MICHIGAN DEFENSE
QUARTERLY

Volume 30, No. 1 August 2013

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MCR 2.302(B)(1): A Potential Relevancy Screen to Prevent Turning Over Sensitive Corporate Documents During Discovery

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Executive Summary

Michigan courts have long recognized that corporate rules, procedures, handbooks, manuals, and other internal documents setting forth internal corporate policies cannot be used to establish a standard of care or legal duty in a negligence action. Instead of waiting until trial to lodge admissibility challenges, practitioners should proactively use MCR 2.302(B)(1)'s relevancy requirement, along with supporting Michigan case law, to try to prevent the production of these types of documents in the first instance.

Introduction

For more than a century, Michigan courts have consistently held that a corporate defendant's internal rules, manuals, guidelines, written procedures, and handbooks are inadmissible to prove the standard of care or to establish any duty in a negligence action.[1] Inadmissibility at trial does not, however, prevent a plaintiff from potentially obtaining such inherently sensitive documents during the course of discovery, and once released into the hands of plaintiffs, defendants have little control over what happens to their sensitive internal rules, even with the issuance of a protective order. It has become standard practice for plaintiffs' attorneys to seek such sensitive proprietary documents during discovery; such documents may be embarrassing or otherwise sensitive, and once released, could be circulated within the plaintiffs' bar to potential detrimental effect for corporate defendants.

A potential solution and way to prevent disclosure of sensitive internal corporate documents lies in MCR 2.302(B)(1), which imposes a relevancy threshold as to what can be obtained during discovery. This article explores MCR 2.302(B)(1) and related case law as a tool for attorneys to utilize in order to entirely prevent disclosure of a corporate client's internal rules, handbooks, manuals, or other written procedures. The rule represents a potentially valuable tool for attorneys seeking to prevent plaintiffs from obtaining and using for their own purposes sensitive internal corporate rules, handbooks, guidelines, and other documents.

Policy Considerations

The rule that internal guidelines, rules, and other corporate policies cannot be used to establish a standard of care or legal duty is logically compelling — if corporations knew that such documents establishing safety procedures could be forced to be turned over in discovery and later used against them as evidence of negligence through proof of non-compliance therewith, there would be little incentive for corporations to establish such safety procedures in the first place.[2]

As the Michigan Supreme Court in the foundational case of *McKernan v Detroit Citizens Railway Co* recognized, "[I]t would be unfortunate if such a practice were to be penalized by permitting the fact of extraordinary care to increase the responsibility imposed by law, the natural if not inevitable consequence of which would be to induce reluctance to adopt new measures and regulations."[3] And, much more recently in the context of a retailer's internal rules, our Supreme Court noted that:

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> Imposition of a legal duty on a retailer on the basis of its internal policies is actually contrary to Public Policy. ***Such a rule would encourage retailers to abandon all policies enacted for the protection of others in an effort to avoid future liability***.[4]

Thus, preventing parties from using internal rules or guidelines to establish a standard of care or legal duty actually encourages greater self-imposed safety precautions, because corporations can impose such internal rules without fear that they may later be used against them to establish an elevated standard of care.

The policy rationale behind the prohibition on the use of internal policies and procedures in establishing a standard of care or legal duty is closely linked to the policy undergirding MRE 407, the exclusion of evidence of subsequent remedial measures. As the Michigan Supreme Court held in *Smith v ER Squibb and Sons, Inc*:

> Exclusion under [MRE 407] restates a basic tenet which has long been accepted in Michigan. It encourages persons to improve their products, property, services and customs without risk of prejudicing any court proceeding and consequently delaying implementation of improvements.[5]

Logically, if we want companies to undertake greater safety precautions above and beyond their legal duties, they should not be penalized for undertaking subsequent remedial measures or for imposing stringent internal rules and regulations.

Reading MCR 2.302(B)(1) as imposing a relevancy threshold as to such corporate rules, guidelines, policies, handbooks, and other documents similarly encourages companies to implement their own safety rules and procedures, because they can do so without fear that they may have to subsequently turn them over to plaintiffs eager to use such documents for their own devices.

The Underlying Rule, MCR 2.302(B)(1)

Although generally allowing for expansive discovery, MCR 2.302(B)(1) does impose a notable limitation. It provides that only *relevant* matters are discoverable, specifically stating that:

Thus, preventing parties from using internal rules or guidelines to establish a standard of care or legal duty actually encourages greater self-imposed safety precautions, because corporations can impose such internal rules without fear that they may later be used against them to establish an elevated standard of care.

