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Negligence Law Section Quarterly

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From the Chair

How Low Can You Go?

When I was growing up, the title of this article was always associated with the limbo. Here in Michigan, as the bar of justice continues to be lowered, and then lowered again, Justices Taylor, Young, Markman, and Corrigan have won the contest. Hands down. No other contestants left. By the way, before I continue my commentary, I want to reiterate again that this soap box is my opinion, and not necessarily those of the Negligence council or of the section, but based on the overwhelming number of responses to prior articles, I am not only not alone, but surrounded by honorable lawyers from both sides of the aisle.

In my first article, I listed 38 examples of victims' rights being decimated by our Supreme Court. Since that time, the number of cases has nearly doubled. I stated that maybe I was wrong in my opinion, and the Negligence Section sought from the best and brightest of our law students, in a competition where scholarships were awarded, to formulate their opinion as to whether our Supreme Court (appellate system) was denying our citizens their day in court. Many papers were submitted. All but one agreed with me. The grand prize winning thesis is found in this *Quarterly*.

I thought that by this time, I would get used to the destruction of the lives of the innocent through the decisions of the Michigan Supreme Court. Unfortunately, I was wrong. The latest decisions show that my conscience can still be shocked. First there was the Supreme Court ruling that Michigan's Environmental Protection Act, which under Section 1701 of the 1970 law stated that, "Any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources, and the public trusts in these resources from pollution, impairment, or destruction." The *Traverse City Record-Eagle*, in an editorial, stated that, "Former Governor John Engler's Gang of Four has once again chipped away at your rights as a Michigan citizen. In the process, they have also pushed us closer to a time when water—the state's most precious asset—can be bought and sold like corn flakes." This Court that has long publicly declared that a written law is a written law decided that "any person" actually means anyone who can show that they actually use that exact air, water or other natural resource and can prove "specific, particularized harm" by the pollution, impairment, or destruction of those resources. This decision was judicial activism in its most insidious fashion.

Barry Goodman
Goodman Acker PC

In these dire economic times in the state of Michigan, it seems that the legislature can disband and go home. Our Michigan Supreme Court has stated over and over again by their opinions that they are legislating in this state, and taking away the need for the House and Senate to have to act on any issue of import to the citizens of the state of Michigan. Think of the ease in dealing with the current budget crisis by eliminating an entire branch of government.

The *Grand Rapids Press*, considering the same case, found that the curtailing of the rights of citizens to sue for environmental damages is in direct contradiction to the clear meaning of the landmark 1970 Michigan law. The editorial in the Grand Rapids newspaper stated, "The law was written to cast the broadest possible protection over the state's water, land, and air. Lawmakers did not intend to leave that job solely in the hands of an attorney general who

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may or may not be aggressive in pursuing claims. If they had, they would have said so."

Everyone in Michigan drives a vehicle that proudly sets forth the state's nickname of the "Great Lakes state." However, thanks to the majority of this Michigan Supreme Court, we no longer have a right to protect what we as citizens of this state stand for.

The U.S. Chamber of Commerce has spent millions of dollars throughout the country wrongfully painting fair justices as protectors of pedophiles or the like to swing elections. I assume that the Chamber of Commerce will be coming into Michigan and talking about our Supreme Court majority after it ruled that the family of slain University of Michigan–Flint Provost Margaret Eby waited too long to sue, even though the killer/rapist could not be determined until DNA testing some 16 years after the slaying. In a 4-3 vote (and you know who the four were), they overturned decades of precedent created by other justices who had halted time limits on filing lawsuits if the plaintiff could not learn until later about facts allowing them to sue. The three dissenters stated, "Statutes of limitations will be imposed not on those who would sit on their rights, but on the innocent, who, through no fault of their own, have been deprived of the information necessary to bring an otherwise valid claim." When they sought out the defendant's counsel for comment and he couldn't be reached for one, I personally believe it was because he was too embarrassed by the decision that the majority made.

I bet the majority of our Supreme Court can stand up and say with pride, "But we overturned *Apsey* and therefore helped the rights of victims of malpractice to see their day in court." It is this writer's belief that the only reason that they reached that conclusion was not because of any innocent victims, but because the Chamber and large credit card corporations as well as those of similar ilk believed that they would be affected by the *Apsey* ruling and sought through amicus briefs to have it overturned. This seems clear in that it took seven years to correct this mistake, when it could have been done quickly and efficiently. Someone can correct me if I'm wrong, but I believe that there are dozens, if not considerably more, of victims who lost their case at a motion call because of the *Apsey* decision and will never be able to bring those matters back to court to argue the merits of their claim. In fact, and again I will be glad to be corrected if wrong, there were seven pending cases waiting for reconsideration on the *Apsey* issue before our Michigan Supreme Court. After overturning *Apsey,* the majority denied leave to those seven cases pending before that Court, thereby making it next to impossible for those cases to continue through the appropriate judicial process.

