STATE BAR OF MICHIGAN Spring 2003

NEGLIGENCE LAW SECTION QUARTERLY

The Official Newsletter of the State Bar of Michigan Negligence Law Section Timothy H. Knecht, Chair

Contents

FROM THE CHAIR

Timothy H. Knecht

Spring used to be such a wonderful time in Michigan. My memory may be failing but I do believe we did used to have a Spring. Despite a continued onslaught of brutal weather well past Spring's official start, the Negligence Council is still working with your best interests at heart.

Our Spring Seminar in Las Vegas boasted Ms. Sonya Hamlin, a World renown speaker. Ms. Hamlin gave a very nice presentation discussing "What Makes Juries Listen Today". The meeting was well attended but could always be better attended. Out of town seminars have proven to be difficult for all of us to get to in recent years. We will be assessing whether or not we should continue the practice of a Spring Seminar or an out of town seminar over the next year. Any input you might have would certainly be appreciated. Email your thoughts about this issue or any other issue to me at *Tknecht@ccglawyers.com*

We formally adopted a Mission Statement. That Mission Statement is reproduced here:

> "The Negligence Section of the State Bar of Michigan has a long and distinguished history of promoting excellence among its membership and improving our civil justice system. Providing information and education through publications, seminars and our newsletters has been an invaluable asset in the continuing education of Michigan negligence lawyers. Equally important has been preserving the cornerstone of fairness in our civil justice system, the trial by a jury. When appropriate, the Negligence Section has advocated changes, or no changes, to our civil justice system in an effort to promote fairness and efficiency in resolving disputes for all clients.
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> Times have changed, and to pursue these same goals, so must we. The last decade has witnessed a well-organized, national effort, to discredit our civil justice system. This effort has dealt little with facts or solutions, but has instead resorted to vilifying lawyers and disparaging juries. While our profession and judicial system can always benefit from constructive criticism, the design of this movement has not been to improve, but to diminish the effectiveness of our legal system. It is the same right to a fair trial by one's peers that, when many years ago was taken away, was the catalyst for our present United States Constitution.
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> The right to a fair and impartial trial by jury to resolve disputes, to remedy grievances, and for fair compensation for injuries wrongfully suffered, must be preserved. It is our sworn duty, our moral obligation, to oppose all efforts to undermine

Continued on page 5.

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Introduction

By Chad A. Brown, Editor

A wise man once told me that every decision ultimately comes down to a line in the sand. Some times that line denotes the boundary between right and wrong, and sometimes it's just a simple matter of personal preference. The trick to making good decisions is *seeing* the line before you cross it. His point, I think, was that our decisions have consequences; fail to see the line, and you're certain to miss the consequences. It's those unforeseen consequences that form the basis of any negligence practice.

The law is clear that in order to hold an employer responsible under a theory of respondeat superior, the employee has to be in the scope of his employment; however, the line between whether an employee is in the scope of his employment can be very difficult to find. The argument can be made that when the servant takes his hands off of a machine to scratch his nose, he has abandoned the interest of his master and is now acting for self-gratification. However, this interpretation seems illogical on its face. Conversely, an argument can be made that the paperboy who intentionally delivers a paper *through* a plate glass window, just so that he can hear it shatter, is furthering his master's interest and, therefore, is in the scope of his employment. This scenario seems just as illogical.

As our authors show in this installment of Point/Counterpoint, "scope of employment" can be especially difficult to determine in the realm of home health care. Home health care workers can be solely responsible for continuous care of a patient for many hours at a stretch. Simple biology tells us that in every shift there will likely come a time in which the worker must make the decision to leave the patient's side and attend to the worker's own physical needs. The legal question is who bares the responsibility for the consequences of this decision. The frightening question is whether the worker will even notice that there is a line in the sand.

Point

By James Hofer

James Hofer

Your client is a severely disabled child who needs 24-hour per-day care. He breathes through a tube in his trachea, and the tube frequently becomes clogged and must be cleaned. He is unable to clear his own breathing tube and is completely dependant on others for this vital service. Your client's parents employ the services of a local in-home care provider to tend to his needs, and the provider sends the same nursing professional to your client's home, each and every day. The nursing professional seems like a nice-enough person, but she has one serious problem – she smokes. Because of your client's sensitivity to cigarette smoke, there is absolutely no smoking allowed in the house.

On one unfortunate blustery winter day, while the nursing professional is home alone with your client, she disregards your client's well-being and steps outside to have a quick smoke; thereby leaving your client alone to fend for himself. While your client is only alone for five or ten minutes, it is long enough for his trachea tube to clog. When the nursing professional finally finishes her cigarette, she reenters the home and discovers your client drowning in his own bodily fluids. He is valiantly gasping for breath, but he is near death. While his tube is eventually cleared and his life is saved, his parents relate that he is never the same again.

You bring an action against the in-home care provider, and the defense denies liability, alleging that the nursing professional was not within the scope of her employment while she was outside; Therefore, it is claimed, the provider cannot be held accountable for her actions.

While the line between "scope of employment" and "abandonment of the master's duties" can be difficult to draw, in order to alleviate the employer from vicarious liability, the abandonment must be clear and unequivocal.

