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

RECENT EVENTS

Spring Meeting, April 29- May 2
Las Vegas, Aria Hotel

Walt Griffin, Ven Johnson & Steve Galbraith

Sean Carter & Barry Goodman

Todd & Terri Stern

Denise Janes, Bethany Griffin and Walt Griffin

Is There a Difference Between Ignorance and Apathy?

"The difference between ignorance and apathy. I don't know and I don't care."

—Samuel Langhorne Clemens

José T. Brown

Aging lawyers may follow this timeline of ignorance to apathy. My career track included another Twain gem: "It is better to keep your mouth shut and appear stupid than to open it and remove all doubt." Shame on me.

Negligence law in Michigan has been substantially reduced to a nonentity by several forces: FDA approval resulting in immunity for drug companies, significant burdens to file product liability cases, tort reform in medical malpractice, legal decisions regarding open and obvious, auto accident injury thresholds, and the "…tion" factors: case evalua*tion*, facilita*tion*, arbitra*tion*, alternative dispute resolu*tion*. Two-thirds of civil cases in the state of Michigan are in domestic relations. These observations mandate our section to act to address the pillage of negligence law.

During the decade of the '90s, I mostly listened and did not act. I was ignorant, too afraid to bite the hand that feeds me. Tort reform morphed through several revisions, and many lawyers failed to act or speak out on the specifics of the reform. The public and lawyers were told tort reform was necessary to keep medical malpractice premiums down, to keep the doctors in the state. Drug immunity is good for business. In the medical field there is pending state legislation to tax doctors. National Health Insurance Reform diminishes Medicaid reimbursement. Michigan's reimbursement for physician specialties is not competitive. The Monroe pediatrician makes far less than the Toledo counterpart. Few like to admit this, but medicine is also a "business." These are the reasons for the flight of doctors from Michigan. Yet the politicians continue to flog the lawyers for driving up the cost of business through excessive litigation. The real problem is the health care/insurance reform model is not sustainable. Lawyers are the "easy way out," and the public buys into this attack.

My mentor, Earl Cline, would often tell me, "Be careful what you ask for; you just might get it." As I look back at this past decade, have doctors been kept in the state? Have drug manufacturers been kept in this state? Has tort reform been good for lawyers on both sides of the V? Rhetorical, rhetorical, rhetorical.

Continued on page 2

Is There a Difference . . .

Continued from page 1

I was criticized by several of my colleagues for my OP-Ed page in the *Lansing State Journal* for referencing the *public perception* of lawyers as "bottom feeders." (A copy of this article is published in full in this publication). I welcome criticism; it promotes discourse. The trial lawyers, both sides of the V, are frequently criticized for frivolous litigation. How many times have you heard "the lawyers have to eat, too" or "he who sues my client is my friend"? Frivolous litigation happens, but not on the magnitude that any one lawyer is putting food on the table by collecting fees from frivolous lawsuits. I truly believe what is good for both sides of the V is good for the public.

I cherish an inanimate object: my desk. I speak with it when troubled. It was Earl Cline's desk. I have a life estate with permission of Earl's three daughters. Earl's desk tells me to be civil; getting dirty doesn't mean wallowing with the pigs. Earl's desk tells me to have fun outside of the practice of law, to pursue a hobby with passion; it will make me a better lawyer. Earl's desk also tells me, "Don't get old, don't get cynical, and don't get apathetic." "To get something done, you must act, not react. If you don't get involved you're part of the problem. Rational discourse results in solutions."

This requires an analysis of offering solutions to very difficult legal concerns. It is my belief the "Chairperson's Agenda" offers an opportunity for discourse and proposes solutions.

I will highlight my "Chairperson's Agenda" from January 2010 through October 2010. The Negligence Law Section Board has worked toward solutions based on rational discourse.

Holidays 09 and January 2010

McCormick amicus brief was drafted and filed with the Michigan Supreme Court requesting permanent impairment become a jury question in most instances. The amicus brief addresses the right to jury trial in light of *Kreiner*. Some cases will still require a summary disposition decision.

February/March 2010

Changes in MCR 2.112 & 2.118 regard "fairness" with new time frames to file objections to NOI's and the Affidavit of Merit.

April 2010

Treasurer Tom Waun testifies before legislature on the "open and obvious" doctrine HB5744. The substance of his testimony was to allow access to the jury on factual questions. Ongoing invitations are regularly extended to testify before the legislature on select negligence issues. Without the efforts of a lobbyist, it's nearly impossible to keep track of legislative sausage in Lansing. Our efforts should be extended to include providing Law School for Legislators. After all, over 50 percent of the House and Senate will be "new" after November 2010. The State Bar of Michigan will invite our section to be involved in teaching legislators.

May 2010

- Negligence Law Section Annual Meeting in Las Vegas, April 29 to May 2
- Second amicus brief in *Colianni* and *Trentadue* at the request of the Michigan Supreme Court. The issue concerns the common law statute of limitations due to "discovery" of the murderer in a civil action after forensic DNA analysis, several years later.
- May 26 Medicare Lien II Education Seminar. Although the reporting requirements were recently extended, this issue is a significant

problem. Super liens now impact the defense bar.

June 2010

Thomas M. Cooley Law School invitation to provide a seminar to law students.

July 26, 2010

Summer Learning Seminar II in Traverse City. Justice Michael Cavanaugh will be honored as a special mentor for negligence law attorneys and as a steadfast defender of the right to a jury trial in Michigan.

