Security Section. He has been a federal prosecutor for 14 years, during which time he has investigated and prosecuted a wide range of crimes, including fraud offenses, money laundering, tax fraud, government program fraud, regulatory offenses, public corruption, violent crimes, and national security offenses. Prior to joining the U.S. Attorney's office, he practiced civil and criminal litigation at Jenner & Block LLP in Chicago.*

WEST MICHIGAN CHAPTER OF THE FEDERAL BAR ASSOCIATION

A professional organization for private and government lawyers who practice in the United States District Court for the Western District of Michigan.

Our goal is to improve the practice of law in our federal courts and foster a positive and collegial relationship among the attorneys and judges who practice law and dispense justice in this district.

Welcoming Ann Filkins as Clerk of Court for the District Court

We are pleased to welcome Ann Filkins as the new Clerk of Court for the Western District of Michigan. Ann's first day in office was September 6, 2022. Her appointment followed the retirement of Tom Dorwin, who served as Clerk of Court since 2016.

Ann joins the federal court from the Kalamazoo County Court system, where she served for over 20 years. Her most recent position was Court Administrator for the 8th District Court, which she held for over six years. Before that, she served at the 9th Circuit Court for 15 years in a variety of roles.

Welcome, Ann and best wishes in retirement, Tom!

What Constitutes "Good Cause" for a Juror's Removal?

By Chris Tracy and Josh Reuter

When it affirmed Judge Jarbou's decision to remove and replace a juror in *United States v. Ozomaro* (No. 21-1329), the U.S. Court of Appeals for the Sixth Circuit answered the question whether a juror may be removed and replaced during deliberations. But more specifically, the Sixth Circuit Court of Appeals clarified the standard of "good cause" that empowers a district court to exercise its discretion to remove and replace a sitting juror.

In *Ozomaro*, the defendant, who eventually proceeded to a jury trial *pro se*, was indicted on one count of possessing with intent to distribute methamphetamine. The court conducted voir dire, which included a series of open-ended questions such as whether anything prevented the jurors "from being fair and impartial to either side" and whether any juror held "negative opinions about police in general or the criminal system as a whole." No juror answered in the affirmative, and neither the Government nor the defendant challenged a juror for cause on those bases. After peremptory challenges, the court empaneled twelve jurors with two alternates.

After two days of trial, the jury began deliberations. Into the sixth hour of deliberations, the court received a jury note, which explained that they could not reach an agreement. The court gave the jury an *Allen* charge (encouraging the jury to reach a verdict), and they returned to deliberations. Without reaching a verdict on the first day, deliberations continued into the following day. However, prior to the jury reconvening for the second day of deliberations, issues arose.

The court staff was informed by a juror that they had observed another juror drinking at lunch during the trial. Another juror called the court's chambers to inquire about the legality of drinking on a lunch break and advised that a juror "openly admitted bias to the Government." The court, upon hearing of such issues, began to separately question each juror to investigate the alleged juror misconduct. In the court's investigation, it discovered that the same juror had been drinking during lunch breaks and making statements about his bias against the police and the Government. Based on the interviews with each juror, and in discovering which specific juror had committed misconduct, the court excused the juror, who was then replaced with an alternate.

Notably, the court did not find that drinking alcohol constituted "good cause" to excuse the juror, given that there was no allegation that the juror had become intoxicated to the point of affecting deliberations. Given the allegations of clear bias on part of the juror towards the police and the Government (on top of the lack of candor by the juror), however, the court determined that there was "good cause" to excuse the juror. After the juror was replaced with an alternate, the court instructed the jury to begin deliberations from the start. Roughly three hours later, the jury returned a guilty verdict. After sentencing, the defendant appealed.

On appeal, the panel addressed the question whether the district court's removal of the problematic juror violated the

Continued on next page

Continued from page 3

defendant's right to a fair and impartial jury. In affirming, the court of appeals began by explaining that Federal Rules of Criminal Procedure 23(b)(3) and 24(c)(1) allow a district court to remove and replace a juror for "good cause" in its sound discretion "whenever facts are presented which convince the trial judge that the juror's ability to perform his duty as a juror is impaired." Although the defendant contended that the district court conducted an inadequate hearing, the Sixth Circuit does not even require a hearing—the investigation and its scope is within the sound discretion of a district court. The only procedural requirement, so to speak, is that a district court have "sufficient information to make an informed decision."

