STATE BAR OF MICHIGAN Winter 2001

NEGLIGENCE LAW SECTION QUARTERLY

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

Contents

FROM THE CHAIR

Victor L. Bowman

I hope this newsletter finds each of you happy, healthy and having a prosperous new year. Right now, I'm thrilled to announce the exciting line-up for the Annual Spring Seminar coming up very soon—May 3-6—in Las Vegas. For starters, we'll be staying at the sparkling new Aladdin Resort and Casino. But before we hit the blackjack tables and soak up the poolside sun, you won't want to miss our intriguing speakers and workshops. Headlining it all: Attorney Ron L. Motley of South Carolina. This plaintiff's litigator extraordinaire—described by some as "the richest lawyer in America" and a recent guest on ABC's *Nightline*— will share his amazing expertise in cases involving asbestos, Firestone tires and the tobacco industry. Mr. Motley will be the featured speaker at the Friday seminar. That's when you can also glean advice and encouragement from veteran plaintiff's lawyer Sheldon Miller of Lopatin, Miller, P.C. in Southfield. Mr. Miller plans to explore something that can help us all hone our craft in an interesting way: by taking a close look at how we as lawyers relate to each other. He'll also analyze how our interactions and etiquette in court, on the phone, in depositions, have evolved in recent decades. Most importantly, Mr. Miller will share his seasoned perspective on how the law itself has transformed throughout his distinguished career. Along with this, Attorney Joe Lujohn of the Plunkett & Cooney, P.C. will again enlighten us on the phenomenon of alternative dispute resolution. He will give us a gauge as to how this dynamic is dramatically replacing jury trials with binding arbitration, facilitation and binding mediation. Other hot topics on the agenda will include issues affecting recent campaigns for the Michigan's Supreme Court and Court of Appeals. Specially, we're going to take a look at how those bids—both successful and unsuccessful—for the bench are now impacting the chemistry of the court. Right now, I have the honor of formally introducing new council member Cynthia Merry of Merry, Famen and Ryan, P.C. in Saint Clair Shores. We are fortunate that Ms. Merry will share her expertise with us as a defense designee. If you have not yet signed up for the seminar, you've still got time! Just flip to the back page of the newsletter for details. The more, the merrier! Next, I want to extend a very special thank you to Bernie Mindell. He has invested years of generous service and hard work with us, and we are very appreciative of his efforts as he leaves the Council. In addition, I am pleased to say our reception in Lansing was a resounding success. Over delicious food and drink at the Parthenon restaurant, Negligence Section members had the honor of talking face-to-face with incoming legislators and representatives from their staffs. Personally, I left the affair quite encouraged that we can have productive dialogue with our peers in the Capitol about the drastic changes taking place in the world of Negligence law. In fact, many members of the legislative branch expressed sincere concern about legal issues that affect the lawyer as a small business person. I urge all of you to carry on this momentum by contacting these legislators who are so willing and waiting to talk about the issues with us despite the current anti-negligence climate. Lastly, I hope the long-awaited Spring sunshine gives all of you an energy boost that will help you win, win, win! See you in Vegas!

Victor L. Bowman

POLICE PURSUIT: Should officers be immune from liability when innocent bystanders are injured? If so, under what circumstances?

Last year, the Michigan Supreme Court issued a ruling in a police pursuit case entitled *Robinson v City of Detroit,* which changed the landscape in such cases by limiting the liability of police officers when an innocent bystander is injured during a police chase. Shortly thereafter, media attention surrounding the death of an eight year old boy during the course of a police chase in Garden City spurred criticism of the Court's ruling. Accordingly, we thought it appropriate to make the Court's ruling in Robinson the subject of our point/counterpoint discussion.

The opinions expressed in the *Negligence Law Quarterly* are those of the authors. Send correspondence and material for publication to:

NEGLIGENCE LAW QUARTERLY
c/o Steven A. Hicks, editor
Adams & Hicks PLC
504 South Creyts Road, Suite C
Lansing, MI 48917

(517) 323-2100
Facsimile (517) 323-2115
shicks1500@aol.com

Point

By L. Page Graves

L. Page Graves

Put your crossword puzzle and old collegiate dictionary down and read this:

> On February 10, 2001, 8-year-old Garden City third-grader, Travis Miles, was tragically killed. His untimely death *resulted from* a high speed police chase on a busy street, when the chased vehicle ran a red light and crashed into the car transporting Travis.

While reading these facts, were you confused about what had occurred? Did you find that the terms used to describe these facts were unclear or ambiguous, prompting you to dust off your old collegiate dictionary to understand what was described? Were any of the terms used, too technical? I am confidently guessing you answered "No," to all three questions.

Now, answer these questions: Provided admissible evidence supports that the Garden-City police chase was conducted, in part, negligently, did Travis' death occur as a consequence of the chase? Or, was Travis' death a consequence of the action, operation or course of the chase? I am confidently guessing you answered, in part, "Yes," to both questions. And now, answer these alternative questions: What was the outcome of the chase? Or, in what particular way did the chase end? I am confidently guessing you answered, in part, "Travis was killed."

> Pursuant to MCL 691.1405; MSA 3.996(105)(emphasis supplied),
>
> "Governmental agencies shall be liable for bodily injury and property damage *resulting from* the negligent operation by an officer, agent, or employee of the governmental agency, of a motor vehicle in which the governmental agency is the owner . . . ."