Cicero once stated, "When you have no basis for an argument, abuse the plaintiff." This seems to be an obvious tenet of the majority of the Michigan Supreme Court. Alan Dershowitz once said, "More lawsuits may not be good for large corporations, but they are good for justice and society, especially if brought by the powerless against the powerful." Because of our Michigan Supreme Court, large corporations could open in droves in this state with almost absolute immunity from suit. Insurance companies are making money at a fast-

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Hope Rises for Medicare Reimbursement Legislation

By Jules B. Olsman, Olsman Mueller, PC

The tremendous problems associated with so-called "Medicare set asides" in workers' compensation cases may, in fact, result in congressional action that will amend 42 USC 1395Y, the Medicare Secondary Payor Act. These changes may also help provide much needed relief to plaintiffs in third-party claims as well.

On May 24, 2007, H.R. 2549 was introduced in the U.S. House of Representatives on a bipartisan basis. Although the bill does not deal directly with third-party claims, there is reason to hope that compromise in the Senate will result in positive legislation that will alleviate the incredible delays and frustration involved in trying to get basic "dollar amount" information in a Medicare reimbursement claim.

When a workers' compensation case is settled anywhere in the United States that involves payment of Medicare benefits, HHS requires that there be a "set aside" of a specific amount of money to deal with future medical expenses. This has created an administrative nightmare that leads to long delays in the process of settlement and redemption of workers' compensation cases. It puts injured persons in an intolerable situation and has created significant problems for employers. Many businesses are concerned that they may be violating Sarbanes-Oxley, the federal statute mandating accurate reporting of finances and liabilities because of the undue length of time it takes to actually process a settlement from the time it is entered into.

On May 22, 2007, U.S. Senator Debbie Stabenow agreed to meet with a contingent of lawyers from Michigan including myself, Denice LeVasseur, Troy Haney, Bob June, Joel Alpert, and Tanya Lamnin in order to discuss problems involved in reimbursing Medicare in personal injury matters. Senator Stabenow's chief of staff, Sander Laurie, spent more than two hours with our group, which also included representatives of other interest groups concerned about Medicare set asides and reimbursement issues. Senator Stabenow was most gracious with her time, meeting with us for more than an hour on this most important issue.

The fact that this has now become a "business issue" as opposed to a "lawyer issue" certainly helps the chance for a bipartisan compromise and a bill that can be enacted.

At its annual convention in July, the American Association for Justice (formerly known as ATLA) approved formation of a new litigation group, the Medicare and ERISA Reimbursement Litigation Group. Litigation groups exist within AAJ to focus attention on very specific issues and causes of action. It will act as a clearinghouse for ideas, cases, and information useful to practitioners. The chair of the new group will be Frank Verderame from Arizona. Frank has successfully litigated and defeated excessive claims for reimbursement by Medicare.

All of us who deal with Medicare liens appreciate Senator Stabenow's interest in this topic and her willingness to assist lawyers and the people we represent in achieving a commonsense solution to this problem.

"Although the bill does not deal directly with third-party claims, there is reason to hope that compromise in the Senate will result in positive legislation that will alleviate the incredible delays and frustration involved in trying to get basic 'dollar amount' information in a Medicare reimbursement claim."

Jules B. Olsman is president of Olsman Mueller, PC in Berkley, Michigan. He is the current secretary of the Negligence Law Section council.

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Negligence Law Section Scholarships

The Negligence Law Section of the State Bar of Michigan has, as one of its goals, the furtherance of education of lawyers and law students in negligence law and trial advocacy, and to promote scholarship in our law schools in the areas of negligence law and trial advocacy and assist law school students with financial means.

This year, the 2007 Law School Scholarship Committee, in conjunction with the American Constitution Society, held a scholarship contest with an award of $ 1,500 to be made to the winner of each of the five Michigan law schools. The following criteria were used in selecting the winning entry for each school:

- the student must be currently enrolled in his or her second or third year;
- the student must have completed research and writing, and
- the student must submit a brief of 1,500 words maximum addressing the following topic:

  "Critics say it is more difficult for Michigan citizens to get their day in court as a result of decisions by the current Michigan Appellate Courts. Do you agree or disagree, and why."