The main issue for the court of appeals, however, was what the "good cause" standard means? Prior to this decision, there was little clarity within the circuit, which left open the question of how to distinguish a juror's beliefs regarding credibility or weight of the evidence from improper bias against a party. Of course, as the court of appeals explained, the former is not a proper basis to remove a juror, but the latter is.

In setting forth the Sixth Circuit's standard for "good cause" in removing a juror, the Court noted the differing approaches throughout the circuits. In the District of Columbia and Second Circuits, "if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request" to remove the juror. The Third and Ninth Circuits follow a similar test, but the possibility regarding the juror's view must be "reasonable." The Eleventh Circuit takes it a step further, allowing a juror to be excused only when "no substantial possibility exists that she is basing her decision on the sufficiency of the evidence," which is essentially a "beyond a reasonable doubt standard."

Turning to the case at hand, the Sixth Circuit officially adopted the "reasonable possibility" standard followed in the Third and Ninth Circuits. In applying this standard to the defendant's case, the court of appeals held that while the problematic juror was clearly the hold out, there was no report that the juror at issue had found specific evidence, a witness, or testimony not credible. Instead, the problem was really that this juror was not candid with the district court and had an improper bias. Thus, the court explained, "The district court was well within its discretion in concluding that there was no reasonable possibility that the discharge stemmed from [the juror's] views of the case," and "the district court had 'good cause'" to remove and replace that juror. The court also explained that when a juror is properly replaced for good cause, reversal is warranted only "on a clear showing that the defendant was prejudiced by the juror's being excused." In finding that the defendant in *Ozomaro* was not prejudiced, the Court considered the length and complexity of the trial, the amount of time the jury had deliberated before a juror was removed, the steps taken to ensure that the alternate was not exposed to extrinsic information regarding the case, and whether the jurors began deliberations anew when the alternate was instituted.

At bottom, the *Ozomaro* decision provides clarity on the issue whether a district court has "good cause" to remove and replace a juror. By adopting the "reasonably possibility" standard, the Sixth Circuit now has a defined test that can be applied to the precarious situation of juror misconduct.

Chris Tracy *is a partner at Warner Norcross + Judd LLP in Kalamazoo. A former federal prosecutor turned litigator, Chris Tracy represents clients from Fortune 500 companies to smaller, locally owned businesses in commercial litigation, real estate disputes, and a variety of civil and white-collar criminal defense matters involving corporate, employment, product liability, environmental, regulatory, and compliance issues.*

Josh Reuter *is an attorney at Warner Norcross + Judd LLP in Grand Rapids. He focuses primarily on real estate, commercial, and tax disputes.*

In Memoriam: Bankruptcy Judge Jo Ann Stevenson

By Jahel Nolan

There is an underlying truth when we lose someone: everyone loses them in his or her own way. On September 9, 2022, when Judge Jo Ann Stevenson passed away, I lost a friend, a colleague, an advisor, and one of my most steadfast supporters and champions. Many people might describe their loss of her in a similar way, but in the end, I can only tell you how her life, and the loss of her, has affected me.

Hon. Jo Ann Stevenson

Jo Ann C. Stevenson was the daughter of Anne Bonomolo and John White. She was born during World War II. Very shortly after returning home from the war, White announced that he had met someone else, leaving her and her mother behind. I believe they never saw him again. Later in life, his other children, Judge Stevenson's half-siblings, found her and welcomed her into the fold. By then, however, her father had died. In the meantime, her mother remarried a wonderful man named Dominick Cacavio, who adopted Jo Ann as a child. The Cacavios had another child, a boy, but he died fairly young, sometime in the 1980s.

The first to go to college on her mother's side of the family, Judge Stevenson enrolled in the Douglass Women's College of Rutgers University in 1960. She majored in French. After graduation, she was employed by Princeton University in the Office of Career Counseling, the Gallup Poll, and as an Assistant Program Director at the Educational Testing Service Law School Administration Test Council. She started her legal career later in life, when she graduated *cum laude* from the Detroit College of Law (now Michigan State University College of Law) in June 1979. She would have been about 37 years old.

