STATE BAR OF MICHIGAN Spring 2001

NEGLIGENCE LAW SECTION QUARTERLY

The Official Newsletter of the State Bar of Michigan Negligence Law Section Victor L. Bowman, Chair

Contents

FROM THE CHAIR

Victor L. Bowman

Standing Room Only Seminar

The Negligence Section Spring Seminar hit the jackpot in terms of productivity in Las Vegas, Nevada, during the first week of May. The workshop and discussions were energetic and interesting, thanks to the following Negligence Section members and invited guests who donated their time and expertise to serve as speakers: Joseph G. Lujan, John A. Schapka, Todd Tennis, Sheldon Miller and Paul K. Hulsey of Mount Pleasant, South Carolina.

STATE BAR ANNUAL MEETING: The next event we can look forward to is the State Bar of Michigan's Annual Meeting in Lansing, Michigan from 9 a.m. on September 12 through September 14th. That's when we will elect new Negligence Section Board members and officers. At the same time, we will hold discussions and panel presentations that focus on current trends in negligence litigation.

NEGLIGENCE SECTION SCHOLARSHIP AWARD RECIPIENTS: It's also time to honor the law students who are receiving scholarships from the Negligence Section: Keith C. Cox, Gwendolyn M. Jones, Danielle J. Hagaman, Bridgett M. Sparkman, James P. Cone, Daniel R. Olson, Jeffrey A. Canja and Miriam H. Morton.

THIRD INVITATIONAL MICHIGAN BENCH/BAR CONFERENCE: I was honored to serve as Negligence Section designee at the Third Invitational Michigan Bench/Bar Conference on May 24-25, 2001. The program was sponsored by the State Bar of Michigan and was entitled, "2001 – A Court Odyssey, Effective Practice for the New Millennium." Three topics for group discussion were: Redesigned Court Systems/Current and Future Trends; Effective Bench/Bar Strategies for Case Management; and Enhancing Confidence in the Bench and Bar.

I participated in the Enhancing Confidence in the Bench/Bar session and I must report that work needs to be done on this issue. Confidence appears to be at a new low between the bench and bar — both internally and externally — with the public we are charged to serve and represent. So, how can we increase our confidence among ourselves and the public at large? Two mantras associated with Al Davis, owner of the Oakland Raiders NFL football club come to mind: "Just win, baby," and "commitment to excellence."

Although zealous advocacy must remain a goal for effective representation of your client's interest, the "Just win, baby" model of representation has now proven at times ineffective and potentially destructive to the public's trust in lawyers. Restoring confidence may be best served with our own individual affirmation of commitment to excellence and professionalism.

Some suggestions and recommendations toward this goal as outlined during the Bench/Bar Conference included: Professionalism and civility toward each other; Respect for the system of court and laws; Acknowledgment of the inherent fairness of the evolution of the decision/resolution process, whether by trial, by court or jury, negotiated settlement or desired result by an alternative dispute resolution model of facilitated mediation or arbitration; Education of the public to what the true legal process is about with the goal once again affirming that lawyers are special people and courtrooms are special places where disputes are resolved and justice is served.

Mold Grows in Michigan

By Jennifer M. Grieco

"Mold litigation" has been practiced in states outside of Michigan for almost ten years with the majority of decisions coming out of California, Texas, Florida and New York. While there is a currently a debate among lawyers practicing in this field as to whether mold litigation is going to be the next asbestos, it is clear that this area of litigation will be practiced by litigators for many years to come.

While mold litigation may be new, the presence of mold in a home or building certainly is not. Mold is ubiquitous in nature. Mold spores travel into a home or building from the outside through open doors and windows as well as moving on people and animals themselves. These spores are waiting for an indoor amplification site containing excessive moisture and the right temperatures where they can grow and thrive. However, there are factors which have worked together recently to place mold's presence in indoor environments into the litigation arena.

First and foremost has been media coverage that has provided for simple public awareness. Building occupants are now aware of the correlation between their indoor air quality and many health reactions they suffer while inside the building or home. Mold is no longer simply painted over and otherwise ignored by occupants, tenants and homeowners. Second, current construction practices have added to the increase of mold problems. Gypsum board and cellulose ceiling tiles have become widely used in building and home construction. These materials, while cheaper than plaster and the building materials of past generations, do not sufficiently withstand chronic water intrusion. They become the food source for mold growth. In addition, the popularity of Exterior Insulation Finish Systems (EIFS) or "Synthetic Stucco" in building construction of the late 1980's and 1990's is alleged to be a flawed design that allows for water penetration.[1] Almost simultaneously with these changes in building materials and construction practices, builders and occupants were faced with the energy crisis of the 1970s which dictated that buildings become tight envelopes keeping in and preserving the heat and cool air generated. Tight building envelopes also preserve and maintain an indoor air quality problem that may not have escalated to such an extent with additional fresh air circulation. Finally, the majority of individuals living in the United States spend between seventy five to ninety percent of their day indoors.[2]

Many of the issues litigated in mold related cases involve indoor air quality. The cases are therefore similar to those seeking compensation for "sick building syndrome" (SBS) *Federal Register Vol. 56, No. 183*. However, unlike sick building litigation where occupants of a building are complaining of illnesses with no known source or contamination in the building, in mold litigation the culprit is known. Mold can be tested, photographed and videotaped. The cause of the mold is chronic water intrusion whether it be in the form of floods, sewage backups, roof leaks, ice damming, condensation or high humidity. The spread of the mold through airborne mold spores can also be assisted by faulty or inadequate heating, ventilation and air conditioning (HVAC) systems.

Correcting the mold problem can be very expensive which has spawned litigation over who is responsible for the mold remediation. As indicated above, it is not an acceptable protocol of remediation to simply utilize bleach or other chemical products designed to inhibit the growth. Remediation involves the identification and correction of the water intrusion, the removal of all contaminated building materials (drywall, ceiling tiles, floor boards and insulation), the cleaning of surfaces, materials and goods which can be cleaned and the rebuilding of the home or building.[3] Mold remediation, similar to asbestos remediation, should be preformed by individuals trained in such abatement, utilizing containment barriers and negative air pressure. Remediation contractors need to not only protect themselves with the use of full personal protection equipment (PPE), utilizing Tyvek suits and N-95 respirators, but to also protect occupants by removing the mold source under containment to prevent the further spread of mold spores. When a contractor cuts into the mold growing in a wall cavity, for example, the molds are "disturbed" and release their spores into the air which spores may contain mycotoxins.

