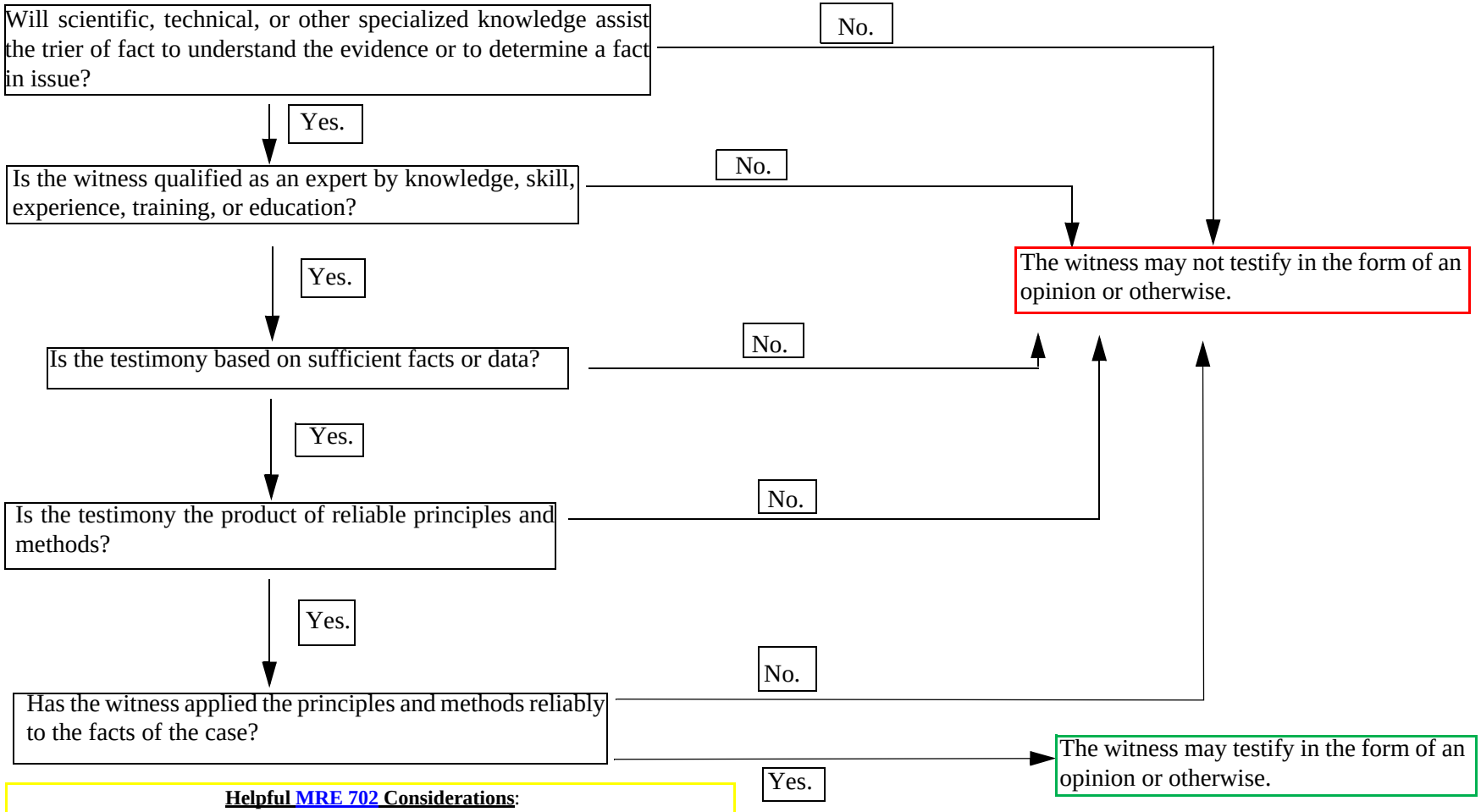
Criteria for Admission of Expert Testimony Flowchart and Special Considerations for COVID-19 Issues[1]

MRE 702 sets forth general criteria for qualifying an expert witness. See also *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).



Helpful MRE 702 Considerations:

*If the trier of fact will not be aided by expert testimony, analysis should conclude with the exclusion of the testimony.
*Who is a qualified witness: skill, knowledge, education, experience, and training?
*Is the expert's testimony in the form of an opinion; does the opinion go too far?
*What is the evidential quality of the science in question, and its accuracy and application to the case facts?