October 2009–October 2010

Ongoing proposal for mandatory continuing legal education. Meetings have been held with Justices Kelly and Hathaway of the Michigan Supreme Court; Lynn Chard, director of ICLE; and Steve Johnston, head of MDTC, to solicit support for MCLE. Janet Welch will attend a Negligence Law Section board meeting to determine the efficacy of a public proposal before the Michigan Supreme Court. The cost of educating younger associates is now the burden of the firm. Are there any carriers that will pay for a second chair associate?

October 2010

Annual Meeting at Amway Hotel, Grand Rapids. Fourth learning seminar this calendar year. Query: why is Michigan only one of four states in the Union *without* MCLE?

The Negligence Law Section council has the responsibility of acting for its members. It is by far SBM's most active section. We should not wait for legislators to call us for advice on pending legislation; most legislators are young, term limited, and don't look at the big picture. The House and Senate can both use our help, not to be political but to be fair. We should write the proposed bills. We should not wait for the Court of Appeals and the Michigan Supreme Court to invite us with amicus requests. Although honored by the recent *Colainni* request for an amicus from the Michigan Supreme Court, our section has an obligation to search and file requests for amicus briefs. Justice Marilyn Kelly recently discussed the inability of the poor and the public to "access the courts" in her State of the Judiciary Address before a joint session of the legislature. Pro bono work, although necessary and laudable, doesn't cut the mustard. What will our section do to aid in the access to the courts? Limited access is not simply an indigent prisoner request, but applies to negligence law.

Might I suggest…talk to your desk. Don't be a complainer, a whiner, a bellyacher; this only results in apathy. Be active, get involved, provide candid, honest discourse with your colleagues; this promotes solutions. Or do you want the alternative? Some would believe that wisdom has two parts: having a lot to say and not saying it. This invites apathy.

Pictures from Las Vegas

May 2010

Right to Left Brian Koncius and his wife, Pamela Miller, Barry Goodman, Donna McKenzie & Brandon McKenzie.

Ray Horenstein, Mark Bernstein & Mrs. Horenstein

Paul Manion, Jacqueline Siemion and Ven Johnson

Mike & Denise Janes

Madelyne Lawry, Jacqueline Siemion, and Janette Yano

Kreiner/McCormick Update

By David E. Christensen and Alison F. Tomak
Gursten Koltonow Gursten Christensen & Raitt PC

In the months following the *McCormick v. Allied* oral arguments, many questions have arisen regarding the Michigan Supreme Court's forthcoming opinion. Will *Kreiner* be overturned? If it's not outright overturned, what can we expect in the *McCormick* decision? Will Justice Cavanagh's *Kreiner* dissent be adopted? How will lower courts apply this new decision? The MSC is expected to issue its decision in *McCormick v. Allied* by the end of the term, which ends in July 2010. Anticipating the answers to these questions involves looking at the judicial and legislative events leading up to *McCormick*.

Rodney McCormick suffered a serious ankle injury when a co-worker backed his truck over his ankle. It required two surgeries to repair the injury, and he was restricted from work for one year. McCormick sued for non-economic damages under MCL 500.3135(1). McCormick's employer moved for summary disposition, claiming that McCormick did not suffer a serious impairment of body function under *Kreiner v. Fischer*. The trial court agreed, and McCormick appealed. In a split decision, the Court of Appeals affirmed the trial court's decision. The dissenting judge opined that there was evidence from McCormick's treating physicians that McCormick's life was not "normal" and that he faced the possibility of future problems.

McCormick appealed the appellate court's decision. The Supreme Court initially denied the application for leave to appeal in an Order dated October 22, 2008. Then the composition of the Court changed with Justice Hathaway defeating Chief Justice Taylor in the election of November, 2008. McCormick filed a Motion for Reconsideration, and the Court reversed itself and granted McCormick leave to appeal in an Order dated August 20, 2009.

During oral arguments held on January 14, 2010, in Lansing, McCormick's counsel urged the Court to reverse the lower court's ruling, as Mr. McCormick had suffered a serious impairment of body function. Further, he argued, the Court should overrule the *Kreiner* decision, as it is a clear example of judicial activism. McCormick's arguments yielded a variety of questions from most of the justices. Justice Robert Young, who signed on to the *Kreiner* majority decision, was perhaps the most active, pressing McCormick's counsel for a standard *he* would have imposed if *Kreiner* were overruled. McCormick argued that the standard is clearly laid out in the statute and it needs no further definition from the Court. Justice Elizabeth Weaver, who is known to be a swing vote on the MSC, characterized the majority opinion in *Kreiner* as "judicial activism" in her questioning.

Recognizing the great importance of *McCormick*, 12 amicus briefs have been filed in this case, including a brief supporting McCormick filed by the Negligence Section. The Negligence Section's brief focused on the section of the no-fault statute that mandates that the judge decide the issue of serious impairment of body function, as a matter of law. MCL 500.3135. This is nearly always a fact-intensive analysis, as the *Kreiner* majority opinion acknowledged. The Negligence Section challenged the constitutionality of this statute on a number of grounds. First, the section's brief argued that the transfer of fact-finding authority from jury to judge under MCL 500.3135(2)(A) is unconstitutional. Judges faced with summary disposition motions are required to view the evidence in a light most favorable to the non-moving party, and are prohibited from assessing credibility and resolving questions of fact. These limitations are in place precisely to protect the venerable right to a jury trial. Section 3135(2)(a) of the No-Fault Act effectively usurps this right by requiring the judge to decide cases as a matter of law even where factual and credibility issues exist.