Jennifer M. Grieco

There are hundreds of thousands of mold species. "All molds have the potential to cause health effects."[4] For people allergic to molds, molds can trigger allergic reactions. However, individuals not previously allergic to mold can also suffer when exposed. The health effects range from allergic type reactions, infection and nerve irritation to toxicity. Many symptoms improve once the individuals are away from the environment. The most common symptoms of fungal exposure are flu-like symptoms – runny nose, itchy eyes, cough and congestion and exacerbation of asthma. Yet certain species of fungi release mycotoxins in the form of spores that can cause toxic or irritant effects in people even if they are not allergic to mold. Mycotoxins are toxic substances that are the products of secondary metabolism of molds and are known to cause adverse health effects in people and animals.[5] The health effects of individuals exposed to mycotoxins vary depending upon the individual's susceptibility, pre-existing allergy or asthma conditions, age and overall fitness and health.[6] Individuals exposed to mycotoxins have reported adverse health effects upon their digestive system (diarrhea and vomiting, intestinal hemorrhage), respiratory system, nervous system (tremors, persistent and chronic headaches), urinary system, rashes, bleeding nose and bleeding lungs. The onset of asthma in individuals who were not previously diagnosed is also a potential injury.

The most common molds in indoor environments that release mycotoxins are species of *Penicillium*, *Aspergillus, Fusarium, Trichoderma, Memnoniella* and *Stachybotrys. Stachybotrys* has received the most media attention because of the controversy surrounding its association with 34 cases of pulmonary hemosiderosis (bleeding lungs) and a rash of infant deaths in Cleveland, known as "the Cleveland Outbreak". In addition, it is

believed that the Soviets utilized mycotoxins from *Stachybotrys* during chemical warfare against Afghanistan.[7] However, it is by no means the only mold of concern. Any mold producing mycotoxins can be toxic to humans and animals. Toxicity can result from either inhaling the mold spores containing these mycotoxins or through direct skin contact with the spores. Obviously, people should not be living with and breathing in such toxins. The concept of mold litigation is a simple one – the environment has suffered chronic water damage, molds are growing and if these molds are present in high levels, measured in colony forming units per cubic meter of air, this is not a healthy environment and therefore the mold must be remediated.

While the concept of mold litigation is a fairly easy one to grasp, mold litigation is anything but easy or cheap. For a potential plaintiff with injuries from the toxic mold exposure, the medical work-up to medically prove causation is time intensive and expensive. Mold testing is in and of itself expensive and a necessary cost of litigation. Sampling for mold should be conducted by experienced professionals in accordance with the recommended industry guidelines.[8] In addition, various experts are needed on both sides of the litigation in the field of microbiology and/or mycology (regarding the study of molds), industrial hygiene or environmental science, mold remediation of a building and personal property, as well as medical experts. Medical experts can include one or more of the following: occupational/environmental physicians, pulmonary specialists, allergists, dermatologists, gastroenterologists, neurologists and neuro-psychologists. In addition it may be necessary to utilize a construction expert to opine on the causes of the water intrusion. Depending upon the location of the moisture intrusion, construction experts can include individuals in one or more of the following specialties: architecture, builder/contractor, roofing, plumbing, HVAC, waterproofing, soils and/or windows. As with any litigation, the case will revolve around a battle of the experts to prove/disprove that (1) the water intrusion was caused by a specific source; (2) the mold resulted from the chronic water intrusion; (3) remediation is necessary utilizing certain specialized methods and at a specified cost; (4) the molds that are present can release mycotoxins (if the case asserts personal injury); and/or (5) the mold exposure caused plaintiff's alleged injuries. The admissibility and credibility of these expert witnesses will of course become a key issue in the prosecution and defense of these cases.

The potential plaintiffs in these cases include all residential and commercial building owners and occupants who have identified toxic mold growth in the building as a result of long-term water damage. Litigation seeks compensation for the expenses associated with mold remediation and for personal injuries suffered from those deemed to be responsible defendants. The potential defendants in these matters include any company or individual who is alleged to have proximately caused the water intrusion including developers, builders, general and subcontractors, architects, landlords, homeowners associations and property managers. In addition to new construction and construction defects, litigation has resulted in the context of used home purchases. In many cases, unsuspecting homeowners purchase homes with chronic preexisting water intrusion that has allowed for mold growth. Individuals wishing to sell the home without first investing in proper remediation can become very inventive in covering up the signs of a mold problem. Oftentimes however there are signs in a home that could be identified but are simply overlooked by a private home inspector hired by the purchaser. Finally, another prevalent type of mold case involves first-party homeowner insurance claims. First party cases against home insurance carriers can involve an improper denial of coverage for mold that has grown as the result of a covered claim, negligent or inadequate repairs by the contractors hired by the insurance company and/or bad faith by the insurance company in the handling of the claim.

Damages in these cases include the costs to remediate and rebuild the real property. In some circumstances the costs to remediate and rebuild may exceed the value of the property, necessitating that it be a total loss. In addition, spores can contaminate personal property located in the home or building. Any item that has visible mold contamination will necessarily be discarded. Items that are porous and cannot be adequately cleaned also may be deemed contaminated and therefore discarded. Even as to the hard-surfaced items in the home or building that can be salvaged, there may also be an expense to clean such item especially if a sensitized individual intends to move back into the home. Out of pocket expenses which are sought include temporary lodging for plaintiffs who move out the contaminated home until proper remediation can be completed. Unfortunately, if the plaintiff cannot afford remediation without redress from a defendant or insurance company, these expenses will escalate during litigation and can themselves be astronomical. However, in order to mitigate their damages, plaintiffs have to leave the contaminated premises, typically their home and belongings. Plaintiffs suffering from adverse health effects also seek damages for personal injury, medical monitoring expenses and emotional distress.

While this area of litigation is fairly new to the Michigan legal community, Michigan has all of the dynamics necessary to breed mold and therefore increased mold litigation. Ice damming has been widespread throughout Michigan. Summers are humid yet homes are tight to fend off these harsh winters. "Michigan basements" and crawlspaces are known to be damp. Sewage backups and flooded basements because of inadequate municipal and/or county sewer systems are certainly an issue.[9] As the urban sprawl surrounding Metro Detroit continues, so does the increase of new homes, condominiums and townhouses at "affordable rates". Finally, unlike the birth of asbestos litigation thirty years ago, lawyers *and clients* now have access to an enormous amount of information (and misinformation) on the internet. This source of immediate access to information will serve to educate all practicing in this field of the victories earned and the defeats suffered in mold litigation not only locally but across the country.

Jennifer M. Grieco *is an associate in the commercial litigation department of Sommers, Schwartz, Silver & Schwartz, P.C., specializing in mold litigation and construction defects. She is a 1997 graduate* cum laude *of the University of Toledo College of Law where she was a Note & Comment Editor of the University of Toledo Law Review and a member of the Order of the Coif. A member of the State Bar of Michigan Business Law Section, Commercial Litigation Committee, Oakland County Bar Association, Michigan Trial Lawyers Association and American Trial Lawyers Association, she has been handling mold litigation on behalf of plaintiffs throughout Michigan for the past two years.*

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A Trial Lawyer's Overview of the New Alternative Dispute Resolution Court Rules

By Peter L. Dunlap

Peter L. Dunlap

Like most other members of the Negligence Section, I am proud to be called a "trial lawyer." I enjoy trying a lawsuit before a live jury, and I believe in the jury system. However, a combination of factors has brought about a change in the landscape of trial and settlement, and has increased the incentive to use alternative means of dispute resolution. These factors include changing demographics, the priority of criminal and domestic cases over civil cases, and client pressures to reduce the cost of litigation (*i.e.* primarily discovery costs). In combination with the fact that 90 percent or more of civil cases settle before trial, these factors have led to the expansion of alternate dispute resolution as a regular part of litigation.