Practice Tips:

*Address preliminary questions of admissibility at a hearing prior to trial. MRE 104.
*Broach, streamline, and create a process for providing notice of how things will proceed. MRE 611(a).
*Utilize pretrial conferences and scheduling orders to shape the presentation of evidence at trial and facilitate the Court's decision making. MCR 2.401(A)-(C).

[1]See the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4, regarding expert witnesses.

Types of Experts That May Assist the Trier of Fact in COVID-19 Related Cases:

Epidemiologist

"Epidemiology is the study of the distribution of disease in populations and the risk factors associated with particular diseases." *Nelson v American Sterilizer Co*, 235 Mich App 485, 492 (1997). "It is observational, rather than experimental, research, in that epidemiologists observe the differences between those who have had a particular exposure and those who have not." *Id*.

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Although the expert's opinion was not universally accepted, it was properly admitted where there was "strong and undisputed support" for the expert's opinion, and the opinion was "objective, rational, and based on sound and trustworthy scientific literature." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 140 (2007).

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Plaintiff's expert was correctly barred from testifying as to the causation of disease where no epidemiological study found a statistically significant link between exposure and contraction of the disease. *Nelson v American Sterilizer Co*, 235 Mich App 485, 488 (1997).

Geneticist

Someone who studies the patterns of inheritance of specific traits, relating to genes and genetic information. See Biology Online.

Hematologist

A hematologist is a specialist in the science or study of blood, blood-forming organs and blood diseases.The medical aspect of hematology is concerned with the treatment of blood disorders and malignancies, including types of hemophilia, leukemia, lymphoma and sickle-cell anemia. Hematology is a branch of internal medicine that deals with the physiology, pathology, etiology, diagnosis, treatment, prognosis and prevention of blood-related disorders. See healio.com.

Neurologist

A neurologist is a medical doctor with specialized training in diagnosing, treating, and managing disorders of the brain and nervous system. A child or pediatric neurologist specializes in the diagnosis and treatment of neurological disorders in children from the neonatal period through adolescence. See American Academy of Neurology.

Pathologist

Someone that examines the origins, symptoms, and nature of diseases. See *Black's Law Dictionary* (7th Ed).

Psychologist

Someone who studies the human mind and human emotions and behavior, and how different situations have an effect on people. See *Cambridge Dictionary*.

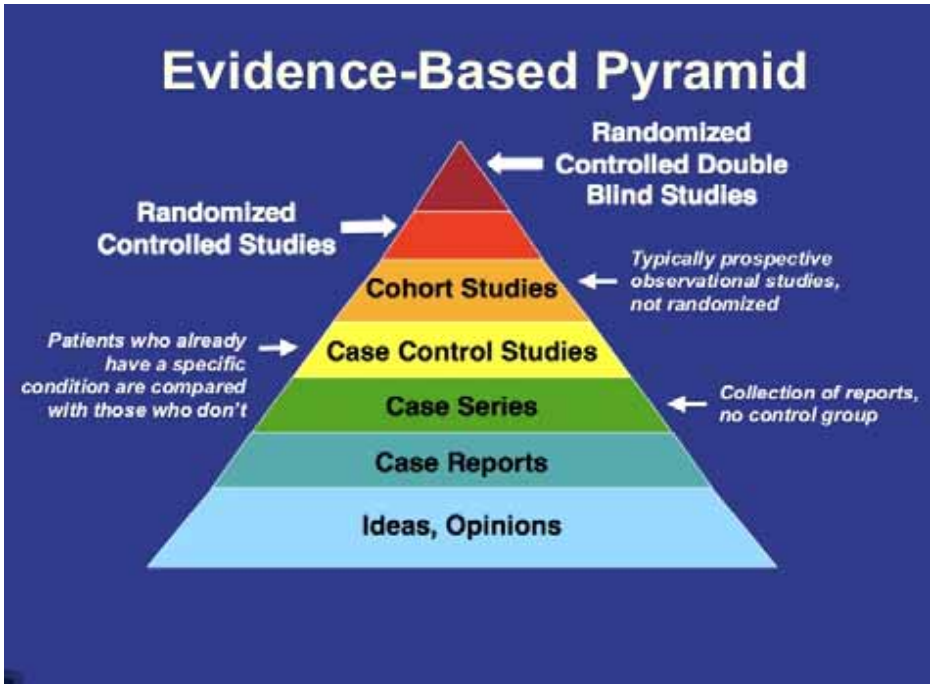
Pulmonologist

A person who studies and treats medical conditions of the lungs and respiratory system. See *Cambridge Dictionary*.

