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FROM THE CHAIR

Sometimes, if we can displace our egos, we have to admit that there are those that state what needs to be said better than we can do it ourselves. So, at this time of year when reflection becomes part of our lives, I want to give you the opportunity to reflect on the words of Howard Nations. Howard is a past officer of ATLA, a past president of the Texas Trial Lawyers Association, and one of the best mass tort lawyers this country has today. While you read this article, please add the majority of the Supreme Court to the appropriate paragraphs regarding stifling dissent, as I am sure if written from a Michigan point of view, Mr. Nations would have done just that.

"The First Thing We Do, Let's Kill All the Lawyers" Shakespeare's Tribute to Trial Lawyers

By Howard L. Nations
Law Offices of Howard L. Nations, A Professional Corporation
The Sterling Mansion, 4515 Yoakum Blvd, Houston, Texas 77006-5895
TEL: (713) 807-8400 FAX: (713) 807-8423
Email: nations@howardnations.com, http://www.howardnations.com/

The great trial lawyer Daniel Webster said, "Justice is the greatest concern of man on earth." There is no greater professional calling than to stand as a lawyer at the bar of justice and breathe life into the Constitution, the Bill of Rights, the statutory law, and common law by defining, asserting, and defending the rights of citizens. Lawyers play many vital roles on the world's stage, but none more important than preserving, protecting and perpetuating the rights of citizens, both individuals and businesses. Since lawyers play such a vital role in our democracy, why has lawyer-bashing increased exponentially in recent years, and how should we respond to it?

One of the many enigmas to arise out of the corporate-dominated decade of the eighties is the advent of lawyer bashing. The adversaries of our proud and noble profession continue to misquote the law, distort case results, and unjustly attack judges and juries in a mass media onslaught designed to silence the voice of the victims—the trial lawyers of America.

Barry Goodman
Goodman Acker PC

Ironically, the rallying cry of the lawyer-bashers has become Shakespeare's quote from Henry VI, "THE FIRST THING WE DO, LET'S KILL ALL THE LAWYERS."

Those who use this phrase pejoratively against lawyers are as miserably misguided about their Shakespeare as they are about the judicial system that they disdain so freely.

Even a cursory reading of the context in which the lawyer-killing statement is made in *King Henry VI*, Part II, Act IV, Scene 2, reveals that Shakespeare was paying great and deserved homage to our venerable profession as the front-line defenders of democracy.

The accolade is spoken by Dick the Butcher, a follower of anarchist Jack Cade, whom Shakespeare depicts as "the head of an army of rabble and a demagogue pandering to the ignorant," who sought to overthrow the government. Shakespeare's acknowledgment that the first thing any potential tyrant must do to eliminate freedom is to "kill all the lawyers" is, indeed, a classic and well-deserved compliment to our distinguished profession.

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From the Chair
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Today's Jack Cades can readily be found throughout the insurance industry and in manufacturing, pharmaceutical, and chemical companies. They want to dismantle the tort system. They want to disrupt the judiciary and abrogate the common law to the detriment of the rights of individual citizens, consumers, and injured persons who deserve competent representation and adequate redress for harm done to them.

Over the centuries, tyrants and demagogues have come in many forms. In today's context, it is not the "army of rabble and a demagogue pandering to the ignorant" who cry for the demise of the lawyers, but rather modern demagogues who manipulate our governmental institutions to their own ends. Why? Because trial lawyers are the first line of defense to prevent irresponsible elements within the insurance, manufacturing, and chemical companies from dismantling the tort system, disrupting the judiciary, and abrogating the common law to the detriment of the rights of individual citizens, consumers, and tort victims.

Doubtless, if Shakespeare could put quill to parchment to script analogous phrases for modern corporate tyrants, he could couch their refrain thusly:

- If America's democratic institutions of right to trial by jury and election of judges are to be abolished, first let's discredit all the lawyers;
- If American citizens' common-law rights to full recovery of legal damages are to be abrogated for the benefit of profit-motivated corporations, first let's defame all the lawyers; and
- If America's judicial system of tort reparations is to be remolded into a profit mechanism for the insurance industry, first let's degrade all the lawyers.

The adversarial nature of the judicial system, of which we are an integral part, dictates that we will never be loved by the public, due to the high level of misunderstanding of the advocacy system. Our protection of individual rights often postures us as the foe of government and business with resulting enmity against us from those quarters. If enduring lawyer-bashing is the price we pay for protecting individual freedoms, then so be it. It is a small price to pay as long as we do not allow the degrading of lawyers to interfere with the performance of our professional obligations by poisoning professional pride or reducing the zeal with which we represent our clients.