According to the *current* rules of statutory construction, "[w]here the language of a statute is clear and unambiguous, the Court must follow it." *Robinson v City of Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Stated differently, "'a clear and unambiguous statute leaves no room for judicial construction or interpretation.'" *Secura Ins Co v Auto-Owners Inc Co,* 461 Mich 382, 387; 605 NW2d 308 (2000). The court "must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may [it] look outside the statute to ascertain the Legislature's intent." *DiBenedetto v West Shore Hosp,* 461 Mich 394, 402; 605 NW2d 300 (2000).

Point

The "Court often consults dictionary definitions to ascertain the generally accepted meaning of a term that is not expressly defined by statute." *Consumers Power Co v Public Service Comm*, 460 Mich 148, 163, n 10; 596 NW2d 126 (1999). "However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself." *People v Stone*, __ Mich __; 621 NW2d 702 (2001)(2001 Mich LEXIS 16). "Concomitantly, it is [the court's] task to give the words used by the Legislature their common, ordinary meaning." *Massey v Mandell,* 462 Mich 375, 380; 614 NW2d 70 (2000).

For those of you who have not read *Robinson*, it may surprise you that notwithstanding its own rules of statutory construction, the court remarkably was unable to determine the intent of the Legislature regarding the phrase "resulting from" by reading the statute itself, prompting it to refer to *The American Heritage Dictionary, Second College Ed*, p 1054 to define the term "result". 462 Mich at 456. Quoting from the dictionary at page 456, the court learned that it was defined as:

> "To occur or exist as a consequence of a particular cause[;] To end in a particular way[;] The consequence of a particular action, operation or course; outcome."

Notwithstanding its specific reference to this definition, the court, without any analysis whatsoever, held in the very next sentence at page 457, that a *governmental agency* is not liable under the "resulting from" language

> "where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another object."

Because the chasing police cars in *Robinson* did not trade paint with the fleeing car or the innocent bystander car/individual that was ultimately struck, the court held that its new resulting from test was not met. The police were, therefore, immune from suit.

This new test raises issues and unanswered questions. First, perhaps the most common argument proponents of strict construction repeatedly make is for a court not to insert "phrases" or "concepts" that do not expressly "appear anywhere within the provisions of the [governmental immunity] exception." *Evens v Shiawassee Co Rd Comm'n,* 463 Mich 143, 176; 615 NW2d 702 (2000). If that is to be the rule, then where in MCL 691.1405, does the above quoted language appear? Have the words "resulting from" used by the Legislature been given their common, ordinary meaning? In the context of the *current* rules of statutory construction and further defined by *The American Heritage Dictionary*, re-read the second paragraph at the beginning of this *Point,* and then answer this question: Does Travis Miles have a cause of action against the Garden-City Police Department, provided evidence indicates the police chase was conducted negligently?

Robinson's "resulting from" requirement under MCL 691.1405, may be far reaching. Under purported strict construction principles, however, the use of the phrase *"pursuing police vehicle*" would seemingly limit its application to only that fact scenario. The court acknowledged that it was the first in our State's glorious jurisprudential history to take it upon itself to parse the words "resulting from". Will the court extend its new test to any garden variety automobile negligence case involving a governmentally owned vehicle?

In the Estate of Travis Minor's case, since the Garden-City police vehicle did not, itself, trade paint with the vehicle it was chasing or the vehicle that Travis was in, it appears that his Estate no longer has an adequate remedy, at law. I respectfully predict that my brother counsel, in his *Counterpoint,* will indicate that an innocent victim is not without a remedy, i.e., he or she may pursue the fleeing motorist who is likely uninsured or, inadequately insured for liability. Was this *sole* remedy intended or envisioned by the Legislature when it enacted MCL 691.1405, back in 1964? And did the Legislature, when it abolished joint and several liability under the guise of Tort *Reform* in 1995, not intend that all persons contributing to an injury be held responsible for his or her proportion of fault?

Whether a police chase case or a multiple defendant auto case that involved a governmentally owned vehicle, where the governmental agency is granted summary disposition under the new resulting from test, may the remaining defendants file a Notice of Non-Party fault, identifying the chasing police/non-contacting governmental vehicle as being partially at fault? Supposes that is allowed and at trial, admissible evidence is presented that supports a finding of fault against the governmental agency prompting a jury to apportion a percentage of fault against it. Has not the jury, therefore, concluded that the victim's death or injury resulted from, in part, the governmental agency's negligent operation of its motor vehicle? Again, was this intended or envisioned by the Legislature?

That presents my final question to this honorable Negligence Section of the State Bar of Michigan, as well as the people of this State: Do only *"those Trial Lawyers*" representing innocent victims view the current state of the law unjust? I confidently guess you answered "No."

L. Page Graves *is an attorney with Willingham & Coté, P.C., in East Lansing, Michigan where he concentrates his practice on personal injury claims involving no-fault insurance and governmental tort liability.*

Counterpoint

By John J. Wojcik

John J. Wojcik

Imagine that you're home on a glistening Saturday afternoon watering your lawn while your three-year-old plays with your black lab in the yard. A loud crack breaks the sound of innocent play as a stranger wipes broken glass from the driver's side window of your car. The man writhes into the driver's seat and seconds later speeds off in your car. Before you can reach a telephone or even realize what just happened, a police car accelerates toward the speeding car with its emergency lights and siren turned on, screaming a warning to both the would-be thief and to the innocent bystander. Both cars round the last turn in your subdivision and accelerate into the distance.