Virologist

A scientist who studies viruses and the diseases that they cause. See *Cambridge Dictionary*.

Additional References and Resources:



Evidence higher on the pyramid may be considered more reliable than that below when considering the admissibility of scientific studies. When evaluating the reliability of an individual expert, it may be helpful to consider their credentials (MD, PhD, DrPH), specialty board, fellow status, academic rank and position, and if they were the study leader (principal investigator). When evaluating the reliability of articles, it may be helpful to consider whether the publisher is reputable or predatory, and whether retractions have been issued. See Beall's List for guidance on potential predatory journals and publishers.

Websites:

The Centers for Disease Control and Prevention

Michigan One Court of Justice COVID-19 News and Resources

Post COVID Conditions

Essential Evidence Plus

COVID Daily Research Briefs

Articles/Journals:

The New England Journal of Medicine

The BMJ

Other:

Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021 (findings, best practices, and recommendations)

Setting Up and Conducting a Remote Proceedings Checklist

Zoom 101 Benchcard

Public Right to Access Remote Hearings - Legal Analysis

Limiting Access to Civil Proceedings Benchcard

Limiting Access to Criminal Proceedings Benchcard

Limiting Access to Family Division Proceedings Benchcard

Limiting Access to Probate Proceedings Benchcard

PRACTICE POINTERS – EXPERT TESTIMONY

Overview: We have all heard the comment, "All experts' testimony is where the trier of fact can hang their hat." With expert testimony occupying such a prominent role in our trials, presentation of expert testimony and its receipt by the Court should entail more, not less, scrutiny. But above all, its presentation should be facilitated by a sound, rules-driven format. This section will outline some measures to that end.

The Rules: What will be heard – or not heard – and when it will be heard depends on the confluence of a few rules: MRE 702; MRE 104; MRE 611(a); and MCR 2.401.

MRE 702: Break this rule down to four words, if, who, how, if. The first "if" is the threshold predicate and deals with helping the trier of fact determine an issue in the case. Just like, "You had me at hello" (attribution, the movie "Jerry McGuire", Sony Pictures 1996), think "You lost me at no." If the trier of fact will not be helped by expert testimony, that's the end of it. Non jury judges can hardly be second guessed on this. The "who" part is easiest. The who is a qualified witness. And qualifications are easy to come by in these parts. Think SKEET: Skill, Knowledge, Education, Experience, Training. Not all of them; any of them. Separately stated without adjectives (in the true Ernest Hemingway sense, eschewing adjectives, yet 702 is not likely a best seller or movie-material). Precious little is needed here. The "how" takes the simmer of the "who" and raises the heat up a couple notches. The how means in the form of an opinion or otherwise (although the "or otherwise" does not register much on the evidentiary Richter scale). The problem here is not that the expert gives an opinion; no, the rub is whether the opinion goes too far. The second "if" requires advance ingestion of your favorite headache-relief medication because it is most complex. Challenges here are about the evidential quality of the science in question and its accuracy and application to the case facts. Likely much more prevalent in civil litigation – especially medical malpractice cases – than criminal or domestic.

MRE 104: Unless you believe juggling while walking is easier than juggling while standing still, don't make the determinations under 702 in the midst of trial. MRE 104, Preliminary Questions, expressly includes the "qualification of a person to be a witness" within its ambit and provides a useful tool for determining whether – and to what extent – an expert may testify. Seizing on this authority, the trial court should funnel challenges to an expert through MRE 104, for a number of reasons. First, better decision making flows from a more reflective and informed consideration of the issue, normally undermined by the fleeting and often half-baked presentations belched up by mid-trial pressures. Second, a pretrial ruling on admissibility, or inadmissibility, may obviate the need for a trial altogether. Without the ability to present an expert as counsel sought or prevent an expert as counsel tried, an adverse ruling could lead losing counsel, begrudgingly to be sure, to the cold comfort of the negotiating table. Better the good or bad news be provided earlier rather than later. Caveat for criminal judges: the losing litigant may be so unenamored with the Court's decision, an interlocutory appeal may occur under MCR 6.126.