While the line between "scope of employment" and "abandonment of the master's duties" can be difficult to draw, in order to alleviate the employer from vicarious liability, the abandonment must be clear and unequivocal. To hold other wise would be to allow an employer to shield itself from all liability with a blanket instruction or policy to "be competent and do nothing but your job."

In *Barnes v Mitchell*, 341 Mich. 7 (1954), an employer chiropractor was held liable for the actions of his assistant who performed an unauthorized procedure on a patient. The court held that even though the employee "was exceeding her authority in [performing the procedure,] that would not excuse defendant from negligence." The present scenario is analogous. While the nursing professional may not have been authorized to leave the client unattended, she was authorized to care for the client and was given substantial discretion in the manner of providing that care. In *Chicago & Northwestern Railway Co. v Bayfield*, 37 Mich. 205 (1954), the Supreme Court stated:

> It is in general no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be expressed orders or implied orders. He assumes the risks of such disobedience when he puts the servant into his business; and the reasons for holding him responsible for the servant's conduct are the same whether the injury results from a failure to observe the master's directions, or from neglect of the ordinary precautions from which no specific directions are deemed necessary.
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> But when the wrong arises merely from an excess of authority, committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend on the question of the exact limits of the servant's authority.

Though she may not be specifically authorized by the employer to leave the patient unattended and go outside for a cigarette, the nursing professional is acting within the scope of her employment, and "providing"

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care for the client, at the time that she is outside. The employer is receiving the benefit of her work and is billing the client for the entire length of the shift.

This is not a case where the nursing professional completely abandoned the client; she is merely negligent in the manner in which she takes care of him. In the course of any day, a nursing professional will not be able to spend each and every moment personally supervising the patient; there necessarily will be short periods in which she will be out of his presence. That cannot mean that every minimal break is a frolic and detour. Within the scope of her authority, because the employer knows that she is working alone and continuously, it is implied that she is allowed to take appropriate moments for her own personal needs. If she takes these moments at inopportune times, or is neglectful in preparing for these moments of absence, then that is negligence in the care of the patient and not abandonment of the employer's interest.

Martin Luther once wrote, "A faithful and good servant is a real godsend; but truly 't is a rare bird in the land." (Table-Talk. clvi, Martin Luther 1483-1546) While some may disagree, none can contest the fact that employees are imperfect and have certain personal needs, which must be met during the course of each and every shift. Because the nursing professional had no means of relief from her duties during the entirety of her shift, she was necessarily impliedly authorize to take appropriate moments of personal time to tend to her human needs. The negligence in this matter is not that she abandoned the client; the negligence is that she failed to properly schedule and prepare for her necessary personal moments. As such, she was acting within the scope of her employment, and the employer can be held vicariously liable for her negligence.

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Counterpoint

By Kenneth V. Klaus

Kenneth V. Klaus

Imagine that you operate an in-home nursing care business. The services that you provide require that you send your employees to the homes of your patients, and sheer economics forbids two employees being sent to a job that one can clearly handle. On your worst of days, you get a frantic telephone call from the mother of severely disabled patient. Through a jumbled mix of anger and tears, you finally decipher that your patient almost died today because your employee abandoned him in order to smoke a leisurely cigarette on the back porch.

Despite the fact that she has always been a good employee and has never garnered any complaints from those in her care, you unequivocally terminate her employment. Obviously, she can't be trusted; you only wish that there had been some clue to her propensities prior to the damage being done.

Although you feel terrible about what happened to the patient, you learn that the patient has filed a claim alleging that you should be held responsible for the nursing professional's abandonment of her ward. You don't know what you could have done differently to avoid this situation, and you don't feel that you should be held responsible just because no one else will.

It is well settled that an employer cannot be held liable for an act committed by the employee where the act is beyond the scope of their employment. *Borsuk v Wheeler,* 133 Mich. App 403, 410 (1984). Nor is an employer liable if the employee's tortuous act is committed while the employee is working for the employer but the act is outside his authority. *Green v Shell Oil Co*, 181 Mich. App 439, 446 (1989). There will also be no vicarious liability if the employee "steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own," even if the employee acts within the course of the employment. *Burch v A&G Associates, Inc.*, 122 Mich. App. 798, 804 (1983), *citing Martin v Jones*, 302 Mich. 355, 358, *quoting Stone v Sinclair Refining Co*., 225 Mich. 344, 349 (1923).

Although more extreme than the issue at hand, the Michigan Supreme Court in *Martin* dealt with a similar issue in that the employee of a service station satisfied his own interests when he shot a customer after an argument developed over the products and services of the station. The court in *Martin* stated:

> Here, [the employee] had no reason to shoot plaintiff outside of a personal desire either to injure plaintiff or else to protect himself from plaintiff. There was no basis on which the jury might find that [the employee] was furthering his master's interests by shooting plaintiff.

While the employee was selling oil in the furtherance of the employer's interests, his action in shooting the customer were clearly outside the scope of his employment. The court went on to say:

> [I]t does not appear that [the employee] shot to protect the property of the Standard Oil Company though he did feel plaintiff might be connected with a gasoline price war then going on; nor did he shoot to further the oil company's business in any way; nor was it one of his duties to be armed. The sale of oil was part of his duty, but [the employee] did not shoot in order to promote the sale of oil.

The simple fact is that this is an attempt to shift blame from a de facto judgment-proof defendant to one with well-insured pockets.