Second, the section's amicus brief argued that Section 3135(2) violates the separation of powers clause of the Constitution. Summary disposition procedures contained in MCR 2.116(C)(10), and the cases decided thereunder, sets forth how cases may be disposed of by a judge. For example, a (C)(10) motion may not be granted if there are material questions of fact remaining, or if a reasonable juror could rule in favor of the plaintiff. Section 3135 contradicts with this court rule by relegating to the

David E. Christensen

Alison Faith Tomak

David E. Christensen is a partner at Gursten, Koltonow, Gursten, Christensen & Raitt, PC and a graduate of the University of Michigan Law School.

Alison Faith Tomak is an associate at Gursten, Koltonow, Gursten, Christensen & Raitt, PC and a graduate of the University of Detroit Mercy School of Law.

You can contact the authors at (248) 353-7598 or by e-mail at dechristensen@gurstenlaw.com and atomak@gurstenlaw.com

judge the intensely credible and factual questions concerning person's ability to live his/her normal life.

Finally, the Negligence Section argued that the *Kreiner* decision should be corrected to eliminate the extra-statutory requirements inserted by the majority's opinion. In attempting to interpret MCL 500.3135(7), the *Kreiner* Court injected requirements above and beyond those outlined by the statute by requiring that the "course and trajectory" of a person's life must be affected to satisfy the serious impairment threshold. The Court simply added (among other factors) a temporal/durational requirement to assist lower courts in determining whether a plaintiff has met the threshold. These stringent judicially-created requirements have made it exceedingly difficult for seriously injured persons to satisfy the threshold.

Kreiner led to a tidal wave of appeals of summary disposition decisions. Under the previous *DiFranco* regime, where threshold was decided under standard summary disposition procedures, there were only forty appeals filed over a ten year period. The threshold was ordinarily a jury question. Since *Kreiner* was decided, the changes have been staggering: an examination of 250 unpublished appellate court decisions revealed 51 decisions in favor of plaintiffs, and 198 in favor of defendants, a whopping 79 percent favoring defendants. (Amicus Curiae Brief of the Negligence Section of the State Bar of Michigan at 4). This resulted in the Court of Appeals being the ultimate fact finder in most of these cases. Many attorneys will recall that the Court of Appeals instituted a special "rocket" docket to handle the immense number of these appeals. It has since been discontinued due to budget constraints.

Even a cursory review of post-*Kreiner* plaintiffs shows the unworkability of this decision and the arbitrary results of having the judge replace the jury.

*Luther v Morris***,** unpublished opinion per curiam of the Court of Appeals, issued January 18, 2005 (Docket No. 244483). Plaintiff missed 52 days from work following fractured dominant arm. She testified that her arm was in a sling and she required assistance with most activities for about two months. Her left arm was previously weakened. She recovered in two months. There was no evidence of ongoing restrictions.

Continued on next page

***Kreiner/McCormick* Update**
Continued from page 5

Plaintiff prevailed.

Guevara v Martinez, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 260387). Plaintiff, a dishwasher, suffered a torn rotator cuff and dislocated shoulder. Plaintiff required a shoulder immobilizer of the dominant arm and five months of physical therapy. He was off work for five months with therapy. No serious impairment was found. Defendant prevailed.

*Cook v Hardy***,** unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket No. 250727). This student suffered a fractured fibula, which was casted six to eight weeks. She missed a vacation and was medically restricted on carrying items while recovering. She could not resume some activities, such as completing an independent study course, for six months. Plaintiff prevailed.

*Swick v Okorn***,** unpublished opinion per curiam of the Court of Appeals, issued November 1, 2005 (Docket No. 263478) . Plaintiff injured his cervical spine and required neck surgery by a neurosurgeon. Plaintiff was off work from December 2003 to August 2004. The plaintiff had ongoing restrictions from working on ladders or roofs, an integral part of his job as a masonry estimator. Plaintiff was also medically restricted from "strenuous" activities. Defendant prevailed.

Gagne v Schulte, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2006 (Docket No. 264788). Plaintiff lost one year of work due to her torn anterior cruciate ligament and medial meniscus, which was surgically reconstructed. She had residual instability in the knee. Plaintiff was restricted from recreational activities such as gymnastics, roller blading, ice skating. She possibly could perform with a knee brace eventually, according to a doctor. Defendant prevailed.

*Welch v Yuhl***,** unpublished opinion per curiam of the Court of Appeals, issued April 18, 2006 (Docket No. 266637). This 14-year-old boy had a deeply lacerated hand which damaged several tendons, a blood vessel and nerve. Reconstructive surgery was performed on his hand. Medical restrictions were in place for only two months, and physical therapy was completed in four months. There was testimony of residual pain and weakness in his hand, but there were no ongoing physician-imposed restrictions. Plaintiff prevailed.

Jones v Wheelock, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 258974). Pedestrian high school student was stuck by car resulting in torn knee ligaments. Reconstructive surgery was required. She was unable to walk without assistance for one month. Physical therapy was required for 10 weeks. She was disabled from work for three months. She had residual pain when standing or walking, and occasional swelling. She dropped out of marching band and basketball due to the injury. Defendant prevailed.