> Parties may obtain discovery regarding any matter, not privileged, ***which is relevant to the subject matter involved in the pending action***, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Thus, under the current formulation of the court rule, a plaintiff can obtain discovery on any matter if it is "relevant" and also "reasonably calculated to lead to the discovery of admissible evidence." While MCR 2.302(B)(1) is certainly formulated to permit expansive discovery, the relevancy requirement cannot be ignored; it can potentially be invoked by counsel to perform a gatekeeper function, completely preventing the turnover of documents that are proven to be *ir*relevant.

Corporate Rules Cannot Be Used to Establish a Legal Duty or Standard of Care: A Century of Consistent Case Law

A particularly germane area of application for the MCR 2.302(B)(1) relevancy screen lies in internal corporate training manuals, rules, handbooks, guidelines, and other internal operating procedures. Michigan courts have uniformly, consistently, and for over a century held that such documents are not in any way relevant to establish, or as evidence of, a standard of care or legal duty in a negligence action. In *McKernan*, the Supreme Court held that "whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party."[6]

The *McKernan* Court's holding has been largely consistently followed to this day. For example, the Court of Appeals in *Gallagher v Detroit-Macomb Hosp Assoc* held that the defendant-hospital's internal rules and regulations were properly excluded by the trial court because they did not establish the applicable standard of care.[7] And in *Zdrojewski v Murphy*, the Court of Appeals recently held again that the internal policies of an institution are irrelevant and simply cannot be used to establish a legal duty in a negligence claim.[8]

Contrary to the generally held rule, the Court of Appeals in *MacDonald v*

PKT, Inc used evidence that defendant Pine Knob had formulated policies to deal with sod-throwing incidents at outdoor concerts to conclude that the defendant had a duty to protect against such incidents.[9] However, another panel of the Court of Appeals quickly called the logic of using internal policies to establish a duty into question,[10] and ultimately, the Court of Appeals' *MacDonald* opinion was reversed by the Supreme Court.[11]

Recently, the Court of Appeals again attempted to stray from the century-old ironclad rule that internal corporate rules cannot be used to establish a standard of care, holding in *Jilek v Stockson*, "that while internal policies and guidelines do not in and of themselves set the standard of care, they should be admitted as long as they are relevant to the applicable specialty's standard of care and to the injury alleged."[12] This attempt to carve out an exception did not last long, however, as the Supreme Court peremptorily reversed the Court of Appeals, concluding that the trial court did not abuse its discretion in excluding the proposed internal policy documents proffered as evidence of a standard of care and adopting the reasoning of Judge Bandstra's dissenting opinion.[13] Thus, the most recent isolated attempt by the Court of Appeals to weaken the long-held *McKernan* rule was completely vaporized, and it remains the rule that the internal policies and procedures of a corporate defendant cannot be used as evidence of or to establish a standard of care or legal duty.

The MCR 2.302(B)(1) Relevancy Threshold in Action

In many cases, courts have not addressed whether internal corporate manuals, rules, procedures, and other documents are admissible until the trial stage.[14] However, as discussed above, ultimate admissibility at trial does not prevent a savvy plaintiff from seeking such documents during discovery. Thus, the MCR 2.302(B)(1) relevancy screen can step in to fill the gap.

In various contexts, Michigan courts have recognized a relevancy threshold in the discovery rule and have consequently held that irrelevant documents are undiscoverable. In *Hartmann v Shearson Lehman Hutton, Inc*, for example, the Court of Appeals held that because the defendant's internal policies were not relevant to the existence of a duty or any question of negligence, they were not discoverable.[15] And, despite the fact that it was decided under the previous "good cause" discovery standard, *Wilson v WA Foote Memorial Hosp* affirmed the denial of discovery of the defendant's internal guidelines, because "[t]he trial judge properly concluded that the internal regulations of this hospital do not establish the applicable standard of care."[16]

In other situations, courts have also held that if the documents or information sought in discovery is not relevant, it is simply not discoverable. For example, in *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, the Court of Appeals held that information about hospital reimbursement amounts from providers of health and workers' compensation coverage was not relevant to determining how much hospitals could charge insurers for services rendered to no-fault insureds, and therefore, the information was not discoverable.[17] And, in *Baker v Oakwood Hosp Corp*, the court held that documents relating to an unrelated abortive research project were not relevant pursuant to MCR 2.302(B)(1), and therefore, the trial court abused its discretion in ordering their production.[18] Finally, in *Pythagorean, Inc v Grand Rapids Twp*, the Court of Appeals again imposed a relevancy threshold, reversing a circuit court order denying a motion to block depositions and holding that the information sought failed the relevancy test of MCR 2.302(B)(1).[19] This strong line of authority, combined with the court rule itself, gives practitioners solid ground for lodging relevancy challenges when confronted with plaintiffs seeking sensitive and potentially damaging internal documents during discovery.