During law school she was a member of the National Moot Court Team, the Moot Court Board, and a co-director of the Moot Court Program. She worked for the Riley & Roumell firm in Detroit during law school, and upon graduation, she clerked for the Honorable Vincent J. Brennan on the Michigan Court of Appeals and then for the Honorable Cornelia G. Kennedy on the U.S. Court of Appeals for the Sixth Circuit. Later, she was a Managing Associate at Hertzberg, Jacob, and Weingarten in Detroit. It was from there, in 1987, that she was the first woman in the Western District of Michigan to be appointed to the federal bench.

As a bankruptcy judge, she presided over approximately 40,725 cases. Among the most notable were *In re Grand Traverse Development Co.*; *In re AutoStyle Plastics, Inc.*; *In re Gantos, Inc.*; *In re Shoreham Paper Co.*; *In re Travel 2000*; *In re Newstar Energy U.S.A.*; *In re Newstar Energy of Texas*; *In re Nartron*; *In re U.S. Flow Corporation*; and *In re Broucek*. During her career, Judge Stevenson rendered several hundred opinions and was affirmed 95 percent of the time. Having had a hand in some of those opinions, I remember her telling me that she liked to make literary references in them because it showed that she read things other than legal briefs and case law. In a recent email exchange with Pat Mears, a retired bankruptcy attorney who knew Judge Stevenson, he mentioned that he always enjoyed the literary allusions in her opinions as well as in conversation with her.

During her time on the bench, Judge Stevenson was an active member in many legal organizations like the Women's Lawyer's Association of Michigan, the American Inns of Court, the Joint Steering Committee for the Gender Fairness Task Force, and a Racial/Ethnic Task Force in the Sixth Circuit, to name a few. She also taught Bankruptcy and Reorganization and Debtor/Creditor Relations at Michigan State University School of Law. She was a regular participant on many panels, as part of many conferences, such as the Federal Bar Association Bankruptcy Seminar, the University of Michigan Institute of Public Policy Studies, and the Sixth Circuit Judicial Conference.

Although Judge Stevenson had an impressive legal career and enjoyed her time on the bench, to me, these accomplishments were part of what *described* her, but not necessarily what *defined* her. Her kindness, consideration, character, curiosity, and courage were the essence of who she was. She did not suffer fools, and she did not tolerate duplicity or betrayal. She had her detractors, as we all do, but if you took the time

Continued on next page

Continued from page 5

to get to know her, you realized that her occasionally fierce exterior was not her natural way. It was a construct, put together with slender means. So slender in fact, that she rarely remembered what or who had annoyed her, and rarely held whatever upset her against anyone. More than once she told me she really did not like confrontation and tried to avoid it.

Her generosity was next-level and went beyond the monetary, although there was that too. When I first started working with her, I had a two-year-old child who was prone to tonsilitis. On my first day, I was telling Judge Stevenson that my child had come down with another case of it the day before. Without missing a beat, Judge Stevenson sat me down and very sternly told me that if I ever took my child to daycare when she was sick, or when I knew she shouldn't be there, she would be extremely upset. She drove the point home by telling me that my child always came first, no matter what was going on in the office. I did have to take days off due to a sick child now and again, and true to her word, she always took it in stride. She was never reproachful. I tried to take this kindness into private practice with me, and extend that same grace to anyone, especially women, working for me.

Her thoughtfulness was also extraordinary. Both Scott Dales (her future replacement) and Norm Witte (one of her law clerks) shared examples of being the recipients of her kindness. Scott, before he was Judge Dales, had scheduled an interview for a law clerk position that was coming open with Judge Stevenson (before he clerked for Judge James D. Gregg), but he had to cancel it due to the sudden news that he and his wife would soon welcome a child from South Korea. Two or three days after he cancelled the interview, he received a note from Judge Stevenson congratulating him on his baby and fortifying his decision to cancel the interview in favor of his family. He had not even met her in person yet.