Hill v Keller, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2007 (Docket No. 269084). Plaintiff suffered a fractured fibula, fractured pinky finger, concussion, lacerations and deep vein thrombosis, a life-threatening condition. Plaintiff was off work for three months. There was residual pain and numbness in plaintiff's right leg, which was objectively confirmed by an electromyogram (EMG). Consequently, the plaintiff could not water ski or play pool, per self-restrictions. Defendant prevailed.

Conklin v Shack, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No. 268316). Plaintiff suffered a fractured back at T-12 and required a back brace for six months to restrict movement. He missed approximately nine and a half months of work. Plaintiff could not play football or hunt. Defendant prevailed.

Turk and Stoner v Dula, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2007 (Docket No. 273424). Defendant prevailed. Stoner, an 81-year-old plaintiff, underwent a knee replacement and shoulder surgery. Plaintiff quit her job due to the pain, but she did not obtain a doctor's note, so it was not considered by the Court.

These cases appear irreconcilable. They demonstrate the arbitrary nature of the *Kreiner* and 3135(2)(a) procedure, and reaffirm the wisdom of the Founding Fathers' firm belief in the jury system. It is the best way to determine credibility and facts, bar none.

The status of Michigan no-fault law is dire. A review of the Michigan Constitution and court rules reveals an equally troubling reality: MCL 500.3135 is an unconstitutional affront to the venerable right to jury trial. If the arguments seem esoteric, the numbers are not: *Kreiner* has resulted in the dismissal of 79 percent of victims' lawsuits.

It is one of the primary missions of the Negligence Section to preserve the public's right to a jury trial: both plaintiffs and defendants. We respect Michigan's tri-partite governmental system. We believe that judges should not be permitted to legislate from the bench, and the legislature must respect the Constitution when making law. It is our hope that the decision handed down by the *McCormick* Court this summer will comport with these values.

Question No. 1 in ERISA Analysis: Do You Have a "Plan" That Falls Under the Act?

By Troy W. Haney
Haney Law Firm

In recent articles, I have addressed the substantive issues surrounding both a participant's claim to benefits under an ERISA-governed employee benefit plan, and an insurer's opposing claim seeking to be reimbursed for benefits tendered out of any third-party recovery that the participant/insured might obtain. Based on inquiries that these articles have prompted, I appear to have begun the discussion a bridge or two downstream, and should now specifically paddle back and address the initial "gatekeeping" inquiry as to whether a particular benefits plan and its funding insurance policy are, in fact, governed by ERISA, and, therefore, entitled to the statute's broad preemption of otherwise potentially applicable state law.

In its Section 2, 29 U.S.C. § 1002, ERISA broadly states the act's intention to apply to each and any "employee welfare benefit plan" which is "established or maintained" by "an employer…or employee organization" or both, "to the extent" that the plan is maintained for the "purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise" benefits in the form of "medical, surgical or hospital care" arising out of "sickness, accident, disability [or] death…." As a comprehensive and reticulated act expressly designed to protect Americans' retirement income, the statute indisputably covers pensions, annuities, and deferred compensation vessels almost without exception, but also has been applied with virtually equal breadth by every federal circuit to long-term disability, health insurance and life insurance benefit claims, which, although not "retirement" vessels expressly, fall equally within the above-recited statutory definition.

After most broadly defining the criteria for a qualifying plan, ERISA then immediately turns via its Section 3, 29 U.S.C. § 1003(b), to listing five specific exceptions where the act does not apply:

> (b) The provisions of this subchapter shall not apply to any employee benefit plan if—
>
> (1) such plan is a governmental plan;
> (2) such plan is a church plan;
> (3) such plan is maintained solely for the purpose of complying with applicable workers 'compensation laws or unemployment compensation or disability insurance laws;
> (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or
> (5) such plan is an excess benefit plan…and is unfunded.

Section 3(b), with its listing of these five exceptions, is typically referred to by the courts as the ERISA "safe harbor" provision. Obviously, government plans and church plans are the most significant docking bays in the safe harbor, while the other three exceptions, although much less frequently encountered, at least bear noting.

Moreover, in addition to the act itself, an administrative regulation adopted by the Department of Labor pursuant to the act's authority, 29 C.F.R. § 2510.3, specifically excludes from ERISA those "payroll practices" whereby an employer self-funds out of its general assets certain benefits that otherwise would fall under the broad foregoing definition. Most typical by far in this regard is a prescribed period of "short-term" disability, usually six months, which is designed to coincide with the "elimination period" of the employer's insurer, whose "long-term" disability coverage then kicks in under the terms of the applicable policy and is controlled by ERISA.

Relative to the above-cited definition of "employee welfare benefit plan," the seminal opinion of the federal courts on point was the *en banc* opinion of the Eleventh Circuit in *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir.

Continued on next page

Troy W. Haney

Troy W. Haney, Haney Law Firm Grand Rapids, Michigan. He is a graduate of Calvin College and the University of Detroit Law School. He is an Executive Board member of the Michgian Association for Justice and has been featured in the Best Lawyers in America, 12th ed. He practices in the areas of employee benefit law; short-term and long-term disability insurance litigation; ERISA-governed long-term disability, health care and pension plan litigation; serious and catastrophic automobile negligence; wrongful death, complex civil litigation in state and federal courts. Contact information: Haney Law Office, PC, 330 East Fulton, Grand Rapids, MI 49503, (616) 235-2300. E-mail: thaney@troyhaney-law.com.