What was the first thought to go through your mind? Did you think that the police officer shouldn't have chased the thief? Did you worry that the police officer was going to drive too fast to catch him? No, you wanted the police officer to catch the bad guy and bring back your car.

Let's take things one-step further. The live-feed on the nightly news shows the thief in your car leading the police car on a high-speed chase on a busy highway. Without any contact with the police car, the rear of the car spins toward the outside of the turn as the rear tires lose traction. Your car skids into the grassy median and slides down the bank. It bounces slightly, slides up the other side of the bank and strikes an on-coming car in a cloud of smoke and dust.

Who caused the accident? Was it the police officer's decision to start the chase that caused the crash? Was it the excessive speed of the police cruiser that caused the thief to speed and skid out of control that caused the wreck? Was it the thief's fault?

Since 1983 Plaintiffs have been successful in arguing that the high-speed of a pursing police car could be considered a proximate cause of the fleeing suspect's vehicle to lose control and crash. *See, Fiser v Ann Arbor,* 417 Mich 461, 339 NW2d 413 (1983). Other cases held that the police officer's mere decision to start the chase could constitute causation of the accident. *See*, *Rogers v Detroit,* 457 Mich 125, 579 NW2d 840 (1998). Both *Fiser* and *Rogers* have been overruled by *Robinson v Detroit*, 462 Mich 439, 613 NW2d 307 (2000).

Robinson was a consolidation of two cases involving high-speed police chases where the suspects' cars veered out of control without being forced off the roadway or even touched by the police cruisers that were giving chase. The *Robinson* court reasoned that it doesn't make sense to hold a governmental agency liable for an accident where the fleeing suspect's car was never forced off the road or even touched by the police car. In doing so, the Court created the "no touch" rule for governmental agencies.[1] If a police car doesn't force a car off the roadway and doesn't touch the car, then the innocent injured party will not be able to prove that the police agency is liable.

The Point author suggests that the Court may have stretched a little far in fashioning the no touch rule. I would have to disagree. The *Robinson* court has strong support for the rule.

Every appellate brief starts off by citing the legal principle that the court is duty bound to give full meaning to statutes when the wording is clear and that it must look to alternative sources when the wording is not so clear. This case is no different. The no touch rule was spun from the cloth of the governmental immunity exception which details when a governmental agency loses its immunity:

Governmental agencies shall be liable for bodily injury and property damage **resulting from** the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner. . .MCL 691.1405.

Did you notice any proximate cause language in the statute? Well, there isn't any. The *Robinson* court picked up on that issue and declined to apply traditional negligence terminology:

> However, the statute does not say that governmental agencies are liable for injuries or property damage "proximately caused" by the negligent operation of a motor vehicle. Rather, the statute says the injuries or property damage must result from the negligent operation of a motor vehicle. Because the Legislature did not utilize proximate cause language, we will not import such an analysis here. 462 Mich at 456.

The governmental agency is only liable for injury and property damage "resulting from" the negligent operation of a government vehicle. That term has not been previously defined by statute or case law. Not surprisingly, the *Robinson* court dusted off a dictionary and learned that the word "result" is defined as:

> To occur or exist as a consequence of a particular cause; To end in a particular way; The consequence of a particular action, operation or course; outcome. *The American Heritage Dictionary, Second College Ed.,* p. 1054.

Before we can poke fun at the *Robinson* court's use of *The American Heritage Dictionary, Second College Ed.,* we have to look further into the court's reasoning. Courts are required to give great latitude to the government's immunity and must narrowly

construe any exceptions to that immunity. *Ross v Consumers Power Co.,* 420 Mich 567, 363 NW2d 641 (1984).[2] Additionally, MCL 257.602(a) and MCL 257.653 both require a motorist (this includes a fleeing suspect) to obey a police officer's direction to stop.

With those thoughts in mind, why then should we hold a governmental agency liable for an accident that occurred because a suspect loses control of the car during a police chase when the police car never touched the other car? The answer is simple. We should not hold the agency liable. In addition to the dictionary, the *Robinson* court uses another faculty that is surprisingly uncommon in the law – common sense. The Court followed the holding of the *Ross* decision and narrowly construed the statutory language of the motor vehicle exception:

> Given the fact that the motor vehicle exception must be narrowly construed, we conclude that plaintiffs cannot satisfy the "resulting from" language of the statute where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object. 462 Mich at 457.

Will the *Robinson* no touch rule be applied in automobile negligence cases involving non-police vehicles? Such an application would be unlikely. An argument could be made that since MCL 691.1507 provides immunity to "all governmental agencies" and MCL 691.1505 created a motor vehicle exception that is applicable to all "governmental agencies," the *Robinson* court's interpretation of "resulting from" may on its face appear to be applicable to "all agencies." However, such an argument would be taking the *Robinson* decision out of context. In its analysis, the *Robinson* court keyed on the factual aspects of the "pursuit" itself. It would be surprising to see the no-touch rule extended beyond police cases as a non-police officer really has no reason to engage in a high-speed chase.

The injured party is not without protection. He or she can always sue the driver of the vehicle and the owner of the car that caused the accident. The assertion that the fleeing motorist is "likely uninsured" may be true in a small amount of cases. However, the amount of insurance has no bearing in determining who really caused the accident.