Students from three of the law schools competed for the 2007 scholarships. The winning entry from each of the three law schools was as follows:

- John Zevalking—Cooley Law School
- Stephen Sinas—Wayne State University
- Allison F. Tomak—University of Detroit School of Law

In addition, the brief submitted by Stephen Sinas, of Wayne State University, was selected as the overall winner and his paper is published in this issue of the *Negligence Section Quarterly*, and Stephen was presented with a plaque at the Negligence Section's Past President's Dinner on Friday, June 1, 2007.

The Legal Rights of Michigan Citizens Have Been Limited by Recent Decisions of the Michigan Supreme Court

It is definitely more difficult for Michigan citizens to get their day in court as a result of the decisions from the current Michigan Supreme Court. While it seems many areas of law relevant to Michigan citizens have been affected by recent rulings of the Michigan Supreme Court, deserving special mention is how the Court has affected people's rights in insurance matters, specifically regarding people's rights under the Michigan No-Fault Automobile Insurance Act[1] and how insurance contracts are interpreted. The following will examine how, as a result of recent decisions by the current Michigan Supreme Court, the legal rights of Michigan citizens in insurance matters have been limited.

As a result of recent decisions by the Michigan Supreme Court, Michigan citizens have fewer rights under the No-Fault Act. The most drastic decision came in *Kreiner v. Fischer.*[2] Under the No-Fault Act, regardless of fault (i.e., no-fault), auto-insurers are required by law to provide all reasonably necessary medical expenses related to care, recovery, and rehabilitation of injuries arising out of the ownership, operation, maintenance, or use of a motor vehicle.[3] In exchange for insurers having to pay for these medical expenses, the No-Fault Act creates a threshold on the type of injury one must sustain to recover in tort for noneconomic loss.[4] The type of injury that reaches this threshold is either an injury that constitutes a serious impairment of body function or permanent serious disfigurement.[5] The *Kreiner* case dealt with the serious impairment threshold.

In 1995, the Michigan legislature amended the No-Fault Act to include a statutory definition of serious impairment of body function. As a result of the amendment, section 3135(7) of the Michigan No-Fault Act now specifically defines a serious impairment of body function as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."[6] Furthermore, on a motion for summary disposition, a court can determine that an injury does not meet this threshold.[7]

In *Kreiner*, the Michigan Supreme Court had to determine whether the impairments of each respective plaintiff fell within the purview of the definition of serious impairment of body function pursuant to section 3135(7) of the No-Fault Act. To make that determination, however, the Michigan Supreme Court had to render its first interpretation of section 3135(7) since the section was enacted in 1995.

In a 4-3 decision, the majority in *Kreiner* interpreted the relevant language of section 3135(7), "affect the person's general ability to lead his or her normal life," to mean that in order for a plaintiff's injury to meet the serious impairment threshold, the injury must affect the "course" or "trajectory" of his or her normal life.[8]

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As a result of this interpretation of section 3135(7) of the No-Fault Act, the types of injuries that meet the threshold for serious impairment of body function have been significantly limited. In Mr. Kreiner's case, the fact that his injuries caused him to work 25 percent less was not enough, in the Court's eyes, to affect the course or trajectory of his life.[9] Furthermore, in light of *Kreiner*, the Michigan Court of Appeals has written a number of unpublished opinions in favor of defendants on serious impairment threshold issues. Examples of the type of injuries that have not passed the threshold in light of *Kreiner* include:

- A young woman who was hit by a drunken driver and suffered torn anterior cruciate ligament and medial meniscus, which required reconstructive surgery and resulted in the loss of her job as a house cleaner.[10]
- A 30-year-old woman suffered a herniated cervical disc, right shoulder injuries that required arthroscopic surgery and resulted in three weeks work loss and three months of physical therapy.[11]
- A high school sophomore who suffered complete tears of the anterior cruciate ligament and medial collateral ligament, had to undergo reconstructive surgery, could not work for 11 weeks work and had to complete three months physical therapy.[12]

Therefore, as a result of the *Kreiner* decision, a Michigan citizen is faced with this reality: if she is injured in a car accident as a result of someone else's negligence and brings a claim against the tortfeasor for noneconomic loss, there is a very real chance her case will be summarily dismissed without a trial unless her injury is of the most severe and debilitating nature.