MRE 611(a): The foregoing covered the "if" and "what" about expert testimony. Now to the "when" and "how." This rule gives the authority to determine the mode and order of witness presentation. The exercise of authority here is best suited to civil non-jury trials with domestic trials sitting atop that genre. Criminal non-jury trials may lead themselves to innovative approaches but criminal jury trials are arguably a no-go. For example, taking experts side by side may enhance judicial decision making when it comes to custody determinations and business evaluations, two common aspects of a contested divorce trial. These expert witnesses have no cross over aspects, proceeding on their own tracks on who should get the children and how much is the family business worth. MRE 611(a) can be used to require presentation of opposing experts consecutively and without regard to other proofs. Or even, for example, one expert as plaintiff's last witness and the other expert as defendant's first witness. Notice and timing here are crucial. Any variance from doing things considerably differently must be preceded by adequate notice.

MCR 2.401(A)(B)(2)(C): These rules provide the Court with broad authority through both pretrial conferences and scheduling orders. They are the vehicles for providing advance notice to counsel on the way things will proceed at trial. Together with MRE 611(a), they provide powerful tools to the Court to properly shape the presentation of the evidence at trial to facilitate the Court's decision making. These rules presage the eventual 702 hearing the Court will conduct. MCR 2.513(G), the Scheduling of Expert Testimony, while seemingly applying to jury trials, could have bearing on non-jury trials. The jury trial limitation would make little sense in the face of the confluence of MRE 611 and the above court rules.

Summary of Practice Pointers: Underline MRE 702 by knowing it inside and out. Break it into parts and then put it back together. Einstein once said if you can't take a difficult topic and explain it simply, then you don't know it well yourself. Simplification comes from separating and anticipating what the 702 hearing will be about. Regularly employing MRE 104 to decide where the 702 issue sits starts here, not at trial. The stopover between pretrial conference and trial will be quite illuminating. Use MRE 611(a) to order the proofs to facilitate cogent analysis and issue resolution. Non-jury judges, what of the expert's disagreement is important to you? Weaponize court rules to be your aid in crystalizing the expert evidence issues. Use the rules to broach, streamline, and create a process for providing notice of how things will proceed. Being proactive will ensure the hat-hanger for expert testimony is firmly attached to the wall.

COVID-19 Related Cases by Topic[1]

[1]Generally, the Michigan Judicial Institute does not include non-binding authority in its publications. However, given new legal issues created by the COVID-19 pandemic and a lack of binding authority, non-binding opinions have been included in this section for guidance. Additionally, cases in this section do not necessarily address an issue of evidentiary value.

Authority to Act

- *Biden v Missouri*, 595 US ___ (2022), holding that the Secretary of Health and Human Services "did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19."

- *In re Certified Questions from the US Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332 (2020), upon inquiry concerning the constitutional and legal authority of the Governor to issue emergency executive orders related to the pandemic, the Court "conclud[ed] as follows: first, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 *et seq*., to declare a 'state of emergency' or 'state of disaster' based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the [now repealed] Emergency Powers of the Governor Act of 1945 (the EPGA), . . . because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law."

- *T&V Assoc, Inc v Dir of Health and Human Servs*, ___ Mich App ___ (2023), holding a face mask order issued by the Director pursuant to MCL 333.2253 exceeded the legislature's grant of authority to defendant. "MCL 333.2253 is so broad and without any cognizable standard for the exercise of that authority that it constitutes an unconstitutional delegation of legislative power." *T&V Assoc, Inc*, ___ Mich App at ___ (comparing the indefinite duration of the Director's powers under MCL 333.2253 to the indefinite duration of the Governor's powers under the EPGA, found to be unconstitutional in *In re Certified Questions*). The court further held that the issue was not moot because the issue was of public significance and likely to recur. *T&V Assoc, Inc*, ___ Mich App at ___. Additionally, plaintiff had standing and an actual controversy existed because it alleged a protected interest, of operating its business, which was jeopardized by defendant's authority. *Id.* at ___.