One major danger of lawyer-bashing to our profession is the effect that it can have on us, individually and collectively, as lawyers and as a profession. If we lose our professional self-respect, America loses far more because our effectiveness in the democratic process will be damaged.

The seminal point in maintaining our self-respect when confronting lawyer bashing is for those of us in the profession to review our historical precedence to understand the role that our legal ancestors played in establishing and defending America's democratic institutions. Through this historical perspective we can better understand our position as the primary defenders of democracy.

As lawyers, we are the beneficiaries of a rich and unparalleled heritage from the past, the bearers of a huge mantle of responsibility in the present, and the preservers and protectors of the individual rights of American citizens for the

future. Reduction of that effectiveness is a major goal of our detractors since the power of the people has always been tied inextricably to the influence of lawyers. As Alexis de Tocqueville stated in *Democracy in America* in 1835, "I cannot believe that a republic could subsist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people."

We are currently engaged in a major power struggle over whether power in America shall remain with the people, through the exercise of individual freedoms, or whether power will continue the shift to government, corporations, and the judiciary and away from the people. Therefore, if power is to be transferred from the people to governments and corporations, it is necessary to reduce the powers of lawyers. As part of this power struggle, we confront an exponential growth in a well-orchestrated regimen of lawyer-bashing that is designed to silence our voices and reduce our ability to stand between the abuse of governmental power and the individual, the abuse of corporate power and the individual, and the abuse of judicial power and the individual. The effects of this well-designed and carefully-implemented campaign of lawyer-bashing resound in the legislative halls, the jury box, and the voting booth. While we are fighting this battle daily in the legislative halls and our public relations efforts are directed toward those who occupy the jury box and the voting booth, we must not allow the lawyer-bashing to reduce our own self-esteem, either as individual lawyers or as a profession.

" . . . we must not allow the lawyer-bashing to reduce our own self-esteem, either as individual lawyers or as a profession."

The idea of silencing lawyers to destroy individual freedom has been around for centuries. But it has been raised to a new art form by corporations without consciences. Heedlessly they compound their wrongs against consumers and workers with assaults on lawyers and crass distortions aimed at the mass media. Trial lawyers are the first—and perhaps only—defense against such perfidy, and history tells us we will prevail.

In seventeenth-century England, Oliver Cromwell, in an effort to thwart individual freedoms, decreed that no more than three barristers could congregate outside of court. He recognized that the greatest threat to his own tyrannical dictates was the collective commitment of the London Society of Barristers to the principles of freedom expressed in the Magna Carta.

In eighteenth-century France, the revolution altered the political face of the world by moving the focus of government from the rights of royalty, tyrants, and dictators to the rights of individuals. Three major political principles emerged—liberty, equality, and fraternity. From these evolved the social and political systems we know today as democracy, socialism, and communism. Only one of these, democracy, granted the individual freedoms now under attack. Paradoxically, the assault on individual rights in the United States is recurring at the same time that a tidal wave of individual democratic freedom is sweeping through Eastern Europe. The ascendancy of democratic institutions abroad enjoins us to guard our own individual freedoms more closely against assault from within.

In twentieth-century Europe, Adolf Hitler, the quintessential despot, asserted, "I shall not rest until every German sees that it is a shameful thing to be a lawyer." In the entire history of this planet, individual rights were never more threatened. Hitler's mantle of destroying lawyers as a predicate to destroying rights of individuals is carried forward today by a carefully calculated campaign of libelous tyranny against lawyers and the rights of American citizens. Hence, the concept of silencing lawyers by those who seek to subjugate freedom of individuals has been attempted for centuries but has been successfully resisted in America by strong-willed citizens represented by the legions of lawyers who have successfully preserved and protected the Constitution and Bill of Rights against such attacks. After each tyrannical attack, our legal ancestors have emerged like the Phoenix from the ashes, to redefine individual rights and freedoms. We, too, must prevail, because we are right, our cause is just, and the perpetuation of freedom is inextricably interwoven with our continued protection of individual rights.