In the summer of 2005, a year after *Kreiner* was decided, the Michigan Supreme Court came down with its decision in *Devillers v. ACIA*.[13] At issue in *Devillers* was the section of the No-Fault Act that limits the amount of no-fault benefits a plaintiff can recover from an insurance company in a lawsuit to only those expenses the plaintiff incurred within one year before filing the lawsuit.[14] This rule is known as the "one-year-back" rule. In *Devillers*, the Court overruled longstanding case law that allowed the "one-year-back" rule to be tolled from the

time when an insured makes a specific claim for benefits to the time the insured is formally denied those benefits. [15] The Court reasoned since there is nothing in the language of the relevant section of the No-Fault Act that warrants such tolling of the "one-year-back" rule, it must be abolished.[16] In a passionate and scholarly dissent, however, Justice Cavanagh argued equitable tolling is an equitable remedy that needs no basis in statutory language. Justice Cavanagh then depicted the reality of a no-fault insurance world without such tolling:

> Once an insured submits a claim for benefits, she has no way of knowing, other than an indication from the insurer, whether the claim will be paid. Quite obviously, then, when an insured acts with due diligence in notifying the insurance company of a claim, whether the insured ultimately collects the full amount of benefits due is completely at the whim of the insurance company. When an insured submits a claim for benefits, an insurer can take as long as it wants to approve or deny the claim. If the insurer takes more than one year, then under the one-year-back rule, the benefits that were due to the insured dissipate into thin air through no fault whatsoever of the insured.[17]

Therefore, the ruling in *Devillers* completely bars an insured from holding his or her insurer liable for no-fault benefits that are clearly covered by the No-Fault Act but that were incurred more than a year before he or she files a lawsuit against the insurer. This is true even if the actions of the insurer were the sole cause of the benefits not being paid or reimbursed by the insurer within a year before the lawsuit was filed.

Moreover, last summer, a year after issuing its opinion in *Devillers*, and two years after issuing its decision *Kreiner*, the Michigan Supreme Court came down with its opinion in *Cameron v. ACIA*.[18] The one-year-back rule was also at issue in *Cameron*. The specific issue in the case was whether the minority/insanity tolling provision of the Revised Judicature Act (RJA) operates to toll the one-year-back rule. This provision of the RJA preserves legal claims for minors and the mentally incompetent until one year after the disability is removed,[19] and it is commonly referred to as the RJA "savings provision." In another favorable ruling for the insurance industry, the Michigan

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Supreme Court in *Cameron* ruled the savings provision of the RJA does not toll to the one-year-back rule.[20] Because of the *Cameron* decision, the one-year-back rule is now applied to minors and mentally incompetent people the same way it is applied to competent adult citizens. The harshness of the Court's decision in *Cameron* is unmistakable—the one-year-back rule now strictly applies to the claims for no-fault benefits of infant children or mentally incompetent people despite their legally recognized inability to protect their own legal rights.

In 2005, in the same year the Court issued its opinion in *Devillers*, the Michigan Supreme Court also issued a significant ruling in *Rory v. Continental Ins. Co*[21] regarding the interpretation of insurance contracts. The heart of the issue the court was faced with in *Rory* is best described by Justice Cavanagh in his dissent: "[t]his Court could continue to acknowledge the unique character of insurance agreements and follow well-reasoned precedent examining contractually shortened limitation periods for reasonableness. Or this Court could disregard the manner in which insurance agreements come into existence and abrogate the "reasonableness doctrine."[22] In light of the fact the majority chose to abrogate the reasonableness doctrine, Justice Cavanagh went on to state that "[b]ecause the majority makes the wrong choice, I must respectfully dissent…"[23] The reasonableness doctrine allowed a court to review an insurance contract, unlike other contracts, for "reasonableness" in its terms. In both of their dissents, Justices Cavanagh and Kelly argue the majority made the wrong choice because by abrogating the reasonableness doctrine the majority leaves people at the mercy of every clause in the insurance contracts they sign.[24] In this sense, *Rory* means Michigan citizens must scrutinize every clause of insurance contracts, especially important ones like shortened period of limitations on when a loss can be recovered, because each clause will be legally enforceable even if it is unreasonable.

In conclusion, the foregoing is not an assessment of the legal soundness of the decisions discussed. Rather, the foregoing has merely illustrated this fact: The legal rights of Michigan citizens in insurance matters have been limited by the recent decisions of the current Michigan Supreme Court.

