

# BAR BRIEFS

Official Publication of the Macomb Bar Association

May 2024



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# Play Ball

*By Ryan Zemke, President of the Macomb Bar Association*

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As the calendar moves through spring and towards the beginning of summer many of us look forward to different things. For some of you it is the warm weather, others the end of school and maybe some time for family vacations, for others they are looking forward to the installation of our next MCBA President Dana Freers (save the date – July 18th), and maybe some of you are looking forward to some leisure time by the pool or on a golf course. No matter what you may be looking forward to, we all can agree that getting to hang out and have some fun outdoors after a long Michigan winter (and then first spring, second winter, second spring, second winter) is just what the doctor ordered.

For me, one of the best parts of summer is the annual Mount Clemens Lawyers Softball League. This long running league is back again and gives all of us a chance to get out and enjoy the weather, our teammates, our competitors, maybe some adult drinks, and hope that nobody gets injured trying to relive their glory days.

League commissioner (and past MCBA President) Charles Trickey III deserves an immense amount of credit for the continuity and success of the league over the past few years – dealing with fields, insurance, game balls, weather, attorneys who love to argue everything from motions to balls and strikes (i.e. past MCBA President Stephen Becker), and setting up post-game get togethers and sponsors that make the season a joy for all involved.

There is no need to play to enjoy the fun – come out and watch your favorite barristers compete and develop relationships within the local legal community. Several young lawyers and law students have developed relationships with other attorneys that have led to future internships or employment as a direct result of their involvement with the league.

Each week has an event at a local watering hole (sponsors reach out to Commissioner Trickey for opportunities) where everyone can sit down and relax and network in a casual setting – not to mention find enough liquid elixir to allow you to get up and move again once your body cools down from the competition.

The rules are tailored to make the games welcoming for all skill levels and the league is always looking for new players.

If you are interested in playing, please contact me and I will assist you with getting placed on a team. The league occurs on Wednesday nights at the fields behind the Mount Clemens Ice Arena on Groesbeck and the league runs from July through August depending on how the weather plays out.

Don't worry if you cannot make every game – everyone is busy, and subs are always needed. We may not be as skilled as we once were, and we may not make millions like the pros, but we definitely have more fun no matter what the outcome may be. I look forward to seeing you on the field in the future.

**The rules are tailored  
to make the games  
welcoming for all  
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league is always looking  
for new players.**



# Michigan's Open-and-Obvious Defense Slips... and Falls

By Marianne Grano, Attorney at KHVPF



For over a century, Michigan employers and property owners were not liable for personal injuries to customers, employees, or guests stemming from an “open and obvious” condition of the property. Thus, for instance, a person slipping on an ice-covered parking lot would lose a negligence case as a matter of law; as the 2012 iteration of the Michigan Supreme Court put it, “Michigan, being above the 42nd parallel...is prone to winter,” ice is “a typical hazard confronted under ordinary circumstances,” and thus open, obvious, and foreseeable.

All this changed in the summer of 2023, with the Michigan Supreme Court reconsidering the “open-and-obvious doctrine” in *Kandil-Elsayed v F & E Oil, Inc.* The case involved precisely the fact pattern that, 11 years ago, was an open-and-shut case: a customer slipping and falling on the ice at a gas station. In a 5-2 opinion, the Court overturned the open-and-obvious doctrine, holding that plaintiffs can now recover for injuries from open and obvious hazards on property. Those cases can now go to the jury to decide, although the jury could still reduce the plaintiff’s recovery based on his or her proportion of fault. For example, a jury could find that, in the icy parking lot example, the customer was 90% at fault for failing to watch out for the ice, and award her only 10% of her damages. Even so, since these cases can now go to a jury, plaintiffs are more likely to recover—and property owners, including businesses, are more likely to be forced to pay out.

What does this decision mean for businesses? First, it’s important to note that the decision applies to customers, employees, contractors, or *anyone else* who visits a location for business purposes. From each of these categories of visitors, Michigan is likely to see a steep rise in slip-and-fall and other actions based on “premises liability,” meaning liability for hazards on property. States that have abolished the open-and-obvious doctrine as a bar to

recovery generally have more premises liability cases. For example, Connecticut, which has not barred these types of suits since 2008 – and which, like Michigan, has rough winters – has the third-highest number of premises liability cases in the country, 2,023 in 2022, even though it ranks 29th in population. Michigan, which has very few premises liability cases now, could similarly see thousands of cases, and many of Michigan plaintiff’s law firms have already started advertising their services for slip-and-fall cases. The good news for businesses is that the average payout from this type of lawsuits is small, typically \$10,000-\$50,000. Also, there are several simple steps businesses can take to minimize liability from slip-and-fall accidents:

- Ensure maintenance staff are aware of a higher need to protect against dangerous conditions that could result in a slip-and-fall.
- Recognize that placement of signs alerting visitors of the danger, though helpful, won’t guard against liability; the danger, be it a wet floor or icy lot, needs to be quickly eliminated.
- Consider increasing ice and snow removal.

