



THE SUMMONS

Saginaw County Bar Association

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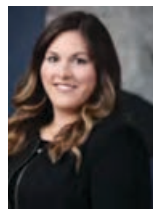
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2020



Merry Christmas, Happy NEW YEAR

MEETING DATES FOR 2020/21

(Go to www.saginawbar.org for meeting updates)

Board Meeting by ZOOM

(All Board Meetings will be held via ZOOM until further notice 1st Wednesday of every month at 12:00 PM)

Courthouse Holidays

December 24th, 25th and 31st.

Pro Bono Committee Meeting by ZOOM

(All PB meetings held via RING until further notice 3rd Tuesday of every month at 12:00 PM)

(If you want your committee meeting dates listed here, send them to Kelli Scorsone, Executive Director)

Let's Do Lunch!

Conversation on Indigent Defense Representation:



Brown Bag Lunch Series for

MAC Attorneys and Criminal
Defense Bar Attorneys

Join us for a ZOOM discussion on criminal defense developments on **Friday, December 18, 2020** at noon on ZOOM.

Meeting ID: 871 5279 1644

Passcode: 851425

<https://us02web.zoom.us/j/87152791644?pwd=aU0xMlF4Tmo1L0VFR2xhUStMVzczQT09>

Topic: Probation Violations/Inability to Pay Hearings Presentation by James F. Piazza, Chief Trial Attorney, Saginaw Defenders Office

THE SUMMONS

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The articles in THE SUMMONS, unless clearly designated otherwise, are those of the author. They do not necessarily represent the opinion of the Saginaw County Bar Association or its members. Please direct your comments on THE SUMMONS, to its Assistant Editor, Ann R. Van Haute, 4301 Fashion Square Boulevard, Saginaw, Michigan 48603 • (989) 498-2100.



PRESIDENT'S MESSAGE

By: Millicent E. Shek

Season's Greetings! I hope everyone enjoyed Thanksgiving and had an opportunity to see family despite the social distancing restrictions.

Most if not all of you have received the 2021 membership renewal form for the Saginaw County Bar Association. The renewal form and accompanying dues are both due by January 1, 2021. You can pay by check (mail to SCBA at 111 S. Michigan Avenue, Saginaw, Michigan 48602) or pay with a credit or debit card by either providing your information on the renewal form or by paying online. Please do not forget to choose your area of practice so that we may honor you on the Saginaw County Bar Association's website (Saginaw-bar.org). If you'd like a headshot to be displayed on the Saginaw County Bar Association's website, please email a photograph to Kelli at scba@saginaw-county.com.

If you have not yet heard, the Saginaw County Bar Association is not holding its annual Holiday party. The Holiday party is a time for many of our members to gather and spend some time together and with our significant others. As with many other seasonal customs, so too has the Holiday party been affected by the novel coronavirus

outbreak. In light of this year's developments, the Holiday party will not be happening.

Your SCBA Board is hopeful that next year society will be getting back to "normal" so we can enjoy the events that bring us together as a legal community.

Merry Christmas, Happy Hanukkah, Happy Kwanzaa, or simply Happy Holidays – whichever it may be for you, I wish you the very best this holiday season. And, as 2020 comes to an end, I know I am not the only one to be happy to say - (first and foremost, thank goodness!) - HAPPY NEW YEAR!

*"At Christmas play and make good cheer,
For Christmas comes but once a year."*

- Thomas Tusser



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In Memoriam

None

Please help the Memorial Committee make sure no member is forgotten. Contact SCBA office at 790-5285 or scba@saginawcounty.com regarding the passing of any Saginaw County Attorney.

Our thoughts and prayers go out to all those who lost loved ones to Coronavirus.



SAGINAW COUNTY LAWYERS' AUXILIARY

By: Claudia J. Wallace

The older we get, time seems to pass way too quickly, certainly not what we want to happen but, I am sure we are all looking forward to this year coming to an end. 2020 has certainly raised havoc in all areas of our lives. As long as we stay united and strong we will see our way through what is yet to come. Imagine you were born in 1900, whitelocklocators.com. If you haven't seen this yet, take a look at it. It might put a little perspective on our thoughts and give us the strength we need at this time.

