STATE BAR OF MICHIGAN

NEGLIGENCE LAW SECTION QUARTERLY

The Official Newsletter of the State Bar of Michigan Negligence Law Section

Spring 2004

FROM THE CHAIR

SPRING SEMINAR AT SEA – A SPLASHING SUCCESS

I told my friends, colleagues and family that I felt compelled to attend the Negligence Section's Spring Seminar at Sea. After all, it wouldn't look good if the Chairperson didn't go. The seminar was held on a cruise ship, which sailed for three nights to the tropical Bahamas. The weather was perfect, the food was great (and plentiful), the beaches were beautiful and the seminar was fantastic! Everybody had a great time. A special "thank you" is owed to Barry Goodman, our current Treasurer, who essentially put this incredible event together. I would also like to thank Madelyne Lawry, our Management Consultant, who was instrumental in keeping us organized and "on task."

The Section also owes thanks to our lobbyist, Todd Tennis, and our special guests and speakers at the Spring Seminar: State Representative James Howell and State Senator Mark Schauer. Mr. Tennis served as the Moderator and Host of the Seminar Program, which consisted of "softball" and "hardball" questions directed to the legislators. Mr. Tennis drafted excellent questions that got to the meat of the issues that concern us, and led to a very candid discussion of the legislative process.

The seminar was held at 7:30 a.m. on Saturday morning. The ship was docked at Co-Co Cay. Amazingly, nobody was in a hurry to hit the beaches. The seminar was incredibly interesting and very informative. From Senator Schauer (a Democrat) and Representative Howell (a Republican), we gained incredible insight regarding the legislative process and how to best effectuate legislative advocacy. We learned how term limits have drastically impacted things in the legislature. We learned how we can accomplish a great deal by reaching out to our *local* legislators. The setting for the seminar was informal, and our honored guests spoke candidly on a number of issues.

Part of the reason that this trip was so successful was that we were "on board" together. We had dinners together each night and had a good deal of bonding time aboard the ship. We had cocktails by the pool. We watched Senator Schauer and Bryan Waldman (President of Michigan Trial Lawyers) climb the rock-climbing wall. Many stories were told. (I would like to award O'Neal Wright and his wife Cora with the award for the best stories.) The atmosphere for the trip was fantastic. There was a lot of laughter and a lot of fun. Did I mention the food?

Judith A. Susskind

All I can say is, if you didn't go, you should have been there! Where were you?

IS NEGLIGENCE LAW SINKING?

Membership in the Negligence Law Section has declined in recent years. I have been told that the number of negligence lawsuits in this state has as well. Certainly, in areas such as products liability and medical malpractice, filings have declined drastically. Have people been less negligent over the past few years? Have injuries that result from negligence been eliminated? Have they drastically decreased in this state? Are doctors nowadays so careful that mistakes are not made? Are products in this state now made foolproof, and without any undue danger to the consumer? Should we just get rid of our system of justice that holds a proven negligent person responsible for the harm he or she has caused because a lawsuit is perceived to be a drain on the economy? Should we expand immunity laws to all folks who attempt to do good in our society? Please, let's not forget where we came from! Let's not forget the lessons that can be learned, and the evils that can be avoided, from holding one accountable for wrongdoing and the injuries that result.

I don't think I stand alone as a believer in our jury system. In fact, the Negligence Section's

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EDITOR CONTACT INFORMATION
12690 Grand Willow Dr.
Grand Ledge, MI 48837
Phone: 517-712-4389
Fax: 517-627-3950

From the Chair
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Mission Statement states in part, "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."

I don't think it should be deemed shameful to file a lawsuit for severe injuries that have been occasioned as a direct and proximate result of somebody's negligence. Jurors can, and regularly do, decide cases fairly based on evidence. Over many years, rules have been carefully implemented into our civil justice system, and enforced, in order to keep this process fair. A trial by a jury of our peers has been considered a hallmark of our esteemed court system. It has served us well. This aspect of negligence law gets no publicity. On the other hand, there seems to be a persistent, prolonged and determined media campaign whose purpose is to convince the public that it is absolutely wrong to sue anybody for negligence.

Newsweek ran a cover story a few months ago about "frivolous" medical malpractice lawsuits. A familiar story. I was disappointed that the article failed to mention the good things that come from holding doctors responsible for medical negligence. I was disappointed that the article didn't expose any of the thousands of egregious cases of medical negligence.

I have been specializing in the field of medical malpractice for over fifteen years. Almost every client that walks into my office to discuss a potential medical malpractice case is ashamed. Most begin the meeting by stating, "I don't believe in suing doctors and I was very reluctant to come here." Many of these people have valid causes of action. However, they have been told, over and over, that it is wrong to sue, and that it is particularly bad for the struggling economy. Well, what would you do if your child were given a medication that the medical chart clearly stated should *not* be given because of a drug allergy, and your child dies in your arms as a result? What would you do if a neurosurgeon made a mistake and operated on the wrong side of your lumbar spine and caused you to become a paraplegic? The law *does* provide a remedy for injuries occasioned by medical negligence. People have been told that they are wrong to seek that remedy. In the meantime, another small business, the business of lawyering, has suffered. *This* is not good for the economy.

In Michigan, a medical malpractice lawsuit cannot be filed against a doctor without an Affidavit of Merit attesting to the ways in which malpractice was committed, and how the malpractice proximately caused injury and damages. Doctors do not like to criticize their colleagues. I have had private meetings with doctors in Michigan who tell me "off the record" that another physician committed medical negligence. However, they also tell me that they will not put that in writing, or testify to that.

When an individual suffers severe injuries because of a fall due to a defect in a walkway of a business, the case may be kicked out of court because there was no notice of the defect. If the defect was noticeable, the case is kicked out because the defect was "open and obvious". Where is the incentive to

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WHERE'S DR. WALDO?
FINDING THE RIGHT MEDICAL MALPRACTICE EXPERT WITNESS

STANLEY S. SCHWARTZ

Ten years ago, the legislature tightened requirements for instituting and pursuing medical malpractice actions. The idea was to shrink the pool of qualified expert witnesses and, most particularly, restrict the use of professional forensic experts – so-called "hired guns." To these ends, the expert witness statute, M.C.L. 600.2169, was significantly modified. Previously, it was sufficient if the expert devoted "a substantial portion" of his/her professional time to clinical practice or teaching in the defendant's specialty "or a related, relevant field of medicine." Since 1993, the expert witness has been required to spend the *majority* of his/her time practicing or teaching the *same* specialty as defendant. Moreover, if the defendant is "a specialist who is board certified," the expert, likewise, must be "board certified in that specialty."