John J. Wojcik *is an associate attorney with Hackney, Grover, Hoover & Bean, PLC., in East Lansing, Michigan where he focuses primarily on medical malpractice and auto insurance defense litigation.*

Endnotes

1 *Robinson* also "massaged" causation related to the governmental immunity exception for governmental employees. It mandated that the employee's actions must be "the proximate cause" as opposed to "a proximate cause" of the negligent conduct. That issue will have far reaching implications and will undoubtedly be addressed in a subsequent article.

2 It is important to note that *Ross* was decided after *Fiser*. It would have been very difficult for the *Fiser* court to have reached its decision with the *Ross* standard requiring that governmental immunity be broadly construed. The *Robinson* court cited the newer *Ross* ruling as justification for overruling *Fiser*. *Robinson, supra,* at 455-456.

Making and Opposing Motions for Summary Disposition on Serious Impairment of Body Function

By Steven M. Gursten

Steven M. Gursten

After five years and many conflicting decisions, an analysis of MCL 500.3135 as amended by 1995 Public Act 222 remains controversial. Several decisions seem to contradict each other and appellate analysis so far is probably more confusing than consistent while practitioners await final interpretation from the Michigan Supreme Court. Although some Michigan practitioners may remain more eager than others for the final word from the Supreme Court, it remains increasingly clear that all attorneys handling auto negligence cases will probably find themselves making and opposing motions for summary disposition. The intent of this article is not a discussion of the current law; rather, it is to provide practitioners on both sides with useful ideas when making or defending these motions on the issue of impairment.

Impairment, Impairment, Impairment

Any analysis under our new law must focus upon the extent of impairment rather than the underlying injury itself.

MCL 500.3135 (7) can be broken down into a three prong test:

1. "An objectively manifested impairment
2. of an important body function
3. that affects a persons general ability to lead his or her normal life."

The question of whether Plaintiff has sustained a serious impairment of body function is a question of law for the court. In that most basic aspect, the new law does represent a return to Cassidy, as a judge is again making a determination as a matter of law when there is either no factual dispute concerning the nature or extent of Plaintiff's injuries or the court determines that a factual dispute is not material.

Any analysis and argument must start with the extent of impairment. Our new law is less concerned with the type of injury (and in that respect it is most fundamentally different from Cassidy and its progeny) and much more concerned with the nature and extent of the impairment on Plaintiff's ability to lead his or her normal life. Indeed, it is consistently under this third prong of our law that these motions for summary disposition are being granted or denied.

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May Findings

The practitioner must make clear to the trial court that granting or opposing these motions requires a considerable amount of work for the bench. May v Summerfield, 239 Mich App 197 (1999) made clear that the court must make its "May findings" a factual record for appellate review as to the extent and nature of Plaintiff's impairments. Practitioners on both sides should therefore be providing to the trial court specific factual findings as to the nature and extent of Plaintiff's impairments. Practitioners may consider providing to the Court these factual findings in an Order for the Judge to use as a checklist when arguing the motion for summary disposition.

> "We all know that complaints of pain are not enough. Pain as a concept is intangible, it creates no tangible real image in peoples minds and it is very possible that every single person in the courtroom may have a different understanding of what pain is. As a Plaintiff practitioner, your job is to make pain real and the most effective way to do this is to demonstrate what the impairments are that your Plaintiff is suffering from. This is also the key to maximizing your damages at trial."

Establishing Impairment

It is not enough to provide an affidavit after Plaintiff's deposition regarding Plaintiff's impairments. The defending Plaintiff's lawyer must spend considerable time with his client before the deposition so the client is ready to testify as to at least 10 or 12 different ways that the injuries have impaired his ability to lead his normal life.

Obviously, the most basic impairment is the length of time disabled from work, although being unable to engage in recreational activities that were important to the Plaintiff before the motor vehicle accident, and even simple things around the house such as problems cleaning or with doing laundry should also be relayed. Plaintiff's should try to explain to her treating doctors, physical therapists, and especially any defense medical examiners what things she is no longer able to do because of her injuries. Plaintiff attorneys should have names of friends, co-workers, and those who have casual yet regular contact with the Plaintiff before the injury (a cashier at the local store, a member of his or her church, etc.) who can relay changes they have observed. These people should be on witness lists, as they make outstanding and very credible witnesses at trial, long after the jury has gotten tired and stopped listening to medical testimony. However, they can also be provided to the court in motions for and against summary disposition in affidavit form or deposition. It should be emphasized to the Court that entire areas of Plaintiff's pre-accident lifestyle have been altered as a result of his or her impairments.

Preparation for summary disposition motions should begin with the initial client meeting. A good lawyer must present to the prospective client a clear understanding of what Michigan law is today. As a Plaintiff practitioner, I must instruct my clients that I feel Michigan law is terribly unfair today in that they can be innocent and in very severe pain everyday, but unless they are able to show differences in pre-accident and post-accident lifestyle they will likely be unsuccessful. Plaintiff attorneys must make sure their clients understand that if he or she is returning to work shortly after an accident (with pain), is resuming the same recreational activities shortly after an accident (with pain), has sporadic or inconsistent medical treatment and poor documentation of his or her injuries, and otherwise is failing to establish how the pain from the injury is actually impairing his or her normal lifestyle, then they will have an unsuccessful case.