- *Flynn v Ottawa Co Dep't of Pub Health*, ___ Mich App ___, ___ (2022), holding that the "Public Health Code grants the local health officer the authority to act in certain situations," and "a health officer is also authorized to issue emergency orders in response to an epidemic." "This action concerns the validity of a mask mandate in schools that was issued and implemented by *emergency order* of the health officer in response to the COVID-19 pandemic." *Id.* at ___. Plaintiffs, county residents with children in kindergarten through sixth grade, "asserted that the order mandating facial coverings was invalid because it was not approved by the board as required by law." *Id.* at ___. "The trial court concluded that the order did not have to be approved by the [county] board [of commissioners] because it was an order and not a promulgated *regulation*, which must be approved by the board." *Id.* at ___. Because "[t]he plain and unambiguous language of the pertinent statutory provisions clearly establishes that 'regulations' and 'orders' have different meanings under the Public Health Code," "the trial court properly concluded that the order imposing the mask mandate was valid pursuant to the procedures set forth in the Public Health Code[.]" *Id.* at ___.

- *Holland v DeWitt Pub Schs*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2023 (Docket No. 360706), p 2,[1] holding that the Superintendent had lawful authority to implement a mask policy without adoption by the School Board and that the Superintendent did not violate the Open Meetings Act by making the decision without a meeting open to the public. The language of local policy was "broad enough to provide the Superintendent with the authority to act as she did in this instance to respond to the evolving circumstances of the pandemic," and "[i]n doing so, she was acting in her individual executive capacity to implement policy and was not subject to the OMA." *Id.* at p 7-8.

[1] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Business Interruption

- *Gavrilides Mgt Co, LLC v Mich Ins Co*, 340 Mich App 306 (2022), following the Governor's issuance of stay-at-home and social distancing Executive Orders in response to the COVID-19 pandemic, plaintiffs submitted a claim for business interruption losses to defendant on their commercial insurance policy, and defendant denied the claim primarily on the basis that plaintiffs had not demonstrated "direct physical loss of or damage to property" within the meaning of the policy. "[T]he word 'physical' necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises"; however, "[t]he complaint asserts that nothing happened to the premises beyond partial or complete closure due to two EOs that had statewide applicability." *Id.* at 318, 319. "Plaintiffs' restaurants were unambiguously closed by impersonal operation of a general law, not because anything about or inside the particular premises at issue had physically changed"; accordingly, "defendant properly denied coverage to plaintiffs because the EOs did not result in 'direct physical loss of or damage to property.'" *Id.* at 319, 323. Additionally, defendant relied on the virus exclusion in the policy as an alternative basis for denying coverage. *Id.* at 323. "Under the circumstances of this case, if plaintiffs suffered any material loss, that loss could only have been caused by the virus, so the virus exclusion would necessarily apply"; "[t]herefore, defendant properly denied plaintiffs' claim pursuant to the virus exclusion." *Id.* at 324. See also *Brown Jug, Inc v Cincinnati Ins Co*, 27 F4th 398 (CA 6, 2022).[1]

- *The Gym 24/7 Fitness, LLC v State of Michigan*, ___ Mich App ___ (2022), on appeal of an original action in the Court of Claims, the Court held that "the business owner of a private property is [not] entitled to just compensation under either the state or federal Takings Clause when the government properly exercises its police power to protect the health, safety, and welfare of its citizens during a pandemic by temporarily closing the owner's business operations."

- *Macomb Co Restaurant, Bar, and Banquet Ass'n v Dir of the Dep't of Health and Human Servs*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2022 (Docket No. 357415), p 9,[2] holding that "plaintiff was not the real party in interest and was not the proper party to bring monetary claims on behalf of its members." "Plaintiff made no assertion that the executive orders restricting the food-service industry affected the legal rights of plaintiff itself" and "it failed to identify any actual controversy between itself and defendants." *Id.* at ___.

- *Skatemore, Inc v Whitmer*, ___ F4th ___ (CA 6, 2022),[3] "[d]efendants were entitled to immunity pursuant to the Eleventh Amendment" and the trial court properly "dismissed [p]laintiff's complaint for lack of jurisdiction" where plaintiffs alleged "various orders limiting the use of [p]laintiff's properties [(bowling alleys and roller-staking rinks)] early in the COVID-19 pandemic constituted an unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution and Article X of the Michigan Constitution."

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[1] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[2] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[3] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

Collegiate Issues

- *Zwiker v Lake Superior State Univ*, 340 Mich App 448 (2022), holding that "Michigan's constitutionally created institutions of higher education are [not] liable to their students for reimbursement for tuition and room and board as a result of the COVID-19 pandemic."