The SCLA met again via Zoom on November 3, 2020. We will continue to do so the first Tuesday of each month at 6:30 p.m. beginning in January 2021. We regret that our annual wreath and poinsettia sale is postponed until November 2021 and the benefit dinner at The Maple Grille for January 24, 2021 will be rescheduled later in the year.

We received this request on October 16, 2020 and voted on it at our November 2, 2020 meeting. It is with great

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10/16/2020
Youth in Government
Steve Wincent
Saginaw County Lawyers Auxiliary

Dear Members of Saginaw County Lawyers Auxiliary,

The Youth in Government programs at White Pine Middle School and Heritage High School provide students a unique opportunity to understand the lawmaking process and how our government works. Students are immersed in a model-government program where they debate, amend, and pass or fail legislation that they create. The process is entirely student run and takes place on the floor of the legislature inside the capital building in Lansing. Students also can be a lobbyist, member of the press corps, join the mock trial program, or the national issues debate section.

Last year we had 80+ White Pine and Heritage students participate in the program. Both delegations earned several accomplishments including the title "Premiere delegation" and had bills signed by the student governor. A very exciting accomplishment came from our Heritage Mock Trial teams. Our two teams worked with Judge Andre Borrello to learn the "ins and out" of how to represent their roles as attorneys and witnesses. They learned how to craft and run a prosecution and defense and one of our teams ended up taking first place in the State! Also, one of our students won the award for "Best Prosecutor!"

Thanks to your previous financial contributions, we were able to participate in the program last year. As this program is not school funded, students must raise the necessary fees to cover themselves, advisor fees, and substitute teacher costs for while the advisors are away at conference with them. My goal is to never turn away a student who wants to participate due to financial need. Student fees totaled over \$34,000 last year. While the majority of students are able to pay their fees, a gift of \$600 would ensure that several students would be able to participate in the program this year.

We greatly appreciate your potential financial support in any way for this year's program. If you would like more information regarding the program, please do not hesitate to contact me at stwincent@scs.k12.mi.us or my cell at 517-936-8438. The Youth in Government website also has more details about the program at www.yimg.org. Thank you once again for your time and consideration.

Sincerely,


Steve Wincent
8th Grade Teacher
Youth in Government Advisor
Saginaw Township Community Schools

pleasure that we can and will support this program again this year.

A new spin on the holidays this year.

Rest assure Santa will still be riding over your homes and dropping gifts to all the good little boys and girls and most likely to all of us also BUT if anyone happens



to get a sneak peek at him take a close look he will be practicing safe distancing!

Enjoy your holidays, shop safe, celebrate safe and hold your loved ones dear. Ring in the New Year with special resolutions.

“And once the storm is over, you won’t remember how you made it through, how you managed to survive. You won’t even be sure whether the storm is really over. But one thing is certain. When you come out of the storm, you won’t be the same person who walked in.”

Haruki Murakami



Warm wishes for a wonderful holiday season.


P.S. Something wonderful to do as a family <https://www.facebook.com/groups/442354996404819/permalink/652348652072118/>



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SCBA EXECUTIVE DIRECTOR'S REPORT

By: Kelli Scorsone, Executive Director

Thank you, ADR Selection Committee: Chairperson Donald Gilbert, Liaison Nathan Collison, Christopher Swartz, Karl Weyand, Kevin Kelly, Gary Patterson, and Iris McCree. This committee selects the Case Evaluation Panels that will serve for five years. They went through fifty applications to form workable panels. Thank you to those that applied.

And Thank you to Jamie Clayton, LSEM and William Cowdry for helping me distribute the complimentary masks for SCBA members.

This year the Pro Bono Luncheon was replaced with an Expungement Clinic for eligible offenders hosted by Legal Services of Eastern Michigan. The attorneys that worked the clinic were Amy Meilink, William Cowdry, Valerie Kutz-Otway, Matthew Sous, and Vanessa Guerra.

REMINDER - Please submit your MEMBERSHIP DUES by January 1st. The application will be sent through the listserv and is available on the website at <https://www.saginawbar.org/>. I will also be emailing applications and reminders throughout December and January through the listserv. All Saginaw County attorneys will be sent a request to join. SCBA cannot grow without **you**.

Your board has been active during 2020 despite the lack of gatherings and we have a better year planned for 2021. Please continue your membership with SCBA.