Norm has a similar story. It involves his third wedding anniversary celebration in San Francisco. Although he did not recall telling anyone at the court the specifics of his weekend plans, when they arrived at the hotel, there was a congratulatory gift basket and nice note from Judge Stevenson. I, myself, and my family have been the lucky recipients of numerous thoughtful missives, surprise presents, and even, in the case of the aforementioned tonsilitis-ridden child, an unexpected check here and there while she was in college. Never once would she allow me to pay for lunch when we went out.

I think Norm and I had very similar experiences working with her. When we would be done with a hearing or trial, we would go into chambers and she would say, "Are you thinking of this the same way I am?" and with only minimal discussion, she would say, "Let's start writing." After the first hour or so (depending on the case) we would compare what we wrote, weaving it all into one (almost) complete opinion.

She lived by her own code that she never explained but was unmistakable. She understood what it was like to feel disenfranchised, so she knew if she wanted something she had to work for it. More than once she told me she was well aware that she might not be the smartest person in the room, but she was the hardest worker. Although considerate of other's situations and quick to accommodate them, she was also alert to when her kindness was being taken advantage of and did not hesitate to call someone out for it. Acts had consequences, especially in the debtor/creditor clashes that came before her. If a party needed something and it was fair and reasonable, most likely, they got it, but if they were less than honest or fomenting litigation, they didn't get away with it.

Continued on next page

She also had a wonderful sense of humor and loved to laugh. Every so often she could really deliver a zinger. After reading another judge's opinion in which he compared the remand of his decision to the persecution suffered by Galileo, Judge Stevenson came into my office, holding the opinion and said, "Galileo? Galileo? I knew Galileo, and you, sir, are no Galileo."[1]

Judge Stevenson was an avid reader, mostly of higher learning and the classics. Although she was always reading something, the books that stand out in my mind were *The Art of War* by Sun Tzu and *A Member of the Wedding* by Carson McCullers. One is the detailed explanation and analysis of fifth century Chinese military, and the other is a Southern Gothic novel about a young girl's fascination with her older brother's wedding that took the author five years to complete. Varied, but not exactly light, reading. She was always interested in life. If there was something unfamiliar to her, she would ask many questions and perhaps do a little independent research. She loved studying languages and learning about different cultures through travel.

During her final years on the bench, she started having some serious health scares which precipitated her announcement to retire on her 65th birthday. The first illness required her to go through a lot of radiation treatments, which she went to during a break at work, returning to the office when finished. It started with a regimen of 24 treatments, but, by the time she was done, she had gone through about 40. She half- jokingly said to me one day, "I think they keep increasing the number of treatments because I am tolerating them so well." In between her health issues, she was still able to travel and enjoy her life, handling the highs and the lows with equanimity. But when the Stage 1 lung cancer quickly progressed to Stage 4, and the experimental drug was zapping her strength and ability to eat, she again faced the future with great courage. True to form, she bought a journal-type book entitled, "You're Dead, Now What?" and started filling it out so that Marshall, her husband, and her son, Kenneth, would have an easier time when she passed.

Although the end was mercifully quick, it was also unexpected. Her body was weakening but her mind was sharp until the end. I'm sure she was not looking forward to her slow walk over the finish line, but her concern was more for her family than for herself and doing for them what she felt they needed from her.

Maybe it was due to my training as her law clerk, but when I heard she was gone, a literary reference came to my mind. It was of a posthumously published poem by Emily Dickinson: "Because I could not stop for Death – He kindly stopped for me." I just hope Judge Stevenson was relieved to see him.

Jahel Nolan *recently retired as a law clerk to Chief Judge Scott Dales of the U.S. Bankruptcy Court for the Western District of Michigan and previously served as a law clerk to Judge Stevenson.*

1 For those unfamiliar with this paraphrase, it comes from the 1988 Vice Presidential debate between Senator Lloyd Bentsen and Senator Dan Quayle during which Quayle likened himself to John F. Kennedy. Senator Bentsen, then 67 years old, compared to Dan Quayle's 41, said, "Senator, I served with Jack Kennedy, I knew Jack Kennedy, Jack Kennedy was a friend of mine, Senator, you are no Jack Kennedy."