About the Author

Stephen H. Sinas received his undergraduate degree from the University of Michigan, with a double major in Economics and English and a minor in Modern Greek Language and Culture. Steve recently graduated from Wayne State University Law School. Steve served as an executive officer of the Wayne State Student Trial Advocacy Program and was a member of its national trial competition team. Throughout law school, Steve also worked as a law clerk in the personal injury department of Sachs Waldman, P.C. This fall, Steve will begin working as an associate attorney at Sinas, Dramis, Brake, Boughton, & McIntyre, P.C., the law firm his grandfather helped establish in Lansing, MI in 1951. His parents are George and Sheryl Sinas. His girlfriend is Heidi Schroeder. His brother, Tom, is an attorney in Minneapolis, Minnesota. Stephen can be reached at stevesinas@gmial.com.

Endnotes

1 MCL 500.3100, *et seq*. Hereinafter referred to the "No-Fault Act."

2 471 Mich 1201 *128 (2004) (decision consolidated with *Straub v. Collete*).

3 See MCL 500.3105 & 500.3107.

4 MCL 500.3135(1)-(3).

5 *Id*.

6 MCL 500.3135(7).

7 MCL 500.3135(2)(a).

8 See *supra* note 2 at 130.

9 *Id.* at 131.

10 *Gagne v. Schulte*, Michigan Court of Appeals, Docket #264788 (Decided on 02/28/06).

11 *May v. Zalucha*, Michigan Court of Appeals Docket #266733 (Decided on 3/16/06).

12 *Jones v. Wheelock*, Michigan Court of Appeals Docket ##258974 (Decided on 4/25/06). Note: Michigan Supreme Court denied leave for appeal with Justices Cavanagh, Kelly, and Weaver voting to grant leave.

13 473 Mich 562 (2005).

14 MCL 500.3145(1).

15 See *Lewis v. DAIIE*, 426 Mich 93 (1986).

16 *Supra* note 13 at 585.

17 *Id.* at 601.

18 476 Mich 55 (2006).

19 MCL 600.5851(1).

20 *Supra* note 18 at 73.

21 473 Mich 457 (2005).

22 *Id.* at 512.

23 *Id*.

24 *Id* at 513-14 (Cavanagh's dissent) & 491-510 (Kelly's dissent).

Legislative Update

Lansing Still Focused on Budget

The normal practice for the Michigan Legislature is to wrap up work on the state budget by early July and then recess for the summer months. This year is not a normal year. Instead, the legislature has yet to send a single budget bill to the governor's desk, and, in fact, has not even determined the amount of funds available to expend.

The legislature was able to complete work on a new business tax which will replace the Single Business Tax (set to expire at the end of this year). The new Michigan Business Tax creates a business income tax set at a rate of 4.95 percent, coupled with a net worth tax of 0.8 percent. It also incorporates a number of credits mainly based on employee and capital investment costs that businesses can use to lower their overall burden. The Michigan Business Tax is designed to completely fill the $1.9 billion gap created by the elimination of the Single Business Tax.

Now the legislature is turning its aim to dealing with the remaining $1.8 billion projected shortfall for next year's budget. This is where things are getting very complicated, and political. The governor has repeatedly called for tax increases to stabilize the recurring shortfall the state has endured for the past six fiscal years. Her original proposal—a 2 percent sales tax on services—has largely been abandoned due to lack of support. Discussions now center on a combination of an increase in the Michigan Income Tax from 3.9 percent to as high as 4.6 percent, possibly combined with a modified service tax for "luxury services" (e.g., sporting event tickets, spa treatments, etc.) Word at this time is that taxing legal services is off the table, but anything can happen as we get closer to the September 30 deadline.

Senate leaders are continuing to reject the tax increases in favor of governmental reforms to reduce costs. As of this writing, the Senate is planning a series of discussions over potential reform proposals, including reducing pension benefits for public employees, lowering wages for correctional officers, combining certain state departments, and lowering retiree health care benefits for public school employees. They have vowed not to even take a vote on potential tax increases until some of these reforms are addressed.

With the focus of legislative leaders on the budget crisis, legal issues have received little attention of late. Legislation to remove liability immunity for certain pharmaceutical manufacturers is stalled in the Senate. Similarly, House Bill 4301—the bill to restore the injury threshold for no-fault auto cases (the so-called "Kreiner" issue)—has been put on the back burner in the Senate after passing the House in March. The Coalition to Protect Auto No-Fault made a strong push to include the issue as part of the discussion on the Michigan Business Tax, but was not able to cement a deal.

The Negligence Section is working to reintroduce legislation to reform the medical malpractice affidavit of merit process. Similar legislation passed the House two sessions ago only to die without even receiving a hearing in the Senate. Representative Mark Meadows (D-East Lansing) will sponsor new legislation this year in an attempt to reduce the number of plaintiff and defense attorneys who are losing their cases based on technical flaws in affidavits of merit and affidavits of meritorious defense. These cases are too important to hinge on clerical errors, and we hope to get this legislation moving after the legislature completes the budget process.