Another example of an employee stepping away from his employment to satisfy his own desires was examined in *Burch*. In *Burch*, the employee was a taxicab driver that assaulted and robbed a passenger after taking the passenger to his destination. The Court of Appeals held that the employer could not be held vicariously liable for the driver's actions because he acted "solely out of the cab driver's personal motivations." *Burch* at 806.

Clearly, the case of our nursing professional is analogous to the preceding. Despite her knowledge that, at any time, the patient could need help clearing his airway, the nursing professional departed from the scope of her employment, abandoned her post, and undertook to satisfy her own personal whim. To paraphrase the Martin court, there is no basis upon which it could be found that she was furthering her master's interests by neglecting the patient in favor of a cigarette break. Therefore, she cannot be held to have been acting within the scope of her employment, and the employer cannot be held vicariously liable.

The simple fact is that this is an attempt to shift blame from a de facto judgment-proof defendant to one with well-insured pockets. Nietzsche may have been accurate when he said, "We either praise or blame according to whether the one or the other provides the greater opportunity to let our power of judgment shine." However, with regard to the nursing professional in this matter, the words of a more modern philosopher may be more appropriate. "Some people claim that there's a woman to blame, but I know, it's my own damn fault." (Margaritaville, Jimmy Buffett 1946-present).

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From the Chair

Continued from page 1

> or eliminate this long fought for basic right of every citizen. It is our duty and obligation to inform the public of all efforts which attempt to deprive them of these rights, and to marshal our members, our resources, and our efforts to these ends."

Over the next few months, your Council will be debating and coming up with an amended set of By-Laws to reflect current reality. As part of this process, we intend to expand the Negligence Council. Once those By-Laws are thoroughly debated and approved by the Council, they will be published for your review and comment.

At our March meeting, Mr. John Berry, Executive Director of the State Bar of Michigan and Ms. Janet Welch, General Counsel for the State Bar of Michigan were our guests. Mr. Berry and Ms. Welch helped clarify what the Negligence Section can and can't do with regards to lobbying. You should know the State Bar has given all sections some latitude in lobbying efforts. The Negligence Section can take a position on an issue that the State Bar has not taken a position on by simply notifying the State Bar that we are taking that position. There is also a process whereby the Negligence Section can take a position contrary to the position taken by the State Bar, provided we get the permission of the State Bar. Importantly, the Negligence Section can engage in proactive activities that will let the Section promote and foster the interests of the Membership of the Negligence Section.

We continue to engage the services of Capitol Services, Inc., and Public Affairs Associates, Inc., as our Lobbyists. We will continue to take positions against blanket immunity for special interest groups and will continue to push to keep the Courthouse doors wide open, keeping the legal system available as a remedy for all.

Timothy H. Knecht, Chair

Preparing Yourself and Your Client for Facilitative mediation

By Peter Dunlap

Like it or not, facilitative mediation in both the federal and state courts is a fact of your professional life. Preparation for this event is of equal importance as preparing for trial. As a facilitative mediator, and as an attorney representing clients in a facilitative mediation setting, I have seen the good, the bad, and the ugly. What follows is an attempt to project you into the first category while avoiding the latter two.

Pre Mediation conference with the Facilitator

The facilitator will usually schedule a pre-mediation telephone conference. If not, you, the attorney, should ask for one, as its importance cannot be underestimated. At this conference, each party should divulge the names of all people who will be in attendance and their role on behalf of the party, be it corporate or personal. Frequently, individuals will ask for the support of a family member who may wish to attend. The estate of a deceased party may wish to send the deceased's spouse as well as a member of the deceased's family. If these are individuals key to the settlement decision, they should, by all means, attend. Request that the facilitator order each party to have a representative present with full authority to settle. If this person does not have this authority, ask who does and why they are not in attendance. Go over rules of confidentiality. In private caucus with the facilitator and the individual party, will the facilitator feel free to divulge what is said in caucus to the other side or, if requested, may particular matters be held in confidence? The facilitator may ask the status of settlement negotiations, i.e. what was the last demand by the plaintiff and the last offer by the defendant. Are other parties necessary to represent all interests critical to the settlement process? This is very important since MCR 2.410 (D) (2) allows the court to order non-parties, such as lien holders, to attend facilitative mediation. Frequently, the attorneys will be asked to present their client's position at the beginning of the meeting where all parties are present. Determine what other procedures may be practiced by this particular facilitative mediator. In general, everything that may be an impediment to settlement of the case, at this particular point in time, should be discussed during pretrial conference.

Preparation of the Client

The client's participation in the facilitative mediation process is essential. Attorneys must remember three things: it is the client's case, it is the client's case, it is the client's case! The client will be encouraged to talk during the facilitative process, particularly to the facilitator and often to the other party in joint session. Go over the strong and weak points of your case. If you don't advise your client of the weak points, your opponent will certainly do so which can be embarrassing for both you and your client. Advise the client there may be long periods of free time while the facilitator is in caucus with the other side. Help them understand that this time is not wasted but rather time spent to assist in the settlement of their case. You and your client should understand your "best alternative to a nego-

tiated agreement." (BATNA) What is the lowest figure your client will take (or the highest figure the defendant will pay before ending the facilitative process and proceeding to trial. *Be flexible!* Your BATNA may change during the course of the day depending upon what develops. Prepare your client for a resolution that is less than their expectations in order to avoid a costly and lengthy trial. Remember, again, this is the client's case.