Agree or disagree with these changes, the revised provision would strike a casual reader as being quite straightforward. As a wag once remarked, "If God wanted statutes to make sense, He would not have invented judges." In recent years, there has accreted around the expert witness statute a body of Court of Appeals decisions, most of them unpublished Per Curiams, which have been barren of essential facts, badly reasoned, at odds with other panel decisions, or all of the above. This muddle makes selection of an unchallengeable expert witness much like a lottery, even for the most experienced and diligent malpractice attorney. Or, if out of an abundance of prudence and cost efficiency, one tries to combine in a single witness the differing criteria viewed as necessary by different appellate panels, the result is often a Kirtland Warbler sort of expert, a creature nearly impossible to find.

Start with the concept of a specialist. The common law created and the 1993 amendments perpetuated a questionable distinction in malpractice law between general practitioners, who are held to a localized standard of care, and specialists, who are judged by the national norms of their discipline. Lacking a statutory definition of either term, courts have resorted to the dictionary to describe general practitioners as doctors "whose practice is not limited to any specific branch of medicine" and specialists as those "who deal only with a particular class of diseases, conditions or patients." Given the universality of post-graduate residencies in medicine, every physician is trained in and goes on to practice some specialty, be it a wide-ranging primary care field, like family practice, or a narrower craft, such as thoracic surgery or urology. Today only apprentice physicians – interns and residents – may be relegated by Michigan law to the category of general practitioner. See, e.g. *Bahr vs. Harper Grace Hospitals*, 198 Mich. App. 81 (1993). Even the classification of residents as GPs is dubious inasmuch as residents are trained and acquire experience in specific medical specialties. See, e.g. *Valentine vs. Kaiser Foundation Hospitals*, 194 Cal. App. 2d 282, 15 Cal. Rptr. 26 (1961). (The California court held residents to the standard of care of the specialty he/she was being trained in at the time of the alleged malpractice in question. I must say, a much more sensible approach to the problem.)

More fundamentally, the extent to which new knowledge and techniques are shared across the country and, indeed, globally, makes the concept of distinctive local standards of care a glaring anachronism for all other health professions, not merely medicine, as was pointed out by separate opinions in at least two Court of Appeals cases. *Decker vs. Flood*, 248 Mich. App. 75, 87-88 (2001) (Neff concurring) (Dentistry); *Jalaba vs. Borovoy*, 206 Mich.

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App. 17, 25 (1994) (Stempien concurring) (Podiatry).

Granting the fact that modern physicians are all specialists of one kind or another, how does one determine what specific field of medicine the defendant specializes in *for the purpose of the expert witness statute*? Suppose defendant regularly practices dermatology, and is board certified in that specialty, but the malpractice arises out of his bungled attempt to set a fractured leg. Common sense tells us that dermatology is extraneous to the case that there is no dermatological standard of care for treating broken bones, and that plaintiff is not obliged to enlist, as an expert witness, a board-certified dermatologist who sometimes tends to fractures. Common sense tells us, rather, that defendant doctor was "specializing" – albeit as a moonlighter or interloper – in the domain of orthopedics when he treated plaintiff and that is the germaine specialty from which expert witnesses are to be drawn. Sensibly, a panel of the Court of Appeals has written "The specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold." *Tate vs. Detroit Receiving Hospital*, 249 Mich. App. 212, 218 (2002). Lending some support to a contrary conclusion is *Decker vs. Flood*, 248 Mich. App. 75 (2001), in which an endodontist was held not to be a proper expert witness against a plain vanilla "general dentist" accused of botching a root canal. The judges were not entirely unaware of the absurdity of declaring that an experienced root canal dentist is overqualified and cannot pronounce an opinion about the standard of care for root canal surgery but they felt helpless to escape the GP/Specialist differentiation embodied in the statute.

> "This muddle makes selection of an unchallengeable expert witness much like a lottery, even for the most experienced and diligent malpractice attorney."

Dealing as it did with a general practitioner, *Decker* does not directly address the case of a specialist in one field who crosses over to practice, pro hac vice, in a different specialty and, therefore, it does not necessarily rule out the use of an orthopedic surgeon as the expert in our dermatologist hypothetical. But consider a recent unpublished panel decision, *Kyser vs. Hillsdale Comm. Health Center* (Court of Appeals Number 237060, July 22, 2002) that invoked *Decker* and failed to cite, much less distinguish, *Tate*. Readers of *Michigan Lawyers Weekly* have recently been reminded that unpublished Per Curiams, while not officially binding precedents, are easily accessible to lawyers and more and more often are showing up in their briefs. *Kyser*, thus, is a decision with considerable potential for mischief.

In *Kyser,* the defendant doctor was board certified in internal medicine but "was working in [a hospital] emergency room at the time he treated plaintiff." Plaintiff submitted an Affidavit of Merit from a board-certified specialist in emergency medicine, which the panel found insufficient on the analogy of *Decker,* cited by the panel for the proposition that "an expert must specialize 'in the same specialty' as the defendant doctor, not [simply] specialize in the area of medicine being practiced by the defendant doctor at the time the cause of action arose."

We are not told why the defendant internist happened to be practicing emergency medicine or how much of his time was spent in the emergency room. If he worked there exclusively, was he not in every sense a specialist in emergency medicine (whether or not possessed of board certification in that field)? If so, *Tate* makes it clear that defendant's other unrelated specialty, unpracticed internal medicine, has no significance in determining the qualifications of the expert witness. To the same effect is *Nelson vs. Gray* (Court of Appeals Number 236369, August 26, 2003, Opinion), in which the defendant, who was board certified in family medicine, was practicing full time in a hospital emergency room when he allegedly committed malpractice on plaintiff. The panel concluded that defendant had two specialties, family medicine and emergency medicine, and had no trouble recognizing that the malpractice suit implicated only the latter. Consequently, in *Nelson* the court held that plaintiff made the wrong choice by offering board-certified family practice physicians as his expert witnesses; what was required was a specialist in emergency medicine.