Todd N. Tennis has been a lobbyist with Capitol Services, Inc., a multi-client lobbying firm that specializes in representing 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 with his wife, Cheryl, and son, Troy.

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Don't worry. Don't stress.

Back copies of the newsletter can be found at

http://www.michbar.org/negligence/quarterly.cfm

Are There Still Good Reasons to be a Defense Lawyer?

By Paul Manion and Steven B. Galbraith

As opposed to a zesty article detailing the latest Waltz *decision, we thought something reflective on our 25-year plus defense practice might be of greater interest to our readers*

Were the good old days so good? Have young personal injury lawyers missed the golden era? The answer, as revealed by the Economics of Law Practice Surveys (from which we casually exploit facts), is that the old days were good and the current days are different but not necessarily better or worse. Surprisingly, this is the same answer we reach when reflecting on changes in the daily practice of law.

In 1981, 18,000 lawyers practiced in Michigan.[1] In those days, believe it or not, there were dire vocal warnings (from attorneys no less) that there were too many lawyers. By 2006, the number practicing soared to over 32,000.[2] Now there are still dire warnings about our numbers, but these come from other less reliable sources. Contrary to the good old days, attorneys feel we need more legal warriors to help fight the respected battle to preserve our jury trial system. Also, every practicing defense attorney secretly wishes there were more practicing plaintiff personal injury lawyers to file more cases. Alright, not every, but most.

For those of us who still remember when a buck was a buck, we recall reporting median net income in 1981 of $32,000. This number included all practicing lawyers and judges. The most frequent income was reported to be substantially less —between $15,000 and $19,999. In 1981, the income level of attorneys was surpassed by carpenters, electricians, and even common laborers! Upon reflection, the money in the good old days wasn't really so good. Fortunately, by 2006, defense attorneys reported median net income of $127,762, leaving skilled and unskilled workers wondering why they abandoned their plans to attend law school. And the money is a lot bet-

ter for most plaintiff personal injury lawyers. Clearly, choosing a career path as a defense attorney in 1981 was a lucrative decision.

Even though the money is good, are we working harder and more hours now than before? The 1981 survey advises that 81 percent of all lawyers had chargeable hours of less than 40 hours per week. By 2006, lawyers had learned to equivocate in a more detailed response, so lawyer hours were bolstered by marketing and community service. Surprisingly, chargeable hours were not drastically different. If asked, defense lawyers will say we are working harder and making less, but the survey suggests the correct answer is likely not. It might be that our perception of the practice of law is the only thing that has really changed.

We must be more efficient today. Certainly, technology advancements over the past 25 years have morphed the practice of law and made the practitioner's life easier (more difficult?) Gone are the days of carrying dimes for phone calls, wet copiers, belt recorders; carbon paper, IBM typewriters, and a number of things now seen only in law office museums. Need current case law? In 1981, you would wait for the snail mail delivery of your monthly *Michigan Bar Journal* or the quarterly *Negligence Law Newsletter* for the latest decisions. In 1981, escape was still possible, if only for a fleeting afternoon of golf. ("Sorry, we can't find your lawyer until he calls the office.") However, today there is no escape from your BlackBerry or computer. Cases are flashed instantly on to your screen moments before that critical motion. Can GPS tracking bracelets be far behind?

Though not characterized by a particular field of practice, hourly rates 25 years ago were less than $76 per hour for 74 percent of the reporting populace. The 2006 survey report notes that personal injury defense attorneys have the *lowest* hourly rate of any of the 20 primary fields of law reporting, with an embarrassing $135 median hourly billing rate. Public defenders came in next to last, but fared better at $150 per hour. Without looking at any survey numbers, every defense lawyer will tell you hourly rates have not improved much over the past 25 years. But did you realize that the rate of inflation since January 1981 is a whopping 132.66 percent? Our hourly rates have not improved at all! Can it be that the good old days were better?