Mediation Briefs

The focus of a mediation brief in the facilitative process is somewhat different than the evaluative mediation (MCR 2.403) with which we are all familiar as trial attorneys. The focus is not to persuade the facilitator but rather to identify the important factual and legal issues that are "sticking points" to a settlement of the party's disagreement. Identify issues of substantive law, evidence or procedure together with your best argument in favor of your client's position. Discuss ruling of the court, either decided previously or yet to be heard, such as motions for summary disposition or motions in limine. Remember that the target of your brief is not the facilitator but rather the other party. Some of the most effective briefs I have seen attach verdict summaries from cases that are factually similar. Jury Verdict Research is a wonderful source for this information.

Facilitative Mediation Session

Be prepared, and prepare your client, to talk about the factual and legal strengths of your case with the other party. Persuade the other party why they should accept your settlement posture and abandon theirs. Remember that clients *need* to tell their story. This is particularly true for plaintiffs in personal injury cases. Train yourself and your client to listen when the other side speaks. For defendants, never under estimate the power of an apology. I have seen too many cases to count where the plaintiff's attitude has been shaped by their perception that the defendant "doesn't care" and has "never contacted me." Don't mislead the facilitator about your ability to prove certain factual or legal issues, or about anything else for that matter. Above all, *never* send the facilitator to deliver a false message to the other side. The facilitator's credibility, both real and perceived, is essential to the settlement process. Avoid, and instruct your client to avoid, language that will insult or embarrass the other party or their attorney. This is conduct that shuts off communication and prevents your client's story from being heard by the people that matter, your opponents. Avoid the temptation to say "this is my last and final offer (or demand)" to either the facilitator or the other party. Today's BATNA may not be tomorrow's BATNA, or, indeed, the same BATNA at 4:00 p.m. that it was at 10:00 a.m.

In complex cases, know what you want. Prepare a release in advance along with a draft of a proposed stipulation and order. A successful facilitative mediation should always, with rare exceptions, result in a signed agreement identifying the elements of settlement.

Choosing the Right Facilitator

The parties, not the court, have the first opportunity to jointly choose a facilitator. The court steps in and makes the selection only when the parties cannot agree [MCR 2.411 (B) (1)]. Ask other trial attorneys who they have utilized as facilitators. Frequently, the judge will know who has been a successful facilitator and the names of the attorneys previously involved with that particular facilitator. Websites for Michigan Trial Lawyers Association and Michigan Defense Trial Counsel contain sites where attorneys may recommend particular individuals as facilitators. Above all, choose someone who you feel will communicate well with both your client and the opposite side.

This is the opportunity for you and your client to communicate with your adversaries. If your case is as strong as you and your client believe, communication, not adversity, is your goal. Your goal should be to persuade your opponent the same as you would a member of the jury. The facilitator is there not to impose settlement of your case or act as a referee but rather to enhance the mediation process. Remember the words of Ambrose Bierce from *The Devil's Dictionary* (1906) who defined "litigation" as "a machine which you go into as a pig and come out of as a sausage."

Peter L. Dunlap

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Legislative Update

By Richard P. Duranczyk and Steven A. Hicks

The Legislature is currently in session, and although the primary focus has been on the budget, there have been a few bills introduced that, if passed, will affect the practice of negligence law in Michigan. In particular, HB 4198 was signed into law by the Governor on April 21, 2003 as Public Act No. 2 of 2003. It amends a prior statute regarding assumption of risk when operating a snowmobile. It was sponsored by Rep. Charles LaSata (R-St. Joseph) and was designed to eliminate the broad immunity given to snowmobile operators under the assumption of risk doctrine in situations where someone was injured by another snowmobiler's negligence and not the "obvious and inherent" dangers of operating a snowmobile. For more information, see the text of the bill as signed by the Governor at *www.michiganlegislature.org*. Aside from HB 4198, the following bills have been introduced in either the House or Senate:

SB 125 (Sen. Brater, D–Ann Arbor) creates liability for health maintenance organizations for certain harm to enrolled members. (Senate Banking & Financial Institutions Committee)

SB 469 (Sen. Barcia, D–Bay City) prohibits felons from filing personal injury lawsuits (Senate Judiciary Committee)

HB 4140 (Rep. Palsrok, R–Manistee) limits liability of canoe liveries for injuries sustained by renters and users of rented non-motorized watercraft (Passed in House, Referred to Senate Judiciary Committee)

HB 4149 (Rep. Meyer, R–Bad Axe) prohibits convicted criminals from filing certain personal injury lawsuits (House Judiciary Committee)

HB 4465 (Rep. Koetje, R–Grandville) prohibits local governments from suing on behalf of its residents for damages alleged to have been caused by a legal product (House Government Operations Committee)

Richard P. Duranczyk

HB 4494 (Rep. Sheltrown, D–West Branch) would allow recovery for bodily injury or property damage as a result of negligent road design or failure to provide traffic control devices (House Judiciary Committee)

HB 4538 (Rep. Condino, D–Southfield) would provide for liability for harm caused by health maintenance organizations to enrolled members. (House Insurance Committee)

Steven A. Hicks

Further, a package of bills have been introduced in the Legislature which would increase filing fees in the Supreme Court and Court of Appeals from $250 to $375 and in Circuit, District, and Probate Court from $100 to $150. For more information, go to the website.