Now let us suppose that in *Kyser*, the defendant worked only part time in the emergency room and otherwise devoted himself to the practice of internal medicine. Why should the analysis be any different? The statute does not say that *the defendant* must spend the majority of his/her professional

time in emergency medicine in order to be sued as a specialist. The 51 percent standard is clearly targeted at the *expert witness* in order to keep professional forensic witnesses ("hired guns") out of malpractice cases – a concern that plainly is irrelevant when it comes to pinpointing the specialty being practiced by the doctor who is sued. What we want is a credible statement from a qualified expert defining the professional standard of care required to be followed by anyone who undertakes to practice, whether regularly, occasionally or simply on a one time basis, in the expert's specialized field of medicine. Moreover, if one needs to identify not only the field of medicine in which the malpractice occurred, but the unrelated field or fields of medicine in which the defendant spends the majority of his/her professional time, how is a plaintiff to go about obtaining such information? Plaintiff, let's remember, is compelled to submit the Affidavit of Merit, signed by a qualified expert, at the time of filing suit and well before there is access to discovery. How then is it possible for the *Kyser* plaintiff to know that the emergency room physician, who caused him harm, spent most of his time in an office treating patients as an internist?

Kyser provides the wrong answer to our hypothetical: only a board-certified dermatologist, not an orthopedic surgeon, can offer an expert opinion on the proper treatment of broken legs. That is to say, only a dilettante can be relied on to state the governing standard of care!

What seems to send some judges off the tracks is the statute's reference to matching board certifications in conjunction with the requirement of matching specialties. In one sentence, the statute asserts that when the defendant is a specialist, the expert must "specialize at the time of the occurrence that is the basis for the action in the same specialty" as the defendant, the focus here being on what the defendant does, or was doing, at the time of the occurrence. This is followed by another sentence: "However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty." Here the reference is to the doctor's credentials, not his behavior, on who he is, not what he does. A sensible reader would say that the two sentences must be read together and that "specialist" in *both* sentences signifies the field of medicine in which the alleged malpractice was committed. The statute speaks of defendant's specialty in the singular; if he or she happens to hold one or more board certifications for other specialties having nothing to do with the treatment meted out to this plaintiff-patient, there is no reason why the expert witness should have to possess those irrelevant board certifications. However, the statute appears to demand compliance with this board certification match regardless of its relevancy to the facts.

"The complication for the malpractice lawyer and the interpreter of the 1993 statute is that all but six of the primary boards in medicine grant 'certificates of added qualification' in a variety of *subspecialties*, based on additional training and testing."

However, even if one accepts this analysis, the statutory expression, "board certified," lacking any definition, introduces another set of difficulties. At first blush, it would seem that the statute is speaking of the system of specialty boards in the medical profession. There are 24 board certifications recognized by the American Board of Medical Specialties (ABMS) and the American Medical Association. Each of these primary boards grants board certification based on completion of an accredited residency program in a specialized field and on written and oral examinations administered by the board.

The complication for the malpractice lawyer and the interpreter of the 1993 statute is that all but six of the primary boards in medicine grant "certificates of added qualification" in a variety of *subspecialties*, based on additional training and testing. A doctor whom we conventionally label a cardiologist or a hematologist or an endocrinologist is first and foremost board certified in the specialty of internal medicine and typically holds a certificate of added qualification in the subspecialty of cardiovascular disease or hematology or endocrinology or nephrology.

There is no apparent logic to the ABMS classifications of specialties and subspecialties. Why is urology a freestanding specialty with its own primary board while cardiology is relegated to

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a subspecialty of internal medicine? If cardiology could not be considered a discreet specialty for malpractice purposes because of the eccentric way in which the medical profession organizes its credentialing system, then it would follow that an internist who devotes all his practice to, say, infectious disease can serve as an expert when a cardiologist is sued for malpractice (and vice versa). Moreover, osteopathic physicians would be treated differently than M.D.s in court because their system of certifying boards does not fully mirror their M.D. counterparts. The ABMS recognizes 24 medical specialty boards handing out 36 general board certificates. In addition, there are 89 subspecialty certificates. (See *http://www.abms.org/approved.asp*) Osteopathic medicine recognizes but 18 certifying boards; however, there are 30 certifications of special qualifications and 47 certifications of added qualifications (this makes a total of 76 subspecialties). (*See http://www.aoa-net.org/Certification/jurisdiction.htm*) Despite these formal variances, it is generally thought to be acceptable for an osteopath to testify in an M.D. malpractice case and vice versa. *Piontek vs. Armstrong* (Court of Appeals Number 235792, December 27, 2002, Unpublished Opinion). *C. McDougall vs. Schanz*, 461 Mich. 15 (1999) (Expert was objectionable because he was no longer active in practice, not because he was an M.D. and defendant was a D.O.).

A further complication is that there are other credentialing organizations in medicine outside the ABMS, though they may not be as well established or as widely respected. Can their members or diplomats also claim to be "board certified" inasmuch as the statute does not specify which boards or which certifications it has in mind?

"A further complication is that there are other credentialing organizations in medicine outside the ABMS, though they may not be as well established or as widely respected."