Have a great holiday season.

Pro Bono News

By: Amy L. Meilink
Legal Services of Eastern Michigan

October 26-30, 2020 was National Pro Bono Week. In years past this was when we would hold our annual Pro Bono luncheon and recognize those that have provided valuable pro bono services to low income members of our community. As with so many things this year, we could not hold this event. Still, Legal Services would like to acknowledge the ongoing work the SCBA Pro Bono Committee which is comprised of Valerie Kutz-Otway, Kathy Houck, Kathy Smith, Bill Cowdry, Dan Straka, Kelli Scorsone, Amy Meilink and Jamie Clayton. This group has continued to meet monthly to discuss how we continue to do pro bono work and how to recognize local attorneys for the dedication to this work.

To that end, we do want to recognize the following attorneys that have provided pro bono legal assistance to Legal Service clients over the past year:

Carolyn Bernstein
Christopher Radke
Darrell Zolton
Dennis Grimaldi
Donald Gilbert
Eric Dalek
Gary Campbell
Joshua Reinert
William Jungerheld
Katherine Baluha
Megan Cottingham-Heath
Timothy Morre

Patricia Rehmann
Valerie Kutz-Otway
William Cowdry
Mathew Sous

In other news, we had an Expungement Clinic scheduled for March 13, 2020. This was the very beginning of the pandemic surge and we cancelled it as we expected a large turnout and did not feel it was safe. We received valuable financial assistance from the SBM Young Lawyers section that allowed us to pay for ICHAT reports and other expenses. Thanks to advocacy by State Representative Vanessa Guerra, a partner on this project, the Saginaw County Sheriff's Department agreed to waive the fingerprinting costs. The plan was to help complete the paperwork to set aside a conviction or let people discuss their conviction record with an attorney, if they were not eligible. Due to the then pending state legislation on this issue, we wanted to let people know how they might be eligible in the future.

After we cancelled the clinic, we let people know if they were not eligible for an expungement. However, we had about a dozen people who still needed help getting the paperwork done and the process started. This became the focus of the Pro Bono Committee. On October 29, 2020, during Pro Bono week, a small group came together

at Legal Services of Eastern Michigan to see this project through. We want to thank Vanessa Guerra, Matt Sous, Valerie Kutz-Otway and Bill Cowdry for their help at this clinic. Despite the recent passage of laws changing the requirements for expunging a criminal record, there is still need. The law does not go into effect until April 2021 and then there is a two year period of implementation. The Pro Bono Committee has discussed ways to address this need. Watch for more information about ways you can help!

Finally, I would like to recognize Jamie Clayton as our new Pro Bono Coordinator. I am still the supervisor but have found I do not have the dedicat-

ed time to wear the hat of coordinator. Many of you met Jamie when she delivered your SCBA masks. This time of year, she would be reaching out to find people to help with our monthly Legal Advice Clinics. Most of these were cancelled for 2020 but we hope to hold them again in 2021. This would include video conferencing, with which most attorneys are now familiar. This platform would allow you to remain in your office, which may make the commitment easier to handle.

Again, thank you all for your help and support. If you would like to join the Pro Bono Committee, please reach out to any of the members.



*Have a safe and healthy over
the holiday season!*



BANKRUPTCY CASE NOTES

By: Jack Weinstein

Must a lease assumption follow reaffirmation rules? That was the issue of first impression before the 9th US Circuit Court of Appeals in the case of *Bobka v Toyota Motor Credit Corp*, 2020 WL 4433115 (9th Cir. 8/3/2020). Bankruptcy §524(c) (hereinafter cited by its section number) allows individual debtors to reaffirm debts that would otherwise be discharged in bankruptcy. A reaffirmation agreement is effective only if certain procedures are followed including the Bankruptcy Court's involvement. Section 365(p) provides that individuals may assume leases, but that section also states that when a lease is assumed, that the liability under the lease will be assumed by the debtor and not by debtor's estate. When debtor filed for

Chapter 7 Bankruptcy, she wanted to keep her leased Toyota Rav4. She contacted Toyota and was told that she would need to assume the lease. Thereafter, debtor sent Toyota a signed lease assumption agreement and subsequently received her bankruptcy discharge.