- *Norris v Stanley*, ___ F4th ___ (CA 6, 2023),[1] the court held that Michigan State University's policy that its employees receive the COVID-19 vaccine "neither violated plaintiffs' constitutional rights nor was preempted by federal law."

- *Dahl v Bd of Trustees of Western Mich Univ*, ___ F4th ___ (CA 6, 2021),[2] the Court refused to issue a stay of the district court's injunction that enjoined University officials from enforcing a vaccine mandate for student-athletes.

[1] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[2] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

Compassionate Release

- *Moore v Lakeland Correctional Facility Warden*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2022 (Docket No. 356596), p 2,[1] the trial court correctly found that plaintiff was not entitled to habeas relief where he argued that "he must be released from confinement because COVID-19, and defendant's response to it, amount[ed] to a second sentence for the same convictions in violation of the Double Jeopardy Clause." The Court concluded this was a "novel argument" for which plaintiff provided "no legal authority." *Id.* "Plaintiff has not been subjected to a second prosecution for the same offense." *Id.* The appellate court also dismissed plaintiff's request to alter or challenge the conditions of his confinement through declaratory or injunctive relief because those matters were not proper habeas claims. *Id.*

- *United States v Bass*, ___ F4th ___ (CA 6, 2021),[2] holding that on remand the district court "should apply the relevant risk analysis based on current information" when considering defendant's motion for compassionate release due to COVID-19.

[1] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[2] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

Contempt

- *In re Contempt of Pavlos-Hackney*, ___ Mich App ___, ___ (2022), holding that "civil contemnors are only entitled to 'rudimentary' due process protections consisting of notice and an opportunity to present a defense." This case stems from two judgments of contempt entered against the contemnors for the continued operation of a restaurant "in willful defiance of the trial court's orders to cease operation"; "[i]n turn, the orders to cease operation arose out of plaintiff, the Michigan Department of Agriculture and Rural Development (MDARD), suspending the food establishment license for [the restaurant], following [the owner's] willful defiance of public health and safety orders related to the COVID-19 pandemic." *Id.* at ___. "Due process guarantees only an opportunity [to present a defense], and it is [the contemnor's] own fault if she intentionally failed to avail herself of that opportunity"—"the fact that [the contemnor] was not actually prepared to present a defense does not establish a due process violation," and "[c]onsidering the nature of the contemptuous conduct and the surrounding context, it appears that the contemnors had adequate time and opportunity under the circumstances to prepare what defense they could." *Id.* at ___. Accordingly, "the contemnors received in full the due process to which they were entitled[.]" *Id.* at ___.[1]

[1]Pavlos-Hackney appealed the trial court's subsequent grant of summary disposition in favor of the MDARD (and denial of her request for declaratory and other relief) offering challenges to the suspension of the restaurant's food license and the contempt judgments, none of which were found to have merit. See *Mich Dep't of Agricultural and Rural Dev v Zante, Inc*, ___ Mich App ___ (2023). Pavlos-Hackney failed to "appeal the administrative order upholding the food license suspension" and was precluded from "relitigating that decision." *Id.* at ___. Additionally, the Governor's executive orders and the constitutionality of MCL 333.2253 were "irrelevant" because courts do not "lack contempt jurisdiction when an underlying law is *subsequently* declared unconstitutional." *Zante, Inc*, ___ Mich App at ___.

Double Jeopardy

- *Moore v Lakeland Correctional Facility Warden*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2022 (Docket No. 356596), p 2,[1] the trial court correctly found that plaintiff was not entitled to habeas relief where he argued that "he must be released from confinement because COVID-19, and defendant's response to it, amount[ed] to a second sentence for the same convictions in violation of the Double Jeopardy Clause." The Court concluded this was a "novel argument" for which plaintiff provided "no legal authority." *Id.* "Plaintiff has not been subjected to a second prosecution for the same offense." *Id.* The appellate court also dismissed plaintiff's request to alter or challenge the conditions of his confinement through declaratory or injunctive relief because those matters were not proper habeas claims. *Id.*

[1] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Family Medical Leave Act

- *Milman v Fieger & Fieger, PC*, ___ F4th ___ (CA 6, 2023),[1] plaintiff's "request to her employer for unpaid leave - following the first step of the FMLA's process," when her son began exhibiting signs consistent with COVID -19 "was grounded in a legitimate exercise of the FMLA's procedural framework and was therefore protected under the FMLA."