Conclusion

Michigan appellate courts have repeatedly recognized that MCR 2.302(B)(1) contains a relevancy threshold test, and where documents sought are not relevant, they are simply not discoverable. This is of particular utility to practitioners seeking to prevent turning over sensitive corporate rules, procedures, handbooks, manuals, or other internal documents, as Michigan courts have long recognized that such materials cannot be used as evidence of or to establish a standard of care or legal duty in a negligence action; they are simply not relevant. Instead of waiting until trial to lodge admissibility challenges, practitioners can proactively use MCR 2.302(B)(1) to seek to prevent turning over internal rules and procedures in the first place, thus preventing plaintiffs from going on fishing expeditions and potentially misusing such sensitive corporate documents.

Reading MCR 2.302(B)(1) as rendering the irrelevant rules, policies and procedures of a private entity non-discoverable in a negligence action also supports broadly held policy goals. If those corporate documents were relevant and discoverable, there would be no incentive for corporations to establish strict internal safety rules, because they could be held to a much higher and difficult standard of care. Thankfully, the MCR 2.302(B)(1) relevancy threshold encourages, or at least does not punish, corporate defendants who choose to establish their own rules and procedures, as such internal

documents can potentially be completely kept out of plaintiffs' hands on relevancy grounds.

Endnotes

1. See *McKernan v Detroit Citizens Street Ry Co*, 138 Mich 519, 530; 101 NW 812 (1904); *Zdrojewski v Murphy*, 254 Mich App 50, 62-63; 657 NW2d 721 (2003); *Gallagher v Detroit-Macomb Hospital Assoc*, 171 Mich App 761, 766; 431 NW2d 90 (1988).
2. See *Premo v General Motors Corp*, 210 Mich App 121, 124; 533 NW2d 332 (1995) ("To impose liability upon an employer who, by means of work rules, policies, etc., undertakes the problem of alcohol use and/or abuse is clearly against public policy and would encourage employers to abandon all efforts which could benefit such employees in order to avoid future liability.")
3. *McKernan*, 138 Mich at 527.
4. *Buczkowski v McKay*, 441 Mich 96, 99, n. 1; 490 NW2d 330 (1992) (emphasis added).
5. *Smith v ER Squibb and Sons, Inc*, 405 Mich 79, 92; 273 NW2d 479 (1979); see also *Downie v Kent Products, Inc*, 420 Mich 197, 211; 362 NW2d 605 (1984) ("The more important ground for excluding [subsequent remedial measures] evidence 'rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.'"), quoting Advisory Committee Notes, FRE 407.
6. *McKernan*, 138 Mich at 530.
7. *Gallagher v Detroit-Macomb Hosp Assoc*, 171 Mich App 761; 431 NW2d 90 (1988).
8. *Zdrojewski*, 254 Mich App at 62-63; see also *Transportation Insurance Co v Detroit Edison Co*, 2003 WL 22956418, at *2 (2003), holding that "[i]t is well settled in Michigan that internal company manuals, guidelines or rules are not admissible to establish the standard of care in a negligence action."
9. *MacDonald v PKT, Inc*, 233 Mich App 395; 593 NW2d 176 (1999).
10. See *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 682; 593 NW2d 578, 588 (1999) ("We find the consideration in *MacDonald* of the defendant having formulated policies to deal with sod-throwing incidents to be questionable.")
11. *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).
12. *Jilek v Stockson*, 289 Mich App 291, 314; 796 NW2d 267 (2010).
13. *Jilek v Stockson*, 490 Mich 961; 805 NW2d 852 (2011).
14. See, e.g., *Premo*, *supra*; *Gallagher*, *supra*; *Zdrojewski*, *supra*, all addressing admissibility at trial rather than whether internal corporate rules, manuals, etc. are discoverable.
15. *Hartmann v Shearson Lehman Hutton, Inc*, 194 Mich App 25; 486 NW2d 53 (1992).
16. *Wilson v WA Foote Memorial Hosp*, 91 Mich App 90, 95; 284 NW2d 126 (1979).
17. *Mercy Mt Clemens Corp v Auto Club Ins Ass'n*, 219 Mich App 46, 55; 555 NW2d 871 (1996).
18. *Baker v Oakwood Hosp Corp*, 239 Mich App 461; 608 NW2d 823 (2000).
19. *Pythagorean, Inc v Grand Rapids Twp*, 253 Mich App 525; 656 NW2d 212 (2002).