Question No. 1 . . .
Continued from page 7

1982), in which the court laid down the required ingredients for an ERISA plan, including: (1) identification of intended benefits, (2) identification of intended beneficiaries, (3) a source of funding, and (4) a procedure for obtaining benefits. The *Donovan* court went on to state that while the mere purchase of insurance by the employer does not itself create a plan, it is evidence of the existence of a plan, and that while a mere decision to extend benefits does not constitute a plan, the implementation of that decision is what typically becomes the plan. The *Donovan* test was subsequently adopted in every circuit (see, e.g., *Brown v. Ampco-Pittsburgh Corp.,* 876 F.2d 46 (6th Cir. 1989)), and the federal courts have almost universally ruled that the failure to follow all formalities will not itself prevent a plan from being a plan under ERISA, and as long as the *Donovan* elements are met, a plan exists. In this regard, claimants and their attorneys should resist falling prey to labeling, as employers and insurers have broadly undertaken to weave the "plan" and "policy" into one document, and use the two labels interchangeably.

In short summary, combining the statutory definition with the *Donovan* formulation yields what may be written as an equation:

> ERISA described benefits + "established or maintained" + ongoing maintenance = Plan.

In *Meredith v. Time Ins. Co.,* 980 F.2d 352, 355 (5th Cir. 1993), the court characterized the analysis via a decision tree:

(1) Does a plan exist?
(2) Does it fall outside the "safe harbor" [and, I add, outside "payroll practice"]?
(3) Was it "established or maintained"
  (a) by an "employer"
  (b) intending to benefit employees?

If all answers are "yes," ERISA applies and controls; if any answer is "no,,ERISA does not apply.

Now, if the above seems arcane, attenuated, or just plain too boring to follow, I offer the following shortcut to quickly determine whether or not an insurance "policy" or "plan" falls under ERISA. The website *freeerisa.com* is a terrific resource. With only the name of the employer, you can go to this website and search for all ERISA filings. If the plan you are looking for is not listed, you should be immediately suspicious about whether you are looking at an ERISA plan or simply a state governed insurance contract. Of course, the general rule is that if the insured does not work for a governmental entity or religious organization, it's likely an ERISA plan.

If It's Broken It Needs Fixing
No Fault Insurance Threshold Needs to be Repaired

By José T. Brown, Chairperson of the Negligence Law Section

The Negligence Section of State Bar of Michigan is a practice section comprised of an equal number of plaintiff and defense attorneys practicing negligence law. The Negligence Law Section strives to protect the public's right to jury trials, to enhance the practice of negligence law among its members and the greater Bar, and conducts educational functions for its members and the public.

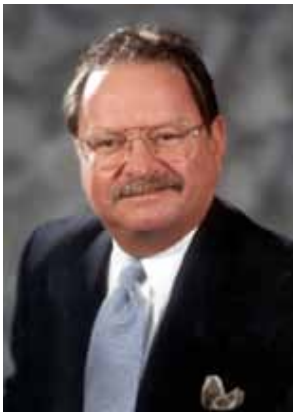
Although trial lawyers maintain the public's perception as being "bottom feeders," our section represents both injured parties and defendants. As such, the Negligence Section is very directly concerned with the outcome of the *McCormick* case, a recent Michigan Supreme Court case. *McCormick* most importantly affects the public's right to jury trial under the Michigan constitution.

The No-Fault Act contains provisions that, as interpreted by the *Kreiner* case, seriously threaten the right to jury trial and have resulted in a system of justice that is producing arbitrary results. Judges are now charged with performing the functions traditionally reserved for the jury. The Negligence Law Section believes charging the judge with finding facts and judging credibility concerning serious impairment of body function violate the Constitution, and *Kreiner*'s interpretation of the serious impairment threshold greatly exceeds what the legislature intended. These factors combine to threaten the integrity of the jury system and judiciary. The issues raised in the *McCormick* case have dire concerns for our system of civil justice among practitioners of automobile negligence, no-fault law, and most importantly the citizens of the state of Michigan.

It is the position of the Negligence Law Section that in 1995, the Michigan legislature passed MCL 500.3135(2)(a), amending the 1972 act which transferred the primary fact-finding function of the jury to the judge in a case of determining serious impairment of body function. In the whole of Michigan jurisprudence the Negligence Law Section has been unable to find other instances of the abrogation of the primary jury function in favor of the judge, in non-governmental cases, where there are material questions of fact on an ultimate issue. This violates the Michigan constitution's guarantee of a right to trial by jury.

Beware; while this section advocates the right to jury trial, every defendant would still have the right to seek summary disposition or dismissal of the case where there is no material dispute as to facts and when reasonable minds cannot determine that the injury threshold has not been met. The frivolous cases deserve dismissal. Judges will continue to dismiss frivolous cases. The changes requested in *McCormick* will not promote frivolous cases for the bottom feeders.

The *Kreiner* decision has altered the statutory definition of serious impairment of body function found at MCLA 500.3135(7); *it* injected a temporal/durational requirement that is not in the statute. *Kreiner* also added an extra statutory requirement that a person's impairment "affects the person's general ability to lead his or her normal life" to require that the persons impairment completely prevent him/her from leading his/her normal life. "Affecting" and "preventing" are very different terms. *Kreiner* needs to be fixed.