In addition to these measures, look at your business’s liability insurance policies to see what protections are afforded for premises liability. An attorney can assist in this regard, or other questions related to slip-and-fall liability, or premises liability in general.

*Marianne Grano concentrates her legal work in commercial and municipal law. She graduated Magna Cum Laude from Wayne State University Law School, where she served as Senior Articles Editor for the Law Review. The Law Review also published her work entitled “Divine Disputes: Why and How Michigan Courts Should Revisit Church Property Law.” During law school, Ms. Grano completed externships in the Michigan Supreme Court and the State Appellate Defender’s Office. She received an instructor’s award as the top legal writing student in her section. She was inducted into the Order of the Coif for her academic achievement.*



# Prepare, Protect, Prevail: Navigating a Backup Disaster Recovery Plan

By Cheyenne Harden, Cyber Protect, LLC



Disasters are inevitable, but the extent of their impact doesn't have to be. Whether it's natural catastrophes, technological meltdowns, or human errors, any interruption in our always-online world can spell disaster. And it is not the never-happens-to-us catastrophic events that cause the most harm, but the everyday things – accidental deletions, updates turned haywire, failed hardware. However, with an effective backup disaster recovery plan (BDR), the potential data loss damage can be significantly mitigated.

Just think of it as having your very own data time machine. Hop in, and you could revisit lost moments, outmaneuver unfavorable outcomes, and sidestep data chaos like it never happened.

## Data: The Core of It All

Let's talk about data – the atomic unit of the digital universe. Imagine data as words or sentences that form chapters of a book (files) in a vast library. This library, which is our computer system, stores data on shelves (disks) and is arranged in a directory structure, similar to a book catalog that helps you locate the required book.

Like the books in a library, our data is vulnerable and too susceptible to loss or corruption despite protective measures such as firewalls (akin to metal detectors) and antivirus software (our security guards). To deal with this, we need a robust data backup and restore strategy as an integral part of our data protection policies.

## The Backup Mantra

A backup is a stored copy of data that allows us to recover lost information or restore system functionality from a copy. Acting as a portal to previous data states, this process offers distinct data protection levels. Some of these backup types include File, Disk, and System backup, each effective in different scenarios.

- **File backup:** Imagine your favorite detective series book missing a chapter. Just as the missing chapter leaves the story incomplete, data loss at the file level renders it incomprehensible. Therefore, file backup creates a byte-by-byte identical copy of the original file at a specific time, mitigating any possible damage.
- **Disk backup:** If a section of the library were to be consumed by fire, many books would be lost, parallel to data loss or corruption at the disk level. To combat this, disk backup comes into action by creating an 'image' or a block-level copy of the storage device, thus allowing for a full restore to the disk's exact state before the disaster.
- **System backup:** Imagine what would happen if the entire library was wiped off, indicating complete data loss. A system backup makes multiple backups – from files and applications to system configurations. This protects the user data and preserves the system's overall integrity and operational state, readying it to revert to a "last-saved" operational state.

## 3, 2, 1 Backup

The 3-2-1 backup rule is a widely recognized and recommended data backup strategy to ensure the safety and redundancy of your data. It provides a straightforward framework for creating reliable and robust backups. Here's what the rule entails:

- **3 Copies of Your Data:** You should maintain three copies of your data. This includes the original data and two additional copies. This ensures redundancy and helps protect against data loss if one copy becomes corrupted or inaccessible.

- **2 Different Media Types:** Your backup copies should be stored on two different media types. For example, you could have one copy on a physical hard drive and another in the cloud, or one on an external hard drive and another on tape. Using different media types reduces the risk of a single type of failure affecting all your backups.

- **1 Offsite Backup:** At least one of the backup copies should be stored offsite or in a different physical location from the others. This safeguards your data against disasters like fires, floods, or theft that could impact all your local backups. Cloud-based backups are a common and convenient choice for offsite storage.

Following the 3-2-1 backup rule helps ensure that your client’s data is backed up, adequately protected, and readily recoverable in various scenarios, including hardware failures, data corruption, or catastrophic events.

*Cheyenne Harden is a Security Expert, and a Data Breach and Ransomware Prevention Specialist.*

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# To A Reasonable Degree Of Medical Certainty

By Ernest P. Chiodo, M.D., J.D., M.P.H., M.S., M.B.A., C.I.H.

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Virtually every trial attorney at the close of their direct examination of a medical expert will ask their medical witness if their opinion was *to a reasonable degree of medical certainty*.