If tort deformers prevail, American citizens will suffer the ultimate irony, as England has, that at the same time the world is attempting to emulate America and its democratic institutions, American citizens, in the name of international business competitiveness and insurance profits, will lose those same institutions that make us the exemplar of freedom for the world. This must not be allowed to occur, and occur it shall not as long as the legal profession stands guard at the gates of democracy, accompanied by judges and legislators who respect the cornerstone of American democracy: the rights of individual citizens.

But, lest our adversaries underestimate us and we forget our own heritage, we must all recall that before there was an insurance industry, lawyers were defining the rights of free citizens under the Magna Carta.

When the robber barons of nineteenth-century America sacrificed the lives of their employees in unsafe workplaces throughout the country, lawyers and judges in courtrooms across America were breathing life into the

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Constitution and gradually and painstakingly protecting, on a case-by-case basis, the individual rights of American citizens. Therefore, as we carry forward the mantle of responsibility for protecting those hard-won rights, we must not shirk from the media and legislative attacks on our noble profession. Just as elements of modern corporate America perpetuate the principles of its forefathers, the nineteenth-century robber barons, so must we follow our legal ancestors, Jefferson, Madison, and Lincoln, in preserving the freedoms that lawyers have defined and have defended for centuries.

"The self-esteem of our profession increases when we consider who are the forefathers of today's American lawyers and how they responded to attempts to silence lawyers and thereby stifle individual freedoms."

Both as professionals and as individual attorneys, we must never lose sight of the respect that we deserve for the role we play in society, a role that extends far beyond the courtroom. We must bring our individual and collective talents to bear to defend freedom with pro bono work for the disadvantaged, consumer protection advocacy for those not yet killed or maimed by defective products, protection of the civil liberties of every individual whose rights are threatened, and legislative advocacy, both offensive and defensive in state and federal legislative halls.

While the insurance industry and other powerful interests aim to discredit lawyers, only America's legislators can effectively silence them. Before legislators silence America's voices of freedom, intellectual integrity dictates that they examine the cultures that have no independent lawyers and determine how these lawyerless societies have fared. Today it is American trial lawyers who are pouring into the eastern European countries to spread democracy and establish the right to trial by jury, ironically a right that is under corporate attack in our own country.

Since the past is prologue, every trial lawyer should examine the antecedents of our great profession to better understand our role in society today and our obligations to the citizens of tomorrow.

When we think of those who preceded us in this noble profession, we become imbued with the spirit, the virtues, and the values that we are called upon to preserve, protect, and perpetuate. A review of our antecedents, whether gestalt or collage, establishes that greatness was the hallmark of our legal ancestors, and the mantle that they passed is worthy of nothing less than our best efforts to bear it, in all its glory, improve it with devotion and dedication to its principles, and pass it to our successors, draped in greater dignity than when we received it.

Even a cursory review of the vital role that lawyers have played in America's history reveals a discernible common thread: our legal predecessors have steadfastly refused to stand silent in earlier power struggles that threatened individual liberties, regardless of the enormity or the source of the threat.

The self-esteem of our profession increases when we consider who are the forefathers of today's American lawyers and how they responded to attempts to silence lawyers and thereby stifle individual freedoms.

We see lawyers in the philosophical forefront of our great country: we see him with quill in hand in Monticello and Philadelphia and in Washington as he defined in writing the rights of American citizens. His name was Thomas Jefferson, and he was a lawyer.

We see him at that miracle in Philadelphia, the Constitutional Convention of 1787, fighting for the Bill of Rights, which became the credo of American freedom, and at his desk drafting the Federalist Papers to lead the land he loved in the right direction, toward individual freedom. His name was James Madison, and he was a lawyer.

We see him addressing the delegates of the Second Virginia Convention, exhorting the battle cry of the republic, "Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!" His name was Patrick Henry, and he was a lawyer.

Where would America be today if these lawyers had been successfully silenced?

We see them at the birth of America: defying the tyrannical dictates of King George III at the risk of their lives as they lead the revolution against the Stamp Act of 1764; we see 25 lawyers among the 56 signers of the Declaration of Independence; we see them drafting the Articles of Confederation and as leaders of the constitutional conventions of the new states. Their legions include John Jay, Alexander Hamilton, and John Marshall, and they were lawyers.

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We see them occupying the presidency, leading America through the crucial formative years of our republic, as 13 of our first 16 presidents from Washington through

Lincoln were lawyers. In addition to Thomas Jefferson and James Madison, their numbers include such shapers of America's destiny as John Adams, James Monroe, John Quincy Adams, and Andrew Jackson. As the forty-second president occupies the White House today, he is the twenty-seventh member of our distinguished profession, which makes it all the more ironic that much of the recent lawyer bashing emanated directly from the White House.