The most interesting section of the 2006 report involves views on economic sentiment and job satisfaction, not a subject considered in 1981 (apparently, job satisfaction was not important enough for the study). Although the topic is subjective, interviews with our peers have confirmed the study results to be objectively manifested, affecting the course and trajectory of our life and negatively impacting our general ability to lead a normal practicing life. Although plaintiff personal injury lawyers rank first in opining that current *economic* circumstances were dire, defense attorneys were not far behind. When asked to voice Chicken Little optimism for the future, personal injury defense lawyers led the bar in pessimism. By contrast, personal injury plaintiff attorneys had a much rosier outlook. (Apparently, the defense bar was more attuned to forthcoming appellate tort reform decisions.) By the way, did you know that in the 2006 survey, overall job satisfaction was high, at over 90 percent? It appears we talk a pessimistic game, but don't really believe it.

So what is to be gleaned from this 25-year retrospective? Are we better off now than 1981? Is there a substantive foundation for our sour attitudes? What will the 2031 report indicate? Personally, the practice of defense litigation has been rewarding in so many ways. Although the hours have been long and the hourly rates low, the practice is still satisfying and a great career path.

Do you still long for the good old days? Do you have a tee time?

Endnotes

1 *An Overview of the 1981 Economics of Law Practice Survey of Michigan Lawyers,* by John M. Wright, *Michigan Bar Journal*, 20 January, 1982; *Michigan Bar Journal,* February, 2002, 112; and *Michigan Bar Journal*, March 1982, 2009.

2 *2006 Economics of Law Practice Monitor Final Report, Michigan Lawyers Weekly*, December 2006.

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Annual Reception and Dinner Honoring Past Chairpersons of the Negligence Council and Presentation of the Earl J. Cline Award for Excellence to Honorable Pat Donofrio

Dearborn Country Club
Friday, June 1, 2007

❶ Stephan Sinas, Law Student 2007 Scholarship Recipient and Honorable Pat Donofrio, 2007 Earl J. Cline Award for Excellence Recipient

❷ Past Chairs – Cynthia Merry and Robert Siemion

❸ Jules Olsman, Negligence Council Secretary

❹ Geroge Sinas; Past Chair Stephan Sinas; Barry Goodman, current chair of Negligence Council; and Jules Olsman, Negligence Council secretary

❺ Honorable Pat Donofrio, 2007 Earl J. Cline Award for Excellence Recipient, and Honorable Donald Owens, Michigan Court of Appeals

❻ Jose' Brown, Negligence Council treasurer; Honorable Pat Donofrio, 2007 Earl J. Cline Award for Excellence; and Tim Knecht, past chair

❼ Jane and Tom Peters, Negligence Council vice president

❽ Michael Stacey, former Earl J. Cline Award of Excellence Recipient; Honorable Peter Maceroni, Macomb County Circuit Court; Honorable Diane Druzinski, Macomb County Circuit Court; and Jules Olsman Negligence Council secretary

❾ Honorable Peter Maceroni, Macomb County Circuit Court; Honorable Diane Druzinsk; Honorable Pat Donofrio, 2007 Earl J. Cline Award for Excellence Recipient; and Honorable Richard Caretti, Macomb County Circuit Court

❿ George Bedrosian, former Earl J. Cline Award of Excellence Recipient; Dr. Donald Newman; Justice Marilyn Kelly, Michigan Supreme Court; and Honorable John Murphy, Wayne County Circuit Court

er rate than in nearly any other state in the country thanks to our Court. The *Kriener* decision is not what our legislature intended when they passed amendments to the No-Fault Act. However, from the sounds of silence from our state Senate, it seems to be that they would rather have the Supreme Court legislate than step up to the plate and state publicly, and with rule of law, that this is not what they meant. I implore the Senate to pick up the Kriener bill passed months ago by the House, and in a show of true democracy, give it a vote.

Prosecutors, take note. Each of you should seek to attain the almost perfect conviction rate of our Engler majority. Rarely has a victim of negligence gone unpunished. Instead, they have been "found guilty" without a chance of parole, to life sentences of both economic and non-economic pain. The Republican "trickle down theory" has been used by this majority to take away rights from children and incompetents (think Cameron) that no circuit court would dare to do. Sleep well, justices. Those whose lives you've touched cannot.

I am hoping that everyone in this section stands up, whether in the next Supreme Court election, or with letters to the editors. Whether you are plaintiff's counsel or defense, please do not be silent. There's an old story that a trial judge couldn't keep his eyes open in court. He realized that he had fallen asleep when he cracked his eyes open and not a sound could be heard. One lawyer was looking at him with notes in his hand. The other lawyer questioning the witness was standing still before he continued. The judge looked at the first lawyer and announced, "Objection sustained!"

"But, Judge, I didn't object," the lawyer said.

"Well," said the embarrassed judge, "you should have!"