Effective August 1, 2000, the Michigan Supreme Court adopted MCR 2.410 and 2.411, together with modifications in MCR 2.403 and 2.404. The term "case evaluation" has replaced what we have been accustomed to calling "mediation." "Mediation" has been defined as "a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. *A mediator has no authoritative decision–making power."* Changes in Rule 2.401 regarding pretrial procedures require the court to "consider . . .whether to refer the case to an alternative dispute resolution procedure under MCR 2.410," *i.e.* "case evaluation" under the old 2.403, as amended, or the new "mediation" under Rule 2.411.

Rule 2.410 governs all forms of ADR (*i.e.* "case evaluation," "mediation" under Rule 2.411 and domestic relations mediation under MCR 3.216.) This rule also mandates that a court which submits cases to the ADR process "shall" adopt an ADR plan "by local administrative order." That order can include "adjoining circuits or districts," so in some area, there may be multi-district or multi-county plans.

Court Rule Highlights

The highlights of the Court Rules are as follows.

- All contested civil matters **may** be ordered to a non-binding ADR process either specified by rule or "other procedures provided by local court rule or ordered on stipulation of the parties."
- The ADR plan adopted by local administrative order must, among other things, identify the list of persons available to serve as mediators and the system by which the mediators are to be assigned and specify how access to the ADR process will be provided to indigent persons.
- A party may move to set aside or modify an order submitting a case to an ADR process **within 14 days after entry of the court order referring the case to ADR**.
- The parties may stipulate to the selection of a mediator, who may be exempt from the qualifications mandated by MCR 2.411(F).
- A non-lawyer may qualify as a mediator if he or she has "a graduate degree in conflict resolution, or 40 hours of mediation experience over two years, . . ." People who have served as mediators (now case evaluators) under the old MCR 2.403 do not necessarily qualify for service as a mediator.
- In addition to the traditional power to direct that the parties and persons with authority to settle a case be present, the new Rule 2.410(D)(2) specifically includes "**representatives of the lien holders**, or representatives of insurance carriers" as persons who may be required to be present. While the rule specifies that failure of a party or parties' attorney to attend an ADR proceeding may result in default or dismissal, the rule is silent concerning penalties to be applied to absent lien holders or insurance carriers. Presumably, this preserves the current rule, which prohibits sanctions against the party for the insurer's non-appearance.. However, the court's traditional contempt power would apply. This is highly significant for both plaintiffs and defense counsel who have been confronted with a worker's compensation or health care lien holder who simply refuses to cooperate in the settlement process
- The fees for the mediator, which will be specified in the "plan" for individual mediators, will be shared by the parties on a pro-rata basis.
- Extensive educational and training requirements are set forth in the Rule 2.411(F). "standards of conduct" for the mediators are to be developed by the State Court Administrator's Office.

When considering facilitative mediation, it is important for all of us to understand that the facilitator ("mediator") is not there to impose a solution or to provide an evaluation. Indeed, as noted above, the mediator has "**no authoritative decision making power**." A good facilitator is not there to advise that your case is worth far more or less than your evaluation as an attorney, but rather to move the parties toward an acceptable mutual solution of their disputed issues. The process depends upon the mutual cooperation of the parties and the mediator. The fear by some

attorneys that a solution will be forced upon them is unrealistic in a setting controlled by a trained and competent mediator.

Frequently asked questions

Question: Can the court order my case to "case evaluation" under Rule 2.403 *and also* "mediation" under Rule 2.411?

Answer: Yes, although it is unlikely. In early scheduling conference orders under MCR 2.401(B)(1)(b) the court may "refer the case to *an* alternative dispute resolution procedure under MCR 2.410," which includes both case evaluation and mediation. While the rules, in more than one place, refer to "*an alternative resolution procedure,"* MCR 2.401(2) also provides that "more than one [scheduling order] may be entered in the case." The option of objecting to MDR 2.403 case evaluation still remains "for good cause shown." MCR 2.403 (A)(2)

Question: Will I need to file a mediation brief?

Answer: This is optional with the individual mediator who may direct the parties to submit a document or summaries providing information about the case. MCR 2.411(C)(1)

Question: How long will these mediation sessions last? This is important to my client if I am paying a mediator's hourly rate?

Answer: The rule provides "the mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, at the end of the first mediation session, or until a time agreed to by the parties." MCR 2.411(C)(2).

Question: Are statements made during the mediation procedure by the lawyer or a party confidential?

Answer: MCR 2.411(C)(5) specifically provides for confidentiality of both statements and written submissions, with certain exceptions, and prohibits their use in any other proceeding including trial. However, it is important to determine the "ground rules" with any mediator at the inception of a mediation session. My own personal preference is to specify that anything I am told by the parties, or their attorney, may be shared with the opposition *unless* I am specifically requested to keep that information confidential.

Question: May I dispute the fees charged by a mediator if they are excessive?

Answer: The trial judge is specifically entitled to determine the "reasonableness" of the fee. MCR 2.411(D)(5)

Question: May mediator fees be taxed as a cost?

Answer: Yes. MCR 2.411(D)(4).

Question: Am I compelled to accept a mediator appointed by the court?

Answer: No. The rules encourage the parties to stipulate to the selection of a mediator even though that person may not meet the qualification set forth in the rules. MCR 2.411(A)(2)(1) The Court only appoints the mediator if the parties do not agree upon mutual selection. Even then, a mediator may be disqualified under the same procedure for disqualification of a judge. MCR 2.003.

Many of us have experienced the facilitation process both as advocates for our clients and as facilitative mediators. Like any process, there will be successes and failures. Success depends upon a properly trained group of facilitative mediators and the cooperation, knowledge and diligence of practicing attorneys. Recent data compiled by the United States District Court for the Western District of Michigan for April through June of 2000 reported 40 settlements out of 58 cases. Of the participants, 49 indicated they would use facilitative mediation again while eight disagreed. We should expect no less in the state courts.

Peter L. Dunlap *has practiced at Fraser Trebilcock Davis & Foster, P.C. since 1967. He is on the list of certified facilitative mediators for the United States District Court for the Western District of Michigan. He has completed a four day ADR workshop conducted in Toronto, Ontario under the auspices of the University of Windsor and an arbitration training course at the University of San Diego School of Law, San Diego, California, conducted by the National Arbitration Forum. He is a member of the Alternative Dispute Resolution Section of the State Bar of Michigan and currently serves on the State Bar's Negligence Council. He practices in the areas of alternative dispute resolution, personal injury litigation, business litigation and legal malpractice.*

Mold Grows in Michigan

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Endnotes

[1] "The Performance of Exterior Insulation Finish Systems and Property Values" Appraisal Journal, January, 1999. Cited in The New York Times, "Some Users of Fake Stucco Find Headaches are Real", by Fred Bernstein, 7/3/99, E-5. *See also* "Exterior Insulation and Finish Systems", *National Hazard Mitigation Highlights* No. 7, February, 1997, Insurance Industry Institute for Property Loss Reduction, 1-12.