Confused? Check out Judge Talbot's opinion in *Woodard vs. Custer* (Court of Appeals Number 239868, October 21, 2003, Unpublished Opinion), in which he erroneously asserts that pediatric critical care is an independent board-certified specialty, when, in point of fact, it is a subspecialty of pediatrics. Perhaps Judge Talbot considered a certificate of added qualification (subspecialty) equivalent to board certification. If so, how do we reconcile the decision in *Watts vs. Canady*, 253 Mich. App. 468 (2002) with the *Woodard* opinion? In *Watts*, the court distinguished "specialty" from "subspecialty" by stating "… but we presume that the legislature chose to use 'specialty,' not 'subspecialty.' We see no grounds for imposing a subspecialty requirement when the legislature has spoken in terms of a specialty requirement. We note that while the line between a specialty and a subspecialty may appear to be fuzzy, the terms can be defined precisely according to the standards set forth by the AMA." Is there any wonder why confusion exists in this muddled area of experts? Or, consider *Massenberg vs. Henry Ford Health System* (Court of Appeals Number 236985, September 25, 2003, Unpublished Opinion), wherein the panel allowed an internist, with the subspecialty of gastroenterology, to testify as an expert against an internist with the subspecialty of geriatrics. Although the subject of the claimed malpractice was defendant's failure to diagnose liver abscesses, the court discounted the expert's qualifications as a gastroenterologist (he devoted only "a portion" of his time to the subspecialty) as if that expertise in a subspecialty directly relevant to the case was a minus, rather than being the very reason why the court should allow his opinion. It is interesting to note that in *Tate vs. Detroit Receiving Hospital*, 249 Mich. App. 212, 217 (2002), the court asserted that the primary goal of statutory interpretation is to determine and give effect to the intent of the legislature. Unfortunately, the problem is that almost each and every Court of Appeals decision seems to present a unique and different interpretation of legislature intent.

It is certainly not unreasonable to view the first sentence of the statute as being somewhat flexible since there is no fixed or unalterable definition of the term specialty. This would then permit a matching of a defendant, certified in a particular subspecialty, with an expert specializing in the same field of medicine but without a subspecialty certification. Per contra, under the very same set of facts could not the defendant claim to be "board certified in a specialty" within the meaning of the second sentence of the statute

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Member Profiles

Brian A. McKenna

Brian was born in Belfast, Ireland and moved with his family in May 1969 to the Detroit area. He grew up in St. Clair Shores, Michigan. His motivation for becoming a lawyer came in large part from his brother James who exposed Brian to what it was like to help injury victims as a plaintiff's personal injury attorney. James also got him his first law clerk job at his office. Seeing his brother's enthusiasm for helping personal injury victims was probably the most significant motivating factor for Brian.


Brian McKenna

Brian graduated from Ferris State in 1989 and from Wayne State in 1993 with his law degree. He started as a law clerk at Sachs Waldman, Professional Corporation in January 1993. Before graduating from law school in the spring of 1993, he clerked for Barry Waldman, George Fishback, and Gregory Janks. He was hired as an associate at Sachs Waldman following his graduation from Wayne State, and eventually became a partner. Brian's practice is devoted to representing injury victims primarily in the area of first- and third-party automobile accident claims. Working with accident victims can be both challenging and rewarding. Typical clients are less sophisticated than the insurance clients that are the opposing parties in many of these cases. Helping individuals and families that have had their way of life suddenly and sometimes irreversibly changed is very challenging.

Brian's most significant professional accomplishments include being asked to become an associate at Sachs Waldman, Professional Corporation in 1993, and eventually becoming a shareholder. His most significant personal accomplishment is being a husband and father.

Brian has been a member of the Negligence Section of the State Bar of Michigan since he first joined the Bar. Negligence law is a significant part of his practice, and receiving the newsletters has been beneficial to his practice. Recently, he has worked with the Section in helping to effectuate change regarding notice of intent requirements impacting both sides in medical malpractice claim and in effectuating change regarding service of summons and complaints of claims approaching the end of their statute of limitations. The greatest benefit of being involved with the section is being able to have a voice and effectuating change in improving the environment for the practice of negligence law. Brian encourages other lawyers to become involved with the section because this section does advance the issues important to practitioners involved in the practice of negligence law — the larger our Section, the louder the voice.

Outside of the practice of law, Brian enjoys playing hockey and spending time with his wife, Kelly and children, Sean, 11; Shannon, 4; Conor, 3; and Brian, 2. The family attends many sporting events that the children participate in, including baseball, hockey, soccer, and swimming.

Brian A. Mckenna
Sachs Waldman PC
1000 Farmer Street
Detroit, MI 48226
Phone - 313-496-9416
Fax - 313-965-4315
brianmckenna@sachswaldman.com

Thomas M. Peters

Thomas originally hails from Saginaw, Michigan. His motivation for becoming a lawyer was to have a job that was not closely connected to the automobile industry. Tom has an undergraduate degree from Michigan State University with majors in language, finance, and advertising. His law degree is from Wayne State University Law School. He has been employed as an attorney with the Troy, Michigan firm of Vandeveer Garzia, P.C. since November 1973, having clerked with them since July 1971. Tom specializes in products liability, trucking, and serious exposure cases. He counts participating on a major level in probably the most successful products liability defense program in the country – defending the very first child resistance


Thomas M. Peters

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Celebrating the 48th Year of the Negligence Council

We salute our past chairpersons

2003-2002	Timothy Knecht
2001-2002	David Getto
2000-2001	Victor L. Bowman
1999-2000	Timothy J. Donovan
1998-1999	Linda M. Galbraith
1997-1998	Carol A. McNeilage
1996-1997	Lamont E. Buffington
1995-1996	Janet M. Brandon
1994-1995	Joseph G. Lujan
1993-1994	Paul A. Rosen
1992-1993	Walter P. Griffin
1991-1992	Kathleen L. Bogas
1990-1991	J. Michael Fordney
1989-1990	George T. Sinas
1988-1989	Robert G. Russell
1987-1988	Thomas D. Geil
1986-1987	Robert N. Hammond
1985-1986	Charles J. Barr
1984-1985	Richard J. McClear
1983-1984	James A. Tuck
1982-1983	Ronald E. Westen
1981-1982	Clifford H. Hart
1980-1981	David M. Tyler
1979-1980	Sherwin Schreier
1978-1979	Robert G. Chaklos, Sr.
1977-1978	Arnold M. Gordon
1976-1977	William D. Booth
1975-1976	George J. Bedrosian
1974-1975	John A. Kruse
1973-1974	James W. Baker
1972-1973	Kenneth S. Halsey
1971-1972	Richard B. Baxter
1970-1971	David V. Martin
1969-1970	Eugene D. Mossner
1968-1969	Richard A. Harvey
1967-1968	Saul M. Leach
1966-1967	Thompson Bennett
1965-1966	Charles R. MacLean
1964-1965	Robert E. Rutt
1963-1964	The Hon. Cornelia G. Kennedy
1962-1963	Ivin E. Kerr
1961-1962	William J. Weinstein
1960-1961	Marcus L. Plant
1959-1960	A.D. Ruegsegger
1958-1959	Thomas W. Finucan
1957-1958	Kenneth J. Stommel
1956-1957	Carl Gussin
1955-1956	Leroy G. Vandeveer