For the defense practitioner this means changing how you view these cases. The focus of our law today is not on the type of injury (i.e., fractures are "serious", but "soft-tissue" are not). Focus should be upon the extent of impairment. This means cases that you have normally considered to be very serious, such as fractures and spinal injuries may actually under our new law be considerably less significant, if a Plaintiff is unable to demonstrate impairment as a result of injury. Pain and pain complaints alone are not sufficient under Michigan law. Impairment is, and rightly or wrongly, it is your job to provide the trial court with the proper analysis and framework to look at these cases and not just assume that as a result of the initial injury that they will automatically qualify.

Outside the scope of this article remain important ethical and moral questions. Is our civil justice system today accomplishing what it is meant to, when people with significant injuries who try despite constant pain to work are being unfairly punished? There are also important constitutional questions and equal protection questions that are raised. With our constant focus on impairment today, we must recognize that the same injury may qualify and be worth much more for someone who is, for example, younger and not able to work versus someone who is older and retired. The very same fracture to a construction worker is considerably more valuable than that same fracture to a lawyer who is nevertheless able to return to his job within a couple days of the accident. We must question if higher public policy is being served when our threshold of serious impairment will actually punish the person who is trying to provide for his family and not be fired by continuing to work, while in significant and constant pain.

Making Impairment Real

On some level, every practitioner who goes to trial in auto negligence cases already knows this. We all know that complaints of pain are not enough. Pain as a concept is intangible, it creates no

tangible real image in peoples minds and it is very possible that every single person in the courtroom may have a different understanding of what pain is. As a Plaintiff practitioner, your job is to make pain real and the most effective way to do this is to demonstrate what the impairments are that your Plaintiff is suffering from. This is also the key to maximizing your damages at trial. Ironically, one unintended result of our new law is that in documenting impairment to survive summary disposition, Plaintiff lawyers are increasing the value of their cases.

> "[F]unctional capacity testing can be an extremely persuasive and powerful tool for providing the court a sufficient factual basis for granting or denying summary disposition."
>
> "Nursing evaluations, physical therapy questionnaires, surveys and testing can and should be presented to the trial court at motions for summary disposition to support or attack the level of Plaintiff's impairment."

To maximize damages and flesh out and document impairment you are only limited by your imagination. These impairments should be provided to the trial court to readily assist the trial court in determining its "May" findings. If Plaintiff or defense counsel is unsure about the actual nature and extent of impairment, there are a wealth of resources that can be turned to.

Functional capacity testing questionnaires, such as the McGill Pain Questionnaire, electronic pain diaries like PIPER that allow an injured person to record throughout the day their levels of pain and how injuries are affecting them, and the AMA Guidelines for Pain and Disability are all available and can be used to help document impairment. Readers may wish to contact a vocational rehabilitation expert for other examples of the type of testing that can be used to document impairment. Such functional capacity testing can be an extremely persuasive and powerful tool for providing the court a sufficient factual basis for granting or denying summary disposition. Moreover, at trial the more that you can impress upon a jury how an actual injury has been impairing a person's normal life, will better assist you in really achieving the best result possible for your clients.

Nursing evaluations, physical therapy questionnaires, surveys and testing can and should be presented to the trial court at motions for summary disposition to support or attack the level of Plaintiff's impairment.

With elderly clients and the unemployed, "time off work" will not establish a period of serious impairment. The Plaintiff practitioner can and should consider pain or grief counselors to establish the long term affects of pain that can depress a person's ability to function in every arena of their life. The same can be said with a psychopharmacologist or pharmacologist to talk about what the different pain medications are, what they mean, the harms and risks that the Plaintiff is exposed to in taking these medications and the long term affects that he or she may be suffering as a result.

Demonstrative aids can and should be brought to these motions for summary disposition. There are wonderful life activity calendars that come in all different shapes, sizes and colors that can graphically and persuasively show the impact of an injury by comparing a person's pre and post-accident lifestyle. Plaintiff and defendant practitioners should also consider demonstrative aids to assist the judge with what the injury really means. It is unfair to assume that every judge has a background as familiar with these injuries as the practitioners who deal with medical issues everyday. When possible and when the opportunity presents, the plaintiff of defense practitioner should make every effort to impress upon the judge the effect of an underlying injury and assist the Court as to why this injury is or is not significant to the Plaintiff.

The Law

Michigan practitioners on both sides should be using the law and applicable jury instructions to buttress their arguments to the Court. Michigan Jury Instruction 36.01 and the applicable case law, SJI 50.10, SJI 50.11, etc. all have important roles when arguing these motions. Particularly for Plaintiff attorneys, these instructions are very helpful in stopping improper defense argument that Plaintiff is doing much better now or that the impairments have ceased to be serious or that Plaintiff had prior pre-existing injuries or problems before the motor vehicle accident.

One important and recent change has been made to MCR 2.116. This court rule provides the basis under which motions for summary disposition are argued and decided. On January 1, 2001, a very important change was made and now evidence for summary disposition must meet the same evidentiary threshold as evidence that would be offered for admission at trial. It is important to remind the Judge that decisions based upon allegations of ambiguous or vague entries in medical records are not a proper basis to decide these motions. Although still controversial in terms of its effect, it is my belief that this new change to the court rule makes it much harder for defense lawyers. It is clear that before they can make these motions, they will have to perform significantly more work throughout discovery and in taking depositions to meet this new evidentiary requirement under MCR 2.116 (which may have the opposite effect and actually increase the value of the Plaintiff's case).