Justice Michael F. Cavanagh

Outstanding Achievement Award
Will be Presented to Justice Michael F. Cavanagh

The Negligence Law Section of the State Bar of Michigan proudly confers this Outstanding Achievement Award upon Justice Michael F. Cavanagh for his long and distinguished service on the Michigan Supreme Court.

The Award will be presented on July 25, 2010, at the Annual Summer Meeting at Turtle Creek Casino in Williamsburg, Michigan.

SBM State Bar of Michigan

NEGLIGENCE LAW SECTION
NORTHERN MICHIGAN COUNCIL EVENTS

Barbeque – Sunday, July 25, 2010
Turtle Creek Casino & Hotel
7741 M-72 East
Williamsburg MI 49690
231-534-8880
6:00 p.m. – 7:30 p.m.
$126/room

Golf *Arcadia Bluffs Golf Club – Monday, July 26, 2010
3224 Bischoff Road
Arcadia, MI 49613
800-494-8666
Tee Times Start at 9:00 a.m.
Golf is limited to 55 players.
$155/person, includes range balls, green fees --18 holes, and cart

Date_____

First Name_____ Last Name_____

Guest_____

Firm_____

Address_____

Phone_____ Fax_____

Email_____

❑ **Please register me for the Barbeque on Sunday, July 25, 2010 @ Turtle Creek Casino & Hotel. For room reservations call 231-534-8880**.

❑ **Please register me to play golf on Monday, July 26, 2010 @ Arcadia Bluffs.**

*All golfers must provide a valid credit card to use in the event of a late cancellation or no-show. All credit card numbers will be secured and only used if the golfer does not cancel prior to **July 14, 2010** or does not show up on **July 26, 2010**. Please sign and complete the following information and return to the Negligence Council office to confirm your registration. The Negligence Council is authorized to process my credit card if I do not cancel my golf reservation by July 14, 2010, or do not appear on July 26, 2010.

Name:_____Signature:_____

Master Card ___ Visa __ #_____ Exp Date_____

Please return form to: **Negligence Council,** PO Box 66, Grand Ledge, MI 48837 or fax to 517-627-3950. For questions, call 517-622-8106, or send an email to neglawsection@comcast.net

Revised 1-26-10

Congratulations to Kathleen L. Bogas

2010 Earl J. Cline Award Winner

Kathleen L. Bogas

Kathleen L. Bogas is a past president of the Michigan Association for Justice and immediate past president of the National Employment Lawyers Association. She served as chairperson of the Negligence Council in 1991-1992, is current co-chair of the Judicial Qualifications Committee of the State Bar of Michigan, a member of the Judicial Crossroads Task Force Business Impact Committee, and a member of the Judicial Advisory Committee for Senators Stabenow and Levin.

Kathy has been inducted into the American College of Trial Lawyers and is also a member of the College of Labor and Employment Lawyers and the American Board of Trial Advocates. In 2001 she was awarded the Respected Advocate Award from the Michigan Defense Trial Counsel. She has been listed in the *Best Lawyers in America* since 1989, being named the Top Labor and Employment Lawyer in the Detroit Area for 2010 and one of the Top Ten Lawyers in Michigan in *Super Lawyers* since 2006. Kathy is one of the editors of *Federal Employment Litigation* and *Employment Litigation in Michigan*, a contributing author to *Introducing Evidence*, and she has written numerous articles and given presentations on many areas of law throughout the country as well as teaching trial advocacy in trial institutes. Ms. Bogas can be contacted at (248) 502-5000 and kbogas@kbogaslaw.com.

Earl J. Cline Award

This award is presented in recognition **of his/her** superb skills as a **judge/attorney** in the field of negligence law and dispute resolution.

It shall be the purpose of this organization:

To PRESERVE THE JURY SYSTEM AND promote the fair and just administration of negligence law.

To advance professional and ethical standards on the part of negligence law practitioners.

To preserve and promote trial advocacy skills in the practice of negligence law.

To ENCOURAGE ATTORNEYS TO ENTER THE FIELD OF NEGLIGENCE LAW.

To Recognize by way of awards and scholarships excellence in tort law and outstanding contribution to the practice of the profession.

Prior Recipients:

2003—Honorable Michael L. Stacey
2004—Samuel A. Garzia
2005—Frank W. Brochert
2006—George J. Bedrosian
2007—Honorable Pat Donofrio
2008—Honorable Robert J. Colombo, Jr.
2009—George Googasian
2010—Kathleen L. Bogas

Invite someone to join the section

http://www.michbar.org/sections/pdfs/app_03v2_exst.pdf

Celebrating the 55th Year of the Negligence Council

We Salute Our Past Chairpersons

2008-2009 Jules B. Olsman
2007-2008 Thomas M. Peters
2006-2007 Barry J. Goodman
2005-2006 Robert P. Siemion
2004-2005 Cynthia E. Merry
2003-2004 Judith A. Susskind
2002-2003 Timothy H. Knecht
2001-2002 David R. 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

INSURANCE COVERAGE ADVISOR: Finding Insurance Coverage: Reading the Policy

By Hal O. Carroll
Vandeveer Garzia, PC

The area of insurance coverage is long on theory and a lot of it is abstract, but finding and proving coverage is an intensely practical exercise that comes down to some basics. Here are some steps and suggestions to guide plaintiff's counsel in assisting in the search for coverage.