[2] EPA's Indoor Air Quality Home Page, (www.epa.gov/iaq)

[3] U.S. Environmental Protection Agency, *Mold Remediation in Schools and Commercial Buildings*, www.epa.gov/iaq (March 2001); New York City Guidelines on Assessment and Remediation of Fungi in Indoor Environments (2000).

[4] EPA, *Mold Remediation in Schools and Commercial Buildings* (March 2001).

[5] *Is Indoor Mold Contamination a Threat to Health*, Harriet M. Ammann, Ph.D., D.A.B.T., Senior Toxicologist, Washington State Department of Health.

[6] Ammann.

[7] Medical Aspects of Chemical and Biological Warfare, Office of the Surgeon General, Dept. of the Army, ch. 34, 1997.

[8] American Conference of Governmental Industrial Hygienists (ACGIH) *Bioaerosols: Assessment and Control* (1999); American Industrial Hygiene Association (AIHA), *Field Guide for the Determination of Biological Contaminants in Environmental Samples* (1996).

[9] *But see*, Pohutski v. City of Allen Park, S.Ct. No. 116969 and Jones v. City of Farmington Hills, S.Ct. No. 117935 (Feb. 5, 2001), wherein the Supreme Court granted leave to determine the issue of the applicability of the trespass nuisance exception to governmental immunity in the flooded basement litigation arena.

Nawrocki/Evens—One Year Later

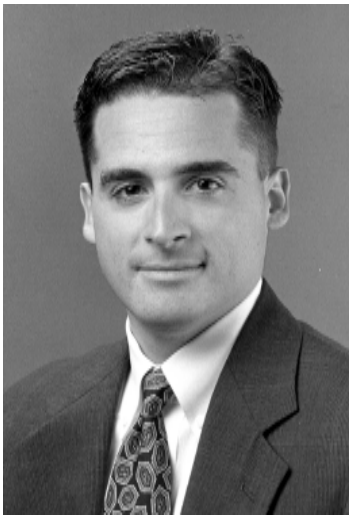
By L. Page Graves

The highway defect exception to governmental immunity, MCL 691.1402(1); MSA 3.996(102)(1), if broken down in part, sentence by sentence, reads as follows:

> S1: Except as otherwise provided in section 2a, each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.
>
> S2: A person sustaining bodily injury or damage to his or her property by reason of failure of a governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency.
>
> S3: The liability, procedure and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of Act No. 282 of the Public Acts of 1909, as amended, being section 224.21 of the Michigan Compiled Laws.
>
> S4: The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and shall not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel."

On July 28, 2000, the Michigan Supreme Court released for publication, its opinion in *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143; 615 NW2d 702 (2000)(and its companion case, *Evens v Shiawassee Co Rd Comm'rs*). Notwithstanding the Court's criticism in *Nawrocki/Evens* of its prior decision in *Pick v Szymczak,* 451 Mich 607; 548 NW2d 603 (1996) for, among other things, using phrases and concepts like "points of hazard" that do not expressly "appear anywhere within the provisions of the highway exception" (*Evens*, 463 Mich at 176 - 177), the Court, nevertheless, created and adopted its own phrases and concepts for applying the highway exception.

At pages 151-52 (emphasis supplied) of the Court's opinion in *Nawrocki/Evens*, for example the majority expressly held that the *state or county road commissions'* duty to "repair and/or maintain . . . . is limited exclusively to *dangerous or defective conditions* within the improved portion of the highway designed for vehicular travel." Thereafter, the Court, in obiter dicta, referred alternately to this "dangerous or defective condition" as being a part of "the actual roadbed" (Id, p 162), "the actual physical structure of the road bed surface, paved or unpaved" (Id, p 183), and/or "the actual roadway" (Id, p 184). Regarding the new language to be used, "dangerous or defective condition," it should be noted that that express language appears in the sister exception to governmental immunity, MCL 691.1406; MSA 3.996(106), which is commonly known as the "public building exception." Needless to say, none of the new phrases and concepts employed by the Court in *Nawrocki/Evens* can be found in the express language of the highway exception.



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Based upon its entirely new conception, phraseology and interpretation of the highway exception, and given that the plaintiff's claim in *Evens* was based solely on the county road commissions' faulty or inadequate traffic control devices, the Court in *Nawrocki/Evens* held that the county road commission owed no duty under the highway exception to install, repair, maintain or improve traffic control devices. Id, p 180. By doing so, the Court overturned over a quarter century of case law recognizing such a duty. *Pick*, supra, *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 135; 523 NW2d 791 (1994), *Scheurman v Dep't of Transportation*, 434 Mich 307; 456 NW2d 66 (1990)(Boyle, J, concurring), *Salvati v Dep't of State Hwy*, 415 Mich 708; 405 NW2d 856 (1982), *Tuttle v Dep't of State Hwy*, 397 Mich 44; 243 NW2d 244 (1976), *Sweetman*, 137 Mich at 23; *Grof v State*, 126 Mich App 427, 434 - 435; 337 NW2d 345 (1983), *O'Hare v City of Detroit*, 362 Mich 19, 26; 106 NW2d 538 (1960), *National Bank of Detroit v State,* 51 Mich App 415; 215 NW2d 599, 600 (1974), *Williams v Dep't of State Hwy*, 44 Mich App 51; 205 NW2d 200, 206 (1972), *Lynes,* 185 NW2d at 114.

Remarkably, and notwithstanding the Court's express demand just 10 days before it released *Evens*, that

> "Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Where the language of the statute is clear and unambiguous, the Court must follow it."[(*Robinson v Detroit*, 462 Mich 439; 613 NW2d 307, 318 (2000)(released, July 18, 2000),]

the Court overturned over a decade of binding precedent by pronouncing the astonishing conclusion that the *state and county road commissions* had absolutely no duty to keep a highway "reasonably safe" despite that phrase appearing not once, but twice in the statute. Id, 463 Mich at 160. See *Chaney v Dep't of Transportation*, 447 Mich 145, 150; 523 NW2d 762 (1994), *Killeen v Dep't of Transportation*, 432 Mich 1, 3 - 4; 438 NW2d 233 (1989), *Greg v State Hwy Dep't*, 435 Mich 307, 316; 458 NW2d 619 (1990), *Roy v Dep't of Transportation*, 428 Mich 330, 341; 408 NW2d 783 (1987), *Skogman v Chippewa Co Rd Comm*, 221 Mich App 351, 353; 561 NW2d 503 (1997); all notably decided after *Ross v Consumers Power Co* (On Rehearing), 420 Mich 567 (1984).