We see lawyers leading the country in wartime: at Gettysburg with tears in his eyes rededicating our country to the principles of equal justice for all. His name was Abraham Lincoln, and he was a lawyer.

And speaking to us from his wheelchair, lifting our spirits, making us stronger with his inspirational philosophy, "The only thing we have to fear is fear itself." His name was Franklin Delano Roosevelt, and he was a lawyer.

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We see lawyers in the criminal courts of twentieth-century America: at the bar of justice from Chicago to Dayton, Tennessee, breathing life into the Constitution and helping define and defend individual rights. His name was Clarence Darrow, and he was a lawyer.

We see lawyers crying out for the civil rights of their black brethren, demanding equal justice for all: as we see her addressing the Democratic National Convention as its keynote speaker and capturing the hearts and minds of those who heard her extolling the virtues of democracy and individual freedom in the halls of Congress. Her name was Barbara Jordan, and she was a lawyer.

And we see him at the bar of justice of this great land and finally, on our highest bench, reminding us all that justice is colorblind and that all citizens of this great country, regardless of race, creed, or color, are equal under the law. His name was Justice Thurgood Marshall, and he was a lawyer.

Where would America be today if these lawyers had been successfully silenced?

We see lawyers in recent years at the helm of the Association of Trial Lawyers of America: we see him in the courtrooms and classrooms of Connecticut and at lectern after lectern across the land, lecturing to the lawyers he loved. His name was Teddy Koskoff, and he was a lawyer.

Teddy reminded us that, if you are a lawyer, you stand between the abuse of governmental power and the individual, the abuse of corporate power and the individual, and the abuse of judicial power and the individual. And if you are a lawyer, you are helping to preserve the precious freedoms of our past, defending the individual citizen's rights today, and protecting the rights of America's citizens for generations to come.

We see him in the congressional halls: testifying, cajoling, and demanding that the rights of America's consumers and citizens not be rent asunder in the name of corporate profit and political expediency. He is the consummate consumer advocate; his name is Ralph Nader, and he is a lawyer.

We see him at the Southern Poverty Law Center: we see the son of tenant farmers as he emerges from the cotton fields in rural Alabama to become one of the great civil rights lawyers in history, confronting death threats to himself and his family to bring the klan, skinheads, and other hate groups to the bar of justice. His name is Morris Dees, and he is a lawyer.

We see them at the bar of justice in Texas: representing the halt and the lame, the widow and the orphan and the catastrophically injured whose future quality of life rests on their immense skills and unswerving sense of justice. We listen as they teach us how justice can best be achieved in the face of overwhelming odds, doing battle with corporate America. We watch in awe as they show us how David, armed only with a stone of justice, can bring down today's gargantuan Goliath, manufacturers of defective and dangerous products. Their numbers are legion, but their names include Scotty Baldwin, Tommy Jacks, David Perry, and Jim Perdue, and they are lawyers. They are our leaders, our friends, and our inspiration as they remind us of the mantle of responsibility that we carry as lawyers today. Where would the victims of defective products be if these lawyers had been successfully silenced?

We see them as women lawyers, inspiring others as role models: in the courtrooms, leading others through example and exhortation in the battles for equal justice for all, including women and minorities. The ranks of women and minority lawyers are constantly increasing, to the great benefit of both the public and our profession.

As has been often proven over the centuries, Shakespeare was right: if tyranny is to prevail, tyrants must first kill all the lawyers. Equally relevant today, if corporate tyranny is to prevail, corporate tyrants must defame, degrade, and thereby discredit all the lawyers. Once again, the timeless wisdom of Shakespeare is proven. He would have made a great trial lawyer.

It will serve us all—legislators, judiciary, and lawyers—to recognize that the ultimate aim of the tort deform movement is the abrogation of those individual rights and liberties of American citizens, consumers, and tort victims that are the bedrock of American democracy. As *Newsweek* magazine stated, "The war against the lawyers is at bottom a camouflaged aggression against the jury system."

Fortunately, there are multitudes in our society who recognize our role and respect us for it. As his holiness, Pope John Paul II, stated, "As trial lawyers, you are committed to the resolution of conflicts and the pursuit of

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justice through legal and rational means. This work is indispensable to the construction of a truly humane and harmonious social order, as the centuries old judicial experience of the West bears eloquent witness."