Passing the Chief Judge's Gavel

On July 7, 2022, the Court and the FBA celebrated the passing of the chief judgeship of the Western District from Judge Robert Jonker to Judge Hala Jarbou. By statute, Judge Jonker's term as chief judge of the district was seven years. Thank you, Judge Jonker, for your outstanding stewardship, and congratulations, Judge Jarbou!

The ceremony was well attended by members of the bar and bench as well as court staff.

Retired Magistrate Judge Hugh Brenneman delivered remarks regarding the district's history.

Judge Jarbou presented Judge Jonker with a signed copy of *Just Help!* by U.S. Supreme Court Justice Sonia Sotomayor.

Judge Jonker reflected on the transition of the chief judgeship to Judge Jarbou.

District Court Roundup

By C.J. Schneider and Richard Perez

Michigan Department of Environment, Great Lakes, and Energy v. STS Hydropower, LLC
1:22-CV-269, 7/1/2022
Hon. Robert Jonker

Plaintiffs, the Michigan Department of Environment, Great Lakes, and Energy and the Michigan Department of Natural Resources, brought suit in state court against hydropower and other renewable energy companies alleging that defendants grossly mismanaged their drawdown of Morrow Lake for repairs of Morrow Dam, causing environmental harm. Following removal, plaintiffs moved to remand for lack of subject matter jurisdiction.

The Court concluded that Plaintiffs' claims did not raise substantial question of federal law. The Court also held that the Federal Power Act did not provide complete preemption and the balance of state and federal powers favored resolution in state court. The Court considered whether exercising jurisdiction would "herald a potentially enormous shift of traditionally state cases into federal courts" and reasoned that this is exactly what Defendants' theory would do. The Court ultimately concluded that the case should be remanded to state court.

AAGs Megen Elise Miller and Kelly Marie Drake represented the state agencies. Gabriel Esteban Bedoya, Jonathan Ajlouny, Rian Cierra Dawson, and Peter Ruddell of Honigman LLP represented Defendants.

Balow v. Michigan State University
1:21-cv-44, 8/8/2022, Hon. Hala Jarbou

Plaintiffs, members of the Michigan State University varsity women's swimming and diving team, sued the university when it announced in October 2020 that, due to budget constraints, it would discontinue its men's and women's varsity swimming and diving programs. Plaintiffs claimed that Defendant MSU discriminated against women in violation of Title IX, 20 U.S.C §1681 *et seq*.

The Court granted Plaintiffs' preliminary injunction in part and ordered Michigan State to propose a Title IX compliance plan. The Court held that Plaintiffs had shown a substantial likelihood that the participation gap at MSU is higher than a viable varsity women's swimming and diving team.

The Court also held that Plaintiffs met their burden of showing irreparable harm, reasoning that Plaintiffs who remained at MSU would lack an opportunity to compete on a varsity team at a time when their school appears to offer proportionally more intercollegiate athletic opportunities for men than for women. Although the cost to MSU in reinstating the team would be close to $1 million per year, the public interest would be served by reducing discrimination in the provisions of athletic opportunities for women.

Continued on next page

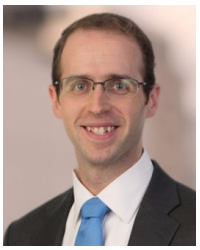
Lori Bullock and Joshua Hammack of Bailey & Glasser LLP; Danya Keller and Jill Zwagerman of Newkirk Zwagerman PLC; and Brian Koncius of Bogas & Koncius represented Plaintiffs. Ashley Higginson, Scott Eldridge, Brian Schwartz, and Erika Giroux of Miller Canfield; AAG Elizabeth M. Watza; and Uriel Abt of the Michigan State University Office of the General Counsel represented Defendants Michigan State University and Michigan State University Board of Trustees.

Keweenaw Bay Indian Community v. Khouri
2:16-CV-121, 8/11/2022, Hon. Paul Maloney

Plaintiff, Keweenaw Bay Indian Community, a federally recognized tribe, sued the Treasurer of the State of Michigan, seeking declaratory and injunctive relief and damages for Michigan's enforcement and collection of state taxes that allegedly violated federal law. Judge Maloney granted the tribe summary judgment and enjoined Michigan from enforcing its use tax statute, as currently written, against the tribe and its registered members residing in "Indian Country." Michigan moved for post-judgment relief from the injunction.