In one year, the repercussions of *Nawrocki/Evens* have been mixed, curious and unclear. All of the highway cases that have

applied the new rule announced in *Nawrocki/Evens* did so without considering its appropriateness given that vested rights were being destroyed in the process. Arguments against retrospective application, however, have been successfully raised in pending litigation before the Court of Claims, even where lack of adequate traffic controls was the sole issue under *Pick*. Specifically, on December 31, 2000, Ingham County Judge, Carolyn Stell, opined:

> "When a case overrules clear and uncontradicted case law, it should be limited to prospective application. The Supreme Court noted in *Pick* at 624 that the opinion was intended to 'clearly state a workable principle that is faithful to the plain language of the highway exception, read in its proper context, and the intent of the Legislature in providing the exception.' The bench and bar have relied on that opinion. It would be unjust to apply *Nawrocki* retrospectively. The Court will decide this case under the law enunciated in *Pick*."

Prince v MSU, Ingham County Circuit Court, Docket No. 93-14998-CM. The case remains pending before the Court of Claims and no application for interlocutory leave to appeal to the Court of Appeals has been made.

Similarly, this past spring, on March 23, 2001, Wayne County Circuit Judge, Kaye Tertzag, sitting as the Court of Claims, adopted Judge Stell's reasoning and held in another related traffic control device claim that *Nawrocki/Evens* should be applied prospectively, only. *McCann v MDOT*, Wayne County Circuit Court, Docket No. 99-930047-NO. MDOT did file an application for interlocutory leave to appeal which was granted and certified by the Court of Appeals on June 18, 2001 (Docket No. 234213). Therefore, with *McCann,* the prospective verus retrospective debate is now postured to announce a controlling decision on that precise issue. It is unclear, however, exactly how the Court of Appeals will deal with the issue given three decisions it has issued since *Nawrocki/Evens*, where significantly, that issue was not formally before the court.

In *Hanson v Board of Co Rd Comm'rs for Mecosta Co* (On Rehearing), unpublished opinion of the Court of Appeals, decided October 3, 2000 (Docket No. 217869), the 2-1 court reversed itself in light of *Evens* given that it had heavily relied upon *Pick* in reaching its previous decision. Since *Evens* overturned *Pick*, the court in *Hanson* felt compelled to do the same. The case in *Hanson*, however, was not limited to claims regarding faulty traffic control devices or the lack thereof; it also raised a claimed sight-line restriction inherent in the design of the roadway itself. In addition to tossing out the plaintiff's traffic control device claims in light of *Evens*, the court in *Hanson* latched on to the obiter dicta in *Evens*, i.e., "roadbed surface", and tossed out plaintiff's restricted sight-line design claim as well, reasoning that the alleged design defect was a product of the terrain and not a "road surface condition." (Slip Op, p 3). An application for leave to appeal has been filed with the Michigan Supreme Court (Docket No. 117973) and is still pending.

Although unpublished, *Hanson* is troubling for two reasons. It applied obiter dicta from *Nawrocki/Evens* and by doing so, expanded the scope of the otherwise limited holding of *Nawrocki/Evens* regarding the state and county road commissions' lack of duty to repair and maintain traffic control devices. Since the late 1800's, design defect cases have long been recognized as an actionable theory under the highway exception. *Killeen v Dep't of Transportation*, 432 Mich 1, 3 - 4; 438 NW2d 233 (1989), *Chaney v MDOT*, 447 Mich 145; 523 NW2d 762 (1994)(Levin, J, dissenting on a different issue, p 186 and fn 18), *Arnold v Department of State Highways*, 406 Mich 235, 238, 277 NW2d 627 (1979); *Peters v Department of State Highways,* 400 Mich 50, 58; 252 NW2d 799 (1977); *Malloy v Walker Twp,* 77 Mich 448, 460 - 461; 43 NW 1012 (1889); *Carver v Detroit & Saline Plank Road Company,* 61 Mich 584, 590; 28 NW 721 (1886); *Sweetman v State Hwy Dep't*, 137 Mich App 14, 22; 357 NW2d 783 (1984); *McKee v Dep't of Transportation,* 132 Mich App 714, 723; 349 NW2d 798 (1984); *Stemeler v Michigan Dep't of State Hwy*, 58 Mich App 620; 228 NW2d 492 (1975); *Lynes v St. Joseph Co Rd Comm*, 29 Mich App 51; 185 NW2d 111, 112 - 113 (1970). Therefore, *Nawrocki/Evens* should not be applied retrospectively to design defect cases that accrued before it was announced.

Even if the new rule in *Nawrocki/Evens* is to be applied, that case's strict construction principles mandate that design defect theories survive governmental immunity. Not once, but twice in the fourth sentence of MCL 691.1402(1); MSA 3.966(102)(1), herein referred to as S4, which the court in *Evens* stated:

> definitively limits the state and county road commissions' duty with respect to the *location* of the alleged dangerous or defective condition;[Id, 463 Mich at 162 (emphasis in original),]"

the term "designed" is expressly used. The Legislature could have used any number of words in lieu of "designed", but it did not. *Evens*, itself, and *Robinson*, just ten days before, demand that every word used by the Legislature be given effect and the court must follow it. Of course, no court could render "designed" surplusage or nugatory, because, once again, *Evens*, says so. 463 Mich at 161 - 162, fn 18. Accordingly, following *Evens*, and its express directive in footnote 18, the very astutely parsed language of the fourth sentence (S4), containing the "designed" language must be read with the "duty" language in the first sentence (S1) of the statute.

Since "the improved portion of the highway designed for vehicular travel" must have a design, and since only the state and county road commissions design and constructs highways, and because each have the duty to repair and/or maintain their highways, it therefore follows that where the highway is not properly designed or constructed, it is not properly maintained and must be repaired. Stated differently, where, by design and construction, the roadbed restricts sight distance and renders travel unsafe, it follows that the state or county road commission has a duty to "repair" the "dangerous and defective condition." With *Hanson* on application for leave to appeal, though, we will have to patiently wait and see if this simple logic will ultimately hold true.

On February 21, 2001, the Court of Appeals released for publication, two highway cases that applied *Nawrocki/Evens.* First, is *McIntosh v State Dep't of Transportation* (On Remand), 244 Mich App 705; 625 NW2d 123 (2000) (an application for leave to appeal has been filed with the Michigan Supreme Court (Docket No. 118777) and is still pending). Although *McIntosh* involved a claimed defect in the design (width) of the grassy median separating adjacent highways and lack of a barrier, the holding in the case did not foreclose the validity of a design defect theory. Like in *Hanson*, the court in *McIntosh* previously relied heavily on *Pick*, in favor of plaintiff's theory, but in light of *Nawrocki/Evens*, was ordered on remand to reconsider the claim and therefore, was compelled to reverse itself. Significantly, however, the court distinguished plaintiff's design claims as not being within the

location limitation contained in the fourth sentence (S$) of the highway exception, i.e., "the improved portion of the roadway designed for vehicular travel."