We can therefore anticipate motions for summary disposition will be made after discovery has ended.

Conclusion

Our new law requires more time and more money for all auto cases. There will be fewer cases, but those that survive will have greater value. The burden remains upon practitioners on both sides to respond to their new challenges with creativity and sophistication.

Steven M. Gursten *is an attorney with Gursten, Koltonow, Gursten, Christensen & Raitt, P.C., in Southfield, Michigan where he specializes in handling auto negligence and premises liability cases.*

Legislative Update

By Richard P. Duranczyk

Richard P. Duranczyk

HOUSE BILLS

The following bills were introduced in the Michigan House of Representatives as it began the 2001-2002 legislative session. The name of the representative sponsoring the bill is shown in parentheses as is the committee to which the bill was assigned.

HB 4041 (Faunce) revises the statute of limitations for an action collecting legal fees (Civil Law and Judiciary Committee).

HB 4043 (Faunce) excludes age as a factor in liability of rental care agency in the event of an accident. (Commerce)

HB 4131 (Raczkowski) amends the Revised Judicature Act (RJA) by providing procedures for filing a judgment lien. (Local Government and Urban Policy)

HB 4140 (Shulman) creates a "cyber court" for certain business law suits. (Civil Law and Judiciary)

HB 4148 (Rivet) extends government immunity to municipal governments for sewer backups. (Civil Law and Judiciary)

HB 4275 (Koetje) prohibits a local government from suing a person for the production of a legal product. (Civil Law and Judiciary)

HB 4314 (Zelenko) provides for liability for damages for harm to an enrollee of a health maintenance organization (HMO). (Health Policy)

HB 4448 (Richner) amends the Revised Judicature Act (RJA) to allow prejudgment interest at a rate of 12 percent (or at a specified interest rate) on a written instrument evidencing indebtedness. It has been reported out of committee and is now on the House floor.

HB 4512 (Kuipers) revises the conditions under which one can receive benefits under Workers Disability Compensation Act (WCDA). (Employment Relations, Training, and Safety)

SENATE BILLS

The following bills were introduced in the Michigan Senate at the start of its new legislative session. The name of the senator sponsoring the bill is shown in parentheses as is the committee to which the bill was assigned.

SB 19 (Byrum) creates cause of action against insurance companies acting in bad faith. (Health Policy)

SB 30 (North) provides for good samaritan immunity for non-emergency health care when performed for no compensation. The bill is the same as SB 55 from the last session. The State Bar Negligence Section is actively opposing the bill.

SB 53 (Shugars) provides for good samaritan immunity for certain persons acting in an emergency without compensation. (Judiciary)

SB 65 (Hammerstrom) establishes a lien for certain medical services rendered to crime and tort victims and provides incentives for services. (Health Policy)

SB 109 (Johnson) provides for immunity for non-economic damages for sewer back-ups. It has been reported out of committee and is now on the Senate floor.

SB 184 (Schwarz) adds physician's assistants to a list of medical professions already granted immunity from liability when assist person in an emergency without compensation. The bill has been reported out of committee and it is currently on the Senate floor.

SB 207 (Emmons) amends the Revised Judicature Act (RJA) to provide for prejudgment interest at a rate of 12 percent on specific written instruments such as notes, bonds and contracts. (Judiciary)

SB 220 (Van Regenmorter) creates the law enforcement vehicle pursuit and response policy advisory panel; prescribes its membership and duties. (Judiciary)

EDITOR'S NOTE: HB 5672, which would have extended government immunity to law enforcement activities under certain narrow circumstances when the government is reimbursed by private entities for the presence of on-duty law enforcement officers, was passed by the State Legislature at the end of the 1999-2000 session but it was not signed into law by Governor Engler who exercised a "pocket veto" of the legislation. As a consequence, HB 5672 did not become law even though it was passed by the legislature.

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Recent Developments in Negligence Law

Michigan Supreme Court

Accounting Malpractice Cause of Action Accrued on Date Firm Last Prepared Client's Annual Income Tax Return

Plaintiff filed professional malpractice action in 1997 against defendant accounting firm which arose out of an IRS audit of client's income tax returns filed in 1992 and 1993. The statute of limitations for professional malpractice action is 2 years. The trial court dismissed plaintiff's claim on the grounds that it was barred by the statute of limitations. The Court of Appeals affirmed. The Supreme Court reversed and remanded the case because Defendant last prepared Plaintiff's annual income tax return in 1996. The Supreme Court held that, barring any evidence that each annual income tax preparation was a discrete transaction that was in no way interrelated with other transactions, defendant's tax preparation services amounted to "matters out of which the claim for malpractice arose." As a consequence, plaintiff's malpractice claim against defendant accounting firm accrued on the date the firm last prepared his annual income tax return.