Getting the documents

Get the whole policy, and get it certified. Don't rely on the defendant-insured's file copy (if the defendant even has one). And don't ever rely on a copy from the insurer unless it is certified. Even then, be skeptical.

Get the underwriting file. The underwriting file may contain information about the insured's activities that might cast some light on what risks the insurer knew its insured was facing, and that knowledge might help establish coverage.

Get the claim file. Of course, the claim file will be redacted to take out discussions of the insured's liability exposure, but what you want are any comments such as "the claim appears to be covered."

Reading the policy

Separate the questions. Evaluating coverage under a policy can be confusing, but you can reduce the confusion by asking the right questions, one at a time and in order. Don't ask, "Is there insurance for the claim?" That just mixes separate questions together. Reading a policy is tedious, so pour yourself a cup of coffee and start plodding.

Is the defendant an insured? Does this defendant meet the policy's description or definition of someone who is covered? This might be a simple question, because the answer may be right on the declaration pages. Or you might have to look further, in the section of the policy entitled "Who Is an Insured" or something like that. Don't forget the endorsements. There may be a "Blanket Additional Insured Endorsement," or a "Vendor's Endorsement," or some variation on that theme.

Is the risk a covered risk? The next step is to read the policy's "insuring agreement" to see if the claim falls within the language. Like the first question, this is usually an easy one to answer. Liability policies are obviously different from property policies, although it is possible to confuse them. There was a case where a defendant-insured claimed he was covered under a property damage policy because, he argued, money is property, and if I lose the lawsuit and pay the judgment, I'll have less money, and therefore I'll suffer property damage. Maybe a clever argument, but not a good one.

Does an exclusion apply? A liability policy makes a broad, general grant of coverage and then carves out certain risks through the exclusions. So once you know that the defendant is an insured and that the particular risk is within the policy's insuring agreement, the next step is to go through the exclusions. It helps, when you are reading exclusions, to try to understand more than just the words themselves. What is the real-world intent of the exclusion? What kinds of events is the insurer trying to remove from coverage? This is where textualism falls short and "contextualism" should rule. Ultimately, the specific words will control, but it helps to be able to explain (to the opposition, and ultimately to the judge) what the purpose of the exclusion is. Precisely because insurance policies are so intricate and so strangely written, it helps to be able to bring the language back down to earth and explain what it is really about.


Hal O. Carroll

Hal O. Carroll is a founder and the chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan. He is a chapter author of Michigan Insurance Law and Practice, published by ICLE, and has lectured and written many articles in the areas of insurance coverage and indemnity. He can be reached at hcarroll@VGpcLAW.com or hcarroll@chartermi.net, or (248) 312-2909.

Read the conditions. Liability policies all have conditions, things that the insured must do or must avoid doing that can affect coverage. These are pretty straightforward items, and don't usually create a problem. They include things like giving notice to the insurer and cooperating in the defense.

Looking for pay dirt. So much for the basics. There are several principles that should guide you when you are going through these steps. Your goal is to find coverage, so you should keep in mind some basic ideas.

Don't assume that a policy is tightly written. The standard forms, such as those from the Insurance Services Office, are carefully written, but many are not. The peculiar way that policies are written may make them appear to be impregnable just because they are impenetrable. But they may well have flaws. This is especially true for manuscript forms.

Manuscript forms. A "manuscript form" is just a form that the insurer itself wrote. Writing insurance forms

Continued on next page

2010 Michigan Supreme Court Election to be Pivotal

By Todd Tennis
Captiol Services, Inc.

In 2008, in an unprecedented election, Chief Justice Clifford Taylor was defeated in his bid for another eight-year term on the Michigan Supreme Court. Taylor lost to challenger Diane Hathaway (at the time a Wayne County Circuit Court Judge) by garnering over 1.85 million votes against Justice Taylor's 1.48 million. It has been exceedingly rare for an incumbent Michigan Supreme Court justice to be defeated at the ballot box, so rare that few thought it even possible. Justice Hathaway's victory has caused a wholesale reexamination of the politics surrounding the highest court in Michigan.

Though the races are technically non-partisan, candidates for the court are typically nominated by the Democratic and Republican parties at their conventions.

The defeat of Chief Justice Taylor sent shockwaves through Michigan's legal and political framework. The balance of power on the court shifted perceptibly. The loss reduced the majority of Republican nominees from 5-2 to 4-3. However, one of those Republican nominees—Justice Elizabeth Weaver—has shown a tendency to side with the Democratic nominees on many legal issues. Even more notably, she sided with them in the selection of current Chief Justice Marilyn Jean Kelly. Therefore, despite the fact that Republican nominated justices are still in the majority on the high court, the election of Justice Hathaway created a philosophical sea change.

The independence of Justice Weaver has set the stage for what promises to be another unprecedented race for the Michigan Supreme Court. She and fellow Republican-nominated Justice Robert Young both stand for reelection this year. Justice Young will most certainly garner one of the Republican nominations for the Supreme Court. However, due to Justice Weaver's well-publicized rift between herself and her fellow Republican justices, it is highly unlikely that her party will again nominate her. As an incumbent, Justice Weaver has the ability to self-nominate. Therefore, she will likely be on the ballot regardless of what takes place at the State Republican Convention in August.