[1] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

Mask Mandates

- *T&V Assoc, Inc v Dir of Health and Human Servs*, ___ Mich App ___ (2023), holding a face mask order issued by the Director pursuant to MCL 333.2253 exceeded the legislature's grant of authority to defendant. "MCL 333.2253 is so broad and without any cognizable standard for the exercise of that authority that it constitutes an unconstitutional delegation of legislative power." *T&V Assoc, Inc*, ___ Mich App at ___ (comparing the indefinite duration of the Director's powers under MCL 333.2253 to the indefinite duration of the Governor's powers under the EPGA, found to be unconstitutional in *In re Certified Questions*). The court further held that the issue was not moot because the issue was of public significance and likely to recur. *T&V Assoc, Inc*, ___ Mich App at ___. Additionally, plaintiff had standing and an actual controversy existed because it alleged a protected interest, of operating its business, which was jeopardized by defendant's authority. *Id.* at ___.

- *Flynn v Ottawa Co Dep't of Pub Health*, ___ Mich App ___, ___ (2022), holding that the "Public Health Code grants the local health officer the authority to act in certain situations," and "a health officer is also authorized to issue emergency orders in response to an epidemic." "This action concerns the validity of a mask mandate in schools that was issued and implemented by *emergency order* of the health officer in response to the COVID-19 pandemic." *Id.* at ___. Plaintiffs, county residents with children in kindergarten through sixth grade, "asserted that the order mandating facial coverings was invalid because it was not approved by the board as required by law." *Id.* at ___. "The trial court concluded that the order did not have to be approved by the [county] board [of commissioners] because it was an order and not a promulgated *regulation*, which must be approved by the board." *Id.* at ___. Because "[t]he plain and unambiguous language of the pertinent statutory provisions clearly establishes that 'regulations' and 'orders' have different meanings under the Public Health Code," "the trial court properly concluded that the order imposing the mask mandate was valid pursuant to the procedures set forth in the Public Health Code[.]" *Id.* at ___.

- *Holland v DeWitt Pub Schs*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2023 (Docket No. 360706), p 2,[1] holding that the Superintendent had lawful authority to implement a mask policy without adoption by the School Board and that the Superintendent did not violate the Open Meetings Act by making the decision without a meeting open to the public. The language of local policy was "broad enough to provide the Superintendent with the authority to act as she did in this instance to respond to the evolving circumstances of the pandemic," and "[i]n doing so, she was acting in her individual executive capacity to implement policy and was not subject to the OMA." *Id.* at p 7-8.

- *Resurrection School v Hertel*, ___ F4th ___ (CA 6, 2022),[2] the Court held moot a case involving a private religious school and two parents of students who attend private religious schools seeking a preliminary injunction as to a statewide mask mandate that the State had since repealed.

[1] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[2] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

Medical Intervention

- *Frey v Trinity Health-Mich*, unpublished per curiam opinion of the Court of Appeals, issued December 10, 2021 (Docket No. 359446), p 1,[1] affirming "the trial court's order denying [plaintiff's] motion for emergency order to show cause why a preliminary injunction should not issue directing defendants to administer ivermectin to [plaintiff's father], a patient at defendant hospital who, at the time of her motion, was suffering from COVID-19, and dismissing her complaint."

[1] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

Parenting Disputes

- *Kitchen v Kitchen*, unpublished order of the Court of Appeals, issued June 9, 2022 (Docket No. 361290), holding that "[w]here parties share joint legal custody and cannot agree on a significant decision regarding the children, the trial court is to resolve the issue in the children's best interests. The trial court gave insufficient weight to the uncontroverted evidence from the Centers for Disease Control and the children's pediatrician, as well as the children's imminent trip overseas, all of which clearly preponderate in favor of the booster shots despite the rare but potential risk of myocarditis/pericarditis. Therefore, receiving the booster shot is in the best interests of the children and the trial court erred in finding otherwise. The parties' minor children shall receive COVID-19 booster vaccines as recommended by their physician." (Citation omitted).

Tolling

- *Wenkel v Farm Bureau Gen Ins Co of Mich*, ___ Mich App ___, ___ (2022), holding that Administrative Order No. 2020-3 tolled "the statute of limitations for the commencement of actions" and "the filing of responsive pleadings during the state of emergency"—"[t]he one-year-back rule [in MCL 500.3145(2)] does not fall under either of those categories because it is a limitation on damages, not a limitation on whether the claim can be brought in the first place." "The one-year-back rule is a rule that is *impacted* by when a complaint is filed," and "appl[ies] only to deadlines set by court rule or statute, not those artificially imposed by agreement in a stipulated order." *Id.* at ___.