Debtor was current with her lease payments when she filed bankruptcy, but she stopped making the lease payments shortly after reaffirming her vehicle lease. Toyota then sought to collect the past due balance on the lease. Debtor asserted that her debt was discharged in bankruptcy because the assumption agreement did not comply with the reaffirmation requirements of §524(c). Toyota disregarded her defense and continued



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its collection efforts. Debtor, thereafter, went back to the Bankruptcy Court seeking sanctions against Toyota for violating the discharge injunction.

Debtor argued that the lease assumption was invalid because §365(p)'s procedural requirements had not been followed. However, the Bankruptcy Court ruled that the lease assumption was valid, and the debt survived debtor's bankruptcy discharge. She appealed to the US District Court for the Southern District of California which affirmed the Bankruptcy Court's decision. Subsequently she appealed to the 9th Circuit Court of Appeals.

The 9th Circuit Court of Appeals Panel determined that it was a case of first impression regarding the issue as to whether a lease assumption under §365(p) requires reaffirmation pursuant to §524(c). The Circuit Court determined that the issue had divided a number of Bankruptcy Courts. In making its decision the Appellate Panel interrupted §365(p) by comparing its language to §524(c) which led the court to find that the informal process for assuming a lease is separate and distinct from the strict requirements for reaffirming debts. First, the court found that §365(p) states that parties may contact each other regarding a lease's assumption without violating the stay or discharge injunction. Therefore, if a lease assumption must be reaffirmed, then the negotiations of a lease assumption would never violate the discharge injunction because §524(c) requires reaffirmation agreements to be completed prior to the entry of a debtor's discharge. Secondly, the Panel determined that is a principle of statutory construction that the specific governs the general and therefore the

panel said: "Section 365(p), which sets out procedures specifically applicable to individual debtors' assumptions of leases of personal property, should control over the more general reaffirmation procedures of §524(c)"..."Section 524(c) is logically broader than §365(p) because it governs many different types of agreements involving otherwise dischargeable debt, in contrast to the narrower issue of leases of personal property addressed by §365(p)."

Further, the Panel stated that other Bankruptcy Code provisions inferred that lease assumptions under §365(p) do not require reaffirmation under §524(c).

Judge Miller wrote "The separate listing of reaffirmation under §524(c) and assumptions under §365(p)



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undermines the suggestion that a debtor opting for assumption must also pursue reaffirmation.”

The Panel concluded that the debtor had waived the written requirements and timing requirements once she declared that her intent to reaffirm the lease as set forth in her statement of intentions. Further, debtor had initiated contact with Toyota by phone. While the requirement that a request be in writing helps to ensure its genuineness in protecting against hasty or ill-considered requests, the lease assumption agreement, after

Toyota mailed it to her, did not suggest that Toyota had wrongfully induced her to call rather than writing to her nor did debtor argue that she did not understand what she had agreed to do.

Finally, the Panel determined that it was Toyota and not the debtor that had the right to reject the assumed lease because she waited too long to return it. The court stated: “We will not excuse Mather from the obligations of her lease assumption agreement based on procedural defects that she created and benefited from during her bankruptcy.”



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COVID-19 DEVELOPMENTS IN MICHIGAN – STATE AGENCIES PICK UP THE PIECES OF THE GOVERNOR’S NOW DEFUNCT EXECUTIVE ORDERS

By: Logan Bryne
Masud Labor Law Group

On October 2, 2020, the Michigan Supreme Court (“Court”) ruled that Governor Gretchen Whitmer (“Governor”) lacked authority to continue issuing COVID-19 related executive orders and/or extend Michigan’s emergency declaration past April 30, 2020. In the aftermath of the Court’s decision, employers and residents were left to ponder what COVID-19 related requirements remained valid. As the dust settled, Michigan’s governmental agencies increased their issuance of COVID-19 mandates to instill order and combat uncertainty. Specifically, both the Michigan Occupational Safety and Health Administration (“MIO-SHA”) and the Michigan Department of Health and Human Services (“MD-HHS”) have intensified their COVID-19 related actions to fill the gaps left behind by the Governor’s now defunct executive orders.