Legislative Update

Wortz and Tennis

While there are a handful of bills that the Negligence Law Section of the State Bar are supporting, opposing, or monitoring, there are two pieces of legislation that are of particular importance this month – Senate Bill 990 and House Bill 5338. The two bills have a common thread in that they both amend laws dealing with legal procedures that equally affect plaintiff and defense attorneys. When the Negligence Law Section decided to become more involved in Legislative matters several years ago, one of the early challenges was identifying issues that were equally important to both plaintiff and defense members. The two bills in question represent efforts to clarify legal practices. They will hopefully help protect attorneys and their clients whether they are plaintiffs or defendants.

Senate Bill 990 was introduced by Senator Michael Bishop (R-Rochester), and stems from a recent Supreme Court ruling (*Gladych v. New Family Homes*) that changed longstanding procedures governing filings and notice requirements. The *Gladych* decision adhered to statutory language requiring a defendant to be served with a summons and complaint before the statute of limitations is tolled. A previous decision in a 1971 case (*Buscaino v. Rhodes*) had allowed the statute to be tolled when the complaint was filed with the court, regardless of whether the defendant had been served.

The *Gladych* decision, although viewed as a strict interpretation of statute, nonetheless threatened to upset a system that has worked well for over thirty years. Senate Bill 990 amends the Revised Judicature Act so that once again, the statute of limitations is tolled when the case is filed, provided a copy of the summons and complaint is served on the defendant within the time set forth in Supreme Court rules. SB 990 passed both the House and Senate unanimously, and as of this writing is on the Governor's desk awaiting her signature.

House Bill 5338 was introduced by Representative Jim Howell (R-St. Charles) and deals with affidavits of merit in medical malpractice cases. Representative Howell sponsored the bill at the request of the Negligence Law Section in order to solve problems affecting both plaintiffs and defendants.

When the affidavit of merit was conceived, it was thought of as a tool to ensure that medical malpractice cases had a basis in fact before they were brought forward. A plaintiff's attorney is required to produce an affidavit from a physician showing that a particular case has merit. Similarly, a defense attorney must produce an affidavit of meritorious defense to demonstrate that his or her client has sufficient reason to contest the case.

Over the past several years, however, these affidavits have become far more integral to the outcome of a case than intended. The problem stems from the fact that, due to the way the statute was written, there is no opportunity to correct a technical error within an affidavit of merit. Both plaintiff and defense attorneys have seen their cases dismissed or defaulted due to errors ranging from having the wrong date stamp to mistakes made by a notary

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Second Annual Earl J. Cline Memorial Negligence Award

This year we are pleased to present the second Annual Earl J. Cline Memorial Negligence Award to Samuel A. Garzia in recognition of his superb skills as a judge and practicing attorney in the field of negligence law and dispute resolution. The purpose of the organization is to promote the fair and just administration of negligence law, to advance professional and ethical standards on the part of negligence law, to preserve andpromote trial advocacy skills in the practice of negligence law and to recognize by way of awards and scholarships excellence in tort law and outstanding contribution to the practice of the profession.

Samuel A. Garzia graduated from Wayne State University Law School in 1943 (J.D. with high distinction), and was admitted to the State Bar of Michigan three days later by Judge Toms (having taken bar exams before graduation) and was inducted into the U. S. Army one week later. Upon his discharge he was an attorney for the Wayne County Friend of the Court and was respo nsible for establishing an automatic system for delinquent paying fathers.

He joined the firm of Vandeveer and Haggerty in 1945. Samuel A. Garzia's practice eventually turned to product and construction liability. He is a member of the State Bar of Michigan, Detroit Bar Association, Oakland Bar Association, Fellow of American College of Trial Attorney, and American Bar Foundation. In 1966, he co-founded and was the first president of the Association of Defense Trial Counsel. In 1979, he co-founded the Mediation Tribunal Association, which continues to be the most successful organization in the United States and is credited with reducing Wayne County Circuit's trial docket from five years to less than two years. The Detroit Bar Association awarded him their Distinguished Service Award both in 1981 and 1985. Mr. Garzia spends his winters at Bay Hill in Florida and golfs three to four times a week in Michigan at his own Highland Hills Golf Course.

The award will be presented May 21, 2004 at the Detroit Country Club during the Annual Past Chairs' Event.

Samuel A. Garzia
Vandeveer Garzia
5229 Greenbriar Ct.
West Bloomfield, 48323
Phone – 248-682-7017
Fax – 248-682-7017

From the Chair
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maintain a safe premise under the current laws? What happened to the concept of personal accountability?

Shame on the lawyers, especially the negligence lawyers. We are the worst of the lot. Shame on us for seeking a remedy for our clients. Shame on us for asking jurors to hold a proven negligent party responsible for the damages that person causes.

I do not feel ashamed. Getting back to the Mission Statement of the Negligence Law Section, I am proud to fight to uphold the right to a fair and impartial trial by jury to resolve disputes, to remedy grievances, and to seek fair compensation for injuries wrongfully suffered.

I would love to see the Negligence Law Section grow in numbers next year instead of decline. I believe that the tougher laws in this state for victims of negligence have made us better lawyers, and more determined in many ways. Again, let's remember where we came from. Many years ago, when our rights, such as the right to a fair trial by one's peers, were taken away, a great document called the United States Constitution was drafted and adopted. Let's keep it afloat.