## What does a reasonable degree of medical certainty mean?

It merely means *more likely than not*. That is the standard of proof in civil litigation.

## What is the origin of the phrase “to a reasonable degree of medical certainty?”

In the early part of the 20th Century, Chicago attorneys began using the phrase “*to a reasonable degree of medical certainty*” in questioning their medical experts in order to establish proof of future medical damages. Irwin Goldstein, a law professor at Northwestern University Law School in 1935, wrote a popular trial advocacy book in which he used the Chicagoland phrase. This is why attorneys throughout the United States use the phrase in questioning their medical experts.

## What is the medical meaning of the phrase “to a reasonable degree of medical certainty?”

There is no medical meaning to the phrase. The phrase means nothing to the medical expert. Nowhere in their education, training, or practice has the medical expert ever heard the phrase. Most medical experts have no clear understanding that the phrase simply means “*more likely than not*”. This is because the phrase is not a medical phrase but rather a legal phrase that only arose in jurisdictions outside of Chicago due to Irwin Goldstein’s trial advocacy book. Frankly, many attorneys do not know that the phrase merely means “*more likely than not*”. Most lawyers use the phrase because they have heard it use by other lawyers and assume it has a medical meaning.

## How can the trial attorney use the information in this brief article?

The trial attorney cross examining the medical expert can simply ask the following line of questioning:

“Doctor, you have just testified that your opinion in this matter is to a reasonable degree of medical certainty, correct?”

The doctor will then likely answer “correct”.

“Doctor, please define what is meant by the phrase ‘to a reasonable degree of medical certainty.’”

The doctor may answer that the phrase means *more likely than not*. However, there is a good chance that the doctor will fumble and not have a clear answer to the question. This is because the doctor has never been asked that question before and does not know that the phrase means *more likely than not*.

The jury will see the doctor fumble after having answered the question favorably for the direct examining attorney without actually knowing what the question means. The jury will see that the doctor answered “yes” without actually understanding the question only because he or she believed that the direct examining attorney wanted him or her to answer “yes”.

There is a good chance that this will destroy the credibility of the medical expert in the eyes of the jury. This has been the usual result when the author of this article has used this approach in his trial practice. Rarely has the doctor being cross examined given a clear answer to the question.

*Ernest P. Chiodo MD JD MPH MS MBA CIH is a physician, attorney, biomedical engineer, toxicologists, and Certified Industrial Hygienist. Any attorney wishing to speak with Dr. Chiodo should contact Debbie Hill at (586) 405-2349.*

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# What is Alimony in Gross?

By Timothy P. Flynn and  
Frank L. Briguglio, Clarkston Legal



Typically, spousal support, like child support, is paid in the form of a monthly support obligation in accord with a court order. Alimony in gross, as the phrase suggests, is where the support payor pays a lump sum – or transfers an asset – in complete satisfaction of his or her spousal support obligation.

Often, when a support payor agrees to pay “alimony in gross”, the payor receives a negotiated discount in the form of a reduced present value amount from the stream of payments they would have promised to pay in the future. For example, if the payor is obligated to pay \$1000 per month for 120 months, the payor’s total support liability is \$120,000. Rather than having to pay that amount over time, the payor offers to pay a lump sum of \$102,000; reducing his overall obligation by \$18,000, or 15%.

There are advantages to both scenarios. In the alimony in gross scenario, the payor pays their total obligation “up front”; sometimes, events will occur in the future that may have reduced or eliminated the obligation altogether. For example, the death of the payee; an agreement by the payee to accept less or no alimony; and the possibility that the family court would reduce or eliminate the support obligation altogether.

## Can a Family Court Judge Award “Alimony in Gross”?

Yes; although alimony in gross is less typical than periodic spousal support. Arguably, a family court judge lacks the power to order non-modifiable spousal

support. Most often, alimony in gross is negotiated outside court and between the parties, without a ruling from a court.

When ordered in gross, family court judges often place a payment term on the payor. A spousal support award must be equitable and cannot impoverish the payor.

A Michigan divorce statute gives family court judges the power to award spousal support for the suitable maintenance of the adverse party. The alimony statute enables the judge to award support “in gross” or otherwise as the court deems just and reasonable after considering the ability of the parties to pay support and considering all the other circumstances of the case.

The case law addressing spousal support has led to the development of the following factors considered by the family court judge when deciding the rate and term of an alimony award:

- The ages of the parties;
- The length of the marriage;
- The amount of property in the marital estate;
- The education and training of the parties;
- The ability of the parties to work and earn an income;
- The ability of the parties to pay spousal support relative to other court-imposed obligations;

**Often, when a support payor agrees to pay “alimony in gross”, the payor receives a negotiated discount**

- The need of one party for alimony;
- The health of the parties;
- The prior standard of living of the parties;
- The past conduct of the parties, including any fault of a party in causing the divorce;
- How cohabitation with a new partner affects a former spouse's financial status.