- *Carter v DTN Mgt Co*, ___ Mich App ___, (2023), holding that "under AO 2020-3 and MCR 1.108(1), any day falling during the state of emergency [related to COVID-19] does not count toward determining the last day of a statutory limitations period." "[T]he Supreme Court did not exclude only deadlines that fell during the state of emergency. Rather it more broadly excluded *any day* within the state of emergency '*for purposes of determining the deadline* applicable to the commencement of *all* civil and probate case types under MCR 1.108(1).'" *Id.* at ___ (citing AO 2020-18; emphasis added).

- *Armijo v Bronson Methodist Hosp*, ___ Mich App ___ (2023), holding that AO 2020-3 "did not suspend or toll any time period that must elapse before the commencement of an action" because the order "plainly indicated that a statutory period such as the 182-day notice period specified in MCL 600.2912b(1) which had to elapse before the commencement of a medical malpractice action, continued to run during the state of emergency."

- *Linstrom v Trinity Health-Mich*, ___ Mich App ___ (2023), holding that the statute of limitations "was tolled during the 182 day [notice of intent] waiting period" established in MCL 600.5856(c) and MCL 600.2912b(1)-(2) "[b]ecause plaintiff had to wait for this NOI waiting period before filing suit . . . and the statute of limitations otherwise would have expired during that waiting period[.]" The Court noted that its "conclusion is consistent with [its] recent opinion in *Armijo*" because "[i]n *Armijo*, it was undisputed that the statute of limitations was set to expire before the emergency was declared and before the emergency-related orders went into effect. In [*Linstrom*], unlike the situation in *Armijo*, the statute of limitations was set to expire *during* the emergency period." *Linstrom*, ___ Mich App at ___. However, see also *Hubbard v Stier*, ___ Mich App ___ (2023), holding that "[t]he NOI period was explicitly excluded from AO 2020-3's tolling" and finding that the trial court "erred by failing to grant defendants summary disposition under MCR 2.116(C)(7)" because "plaintiff did not file her claim until after the expiration of the limitations period." "As in *Armijo*, and unlike *Linstrom*, in [*Hubbard*] the statute of limitations was set to expire before the emergency was declared and before the emergency-related orders went into effect." *Hubbard*, ___ Mich App at ___ n 6.

Vaccine Mandates

- *Biden v Missouri*, 595 US ___ (2022), the Secretary of Health and Human Services "did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19."

- *Ann Arbor Police Officers Ass'n v City of Ann Arbor*, unpublished per curiam opinion of the Court of Appeals, issued January 19, 2023 (Docket No. 360147), p 4,[1] holding that a plain reading of the 2021-2022 Omnibus Appropriations Act[2], which contained provisions prohibiting vaccine mandates as a condition of employment by certain government employers, "demonstrates that the Act did not prohibit the City from enforcing its vaccine policy against its employees" because the relevant department receiving funds under the Act was the Department of Treasury, and as such, "the prohibition of vaccine mandates applie[d] to employees of the Department of the Treasury."

- *Norris v Stanley*, ___ F4th ___ (CA 6, 2023),[3] the court held that Michigan State University's policy that its employees receive the COVID-19 vaccine "neither violated plaintiffs' constitutional rights nor was preempted by federal law."

- *Ciraci v JM Smukcer Co*, ___ F4th ___ (CA 6, 2023),[4] an entity does not become a federal actor (does not exercise sovereign power) when it sells products to the federal government and when it imposes a vaccine mandate because the federal government required it to do so as a federal contractor. The fact that defendant acted in compliance with federal law and served as a federal contractor did not make the company a government actor.

- *Dahl v Bd of Trustees of Western Mich Univ*, ___ F4th ___ (CA 6, 2021),[5] the Court refused to issue a stay of the district court's injunction that enjoined University officials from enforcing a vaccine mandate for student-athletes.

[1] Unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).

[2] 2021 PA 87.

[3] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[4] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).

[5] Decisions of lower federal courts, although they may be persuasive, are not binding on Michigan courts. *People v Gillam*, 479 Mich 253, 261 (2007).