> "The median between the eastbound and westbound lanes of I-96 is, obviously, outside the actual physical structure of the roadbed surface designed for vehicular travel. It is not a road surface condition. The width of the median and the lack of a median barrier are basically design features. The *Evens* decision makes clear that defendant had not duty, under the highway exception to governmental immunity, to correct these design defects. *Id.* At 183-184. Defendant's duty only extended to a dangerous or defective condition of the *roadway designed for vehicular travel. Id.* There is no dispute that the median area between the eastbound and westbound lanes of I-96 is outside the actual physical structure of the roadbed surface designed for vehicular travel.
>
> 244 Mich App at 709 - 710 (emphasis in original).

Key to its holding is the court's express distinction that "*these*" defects claimed of by plaintiff were "*obviously, outside*" the "*roadway designed for vehicular travel*" which, therefore, does not preclude a claimed defect which is "*inside*" and/or "*a part of*" the roadway designed for vehicular travel. In other words, the *McIntosh* case is limited to design defect claims that do not allege a defect in the design of the "actual physical structure of the roadbed surface designed for vehicular travel." Arguably, the highway exception is not, as some rhetorically suggest, simply limited to potholes. With *McIntosh* on application for leave to appeal, though, we will have to patiently wait and see if the Court will choose to shed any light on the status of claims alleging a design defect involving the actual road surface.

The final case decided by the Court of Appeals, but not appealed, is *Iovino v State Dep't of Transportation*, 244 Mich App 711; 625 NW2d 129 (2001). That case, which involved solely the claim of inadequate traffic control devices, was remanded in light of *Nawrocki/Evens.* And like the previous cases, it too, was reversed. What is significant about all of these cases discussed so far, though, is that each involved claims against the state or county road commission. *Nawrocki/Evens* was adamant about interpreting each sentence of the entire highway exception.

> "Thus, we begin by observing that the first and second sentences of the highway exception clause apply to all governmental agencies having jurisdiction over any highway. In contrast, the third and fourth sentences address more specifically the duty and resulting liability of the state and county road commissions. . . .
>
> * * *
>
> The fourth sentence of the statutory clause, specifically applicable to the state and county road commissions, proceeds to narrowly limit the general duty to repair and maintain, created by the *first* sentence, 'only to the improved portion of the highway designed for vehicular travel.'. . . We believe the language of this sentence definitively limits the state and county road commissions' duty with respect to the *location* of the alleged dangerous or defective condition; . . ."
>
> *Nawrocki/Evens*, 463 Mich 161 - 162 (emphasis in original).

Because the claim in *Evens* was against the county road commission, the court, based on its strict interpretation of the statutory language held that the plaintiff's claim pursuant to the first sentence (S1), which states the duty to maintain and repair, in that instance, traffic control devices, was precluded by the location limitation contained in the fourth sentence (S4) of the highway exception. Theoretically, had *Evens* involved a claim against a village, township or city with jurisdiction over the roadway, the limitations in the fourth sentence (S4) of the highway exception with regard to state and county road commissions would not apply to other political entities, resulting in liability for a village's, township's or city's failure to maintain and repair traffic control devices, under the first sentence (S1) which is applicable "to all governmental agencies." Id, at 161.

That is why the recently published city-sidewalk case, *Weakley v City of Dearborn Heights* (On Remand), __ Mich App __; __ NW2d __ (June 8, 2001)(2001 WL 637711; Docket No. 212008), is curious. This case, too, was remanded in light of *Nawrocki/Evens*. It involved the plaintiff's claim against the *city* for failing to properly sign and warn of the removed concrete slab, hidden by fallen leaves. Previously, the court held the plaintiff's claims were actionable and relied on *Pick*, in doing so. But on remand, the court, noting that *Evens* overturned *Pick*, applied the location limitation from the fourth sentence (S4) of the highway exception and dismissed the case. (Slip Op, pp 3 - 4). Without considering the significant distinction that this claim involved the city, the Court of Appeals in *Weakley,* apparently read *Nawrocki/Evens* as compelling the same limitation to cities. Clearly, nothing in *Evens*, which involved a county road commission, compels such a result. Even more importantly, neither does anything in the fourth sentence (S4) of the highway exception. If the strict construction principles outlined in *Nawrocki/Evens* are to be followed, then the Court of Appeals' ruling, in *Weakley*, was erroneous. As of this writing, however, no application for leave to appeal to the Supreme Court has been filed.

The last case citing *Nawrocki/Evens*, is another city-sidewalk case, *Haliw v The City of Sterling Heights*, __ Mich __; __ NW2d __ (June 12, 2001)(2001 WL 647854; Docket No. 115686). The court in *Haliw* cited *Nawrocki/Evens* as standing for its obligation to narrowly construe the highway statute applicable to the case before it; the court also utilized *Nawrocki/Evens*' new "dangerous or defective" terminology when analyzing the city's duty to maintain the sidewalk under the first sentence (S1) of the highway exception. Setting aside the debatable unnatural versus natural accumulation of ice on the sidewalk, *Haliw* is notable for the court's apparent willingness to breach its own standards of strict construction, which it had previously lauded in *Evens*. Not only did the court require a "dangerous or defective condition" to be present, but now according to *Haliw*, that condition must be "persistent." (Slip Op, pp 15 and 17). Obviously, nowhere in MCL 691.1402(1), does the term "persistent" appear. Again it will be curious to see whether this new judicially-created "persistency" requirement will be extended to roadway defect cases.

L. Page Graves *is an attorney with Sinas, Dramis, Brake, Boughton & McIntyre, P.C., in Lansing where he concentrates his practice on personal injury claims involving no-fault insurance and governmental tort liability.*

Legislative Update

By Richard P. Duranczyk

Richard P. Duranczyk

HOUSE BILLS

The following is a summary of events in the Michigan House of Representatives during the 2001-2002 legislative session, which is currently scheduled to end on July 19, 2001.

HB 4140 (Shulman) creates a "cyber court" for certain business law suits. The bill was reported from the Civil Law and Judiciary Committee. The House is expected to take action this fall. (Civil Law and Judiciary)

HB 4275 (Koetje) prohibits a local government from suing a person for the production of a legal product. Hearings have been held on the bill in the Civil Law and Judiciary Committee but no vote has been taken. (Civil Law and Judiciary)

HB 4448 (Richner) amends the Revised Judicature Act (RJA) to allow prejudgment interest at a rate of 12 percent (or at a specified interest rate) on a written instrument evidencing indebtedness. It has been passed by the House and is in the Senate.

The following bills were introduced in the Michigan House since the last legislative update. The name of the senator sponsoring the bill is shown in parentheses as is the committee to which the bill was assigned.

HB 4680 (Bogardus) establishes the Internet privacy act and creates a cause of action for violation. (Commerce)

HB 4706 (DeVuyst) extends governmental immunity to municipalities for sewer back-ups. (Conservation & Outdoor Recreation)

HB 4740-4744 (Neumann, Anderson, Wojno, Adamini, Minore) requires insurers to deal fairly and in good faith with those claiming benefits. (Insurance and Financial Services)

HB 4793 (Richner) revises the definition of "government function" in the Government Tort Liability Act. The Civil Law Committee reported an amended version of the bill to the full House which is expected to act on it before the summer recess.