Appointment Time Savers

You've got places to go and people to see. And you can't afford to hang around waiting for an appointment to show up. Here's some tips on avoiding wasting time:

- *Confirm your appointments the day before.* Let people know you're conscientious; they'll likely follow suit.
- *Don't arrive too early.* More than 10 minutes early is wasting time.
- *Bring some work with you.* If you must wait, it cuts down the wasted time if you bring something else you can work on in the meantime.
- *Set the appointment for an odd time.* Instead of 8 or 8:30, try 8:15 or 8:45. People will most likely do their best to make it on the dot.

Recent Developments in Negligence Law

Supreme Court

Supreme Court reinstates trial court's grant of summary disposition in favor of Defendants, based on governmental immunity.

Perry v. McCahill, 467 Mich. 943. In an order, in lieu of granting leave to appeal, the Supreme Court reversed the 4/30/02 decision of the Court of Appeals (Court of Appeals No. 224556, 2002 Mich. App. LEXIS 663) and reinstated the judgment of the trial court for the reasons stated by the dissenting judge in the Court of Appeals.

The two-year grace period in the wrongful death saving statute is measured from the issuance of letters of authority.

Eggleston v. Bio-Medical Applications of Detroit, Inc. Supreme Court No. 121208; 658 N.W.2d 139; 2003 Mich. LEXIS 459. Deciding an issue of first impression, the court held that the two-year grace period in the wrongful death saving statute is measured from the issuance of letters of authority. The statute clearly allows an action to be brought within two years after letters of authority are issued to the personal representative; it does not provide that the two-year period is measured from the date that letters of authority are issued to the initial personal representative. The decedent received kidney dialysis treatment from defendants on June 21, 1996 and died the next day. Defendants argued that the statute of limitations ran on June 21, 1998 (two years after their treatment of the decedent) and that the wrongful death saving statute did not apply because the complaint was not filed within two years of the appointment of the first personal representative. Plaintiff was the "personal representative" of the estate, and filed the complaint within two years after letters of authority were issued and within three years after the period of limitations had run. The action was timely. Reversed and remanded.

Robinson v. City of Detroit applies retroactively.

Sinishtaj v. City of Detroit, Supreme Court No. 122433; 2003 Mich. LEXIS 752 (2003). In an order, in lieu of granting leave to appeal, the Supreme Court affirmed the decision of the Court of Appeals but noted that the Court of Appeals erred in stating that *Robinson v. City of Detroit, 462 Mich. 439 (2000)* was limited to prospective application. The court clarified in its order in *Ewing v. City of Detroit* that *Robinson* applies retroactively.

Court Of Appeals

The common law rule of setoff survived 1995 tort reform legislation in situations still requiring the application of joint and several liability.

Markley v. Oak Health Care Investors of Coldwater, Inc., 255 Mich. App. 245 (2003). The common law rule of setoff survived 1995 tort reform legislation in situations still requiring the application of joint and several liability. Therefore, the $354,133 judgment for plaintiff in this medical malpractice case should have been reduced to reflect an earlier settlement in a separate action. The Legislature did not intend to allow recovery greater than the actual loss in joint and several liability cases when it deleted the relevant portion of MCL § 600.2925d, but it instead intended that the common law principles limiting recovery to the actual loss would remain intact. Here, a jury determined that plaintiff was entitled to $300,000 in total damages for wrongful death. However, plaintiff had already received $220,000 for wrongful death. Without reduction of the jury verdict, plaintiff would have received $520,000 in compensation for a $300,000 harm. This would have defeated the principle underlying the common law setoff, that a plaintiff can have but one recovery for an injury. The principle of one recovery and the common law rule of setoff, in the context of joint and several liability cases, continue to be the law in Michigan. Reversed and remanded.

In a medical malpractice action, the jury could not consider the decedent's potential negligence in causing the condition for which she sought medical treatment.

Estate of Shinholster v. Annapolis Hosp., Court of Appeals Nos. 225710, 225736; 2003 Mich. App. LEXIS 334 (2003). In an issue of first impression, the court held that the trial court did not err in ruling that the jury could not consider plaintiff's decedent's potential negligence in causing the condition for which she sought medical treatment in the first place. The decedent visited the hospital three times in a one-week period complaining of dizziness and, shortly thereafter, suffered a massive stroke, entered a coma, and subsequently died. Defendants sought to introduce evidence that the decedent had not been regularly taking her blood pressure medication prior to her first hospital visit. The court held the trial court properly

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limited the jury's consideration of comparative negligence to the time period after the decedent's first hospital visit. Affirmed and remanded.

Physician could be held liable if, because of the physician's negligence, an IME resulted in physical harm to the examinee.