Therefore, let us never forget the mandate that we assumed upon taking the oath at the bar of this great country: as long as trial lawyers continue to preserve the independence of our judges and juries; as long as trial lawyers uphold by due respect, daily practice, and distinguished conduct, the dignity of the bench and bar, and most importantly, as long as trial lawyers continue to vigorously and unselfishly answer our noble calling of protecting the inalienable rights of tort victims, abused consumers, and the downtrodden in our society, then the profit-motivated prattlings of that unholy alliance of tort deformers will take their proper place in the alleyways of anonymity.

The role of each of us is to accept the mantle of those who led us through example and exhortation in the past, who inspire and imbue us with a sense of our vital role in society in the present, and to carry the mantle as the men and women of the American trial bar who, through our daily activities in the courts of this great land, preserve, protect, and defend the Constitution and the rights of America's citizens for the future.

Our obligation to America is to accept the Bard's compliment as a challenge and so conduct ourselves as to assure that, as long as the bench and trial bar continue to breathe life into the common law and Constitution, those respected and revered principles on which our democracy is based shall continue to carry the indelible imprimatur of the legal profession and be closely guarded by the true sentinels of freedom, the judiciary, and the trial lawyers of America.

I am extremely proud to be a member of this great profession, and I urge each of you to reflect on the mantle of responsibility that we bear, the challenges we face, and the level of complete commitment to individual rights that has been the hallmark of our profession for centuries. Indeed, we must conduct ourselves so that for centuries to come, the refrain of the tyrants and demagogues must remain, "the first thing we do, let's kill all the lawyers." Thank you, Mr. Shakespeare, for the compliment. We shall strive to deserve it.

It makes you proud to be a trial lawyer, doesn't it? The ability to question, to dissent, is one of the cornerstones of freedom. Many have died to protect that right. We have taken an oath to do the same with speech and pen (or keyboard). As Mr. Nations so aptly stated, for centuries, tyrants and demagogues have attempted to act harshly and swiftly to stop those who would speak out, who would question the motives of those in charge. I respectfully ask of Justices Taylor, Young, Markman and Corrigan to please allow Justice Weaver (or in fact any Justice, judge or lawyer) to speak her mind. I may not always agree with her opinions, but she has the right to voice them. She also has the right to dissent. She also has the right to question. She also has the right to shed light on the acts of those that hide behind gilded (sounds like they are locked as well) doors and dispense edicts without even caring for the opinions of those that do not follow them blindly. Yes, I am proud to be a lawyer. I ask the majority of our Supreme Court, are you?

Barry J. Goodman
17000 West Ten Mile, Second Floor
Southfield, Michigan 48075
(248) 483-5000

Parked Car Threshold – MCLA 500.3105(1)

By Gerald V. Padilla

The parked car exclusion has caused practitioners fits. Not every accidental bodily injury involving a motor vehicle is covered under the Michigan No-Fault Act. MCLA 500.3101 *et seq*. A key issue is whether the motor vehicle is being used "as a motor vehicle" at the time of the incident.

There are several older cases where coverage was excluded for a myriad of reasons. For example, coverage has been excluded because the plaintiff was sleeping in the car, *McKenzie v ACIA*, 458 Mich 214 (1998); the plaintiff used the vehicle as a platform for construction, *Gooden v Transamerica*, 166 Mich App 793 (1998) and *Taylor v DAIIE*, unpublished; the plaintiff used the vehicle as a camper trailer, *Koole v Michigan Mutual*, 126 Mich App 482, (1983). This is not an all-inclusive list and is only offered by way of illustration and not limitation.

However, some less obvious situations were recently decided by the Michigan Court of Appeals in two unpublished opinions. Both of these cases involved matters handled by this office and this writer in the trial court where summary disposition was granted. They were briefed and successfully argued to conclusion in the appellate courts by Ray Morganti of our office, where the trial courts were upheld.

Both of these cases involved parked vehicles. But there were fundamental questions that needed to be answered before one even got to the exception.

The rules for parked vehicles are set forth in MCLA 500.3106(1). This requires:

> "Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked motor vehicle unless any of the following occur:
>
> a. The vehicle was parked in such a way as to cause unreasonable risk of bodily injury which occurred.
>
> b. Except as provided in subsection (2) , the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.
>
> c. Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle." [Subsection 2 is the worker's disability compensation exclusion].