HB 4798 (Richner) - Increases jury demand fee as part of effort to raise jury compensation.- The Civil Law and Judiciary Committee reported the bill to the full House with companion bills intended to increase jury compensation.

HB 4809 (Shulman) revises workers' comp benefits involving offer and refusal of favored work. (Insurance and Financial Services).

HB 4913 (George) requires motorcyclists' no-fault insurance to include same coverages as automobiles. (Transportation)

HB 4960 (Patterson) establishes governmental liability for sewer back-ups if certain conditions are met. (Civil Law and Judiciary)

SENATE BILLS

The following is a summary of actions taken in the Michigan Senate during its current legislative session.

SB 30 (North) provides for good samaritan immunity for non-emergency health care when performed for no compensation. The bill is the same as SB 55 from the last session. The State Bar Negligence Section is actively opposing the bill. SB 30 was passed by the Senate to the House Committee on Civil Law and Judiciary, which reported an amended version of the bill to the full House. It is expected to pass the bill before summer recess.

SB 109 (Johnson) provides for immunity for non-economic damages for sewer back-ups. It has been passed in the Senate and referred to the House Conservation and Outdoor Recreation Committee.

SB 184 (Schwarz) adds physician's assistants to a list of medical professions already granted immunity from liability when assist person in an emergency without compensation. The bill passed the Senate and was referred to House Civil Law & Judiciary Committee.

The following bills were introduced in the Michigan Senate since the last legislative update. The name of the senator sponsoring the bill is shown in parentheses as is the committee to which the bill was assigned.

SB 346 (Van Regenmorter) amends the Revised Judicature Act to include death of a fetus in the definition of wrongful or negligent act against a pregnant woman. (Judiciary)

SB 380 (Bullard) limits liability of certain private facilities under certain circumstances. (Judiciary)

SB 528 (Gougeon) prohibits civil actions by persons convicted of any crime if the action for injury or death arose from that criminal conduct. (Judiciary)

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Recent Developments in Negligence Law

Michigan Supreme Court

Macdonald v PKT, Inc; Lowry v Cellar Door Productions, 2001 WL 722136 (2001); Docket No 114039; Docket No 115322 (June 26, 2001)

The Court held that the scope of premises owners' duty to respond concerning criminal acts of third parties is limited to reasonably expediting the involvement of the police, and reaffirmed that merchants are not required to provide security personnel or otherwise resort to self help to address such occurrences. Plaintiffs in these consolidated cases were injured when patrons threw sod at outdoor concerts held at Pine Knob. Clarifying the duty articulated in *Mason*, the Court held that the duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee, and that only a present situation on the premises, not any past incidents, creates the duty to respond. The Court of Appeals erred in the *MacDonald* case by relying on incidents previous to the day in question as a basis for concluding that sod throwing was "foreseeable". Since in both cases defendants already had police at the concert, they fully discharged their duty to respond and were properly granted summary disposition by the trial courts in both cases. The Court of Appeals was reversed in *MacDonald* and affirmed in *Lowry*. The dissent would have denied summary disposition so that a jury could determine whether (1) the sod throwing was foreseeable, (2) the plaintiffs were identifiable invitees, and (3) defendant took reasonable measures to protect its invitees from the harm.

Haliw v City of Sterling Hts, 2001 WL 647854 2001; Docket No 115686 (June 12, 2001)

The natural accumulation of ice or snow on the sidewalk where plaintiff admitted she slipped and fell on a patch of ice, did not give rise to an actionable breach of defendant-city's duty, and the claimed depression in the sidewalk was not an independent defect. Therefore plaintiff could not prove the elements required to establish a negligence claim against a governmental agency. Plaintiff claimed there was a depression in the sidewalk between two slabs that allowed water to pond, but she admitted that she slipped on the ice and did not trip on, or over, anything related to the actual physical condition of the sidewalk itself. The court concluded that as in *Hopson*, plaintiff could not demonstrate that it was the combination of ice and a defect in the sidewalk that caused her slip and fall. The sole proximate cause of plaintiff's slip and fall was the ice, and there was no persistent defect in the sidewalk rendering it unsafe for public travel at all times that, in combination with the ice, caused the incident. Reversed and remanded. The dissent would affirm the Court of Appeals' denial of defendant's motion for summary disposition because there was a genuine factual dispute regarding whether the sidewalk was in reasonable repair, whether plaintiff slipped on a natural accumulation of ice and snow, and whether plaintiff's injuries were proximately caused by the sidewalk's condition.

James v Alberts, _Mich App _, 626 NW2d 158 (2001)

The Court abolished the volunteer doctrine and agreed, but for different reasons, with the Court of Appeals that this doctrine did not bar plaintiff"s claim, and affirmed reversal of the trial court's grant of summary disposition for defendant. The Court returned this area of the law to traditional agency and tort principles, because it believed that they will better resolve the matters to which the doctrine might have applied. Plaintiff incurred injuries while assisting defendant in digging a trench on defendant's property. The parties disagreed about whether defendant invited plaintiff to assist him in digging the trench.

Court of Appeals

Dykes v William Beaumont Hospital, 2001 WL 688483 (2001); Docket No 218386 (June 19, 2001)

The trial court properly granted summary disposition to the defendant because the deposition testimony of plaintiff's sole expert witness failed to establish the requisite causal link between defendant's conduct and plaintiff's decedent's life expectancy or death. Plaintiff's decedent suffered from acute lymphocytic leukemia and had two bone marrow transplants. Following the second transplant, he developed symptoms of a respiratory infection and subsequently died from a severe bacterial infection. Plaintiff alleged that defendant was negligent because it violated the standard of care by failing to perform a bronchoscopy and/or an open lung biopsy to identify the source of the decedent's respiratory problems, and by failing to recognize that aggressive antibiotic therapy was warranted. The expert stated in the affidavit of meritorious claim that had the standard of care been followed, the decedent would have had a greater than 50 percent chance of surviving the infectious process. However, the expert's deposition testimony contradicted the affidavit. The court affirmed the grant of summary disposition and reversed the award of mediation sanctions.

Oberlies v Searchmont Resort Inc, 2001 WL 674423 (2001); Docket No 220485 (June 15, 2001)

While the Canadian corporate defendant"s advertising constituted the transaction of business in Michigan for purposes of the long-arm statute, defendant was properly granted summary disposition because the exercise of personal jurisdiction over defendant did not comport with the principles of due process. Although defendant purposefully availed itself of Michigan business opportunities through its advertising to Michigan residents, the connection between plaintiff"s cause of action for injuries she suffered at defendant"s resort and defendant"s Michigan advertising was so attenuated that it was unreasonable to exercise jurisdiction over defendant. The court concluded that for a foreign defendant to be compelled to defend a suit in Michigan where defendant"s contacts with Michigan are solely limited to advertising aimed at state residents, the advertising activities must, in a natural and continuous sequence, have caused the alleged injuries forming the basis of plaintiff"s cause of action. Affirmed.