The Court granted in part and denied in part Michigan's motion. The Court reasoned that it did not commit a clerical error when it issued the injunction against the State but would grant the State relief by amending the injunction to apply only to the Office of the State Treasurer and those assisting the Office in the collection of taxes. The Court reasoned that the amendment to the injunction was necessary to avoid Eleventh Amendment immunity.

Vernle Durocher of Dorsey & Whitney LLP represented Keweenaw Bay Indian Community. AAGs Jaclyn Levine, Kelly Drake, and Laura LaMore represented 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 *is an associate at Miller Johnson in Grand Rapids. His litigation practices primarily focuses on commercial, governmental, and criminal litigation in all phases of disputes and investigations*

Appellate Roundup

Noteworthy Cases from the Sixth Circuit and Beyond

By Ashley Yuill

Lindke v. Freed
37 F.4th 1199 (6th Cir. 2022)

Departing from other circuits' approach to determining state action through social media, the Sixth Circuit held that a Michigan city manager was not a state actor when he blocked a citizen from his public Facebook page. The manager had posted both personal and government related content on his page, and blocked a commentator who repeatedly expressed their displeasure with his pandemic responses. When the disgruntled citizen brought a § 1983 action asserting a First Amendment violation, the manager prevailed on summary judgment based on the lack of state action. In a published decision, the Sixth Circuit affirmed.

The Court had to draw a new line through the "murky" caselaw determining when a public official acts personally and when he acts officially. The Sixth Circuit walked through examples where state action would be found in this context; for example, if a local law required a County Sheriff to manage an official Facebook account that residents could follow for public safety announcements, the management of that page would be attributable to the state. In this case, the Court held that the manager's Facebook activity was not state action because his page did not derive from the duties of his office or depend on his state authority.

Philip L. Ellison of Outside Legal Counsel PLC represented the plaintiff-appellant. Victoria R. Ferres of Fletcher, Fealko, Shoudy & Francis PC represented the city manager.

Fulkerson v. Unum Life Ins. Co. of Am.
36 F.4th 678 (6th Cir. 2022)

In clarifying the scope of an insurance policy exclusion, the Sixth Circuit recognized that "crimes have long come in many shapes and sizes." The insured died in a car crash while speeding and driving recklessly, and the defendant insurer denied accidental death benefits under an exclusion for losses resulting from the commission of a crime. After the district court granted summary judgment in the insurer's favor, the Sixth Circuit was asked a seemingly simple question: what is a crime?

In a published decision, the Court relied on dictionaries, precedent from other circuits, and state laws to offer a definition: a "crime" is "an illegal act for which someone can be punished by the government." The Sixth Circuit rejected the plaintiff's contention that "crime" refers only to serious offenses, like felonies; although reckless driving may be a less serious offense than premeditated murder, the Court reasoned, it is still punishable conduct prohibited by law. Declining to resolve every possible application of the policy exclusion, however, the Sixth Circuit suggested that offenses like jaywalking or de minimis speeding may not reasonably trigger these exclusions. But it decided to save those questions for another day.

Brett K. Bacon of Frantz Ward LLP represented the insurance company. Robert P. Rutter of Rutter & Russin LLC represented the beneficiary.

In re E.I. DuPont de Nemours & Co. C-8 Pers. Inj. Litig.,
No. 22-0305, 2022 WL 4149090
(6th Cir. Sept. 9, 2022)

The Sixth Circuit recently granted interlocutory review of an Ohio district court's decision to certify one of the largest class actions ever. In *Hardwick v. 3M Co.*, the district court certified a class of nearly all 11.8 million residents of Ohio affected by PFAS contamination even at imperceptible levels. The defendants petitioned to the Sixth Circuit for interlocutory review, which was granted. Interlocutory review of a class-certification decision is an extraordinary procedure, the Court recognized, but "this is an extraordinary class."

Although the underlying merits of the issues will be decided by a future panel, the Sixth Circuit gave some hints about its views; it expressed skepticism about standing and commonality, and foreshadowed its inclination to hold that a Rule 23(b)(2) class must be cohesive. The merits decision in this case will certainly be one to look out for.

A cast of thousands represented the parties to the appeal.

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