### Recent Case Addresses Alimony in Gross

In *Marick v Marick*, the Michigan Court of Appeals addressed the legal concept of alimony in gross. The case featured the divorce of an elderly couple; a second marriage for each spouse.

The family court judge awarded Husband a separate interest in his inherited trust, which he arguably co-mingled. Husband was also awarded three quarters of a million dollars in separate property as his premarital portion of his retirement assets. Wife did not have comparable separate assets.

Husband was obligated to pay Wife alimony in gross in the amount of \$30,000, to be paid out at the rate of \$500 per month. On appeal, Wife asserted this award was woefully inadequate in light of Husband's substantial separate assets. The Court of Appeals agreed, and reversed the trial court.

The appellate court found error in the trial court's calculation of Husband's income; it ruled that the trial court should have counted the interest Husband earned on his separate premarital retirement savings as additional income.

In remanding the case, the Court of Appeals instructed the lower court to better structure an alimony in gross award that properly takes into account the parties' incomes and needs. This, of course, is the challenge in every spousal support case.

*Clarkston Legal is a group of attorneys practicing in the areas of Family Law, Probate and Criminal Defense centrally located in Northern Oakland County. The firm is only minutes away from Oakland County Circuit Court and practicing in all adjacent counties.*



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# Macomb County Prosecutor's Office Crime Victim Rights Unit Hosted an Event for Crime Survivors to Provide Support and Resources

Press Release from the Macomb County Prosecutor's Office



Mount Clemens, MI – On April 26, 2024, the Macomb County Prosecutor's Office Crime Victim Rights Unit hosted "Options, Services, and Hope for Crime Survivors" event to provide crucial support and resources to crime victims. Crime victims were welcomed by Macomb County Prosecutor Peter J. Lucido. The program began with Crime Victim Rights Advocate Tracee Anderson leading a panel discussion that included Macomb County Circuit Court Judge Joseph Toia, Sterling Heights District Court Judge Annemarie Lepore, Brenda Domagalski from Turning Point, Nichole King from Care House, Macomb County Sheriff Department Sgt. David Crabtree, Crime Victim Advocate Michele Van Laan, and Assistant Prosecuting Attorneys Tonya Goetz, Patrick Sierawski, and Jevona Fudge. The panel discussed how they help victims through the criminal justice system.



After the panel discussion, special Guest Nicole Beverly spoke about her experience as a crime victim and gave away her book *Finding Nicole: A True Story of Love, Loss, Betrayal, Fear and Hope* for free to crime victims. *Finding Nicole: A True Story of Love, Loss, Betrayal, Fear and Hope* by Nicole Beverly is available at Amazon, Book Baby, and other major retailers.

"Thank you to Prosecutor Lucido and the Macomb County Prosecutor's Office for holding this event to

acknowledge victims and provide resources and support that can further help them. We still have a lot of work to do to protect victims of crimes. I hope that the legislature and judges and others with the power to create change will help us do so," said Nicole Beverly.

The Macomb County Prosecutor's Office offers services to crime victims and their families through the Crime Victims Rights Unit. The unit consists of Crime Victim Advocates who are professionally trained to provide support and assistance to victims through the criminal justice system.

The Prosecutor's Office Crime Victims Rights Unit provides comprehensive aid, including guidance on filing for Michigan Crime Victims Compensation, referrals to community resources, updates on case progress, courtroom support upon request, assistance with Victim Impact Statements, and help with understanding restitution procedures.

It is easy to request victim's rights and contact the Crime Victim's Rights Unit. Victims can text "Victim" to (586) 250-4090 to receive immediate assistance, including a link to request rights online, or connect with a Crime Victim Advocate or you can call (586) 469-5675.

Through its dedicated Crime Victims Rights Unit, the Macomb County Prosecutor's Office stands as a pillar of support for those impacted by crime. By offering a spectrum of services, from financial aid to expert guidance through legal proceedings, they ensure that all individuals, regardless of economic circumstances, can access justice with ease.





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May 24, 2024 1:00pm-2:00pm

Macomb County Circuit Court Jury Room

REGISTRATION CODE: MLSC63

### DNA: STR MIX & FINGERPRINTS (ZOOM)

May 31, 2024 | 12:00pm-2:00pm

REGISTRATION CODE: MLSC62

### THE CHANGING LANDSCAPE OF YOUTH DEFENSE (ZOOM)

June 14, 2024 | 10:00am-11:30am

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**– MACOMB COUNTY PROSECUTOR –**

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