Levy v Martin, 463 Mich 478, 620 NW2d 292 (2001)

Uninsured Motorist Coverage Void If Insured Provided False Documentation of Wage Loss Claim As Part of No-Fault Claim

Plaintiff insured filed declaratory judgment action seeking ruling that Defendant insurance company was obligated to arbitrate uninsured motorist claim even though she was alleged to have provided false documentation to defendant insurer regarding her wage loss claim. Defendant filed a counterclaim seeking return of no-fault benefits paid to the plaintiff insured. Plaintiff filed a summary disposition motion which contended that the alleged misrepresentation should have no bearing on her uninsured motorist claim because she was not claiming wage loss as part of that claim. Defendant also sought summary disposition on the grounds that the policy provided that the entire policy would be void if the insured misrepresented a material fact relating to a claim. Plaintiff argued that a no-fault policy can be rescinded only for misrepresentation during the application process. Defendant argued that the provision voiding the policy should be applied because uninsured motorist coverage is contractual in nature and uninsured motorist coverage is not required by the no-fault statute. The trial court granted Plaintiff's summary disposition motion and ordered that her uninsured motorist claim be submitted to arbitration because "the insurance policy can only be void if there's a material misrepresentation in the application for no-fault insurance." The trial court further ruled that Defendant's counterclaim for breach of contract and fraud should also be submitted to arbitration. The Court of Appeals affirmed the circuit court order sending Plaintiff's uninsured motorist claim to arbitration but reversed and remanded the fraud counterclaim to the circuit court for further proceedings instead of arbitration. Defendant appealed. On appeal, the Supreme Court reversed and remanded the case to the circuit court for further proceedings because the Court concluded that the policy provision could be enforced so as to void the uninsured motorist coverage.

Cohen v Auto Club Ins Assn, 463 Mich 525, 620 NW2d 840 (2001)

Court of Appeals

Public Building Exception To Government Immunity Applies Where Plaintiff Was Injured On Loading Dock Which Was Part Of The Building

Plaintiff was injured when he tripped on defective concrete on the loading dock for the building. Plaintiff filed a premises liability action against defendant community college under the public building exception to government immunity. Defendant filed a summary disposition motion alleging it was immune because the loading dock was not part of the building. The trial court granted Defendant's motion based on its conclusion that the loading dock was more akin to a walkway area adjacent to a building than part of the building itself. The Court of Appeals reversed and remanded the case because it concluded that the loading dock was part of the building. Consequently, Plaintiff was entitled to bring his premises liability claim against Defendant community college because the public building exception to governmental immunity was applicable under those circumstances.

O'Connell v Kellogg Community College, 2001 WL 216869 (2001)

Door Is Not Dangerous Condition On Land Simply Because It Had No Windows Where Plaintiff Fell And Was Injured When Someone Opened Door From Other Side

Plaintiff filed premises liability cause of action against defendant after she fell and was injured in a vestibule of an apartment building when someone opened a door from the other side while she was attempting to open the door. Defendant moved for summary disposition based on the open and obvious doctrine and its motion was granted. The Court of Appeals affirmed the trial court's ruling but held that the open and obvious doctrine did not need to be applied because a commonplace door is not a dangerous condition on land.

Prebenda v Tartaglia, 2001 WL 298217 (2001)

Attractive Nuisance Claim and Open and Obvious Defense Pose Jury Questions Where Child on Bicycle Struck Chain Barrier in Store Parking Lot

Plaintiff filed lawsuit alleging premises liability and attractive nuisance after he was injured while riding his bicycle when he struck a chain barrier in a store parking lot. Defendant moved for summary disposition based on its contention that the chain was an open and obvious danger and that Plaintiff was trespassing on the premises. The trial court granted Defendant's motion. The Court of Appeals reversed and remanded based on its conclusion that whether the chain was open and obvious was a jury question. Further, the Court held that summary disposition was not appropriate as to Plaintiff's attractive nuisance claim under the circumstances, even if he was trespassing, because Plaintiff did not create the condition nor was he using the store parking lot in a

manner that was unknown to Defendants when he rode his bicycle in the store parking lot.

Pippin v Atallah, 2001 WL 276126 (2001)

Operator of Uninsured Motor Vehicle Titled In Ex-Husband's Name Barred From Making Third-Party Claim Because She Had Regular Use Of The Vehicle

Plaintiff was injured in a motor vehicle accident while driving an uninsured vehicle titled in her ex-husband's name. She filed a third-party auto negligence claim against the driver who was alleged to have caused the collision. Defendant moved for summary disposition under the amended no-fault statute because Plaintiff was operating an uninsured motor vehicle at the time of the accident. Plaintiff argued that her claim was not barred because she was not operating "her own vehicle" at the time of the accident. She further argued that the statute was unconstitutional. The trial disagreed and granted Defendant's motion for summary disposition. The Court of Appeals affirmed because she had regular use of the vehicle even after her divorce which occurred six months before the accident. The Court upheld the statute as constitutional.

Chop v Zielinski, 2001 WL 138990 (Mich App)

Operator of Uninsured Motor Vehicle Titled In Parent's Name Barred From Making Third-Party Claim Because She Had Use of Vehicle for More Than 30 Days

Plaintiff filed a third-party auto negligence lawsuit after she was injured in a motor vehicle accident. Defendant moved for summary disposition on the grounds that the vehicle she was driving was uninsured and the amended no-fault statute bars claims by a person "who was operating his or her own vehicle at the time the injury occurred" without no-fault insurance coverage. There was no dispute that the vehicle was titled in her mother's name and it was not insured at the time of the accident. Plaintiff argued that she was not operating "her own vehicle" when the accident occurred. Defendant argued that she was an owner because she had possession or use of the vehicle for more than 30 days, and consequently, she was an owner as that term is defined under the no-fault statute. The trial court dismissed plaintiff's claim for damages arising out of the motor vehicle accident because she had a "regular pattern of unsupervised usage" of the vehicle in question. The Court of Appeals affirmed. In so ruling, the Court rejected Plaintiff's argument that the phrase "his or her own vehicle" must be given a restrictive interpretation.