The name Republicans are floating around to take her place as a Republican nominee (and, they hope, as a Supreme Court justice) is Wayne County Circuit Judge Mary Beth Kelly. Judge Kelly was initially appointed to the Circuit Court in 1999 by Governor John Engler, and she was re-elected in 2002. She was the center of some controversy in 2007 after she supported privatizing Friend of the Court operations. However, controversy or not, her stance on the management of public employees will likely only bolster her conservative credentials, which will help her at the Republican convention in August.


Todd Tennis

Todd N. Tennis has been a lobbyist with Capitol Services, Inc., a multi-client lobbying firm that represents nonprofit organizations, since 1995. Before 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.

Insurance Coverage Advisor
Continued from page 13

(policies and endorsements) is a tedious and difficult process, and insurers who write their forms in-house can sometimes make serious errors. Here is an example from experience. The insurer issued a claims-made policy. A basic requirement of claims-made coverage, and the main thing that distinguishes it from occurrence-based coverage, is that the insured has to report the claim in the policy year, or a short grace period. Failure to report timely can defeat coverage without the insurer having to show prejudice. The policy in question said on page 2 that the insured "must report the claim in the year in which the claim was made." Nothing remarkable there. But on page 7, back in the definitions section, it said "A claim shall be deemed to be 'made' when the insured reports it to the Company." The insured was sued in 2001, and did not report it until 2003. The insurer said the claim was not reported as required. The insured responded that when it reported the claim in 2003, that was when the claim was "made" as defined in the policy. Of course this meant that all claims were timely under the policy, which is a pretty silly way to write a policy. But the insurer caved in and accepted coverage.

2010 Michigan Supreme . . .
Continued from page 14

On the Democratic side, several individuals have expressed an interest in running, though only a few have made that interest public. The large number of potential applicants is a stark contrast to recent years when running against an incumbent Supreme Court justice was generally considered a lost cause. Justice Hathaway's victory in 2008 has changed the calculus and sparked much broader enthusiasm for the task. There have even been reports that the Democratic Party leadership is speaking with some Republican judges who have expressed an interest in running as a Democratic nominee.

Of the multiple potential Democratic challengers, two have been most public in their desires to run. Ironically, similar to Justice Hathaway and potential Republican nominee Mary Beth Kelly, they would both be running from their positions as Wayne County Circuit Court judges. Judge Deborah Thomas and Judge Robert Colombo have both expressed a desire to be nominated by the Democratic Party, and have actively been seeking support of Democratic interest groups.

What may make their task more difficult is the possibility that the Democrats will only nominate one person to run for Supreme Court this year, rather than two. If they were to do so, not only would it be a tacit nod to Justice Weaver, it would also allow the Democrats to focus all their efforts on unseating Justice Young. Moreover, there is a chance that the Democrats may choose to endorse a Supreme Court candidate as early as April, which would be yet another unprecedented development in what is shaping up to be a highly unusual race.

New Trust Account Overdraft Notice Rule Takes Effect September 15, 2010

New Rule 1.15A of the Michigan Rules of Professional Conduct, also known as the Trust Account Overdraft Notice Rule (TAON), takes effect on September 15, 2010. To review Rule 1.15A in its entirety, visit MRPC 1.15A (http://www.michbar.org/opinions/ethics/TAON.pdf)

A brief summary of the requirements of the TAON Rule is provided below:

- Before the effective date of the TAON Rule, financial institutions doing business in Michigan must submit a signed agreement to the State Bar of Michigan to obtain approval to maintain lawyer trust accounts as defined by MRPC 1.15(a).
- Lawyers must confirm that their financial institutions are on the list of approved financial institutions posted on the State Bar's website.
- No further action is required by lawyers for their preexisting IOLTA accounts; these accounts have already been identified as lawyer trust accounts by financial institutions when opened by lawyers.
- After confirming that their financial institution is on the State Bar's list, lawyers must contact their financial institutions to change the name on their non-IOLTA accounts to include the term "trust" or "escrow" if not already included in the account name.
- After confirming that their financial institution is on the State Bar's list, lawyers may download a form (Non-IOLTA Lawyer Trust Account Notice to Financial Institution) from the State Bar's website and submit the completed form to their approved financial institutions for each non-IOLTA trust account and must send a copy to the State Bar.
- Lawyers must continue to safeguard client and third-party funds held in trust to avoid all overdrafts to their IOLTA and non-IOLTA accounts.
- Approved financial institutions maintaining lawyer trust accounts must submit overdraft reports within five banking days of any overdrafts to the grievance administrator of the Attorney Grievance Commission.
- The State Bar is in the process of communicating with financial institutions to invite their participation in the TAON program. The State Bar expects to begin receiving signed TAON agreements from financial institutions in May and will begin posting its list of approved financial institutions at that time. The State Bar will update the list of approved financial institutions as signed TAON agreements are received from financial institutions. Lawyers should wait until the name of their financial institution appears on the State Bar's list of approved financial institutions before submitting a completed non-IOLTA notice form.

SBM
State Bar of Michigan

MICHAEL FRANCK BUILDING
306 TOWNSEND STREET
LANSING, MI 48933-2012

NON-PROFIT
U.S. POSTAGE PAID
LANSING, MI
PERMIT NO. 191

RETURN SERVICE REQUESTED

IN THIS ISSUE