Case Summaries

Clahassey v Chez Ami, Inc., 674 NW2d 258 (2004)

In an order in lieu of granting leave to appeal, the court reversed the judgment of the Court of Appeals and remanded to the trial court for entry of an order granting defendant-Chez Ami, Inc.'s motion for summary disposition. The Court of Appeals erred in focusing on the risk presented by the mock sumo wrestling suit. Chez Ami provided only the location for the mock sumo wrestling competition and the suit was provided by the other defendants, with whom plaintiff has settled. Therefore, the proper inquiry was whether the risk presented by the location of the competition, including the bar stool, was open and obvious. The risk presented by the location of the mock wrestling competition and the bar stool was open and obvious because an average person of ordinary intelligence would have been able to discover the risk of harm presented. Nor was there any "special aspect" of the location of the competition or the bar stool that would give rise to a uniquely high likelihood of harm or severity of harm.

In re Estate of Marchyok, Court of Appeals No. 242409 (February 24, 2004)

Since traffic control devices are not part of the highway under § 1401(e), the court held the highway exception to governmental immunity did not apply, and the trial court did not err in granting the city's motion for summary disposition. The case arose from an accident occurring at an intersection in the City of Ann Arbor. The decedent was walking west on the sidewalk on the north side of Catherine Street. While the pedestrian signal was turned to "walk," the decedent attempted to cross Glen Street. At the same moment, the traffic light for westbound vehicles on Catherine Street turned green. The decedent was struck and killed by a bus turning right on to Glen Street. The trial court granted the city summary disposition based on governmental immunity. The court held based on Nawrocki, MCL 257.610(a) does not contemplate the imposition of a duty the breach of which subjects the municipal agencies responsible for traffic control to tort liability. Further, the city could not be held liable under the highway exception to governmental immunity for the alleged failure to install or maintain traffic control devices because relevant case law provides traffic control devices are not part of the roadbed actually designed for public vehicular travel. Affirmed.

Gulley-Reaves v Baciewicz, Court of Appeals No. 242699 (February 10, 2004)

Since plaintiff failed to provide notice of the breach of the standard of care regarding the administration of anesthesia as required by MCL 600.2912b(4)(c), the trial court erred in denying defendants' motion for summary disposition. Plaintiff filed a notice of intent to sue the defendants-doctor and hospital alleging the surgeons involved in plaintiff's surgery breached the standard of care resulting in plaintiff's left vocal cords being paralyzed. The complaint alleged medical malpractice related to the surgical procedure and raised malpractice claims based on the anesthesia administered during the surgery. Plaintiff filed two affidavits of merit with the complaint—one related to the standard of care for the surgical procedure and the other related to the standard of care regarding the administration of the anesthesia. The court held a medical malpractice complaint must be limited to the issues raised in the notice of intent. Plaintiff failed to comply with the statutory notice requirement involving the administration of anesthesia. Plaintiff's notice of intent was silent regarding any breach of the standard of care during the administration of anesthesia and did not minimally allege the agents of the hospital administering the anesthesia were at fault. Reversed and remanded.

J & J Farmer Leasing, Inc v Citizens Ins Co, Court of Appeals No. 239069 (February 12, 2004)

The trial court properly denied the defendant-insurer's motion for summary disposition because application of the Keeley decision did not prevent an award of damages based on its bad-faith failure to settle a wrongful death case. Defendant maintained the claim against it must be dismissed because an agreement between plaintiffs, who were the opposing parties in the underlying wrongful death case, essentially released the underlying defendants, the Farmer parties (the insured), from any obligation to pay the unsatisfied portion of the judgment in that case, and the excess-judgment rule in

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cases against Bic lighters and ultimately overseeing their products defense nationwide - among his greatest challenges and rewards in this area. Since his practice is statewide, and to a certain extent involving other parts of the country, Tom believes it is important to work with other attorneys in our state on matters involving our common interests. The section provides Michigan lawyers with first level reporting and representation to certain legislative matters that effect our common interests. Tom feels the greatest benefit of becoming involved with the section is the camaraderie of other attorneys and addressing and resolving issues of common interest. He encourages others to become involved with the Section because it is the better alternative to looking the other way and hoping that things occurring around you do not affect you adversely. His hobbies and interests outside of work include reading fiction, and he has been known to enjoy the good company in an occasional round of golf.

Thomas M. Peters
Vandeveer Garzia
1450 W. Long Lake Road, Ste. 100
Troy, MI 48098
Phone - 248-312-2800
Fax - 248-267-1242
tpeters@vandeveergarzia.com

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Keeley barred an award of damages. The court held the language of the agreement indisputably released the Farmer parties from any obligation to pay the underlying judgment as long as they performed the duties and obligations contained in the agreement. The court held the application of the holding of Keeley in the manner advanced by defendant was contrary to the purpose and intent of Justice Levin's dissent, and held Keeley requires an insurer found liable for bad-faith failure to settle to pay the excess judgment to the extent the insurer would have been able to pay, regardless of the insured's obtainment of a release. Affirmed.

Kosmalski v St. John's Lutheran Church, Court of Appeals No. 240663 (March 4, 2004)

Rejecting plaintiffs' argument their minor daughter was an invitee when she was injured while acting as a volunteer for defendant's vacation bible school, the court nonetheless held plaintiffs established a genuine issue of material fact concerning whether defendant breached its duty to a licensee in connection with the glass door not made of safety glass that injured the daughter. Under the circumstances, when the daughter accepted the invitation of her grandmother, a member of defendant, to provide childcare services during the bible school, the court could find no basis on which to conclude she volunteered to provide these services for a "material or commercial purpose." However, the trial court erred in granting summary disposition for defendant because there was evidence defendant knew or had reason to know of the hidden danger of non-safety glass doors on its premises. Plaintiffs produced meeting minutes in which a member of defendant's executive council raised a non-safety glass concern regarding a door through which children would pass when attending Sunday school and vacation bible school. Further, because children could use the door to access the activity room and were unlikely to appreciate the risk of harm from the shattering of a non-safety glass door, plaintiffs established a genuine issue of material fact whether the door presented an unreasonable risk of harm. Affirmed in part, reversed in part, and remanded.