Kessel v Rahn, 2001 WL 56475 (Mich App)

Filing a Motion To Extend Time For Filing Affidavit of Merit with Complaint Does Not Preclude Dismissal of Medical Malpractice Claim

Plaintiff filed a medical malpractice action along with a motion to extend the time for filing an affidavit of merit. Defendant moved to dismiss the case because the court never granted the motion to extend the time for filing an affidavit of merit, and as a consequence, the affidavit of merit was filed after the 2 year statute of limitations had expired. Plaintiff argued that the applicable statute of limitations was tolled because he complied with its requirements by filing a motion to extend the time for filing an affidavit of merit at the same time he filed his complaint and that the statute of limitations was tolled until the trial judge rendered a decision on the motion to extend the time for filing an affidavit of merit. Plaintiff further argued that the statute was unconstitutional. The trial court found the statute constitutional and granted summary disposition in favor of Defendant because the court found that the time for filing an affidavit of merit had expired. On appeal, the trial court's ruling was affirmed, including its holding that the statue itself was constitutional.

Bartlett v North Ottawa Community Hospital, 2001 WL 171513 (Mich App)

Default Against Employee Precludes Vicariously Liable Employer From Contesting Liability But Does Not Prevent Employer From Arguing Comparative Negligence

Decedent was killed when his vehicle collided with a tractor-trailer stopped on a highway. Plaintiffs sued the truck driver and his employer on his behalf in a wrongful death action. The trial court permitted Plaintiffs to serve defendant truck driver by publication after all other attempts to serve him failed. Defendant truck driver did not respond to the complaint and Plaintiffs defaulted him. Plaintiffs filed a motion for partial summary disposition which contended that the default against its employee prevented defendant employer from contesting negligence or causation. The trial court granted the motion but permitted defendant to argue comparative negligence. Subsequently, defendant employer filed an application for leave to appeal which was granted. On appeal, the Court affirmed the trial court's ruling in a case of first impression because any other ruling would negate the effect of defaults and would undermine the vicarious liability doctrine.

Rogers v J B Hunt Transport, Inc, 2001 WL 138994 (Mich App)

Unintentional Acts May Constitute Provocation But Provocation Does Not Mean Any "External Stimulus" By Victim in Dog Bite Case

Plaintiff child was injured by dog bite when she attempted to pick up a ball. Defendant argued at trial that Plaintiff could not prevail under the dog bite statute because she unintentionally provoked the dog. Plaintiff countered that Defendants could avoid liablity only if Plaintiff intentionally provoked the dog. The trial

court, over Plaintiff's objection, instructed the jury that provocation under the dog bite statute was not limited to intentional acts but also included unintentional acts. The jury returned a no cause of action verdict on Plaintiff's dog bite claim. Plaintiff filed a motion for judgment notwithstanding the verdict which was denied. On appeal, Plaintiff again argued that unintentional acts do not constitute provocation under the dog bite statute. The Court of Appeals held that there was insufficient evidence of provocation, intentional or unintentional, under the facts and circumstances of the case, reversed, and directed a verdict for Plaintiff on the issue of provocation, and remanded the case to the trial court for a new trial.

Bradacs v Jiacobone, 2001 WL 29096 (Mich App)

Government Immunity Bars Roadway Case Against MDOT Where Plaintiff Alleged Inadequate or Improper Traffic Control at Railroad Crossing

Decedent was killed when her vehicle was struck by a train at a railroad crossing. Her estate filed a lawsuit against the Michigan Department of Transportation alleging that it had failed to control or warn vehicles turning right at a nearby intersection of the railroad crossing. Defendant moved for summary disposition on the grounds that the state's duty to maintain a reasonably safe highway applies only to the improved portion of the roadway, and it does not include any installation outside the improved portion, including signs and traffic signals. The trial court granted summary disposition. On appeal, the case was reversed based on the Court of Appeals' ruling in Pick v Szymczak. The defendant appealed. Subsequently, the Michigan Supreme Court overturned Pick in Evens v Shiawassee County Road Comm'rs, and it remanded this case to the Court of Appeals. In light of Evens, the Court of Appeals now concluded that it was "compelled to affirm" the trial court's ruling dismissing the case.

Iovino v Dep't of Transportation, 2001 WL 171517 (Mich App)

Government Immunity Bars Roadway Case Against MDOT Where Plaintiff Alleged Defects In Highway Median

Decedent was killed when another driver lost control of his vehicle on westbound highway, crossed the median, and struck his vehicle as it was proceeding eastbound on the same highway. Plaintiffs filed a highway negligence action on his behalf alleging that the highway was defective because the median separating westbound and eastbound traffic should have been wider or a median barrier should have been installed. The trial court granted Defendant's summary disposition which argued that Plaintiffs' claims did not fall within the highway exception to governmental immunity. The Court of Appeals reversed based on its prior ruling in Pick v Szymczak. In light of the Supreme Court's ruling in Evens v Shiawassee County Road Comm'rs, the Court of Appeals now affirmed the trial court's ruling dismissing the case.

McIntosh v Dep't of Transportation, 2001 WL 171510 (Mich App)

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

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