Dyer v. Trachtman, Court of Appeals No. 235114; 2003 Mich. App. LEXIS 616 (2003). In an issue of first impression, the court held that the trial court erred in denying plaintiff's motion to amend the complaint to add a claim for ordinary negligence because a physician can be held liable if, because of the physician's negligence, an IME results in physical harm to the examinee. Plaintiff alleged that he was injured during an IME that was conducted by defendant. Plaintiff asserted that before the IME, he told the defendant-doctor that he had recently had surgery on his right shoulder and that the surgeon placed restrictions on the movement of his right arm and shoulder, instructing plaintiff to avoid lifting the arm above 45 degrees. Plaintiff alleged that during the IME, defendant forcefully rotated his right arm and shoulder 90 degrees, causing injury and requiring another surgery. The court agreed with the trial court that because there was no physician-patient relationship associated with an IME, there could be no claim for professional negligence. However, a physician does voluntarily accept a lesser duty to conduct an IME in a manner that will not affirmatively cause physical harm to the examinee. Affirmed in part, reversed in part, and remanded.

There was an issue of fact regarding whether a duty to warn or disclose, based on tort law, arose out of manufacturer's employee's visit to the purchaser.

Farm Bureau Mut. v. Combustion Research Corp., Court of Appeals Nos. 234189, 235932; 2003 Mich. App. LEXIS 660 (2003). The trial court erred in relying on the economic loss doctrine and the UCC's statute of limitations in summarily disposing of plaintiffs' action because there was an issue of fact regarding whether a duty to warn or disclose, based on tort law and apart from the sale of the heating unit, arose out of defendant-manufacturer's (Combustion) employee's visit to plaintiff-Midwest, the purchaser of the heating unit. Defendant manufactured the heating unit, sold it to another company, MIHC, which sold it to Midwest. MIHC installed the heater. Later, the heater began to malfunction, and a heater repair firm was called. A technician from that company contacted Combustion, and it sent an employee to check the heating unit. The court concluded that the UCC was inapplicable where there was no contractual obligation or duty on the part of Combustion to install, inspect, and service the heating unit arising out of the sale of the heater. However, a legal duty in tort to properly inspect the heater and warn of any dangers may have arisen solely from defendant's action in visiting Midwest 22 months after the sale. Reversed and remanded.

Damages caps do not limit recovery in wrongful death-medical malpractice actions.

Jenkins v. Patel, Court of Appeals No. 233116; 2003 Mich. App. LEXIS 844 (2003). Holding that the WDA controls an award of damages when a plaintiff pursues a wrongful death action arising out of a death caused by medical malpractice, the court ruled that the medical malpractice cap on noneconomic damages was inapplicable and did not limit the noneconomic damages plaintiff could recover. Considering both the plain language of the relevant statutes and the legislative history, the court concluded that the Legislature intended the WDA to exclusively govern all areas of a wrongful death action, including the award of noneconomic damages, and it did not intend the However, the trial court erred in failing to determine a remittitur amount after concluding that the $10 million damage award was excessive, when the trial court also did not grant defendants a new trial. Affirmed in part, reversed in part, and remanded.

Injuries did not result from "operation" of a motor vehicle where the truck had been stopped to allow a city employee to inspect a hydrant.

Poppen v. Tovey, Court of Appeals No. 236471; 2003 Mich. App. LEXIS 713 (2003). [This opinion was previously released as an unpublished opinion on 3/18/03.] The trial court did not err in concluding that plaintiff's claim did not fall within the motor vehicle exception to governmental immunity and in granting summary disposition to the defendant-city. The case arose from an accident in which plaintiff's car struck the city's water truck from behind while the truck was stopped in the curb lane of a city street. At the time of the accident, the city truck was sitting with its four-way emergency flashers and overhead warning lights activated, and it had been stopped for about three to five minutes to allow an employee to inspect a city-owned fire hydrant. Applying the definition of "operation" of a motor vehicle used in *Chandler v. Muskegon Co., 467 Mich. 315 (2002)*, the court found no error in the trial court's conclusion that plaintiff's injuries did not result from the "operation" of a city-owned motor vehicle where the truck had been stopped to allow an employee-passenger to inspect the hydrant. Once stopped for this purpose, its presence on the road was no longer directly associated with the driving of the vehicle. Affirmed.

MCL § 600.5852 is a saving statute and not a statute of limitations; it does not apply when the statute of limitations has not expired.

Lipman v. William Beaumont Hosp., Court of Appeals No. 234257, 2003 Mich. App. LEXIS 1084 (2003). The trial court properly denied defendants' motion for summary disposition because plaintiff's medical malpractice claim was timely filed on January 24, 200l. Plaintiff's decedent died on August 12, 1998, and plaintiff was appointed personal representative of his estate on December 2, 1998. The court held that the statute of limitations expired on February 4, 2001. The 182-day notice period expired on November 30, 2000, and plaintiff's filing of the notice of intent to sue on June 1, 2000 extended the statute of limitations by 66 days. The court held that MCL § 600.5852, which is a saving statute and not a statute of limitations, did not apply because the statute of limitations had not expired on December 2, 2000. Affirmed and remanded.

Plaintiff's cause of action for damages in her own right for her miscarriage was well-grounded in Michigan law.