However, two separate panels of the court of appeals didn't even get to that section in coming to their conclusions. The operative section, before applying the parked car exclusion, is whether the vehicle is being used as a motor vehicle under MCLA 500.3105(1). This is the first hurdle in the analysis.

Let me give you the facts and the reasoning of the courts.

Case I

A young man is looking for a new vehicle in a car dealership. The sales person is demonstrating the features of the car. One of the features is a hatchback that leads to a roomy storage area in the rear. Showing the versatility, capacity, and durability of the car, the sales rep pantomimes that he is dribbling a basketball and, with the hatchback open, jumps into the back seat, sitting down full force so that the car and hatchback bounce down. Unfortunately, the plaintiff is standing underneath the open hatchback, and it hits him in the head, causing spinal injuries.

Case II

A young lady is attending a bridal show. She is planning her wedding. The show has many vendors, from dressmakers to florists to banquet halls to limousine operators, all displaying their wares for the brides-to-be.

The plaintiff, with her mother, decides to take a look at the various limos that are parked on the street. She climbs into the stretch Humvee and samples the interior décor. When she exits through the rear door, the driver assists her. With one foot in the vehicle and one foot out, she loses her balance and the driver loses his grip. She falls, fracturing an ankle.

Analysis

Both scenarios involve parked motor vehicles. The first has contact with equipment permanently mounted on the parked vehicle, and the second has a passenger exiting the parked car. For the prudent practitoner and student of no-fault, the lightbulb goes on and the parked vehicle exclusion under MCLA 500.3106 is researched.

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Gerald V. Padilla is a founding partner in the law firm of Siemion, Huckabay, Bodary, Padilla, Morganti and Bowerman, PC. He has been practicing in the trial arena since 1975.

His areas of expertise range from complex litigation to professional negligence to insurance issues. He is presently a member of the Negligence Law Council and the Aviation Law Section where he has served as chair, secretary and on the advisory board. He also belongs to the Hispanic Bar Association, the Macomb County Bar Association, the Defense Research Institute (DRI), the Association of Defense Trial Counsel, and the Latin American Bar Association.

He is a member and legal counsel for the Hispanic Business Alliance, the Aurelio Rodriguez Scholarship Fund, and the Gabriel Richard Historical Society Board.

Gerald can be reached at:
Siemion Huckabay Bodary
Padilla Morganti &
Bowerman PC
1 Towne Sq Ste 1400
PO Box 5068
Southfield, MI 48086
P: (248) 357-1400
E: gvpadilla@siemion-huckabay.com

In the dealership fact situation, we have physical contact with equipment permanently mounted on the vehicle. In the second situation, the young lady was exiting the limousine. We have, then, qualified for the exceptions to the exclusion. Perfect; let's sue.

Not so fast. Both cases were decided against the plaintiff. (*Williams v. Progressive Mich Ins Co.,* unpublished, April 18, 2006, 2006WL 1009394 and *Waetjen v. Northland Insurance Company*, unpublished, Docket No. 269802, decided October 26, 2006 WL 3040139).

There is a threshold question. Yes, a threshold to the first party side of no-fault. This is contained in MCLA 500.3105(1).

In both cases, the court of appeals held that the vehicles in question were not being used "as motor vehicles." Both panels employed the phrases "transportational purposes" and "transportational function" in their analysis. They determined that the cars were being used as models to demonstrate features and were not being used for their transportational function.

Both courts reasoned that to even get to the parked car exclusion, one must meet the criterion of MCLA 500.3105(1).

For the car dealer (*Williams*), the vehicle was being used as a display to demonstrate the features of the car. Likewise, for the bride (*Waetjen*), the vehicle was being used as a display also.

In both cases, the courts held that the injury was not associated with the transportational function of the vehicle. There was no evidence that at the time of the injury, the vehicle was being used for any purpose as a motor vehicle. It was not being used to transport anything.

In both cases, the appellate courts cited the case of *McKenzie v. Auto Club Insurance Association*, 458 Mich 214 (1998). There, they cited language that stated:

> The legislature intended coverage of injuries resulting from the use of motor vehicles when closely related to their *transportational function* and only when engaged in that function. 458 Mich 220. [Emphasis added].

McKenzie went on to indicate that the phrase "as a motor vehicle" was generally reserved for getting from one place to another and excepted instances in which a motor vehicle was used for other purposes—for example, as a housing facility, an advertising display, as a foundation for construction equipment, as a mobile public library, or even on display in a museum.