The October 2, 2020, Court decision concluded that, under the Emergency Management Act (“EMA”), the Governor is able to declare a state of emergency for twenty-eight (28) days, at which point only the Michigan Legislature has the power to authorize extensions of the Governor’s declaration, which it did not do in this case. Moreover, the Court also concluded that the Emergency Powers of the Governor Act of 1954 (“EPGA”) did not grant her

authority to indefinitely continue extending the state of emergency.

Why does this matter? As indicated above, the Court’s opinion invalidated all of the Governor’s COVID-19 related executive orders issued after April 30, 2020. Because of this, the Attorney General’s office is no longer enforcing the Governor’s COVID-19 executive orders. Importantly, however, Michigan’s governmental agencies have taken it upon themselves to fill in the gaps left behind by the passé orders.

Michigan Occupational Safety and Health Administration

On October 14, 2020, MIOSHA issued new emergency rules that outlined COVID-19 safety requirements for employers. MIOSHA claims authority to issue these rules under MCL 408.1021, which states in relevant part, “[MIOSHA] shall promulgate an emergency safety standard . . . if the emergency safety standard is necessary to protect employees.” These new rules are designed to protect employees from COVID-19 infections and are set to remain in effect for six (6) months, unless extended. These new rules include industry specific requirements, remote work requirements, and in-person work requirements.

Notably, MIOSHA is no longer requiring temperature checks in industries

where they were previously required. Instead, MIOSHA requires employers to “conduct a daily self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.”

Additionally, in the emergency rules, MIOSHA requires employers to create a policy that prohibits in-person work for employees if the employees can complete their work remotely. Specifically, the relevant rule states that the “employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely.” Due to this rule, employers should document when it determines that it is not feasible for an employee to perform his/her duties remotely.

In accordance with the Governor’s now invalid executive orders, MIOSHA requires businesses that have resumed in-person work to create a COVID-19 preparedness and response plan. Moreover, employers are required to provide employees with COVID-19 related training, which must address workplace infection-control practices,

employee COVID-19 notification requirements, the proper use of personal protective equipment, and how to report unsafe working conditions.

Michigan Department of Health and Human Services

MDHHS recently issued two (2) COVID-19 related orders that have a significant impact on Michigan businesses. MDHHS claims authority to issue these orders under MCL 333.2253, which states in relevant part, “[MDHHS] by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws.” These two orders were issued on October 5, 2020 and October 9, 2020.

First, the October 5, 2020, emergency order: (1) places limits on gatherings; (2) requires face coverings at gatherings, except as provided in the order’s enumerated list of exceptions; and (3) creates industry specific requirements for food service establishments and organized sporting events. Importantly, “[a] business . . . or other operation may not assume that someone who enters the business without a face covering falls in one of the excep-

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tions specified” in the order. However, “[a] business . . . or other operation may . . . accept an individual’s verbal representation that they are not wearing a face covering because they fall within a specified exception.”

The October 9, 2020, emergency order rescinded the October 5th order. More specifically, the new order continued the face covering requirements, but made changes and additions to other requirements. Notably, the October 9 emergency order places restrictions on gatherings. The order defines a gathering as “any occurrence where two or more persons from, more than one household are present in a shared space.” However, the order makes an exclusion for “incidental gatherings of persons in a shared space, including an airport, bus station, factory floor, food service establishment, shopping mall, public pool, or workplace.” In reference to the restrictions for businesses, the order states, “Gatherings of employees in the workplace are prohibited . . . if

not strictly necessary to perform job duties.” Moreover, “Where gatherings are necessary, employees must still maintain six feet of distance from one another where practicable.” In other words, while at work, employees are prohibited from gathering, unless the gathering itself is necessary to perform the employees’ job duties.

What Now?

In lieu of the Governor’s now invalid executive orders, many governmental agencies have stepped up to issue COVID-19 related emergency orders. These orders provide clarity to a situation that left business owners confused and weary about enforcement. While currently enforceable, it is important to watch for legal challenges to these orders.

For advice and consultation on how to comply with COVID-19 requirements, or any other employment or labor law matter, employers are strongly encouraged to contact experienced labor and employment counsel.

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June 29, 2020 Judge Borchard
November 13, 2020 Judge Borrello



Emilie K. DeRemer,
LSEM



Jacob G. Lyday,
O'NeillWallace & Doyle



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