McClain v. The Univ. of Michigan Bd. of Regents, Court of Appeals No. 238782; 2003 Mich. App. LEXIS 1085 (2003). The trial court erred in granting summary disposition in favor of defendants because plaintiff presented sufficient evidence to withstand the motion for summary disposition. Plaintiff suffered a miscarriage and alleged that it was caused by defendants' negligence. Defendants claimed that plaintiff was not entitled to recover for damages based on the loss of her nonviable fetus because she had no physical injury, only emotional injuries, which were solely related to her grief and sorrow. The court held that plaintiff's cause of action for damages in her own right for her miscarriage was well-grounded in Michigan law. The court agreed with *Carter* that *Tunnicliffe* indicates that the physical and emotional damages generally available in negligence actions apply. Plaintiff testified that she isolated herself from her family and friends, saw a psychiatrist four to five times, and suffered from depression. Reversed and remanded.

The statutes concerning allocation of fault are not applicable in an action brought pursuant to the dog bite statute.

Hill v. Sacka, Court of Appeals No. 227715; 2003 Mich. App. LEXIS 1082 (2003). The statutes concerning allocation of fault are not applicable in an action brought pursuant to the dog bite statute. The two-year old plaintiff was bitten, gnawed, and mauled by defendants' dog in their yard while his father was present. Defendants argued that since the jury found that the father was 75 percent at fault, the judgment should have been reduced accordingly. The statute places absolute liability on the dog owner, except where the dog bites after being provoked, which did not occur here. The court found that under a clear reading of the dog bite statute, comparative negligence principles are inapplicable where the statute does not allow for consideration of any comparative negligence by the victim, excluding possibly where the negligence may relate to the defense of provocation. The statute's clear language also does not allow consideration of any negligence or fault on the part of the dog's owner, and the fault or negligence of a third person (the father) is not relevant where the negligence of the victim who is seeking money damages is not considered. The trial court did not err in denying defendants' motion to reduce the judgment to reflect the father's negligence or fault. Affirmed.

The plaintiff that rejected case evaluation was only liable for those attorney fees accrued as a consequence of its rejection.

Ayre v. Outlaw Decoys, Inc., Court of Appeals No. 234826; 2003 Mich. App. LEXIS 1099 (2003). Deciding an issue of first impression, the court held that plaintiff-Burnside was not liable for all of defendant-Attwood's attorney fees that accrued following plaintiff's rejection of the case evaluation. This consolidated wrongful death products liability action involved claims related to the deaths of four people while duck hunting when their boat capsized. Three of the four plaintiffs accepted the unanimous case evaluation in their favor, which assigned 70 percent of the liability to one defendant and 30 percent to Attwood. Plaintiff rejected the award and both defendants rejected all of the awards. The trial resulted in a verdict of no cause of action in Attwood's favor. The trial court awarded Attwood $232,794 in case evaluation sanctions against only plaintiff. The court held the one rejecting plaintiff was not liable for all of Attwood's attorney fees that accrued after case evaluation, including those associated with defending against the claims of the other plaintiffs that were also litigated in the same trial. The rejecting plaintiff was only liable for those attorney fees accrued as a consequence of its rejection, which is to be determined by examining the rejecting plaintiff's theories of liability and damage claims. Vacated and remanded.

Editor's Note

The editor would formally like to apologize to Sarah Kuchon. Sarah was kind enough to write the Point article for the Winter issue of the Negligence Quarterly, and through no fault of her own, her biographical material was erroneously omitted. Sarah Kuchon graduated cum laude from Michigan State University Detroit College of Law. She is an attorney with the Hohauser Law Firm, in Troy, Michigan where she concentrates her practice in the area of personal injury, including automobile negligence, no-fault insurance, premises liability, and medical malpractice.

State Bar of Michigan

68th Annual Meeting

September 11-12, 2003

Lansing Center, Lansing

Thursday
Golden Anniversary Reception
Board of Commissioners Meeting
Section Meetings

Friday
Representative Assembly Meeting
Section Meetings

Saturday
Race for Justice
Potter Park Zoo
(Saturday, September 13, 2003)

Minding Your Practice

MICHIGAN DEFENSE TRIAL COUNSEL, INC.
THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

Friday, June 20, 2003 — Schedule of Events

12:00 Noon – 1:00 p.m.	Registration/Exhibitor Set-up
1:00 p.m. - 5:00 p.m.	Program
1:00 p.m.	Welcome – Introductions.....J. Michael Malloy, President MDTC Co-Chairs; Terrence J. Miglio/James W. Bodary
1:10 p.m. – 2:30 p.m.	***The Changing Contours of Defense Litigation & Trial Practice...*** **A View From the Bench** The Practical Implications of Tort Reform, the Emerging Role of ADR, Technology and Other Developments in Court Room and Avoiding Common Litigation Mistakes .....Moderated by Terrence J. Miglio *Keller Thoma P.C.* <u>Panel Members:</u> Honorable Jeanne Stempien Honorable Pamela R. Harwood Honorable Dennis C. Kolenda Honorable James H. Fisher
2:30 p.m. – 3:15 p.m.	***Pitfalls of Legal Malpractice for the Defense Litigator*** .....Patrick M. Barrett *R.L Polk & Co.* Tort Reform on Practice
3:15 p.m. – 3: 30 p.m.	Break
3:30 p.m. – 5:00 p.m.	***How Does Your Firm Measure Up?*** **Employment Law Essentials for Law Firms** State and Federal Laws Concerning Unlawful Discrimination and Harassment, Interviewing and Hiring Practices, Independent Contractors, Leased Employees, Partners/Shareholders as Employees, and Network and E-Mail Policies..... Andrea J. Bernard *Warner Norcross and Judd, L.L.P.* Employment Contracts, Handbooks and Personnel Policies, Maintaining Personnel Files, and Preventing and Responding to Complaints of Harassment..... Linda M. Foster *Keller Thoma P.C.*
6:00 p.m. – 7:30 p.m.	Cocktail and Hors D'oeuvres Reception MDTC Past Presidents - Celebrating 25 Years of Service
7:30 p.m.	Hospitality Suite