Recent Developments in Negligence Law

Madejski v Kotmar Ltd, 2001 WL 674593 (2001); Docket No 220432 (June 15, 2001)

The trial court erred in concluding that plaintiff's claims were barred by the exclusivity provision of the dramshop act and in granting summary disposition for defendant-Kotmar on that basis. Plaintiff's decedent, an exotic dancer at defendant's topless bar, was killed after leaving work when the vehicle she was driving struck a tree. Her blood alcohol level was .26 at the time. Plaintiff alleged that the decedent's intoxication and subsequent death resulted from defendant's practice of allowing customers to furnish underage dancers with alcoholic beverages to diminish the dancers' inhibitions. The court noted that the dramshop act neither abrogates nor controls the common law action and a claim is not precluded by the dramshop act if it arises out of conduct other than "selling, giving away, or furnishing of intoxicants", and the common law recognizes a cause of action for negligent conduct.

Rickwalt v Richfield Lakes Corp, 2001 WL 674611 (2001); Docket No 210591 (June 15, 2001)

The trial court erred in granting plaintiff interest on the jury's award of $310,000 in future damages for loss of society and companionship. The court found that reading §6301(a) and (b) together, "future damages" plainly include damages arising from death that the jury finds will accrue after the entry of the verdict. Damages for loss of society and companionship qualify as damages arising from death. Therefore, the damages for loss of society and companionship that the jury awarded for the period anticipated, the post-trial life of the decedent, constituted future damages under §6301, on which interest shall not be allowed. The court affirmed the jury's verdict for plaintiff, reversed the trial court's awards of (a) costs for the seven depositions not filed with the trial court clerk and (b) interest on the jury award of future damages for loss of society and companionship, and remanded for entry of an order incorporating an appropriate calculation of interest pursuant to §6013.

Weakley v City of Dearborn Hts, 2001 WL 637711 (2001); Docket No 212008 (June 8, 2001)

On remand from the Supreme Court for reconsideration in light of *Nawrocki*, the court held that the defendant-city did not have a duty to make the sidewalk reasonably safe by placing a barrier or warning device around that portion of the sidewalk that was under repair. Plaintiff tripped and fell on a removed portion of a public sidewalk maintained by the city and adjacent to property owned by the defendants-Duncan. Plaintiff alleged that the city breached its duty to keep the sidewalk in good repair so as to be reasonably safe for public travel. However, in *Nawrocki*, decided after the court's opinion in this case, the Supreme Court held that the duty to maintain and repair does *not* include a separate duty to keep a highway "reasonably safe". On reconsideration, the court concluded that the trial court properly granted summary disposition to defendants on plaintiff's claim of breach of a statutory duty.

Smith v Jones, 2001 WL 615358 (2001); Docket No 215459 (June 5, 2001)

Since the defendants-police officers owed no duty to the plaintiffs by virtue of the public duty doctrine, the trial court erred in denying defendants' motion for JNOV. Plaintiffs called 911 regarding suspicious activity near their home. They alleged the defendants were grossly negligent in parking their patrol car with the suspects in it, in front of their house and asking plaintiffs to identify the suspects, resulting in the retaliatory firebombing of their home. The public duty doctrine insulates officers from tort liability for the negligent failure to provide police protection unless an individual plaintiff satisfies the special-relationship exception. Utilizing the *Cuffy* factors and reviewing the evidence, the court concluded that reasonable minds would not differ in finding that no special relationship existed to create a duty to plaintiffs and justify exposure of the defendants to liability for the criminal acts of third parties. Reversed and remanded for entry of judgment in favor of defendants.

Miller v Purcell, 2001 WL 599074 (2001); Docket No 221473 (June 1, 2001)

The trial court erred by denying defendant"s motion for summary disposition in plaintiff"s claim against defendant following an automobile accident where plaintiff alleged that her injuries amounted to a serious impairment of body function. The no-fault act amendments enacted as part of 1995 PA 222 applied to plaintiff"s claim because she initiated her suit in 1998. An outcome-determinative factual dispute did not exist with regard to the nature and extent of plaintiff's injury. Thereforu, the trial court was required to rule whether plaintiff suffered a "serious impairment of body function." The court was satisfied that plaintiff had not suffered a serious impairment of body function because her general ability to lead her normal life had not been altered by her injury. Plaintiff admitted that she was able to perform all the same activities that she did before the accident. Plaintiff had been able to work 40 hours a week since the accident and was able to perform household tasks. Reversed and remanded.

Piccalo v Nix, 2001 WL 589113 (2001); Docket No. 212752 (May 15, 2001)

The trial court erred in instructing the jury regarding the impairment defense because it would be absurd to allow the defense of impairment to an individual who caused or created the impairment of the injured person. Due to the cumulative effect of errors regarding the trial court"s rulings there was cumulative prejudice. Plaintiff, a passenger in a van where there were only two seats, laid or sat in the back of the van and was injured by tires inside the van, when the driver, an underage drinker, who was served alcohol at defendant"s home, failed to manipulate a slight curve in the gravel road and drove the van into a tree. The case was reversed and remanded for a new trial.

Recent Developments in Negligence Law

Hilgendorf v Saint John Hosp, 2001 WL 589085 (2001); Docket No 215311 (May 11, 2001)

Plaintiffs' motion for a new trial based on an allegation of attorney misconduct, in an action where plaintiffs claimed that defendants-Relich and Rabbani committed malpractice by failing to diagnose their infant son's subdural hematoma and by failing to treat it with a subdural tap, was properly denied. Plaintiffs argued that defense counsel removed exhibits from the courtroom before the jury was allowed to deliberate. Defendants argued that defense counsel only returned the original hospital record, not the copies, and did so by stipulation. Plaintiffs were unable to provide evidence from the record substantiating the error. With regard to the original hospital record, exhibit D, the trial court agreed that plaintiffs' counsel stipulated to defense counsel removing the exhibit from the courtroom. Plaintiffs' counsel did not note any disagreement on the record. With regard to exhibit E, no one testified that they saw defense counsel remove this exhibit from the courtroom, or found it in his office or otherwise under his control. Even if the exhibit was missing because of attorney misconduct, it was impossible to determine how withholding this evidence from the jury negatively affected the verdict.

Bouverette v Westinghouse Electric Corp, 245 Mich App. 391 (2001)

Plaintiff did not fail to establish a prima facie case of breach of implied warranty by failing to satisfy a risk-utility analysis. There was sufficient evidence to establish plaintiff's breach of implied warranty claim premised on failure to warn. Plaintiff's decedent husband died of an apparent electrocution while working on a control panel manufactured by defendant-Medar, which contained circuit breakers manufactured by defendant. Plaintiff presented evidence that the breaker did not make or break simultaneously as intended. There was evidence that the manual should have warned of the fail condition or the breaker itself could have had a warning label. The evidence presented a question of fact whether defendant's failure to warn of this condition was reasonable given the risk of electrocution. Therefore, the trial court properly denied defendant's motions for a directed verdict and JNOV.

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State Bar of Michigan
Negligence Law Section
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083

First Class
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U.S. Postage Paid
Lansing, MI 48933
Permit No. 191