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Spring Meeting 2004

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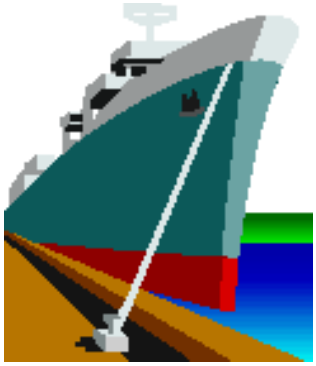

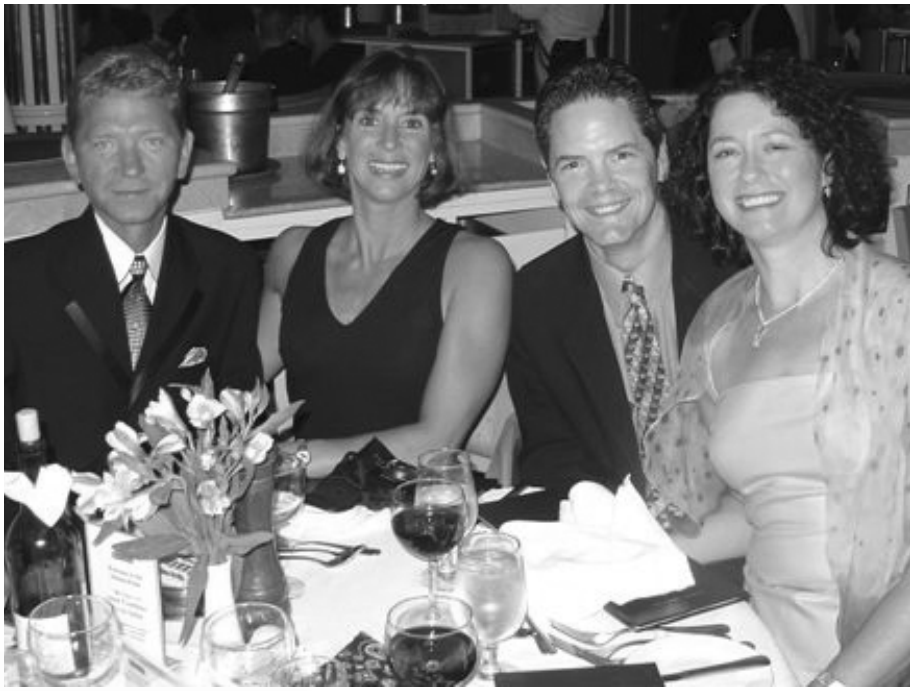

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Majesty of the Seas
March 5-8, 2004

1. Group Photo
2. Oneal & Cora Wright; Rep. Jim & Maria Howell; and Kelly & Brian McKenna
3. Brian & Kelly McKenna; Evelyn & Bryan Waldman
4. Jacqueline & Robert Siemion; Jane & Tom Peters; Cindy Merry & Gene Esshaki
5. Perry Gingerich & Judy Susskind; Sen. Mark & Christine Schauer
6. Tom Peters

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on the strength of a certificate of added qualification issued by the primary board, so that the expert witness must also exhibit such a credential? This is not how the term "board certified" normally is used in the medical community but if the courts' answer is yes – "board certified in that specialty" includes the holders of a certificate of added qualification – then must the expert not only match the defendant's subspecialty certification but also possess the same primary board certification as well? Consider that under the 24 board certifications of the ABMS and its osteopathic counterpart, the same subspecialty may be recognized and credentialed by more than one of the primary certifying boards. For instance, critical care medicine is a subspecialty of anesthesiology, internal medicine and OB/Gyn. Further, the relatively new field of sports medicine is a subspecialty of family medicine, internal medicine, emergency medicine and pediatrics.

Presently pending in the Supreme Court are two cases that could clarify these matters: *Halloran Estate vs. Bahn* (Docket Number 121523), leave granted 468 Mich. 868 (March 25, 2003) and *Grossman vs. Brown* (Docket Number 122458), leave granted 468 Mich. 869 (March 25, 2003). In *Halloran*, the expert was a board-certified anesthesiologist with a subspecialty certificate in critical care medicine; defendant was a board-certified internist with a subspecialty certificate in critical care medicine from his primary board. A divided Court of Appeals panel ruled that the critical care subspecialty was the relevant specialty under the facts and that it was, therefore, enough that the expert matched the defendant's subspecialty certification, though it was issued by a different primary board. In *Grossman*, the Court of Appeals declined to review a trial court's holding that it was sufficient that the expert matched the defendant's primary certification in general surgery (the salient issue was that of post surgery treatment), and that the statute did not require a match of defendant's certificate of added qualifications in the subspecialty of vascular surgery. Among the issues enumerated in the Supreme Court's order granting leave is "the proper construction of the word 'specialty' in the first sentence of M.C.L. 600.2169 (1) (a)" and "the proper construction of the phrase 'that specialty' in the second sentence of [the same statute]." It is not beyond the realm of imagination that the Supreme Court could defeat the plaintiff in both cases, if it so chooses, with a holding requiring double matching – an identity of both primary board certification and subspecialty certification. Such a ruling would make the finding of the Loch Ness Monster less of a task than trying to match an expert with the same qualifications as defendant. For example, what if defendant is board certified in pediatrics but has decided to give up the practice and specialize in emergency medicine? How many physicians in the United States would match up? Lurking in the *Grossman* case is another issue that has caused endless difficulty for plaintiffs' attorneys. In medical malpractice cases – unlike malpractice litigation against members of other professions – the legislature has erected some strict threshold requirements for bringing suit. M.C.L. 600.2912 (d) provides that a medical malpractice suit cannot be filed until a six month notice of claim period has run its course and then requires that the complaint be supported by an "Affidavit of Merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [M.C.L. 600.2169]." The affidavit requirement was added in 1993 at the same time the expert witness statute was recast.

The affidavit must spell out the applicable standard of care, set forth the expert's opinion that the standard was breached, identify the defendant's improper acts or omissions, and explain how the professional lapses proximately caused the injury. Suit is not considered to have been commenced (thereby halting the statute of limitations) unless the affidavit is appended to the complaint filed with the court. *Scarsella vs. Pollak*, 461 Mich. 547 (2000).