Continued Next Page

25 Minding Your Practice

MDTC

MICHIGAN DEFENSE TRIAL COUNSEL, INC.
THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

Saturday, June 21, 2003 — Schedule of Events

7:30 a.m. – 8:00 a.m.	Registration/Continental Breakfast
8:00 a.m. – 11:00 a.m.	***Retooling Your Law Firm:*** Law firm profitability can be dramatically improved by paying careful attention to law firm operations, production and economics. What follows not only explains how improvements can be made in these three areas, but also provides a model so that you can see for yourself the financial results achieved by implementing the proposed changes. .....Dr. Bill McCallister *McCallister Consultants, Inc.*
11:00 a.m. – 11:15 a.m.	Break
11:15 a.m. – 12:00 noon	***Avoiding Burnout*** .....William E. Livingston *State Bar of Michigan,* *Lawyers and Judges Assistance Program*
12:30 p.m.	Fun/Run/Talk/Walk AKA "Rockwell's Ramble"
1:00 P.M.	**GOLF TOURNAMENT**
6:00 p.m. - 7:00 p.m.	Cocktail and Hors D'oeuvres Reception
7:00 p.m. - 10:00 p.m.	Banquet Excellence in Defense Award Presentation 2003 Recipient, James R. Kohl
10:00 p.m.	Hospitality Suite

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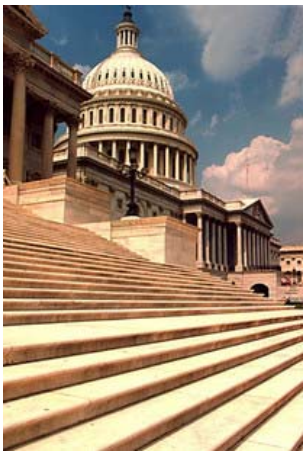
From the Capitol Steps

By Todd N. Tennis & William B. Wortz



Canoe Livery legislation stalls in Senate Committee

HB 4140 introduced by Representative Palsrock (R-Manistee) amends the Natural Resources and Environmental Protection Act to exempt the owner of a non motorized livery boat (non motorized rented craft for non commercial use) from any liability for injury to or death of a user of such a boat that results from the inherent risks associated with the use of such boat. Risk is defined as a danger or condition that is an integral part of using such a boat including but not limited to the following:

- Wave or water motion
- Weather
- Contact or maneuvers necessary to avoid contact with another vessel
- Contact or maneuvers necessary to avoid contact with a rock or natural hazards
- Failure to wear a flotation device – unless the owner did not provide
- Having too many people in the boat in excess of the law

Representative Palsrock is from the Manistee area in Northern Michigan and chairs the Tourism Committee in the house, so these issues are near and dear to him. HB 4140 passed the House and is currently in the Senate Judiciary Committee where it has had a hearing and no action taken. The Chair of the Senate Judiciary Committee, Alan Cropsey (R-Dewitt) is an attorney who promised Rep Palsrock a hearing but does not agree with the intent of the legislation. For now this bill will sit without much attention, but may become part of a deal involving Cropsey sponsored legislation in the future. MTLA testified in opposition to the bill and Todd Tennis from the negligence section sat poised to speak in opposition as well, but his mere presence in the room brought the committee to a screeching halt and it was adjourned.

HB 4706 – Medical records fee cap

Representative Barb VanderVeen (R-Grand Haven) has introduced legislation that would regulate access and disclosure of medical records and cap the fees charged by hospitals for access to such records. The bill has been referred to the House Health Policy committee where Rep. VanderVeen sits as vice-chair. HB 4706 would provide for the following:

Todd N. Tennis

William B. Wortz

- An adult patient or guardian or representative to obtain their medical records through written request
- The hospital must, within 30 days do the following:
- Make records available during business hours
- Inform a record keeping company they contract with of the request
- Inform the patient if they do not exist
- Inform patient if disclosing the record could be harmful to them
- Facility cannot inquire as to why the records are being requested
- The fees are established in the following manner:
  - Initial fee of $10.00 per request for the record search
  - $1/page for the first 10 pages
  - $.50/page for pages 10 – 50
  - $.20/page over 51 pages
  - Any other medium other than paper – the actual cost of preparation
  - Any postage or other retrieval costs for records 7 years old or older
  - Fees are waived for medically indigent, but limited to one set of records

This legislation will be heard by the time you read this update. Please inform Todd Tennis and I if there are concerns with the legislation.

Hit the Links

www.LegalMem.com

One of our colleagues has created this website, which may be particularly useful to Michigan negligence attorneys because it focuses on legal memorandums pertaining to Michigan tort decisions. Appellate decisions are analyzed and incorporated into affected memorandums on a daily basis, *including unpublished decisions*. Charles McCarter, a Michigan attorney and member of our Negligence Section, founded this website.

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