Everyone who reads this article, and everyone around you that probably had the sense not to, needs to object to what is going on in this great state. We should be proud of the rule of law, not scared as to when the next Michigan Supreme Court edict will be issued, and how it will affect justice. This state is currently ruled by injustice. The best thing that we can say today is that it appears that the Michigan Supreme Court is finished for the year. That means that whatever they haven't changed is still good law, at least until next year. Change for the better can occur only if we all agree, not that that is what is needed, but that we must ACT to make sure change happens.

Again, I'd like to thank all my council members for making this a wonderful year, and one that I believe moves the Negligence Section forward in terms of its efficiency and effectiveness. I look forward to passing the gavel on to Tom Peters, who I know will take this section to its next level of excellence. Thank you for indulging in my thoughts, for being a part of this great section, and thank you in advance for your newly instilled desire to change our system of injustice to one of justice once again.

To make things easy for you to get involved, and since our voice depends on membership, please take the time when your Bar statement arrives to rejoin AND get a friend to join. It is the best $35 you can spend to make an impact in our work. If you want more, contact one of the council members and suggest an interest in becoming one of us, and be directly involved in setting policy for the section. Thanks again.

Invite someone to join the Section.

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

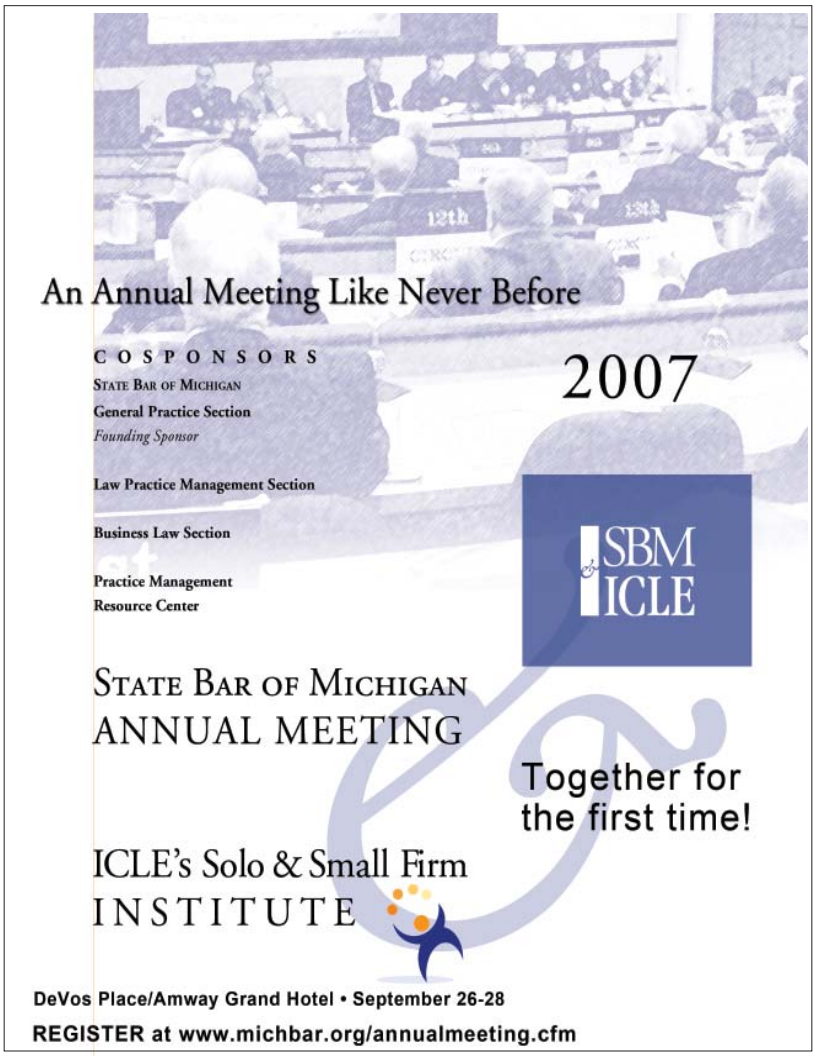
Negligence Law Section
Annual Meeting & Education Event
Friday, September 28, 2007
9:30 - 11:30 am
DeVos Place, Grand Rapids, MI

Issues facing the practice of negligence law
Legislative Update—Todd Tennis, Capitol Services, Inc.

and

New Judge Forum
An Open Discussion with New Appointees: Janet Neff, Robert Junker, Paul Malloney, Jane Beckerng, and Lisa Gleicher
(all invited but not confirmed)

Held in conjunction with the State Bar Annual Meeting



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