



Warner Norcross + Judd LLP

MEMORANDUM

TO: Michigan Radiological Society Board of Trustees
Shannon Sage, Executive Director

FROM: James G. Cavanagh

DATE: September 24, 2024

RE: **Legislative Report**

OVERVIEW

With a close election looming to determine which party will control The Michigan House of Representatives, leadership of that Chamber has scheduled only one session day (September 25) before November. The Senate on the other hand, will meet periodically. Currently, Democrats hold a slim 56-54 majority in the House and Republican leaders believe they can flip a few seats to once again take control of that Chamber. Control of the Senate will remain in the hands of the Democrats as Senators do not face the voters until 2026. Polling indicates the Presidential race is very close. However, since President Biden decided to not seek re-election and since the nomination of Vice President Harris to be the Democrats' standard bearer, the race has narrowed dramatically. As candidates from both parties seek victory, don't look for much substantive action on policy until "lame duck" session.

LEGISLATION

Scope of Practice:

Last April, Senator Jeff Irwin (D-Ann Arbor) introduced SB 279, which is a reintroduction of last session's SB 680. The bill has bipartisan co-sponsorship and has been referred to the Senate Committee on Health Policy. This legislation, in essence, allows nurse practitioners to practice medicine by granting them authority to diagnose medical conditions and prescribe controlled substances without being under the supervision of a physician. It also specifically allows nurse practitioners to engage in "ordering, performing, supervising and *interpreting* laboratory and imaging studies."

The Committee held a hearing on the bill, last spring. Physician groups including MRS spoke out against the measure. Due to that opposition it now appears the bill will die at the end of this session which will be late December.

Physician-Led Patient Care Teams:

Rep. Alabas Farhat (D-Dearborn) has introduced HB 4472, which would establish and mandate practice agreements for physician assistants and nurse practitioners. The agreements call for a patient care team led by a physician or physicians. The legislation was introduced at the

request of Michigan State Medical Society and is supported by physician specialty groups. It is now with the House Committee on Health Policy where it has stayed since its introduction in April. The introduction of this bill was a counter-offensive by MSMS and physician groups to the nurses' efforts to legislate a medical degree.

HB 4015, Insulin Co-Pay:

Sponsored by Rep. Jennifer Conlin (D-Dexter), places a limit on the co-pay of Insulin at \$35 for every 30-day supply. This bill was reported from the House Committee of Insurance and Financial Services to the floor of the House in substituted form.

SB 27, Mental Health Parity:

Sponsored by Sen. Sarah Anthony (D-Lansing), requires health insurers to give equal coverage for behavioral health and substance use disorder services as that given for physical health. Much of this is a codification of federal law. The bill has passed the Senate and House was signed by the Governor and is now Public Act 41 of 2024.

OTHER DEVELOPMENTS

Court Decisions Effecting Physician Liability in Medical Malpractice Actions:

This summer the Michigan Supreme Court issued two rulings having a direct effect on physician liability in medical malpractice actions. In *Daher v Prime Healthcare Services—Garden City* the Court ruled that Michigan's Wrongful Death Act (WDA) does not allow for the recovery of lost future earnings.

In *Daher*, the parents of a deceased child brought a medical malpractice action pursuant to the WDA claiming the defendants failed to treat and diagnose bacterial meningitis in their child. The parent's complaint sought damages which included the defendant child's lost future earnings. The plaintiff's expert witness estimated those future earnings to be \$11 million and \$19 million.

The Michigan Supreme Court agreed to hear the case and decide the question of lost future earnings because there were past decisions of the Court of Appeals which conflicted on the matter. Those conflicting decisions were based on the Legislature's amendments to the WDA. In 1985 legislative amendments to the WDA added another type of damage that could be recovered by a plaintiff, loss of financial support. The Supreme Court concluded that since the legislature did not provide for loss of future earnings at that time, it showed that lawmakers specifically excluded loss of future earnings as another component of damages. In essence, a deliberate exclusion of loss of future earnings as a component of damages.

This decision is very important, especially coming from a Court whose majority lean to the side of plaintiffs. The decision will substantially reduce the amount of damages a plaintiff can seek in WDA actions. It limits recovery of future earnings to *only the financial support* the deceased

would have provided his/her beneficiaries and *not* loss of *wage-earning capacity* that the decedent could have earned over his/her lifetime.

In *Danhoff v Fahim*, Lynda Danhoff filed a medical malpractice claim against Daniel Fahim M.D. and others in the Oakland County Circuit Court. Her husband, Daniel Danhoff filed a consortium claim. Dr. Fahim and others performed a surgical procedure on the plaintiff known as extreme lateral intrabody fusion. After the surgery the plaintiff experienced complications including pain, fever, and blood pressure problems. A CT scan revealed that there were particles outside the plaintiff's colon and that she would had to have another surgical procedure. In fact, the plaintiff would have four more surgeries to correct the perforated colon. As a consequence, Lynda Danhoff filed this action.

The trial Court found that the affidavit of plaintiff's expert witness was not sufficiently reliable to admit his testimony because it did not cite any published medical literature or other authority to base his opinion that the standard care had seen breached. Plaintiff appealed to the to the Michigan Court of Appeals, but that Court affirmed the trial Court's decision. The plaintiff then sought relief from the Michigan Supreme Court. The Supreme Court by a 5-2 majority, Justice Bernstein concurring, reversed the decision of the trial court and the Court of Appeals. The Supreme Court held that the trial court abused its discretion by inadequately assessing the reliability of the standard of care expert witness without appropriately analyzing the proposed sections of the reliability factors mandated by the statute.

The court's decision in essence, makes it *somewhat easier for standard of care expert evidence to be admitted* in medical malpractice actions.

Many thanks to Dr. Leah Davis who has been very active in making all of us aware of these developments especially physician liability.

MRS Public Relations Task Force:

As part of the MRS Legislative effort, a public relations firm has been engaged to keep educating legislators and the public in general, about the practice of radiology and the need to have qualified people interpret images. Market Resource Group (MRG) has developed effective messaging to inform decision makers about the perils of SB 279, the need for HB 4472 and what it takes to become a radiologist. To combine and expedite this effort a Working Group has been appointed to work with MRG and act as liaison for the Board of Trustees. Group members include Legislative Committee Co-Chairs Doctors Joe Junewick and Leah Davis, MRS President, Dr. Rocky Saenz, Dr. Michael Hicks, Dr. Sonia Somant, and MRS lobbyist Jim Cavanagh.

Mandating Insurance Coverage for Diagnostic Mammograms:

The MRS Legislative Committee with Board approval, will be seeking legislation next session which would mandate insurers to cover diagnostic mammograms for Michigan patients. The Committee will be enlisting the assistance of breast radiologists toward this effort and will be seeking a coalition with patient advocacy groups such as the American Cancer Society. The Committee has been reviewing legislation from other states many of which have become law.

Legislation to mandate insurance coverage will be strongly opposed by Blue Cross/Blue Shield, along with other insurers and the Economic Alliance. Nevertheless, this is a patient health and safety issue that needs to be addressed. Meantime, potential bill sponsors are being approached as well as efforts to gain support from potential allied groups.

Many thanks to Dr. Leah Davis, the Legislative Committee and breast radiologists for their leadership on this issue.

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