The real challenge for the plaintiff's attorney is not the extra paperwork but the uncertainties hereinbefore discussed as to which qualifications a doctor must possess in order to provide an effective affidavit of merit and later testify as an expert witness at trial. The 1993 legislation gives legal efficacy to an affidavit signed by a doctor whose qualifications the attorney "reasonably believes" will satisfy the expert witness statute. As noted in *Watts vs. Canady*, 253 Mich. App. 468 (2002), "the Legislature set a lower threshold" for

judging an affidavit of merit than for a later decision on whether the affiant can testify at trial. A doctor whose background warrants the reasonable belief that he is a qualified expert may ultimately be found insufficiently qualified to give trial testimony.

The contours of reasonable belief have yet to be drawn with clarity. The Supreme Court in *Scarsella* left open the question whether a timely but "grossly non-conforming" affidavit can toll the statute of limitations, and the Court of Appeals also has sidestepped that question, *Kirkaldy vs. Rim*, 251 Mich. App. 570 (2002). Though the derisory phrase "grossly non-conforming" leaves me with little doubt about what the ruling will turn out to be.

Just when is an affidavit of merit grossly non-conforming and when is it deficient but, nonetheless, good enough for statute of limitations purposes on the strength of the attorney's reasonable belief? The Supreme Court appeal in *Grossman vs. Brown* comes from an unsuccessful challenge to an expert's affidavit and could provide an opportunity for some clarification, but if the answer in the end lies only in the eye of the beholder (the trial and appellate judges), then consider the plaintiff's predicament. The Supreme Court says, "There is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within 'a reasonable time.'" *Greathouse vs. Rhodes*, 465 Mich. 885 (2001). A wily defense counsel can join issues on the complaint, proceed through discovery and, once the limitations period has elapsed, ambush the plaintiff with a motion for summary dismissal alleging the plaintiff's expert lacks Section 2169 qualifications; hence, the affidavit is grossly non-conforming and the lawsuit was not validly commenced.

Even if a plaintiff should dodge that bullet on a finding that there was a reasonable, if mistaken, basis for believing in the affiant's statutory qualifications, plaintiff may still be left scrambling to find a different expert witness on the eve of trial if he/she has reason to believe that the trial court or appellate court might not believe the expert is qualified to testify. Also are we not faced with the prospect that the trial court may not allow an eleventh hour substitution of experts, even if one can be located?

We are told that the 1993 statute was designed to insure "that in malpractice suits against specialists, the expert witnesses actually practice in the same specialty" (this is a quotation from a 1995 Senate Committee Report cited in Justice Cavanagh's dissent in *McDougall vs. Schanz*, 461 Mich. 15, 48, N.13 (1999), a case upholding the constitutionality of the statute). Yet my doleful feeling is that it is being transformed by judges into a trap that extinguishes the claims of grievously wronged patients who seek their day in court on meritorious allegations of physician negligence. To better understand the court's somewhat obfuscated attitude regarding expert witnesses, all one need do is read two recent Court of Appeals per curiam opinions (Dec. 2, 2003), *McConnell vs. William Beaumont Hospital*, No. 241672, (failing to remand back to trial court for further consideration) and *Giusti vs. Mt. Clemens General Hospital*, No. 241714, (improperly interpreting deposition testimony of plaintiff expert). If the legislature's purpose is not to correct abuses, real or perceived, but to eliminate the medical malpractice cause of action altogether, it needs to say so – openly and directly. That is not a mission for judges, following a designed agenda, to undertake on the pretense of administering the law by interpreting porous statutory language for the purpose of slowly eroding the concept of medical malpractice and, in so doing, immunizing physicians and hospitals from legal liability. The courts should, once and for all, mercifully bring to an end the decade-long game of *Where's Dr. Waldo*.

Stanley S. Schwartz, a senior partner in Sommers, Schwartz, Silver and Schwartz, PC in Southfield, Michigan is a Professor at the University of Michigan Law School teaching a seminar on Trial Advocacy and Law and Medicine. The Shareholders in his firm have established a foundation to enhance the quality of life and education in their community. He can be reached via email at *ssschwartz@s4online.com.*

Stanley S. Schwartz
Sommers, Schwartz, Silver & Schwartz PC
2000 Town Center Suite 900
Southfield, MI 48075
Phone – 248-355-0300
Fax – 248-746-4001

public. While these errors have nothing to do with the merit of the plaintiff's or defendant's case, they are nonetheless tipping the scales of justice one way or the other. Moreover, the attorneys themselves then often become the targets of legal malpractice cases.

House Bill 5338, as introduced, would have solved the problem by removing the requirement that an affidavit of merit be attached to the initial case filing. This would have prevented an entire case being thrown out (or defaulted, from the defense standpoint) merely due to a technical error on an affidavit of merit. However, opposition from the insurance industry and medical field made it clear that this solution was not politically feasible. House Bill 5338 is currently being re-drafted with an effort to address these concerns, while also allowing affidavits of merit to be corrected without affecting the entire case. We are hopeful that this bill will receive a hearing sometime this spring.

William (Bill) Wortz has been with Public Affairs Associates, Inc. for eight years and before coming to work there served four years as Director of Public Policy for the Michigan Association of Realtors. Bill also has extensive experience with the Michigan House of Representatives and has worked in British House of Commons.

William Wortz
Public Affairs Associates Inc.
600 West Shiawassee
Lansing, MI 48933
Phone – 517-371-3800
Fax – 517-371-8015
wortz@paaonline.com
www.paaonline.com

Todd N. Tennis has been a lobbyist with Capitol Services, Inc., a multi-client lobbying firm that specializes in representing non-profit organizations, since 1995. Prior to becoming a lobbyist, Todd earned a degree in political science from the University of Michigan, and worked as a staff representative for former State Senator Fred Dillingham. He has represented the Negligence Law Section of the State Bar since 1999. Todd lives in Lansing with his wife Cheryl and his son Troy.

Todd N. Tennis
Capitol Services Inc.
526 Townsend
Lansing, MI 48933
Phone - 517-372-0860
Fax – 517-372- 0723

SBM
State Bar of Michigan
michael franck building
306 townsend street
Lansing, MI 48933-2083

www.michbar.org

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