The issue really hinges on whether or not the ownership, operation, maintenance, or use of a motor vehicle was "as a motor vehicle" pursuant to MCLA 500.3105(1). To even get to the parked car exclusion, one must first show the vehicle is being used as a motor vehicle. In other words, in order to get to the parked car exclusion, one must first get over the hurdle of whether or not the vehicle is being used in its transportational function.

Putkamer v. Transamerica, 454 Mich 626, 635-636 (1997) is the root of *McKenzie*, supra. This case gave us a three-pronged test. The *Putkamer* court indicated one must demonstrate:

1. The conduct must fit within one of the three exceptions to the parked vehicle exclusion (MCLA 500.3106(1);
2. The injury arose out of the ownership, operation, maintenance, or use of the parked motor vehicle "as a motor vehicle;" and
3. The injury had a causal relationship to the parked vehicle that is more than incidental, fortuitous, or but for.

This puts the cart before the horse, but leads to the same conclusion. If the vehicle is not being used in its "transportational function," then you are not entitled to no-fault benefits. Period.

How to Contact Medicare and Successfully Reduce a Lien

By Donna M. MacKenzie, Olsman Mueller, P.C.

Do you cringe every time you receive a Payment Summary Form from Medicare? Do you think that the lien being asserted by Medicare is excessive, but have no idea how to contact Medicare now that the Chickasaw Nation Industry has taken over as the Medicare contractor? With just a few short steps, you can determine whether Medicare is asserting an accurate lien in your case and submit your lien dispute letter to the appropriate location.

(1) DATES. Check the dates of service on the summary form. In some cases, Medicare may have included charges that were incurred before or after your client's treatment for the injuries relevant to your case.

(2) SERVICES. Make sure that the services being reimbursed are actually related to the injuries sustained by your client. How do you know whether diagnosis code "25000" is related to your case? The diagnosis codes on the summary form can easily be interpreted by downloading the Tabular List of Diseases from the following website: *http://www.cdc.gov/nchs/icd9.htm*.

Scroll down the above web page until you see a list of the years 1996 to 2006 under the heading "ICD-9-CM Rich text files (.rtf) via FTP." Click on the year that you are interested in and open the file that begins with "Dtab." Open the Microsoft Word document that appears on your screen. You can save this document on your computer for easy access in the future.

Once you open the list, you will need to find your code. The diagnosis codes range from three to five digits long and begin with a number or the letters V or E. When searching for a code that begins with a number or the letter E, you will need to insert a decimal point between the third and fourth number in the code. When searching for a code that begins with the letter V, you will need to insert a decimal point between the second and third numbers in the code.

For example, to look up diagnosis code "25000" you must actually find "250.00." Once you locate code 250.00 and discover that the service provided to your client was for treatment of diabetes, you will be able to cross that charge off the Medicare lien in your case arising out of injuries sustained in an auto accident.

(3) DISPUTING THE LIEN. Now that you have found all of the services that you intend to dispute, whom do you contact? The previous contractor for Medicare (United Government Services) was replaced by the Chickasaw Nation Industry, which is calling itself the Medicare Secondary Payer Recovery Contractor, and can be contacted at:

MSPRC Auto/Liability
P.O. Box 33828
Detroit, MI 48232-3828
PHONE: (866) 677-7220
FAX: (734) 957-0998
http://www.cms.hhs.gov/MSPRGenInfo/

*Remember, before you can receive a Conditional Payment Letter, you must first report your case to the Coordination of Benefits Center, P.O. Box 5041, New York, NY 10274, who will forward the file to the MSPRC. Once the MSPRC has the case, your client must execute the Consent to Release form that is provided to you. Only then can you request a Conditional Payment Letter, which lists the diagnosis codes and payments made by Medicare.

Invite someone to join the Section.

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

STATE BAR OF MICHIGAN NEGLIGENCE LAW SECTION SEMINAR

In conjunction with

The Michigan Trial Lawyers Association

&

The Michigan Defense Trial Counsel

LAST REMINDER LAST REMINDER

Sail aboard Celebrity Cruise Lines *Century*

March 15-19, 2007

Itinerary subject to change

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2	Key West, Florida	7:00 AM	2:00 PM
3	Cozumel, Mexico	11:00 AM	9:00 PM
4	At Sea		
5	Miami, Florida	7:00 AM	

Itinerary subject to change

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Cat 5 Ocean view Stateroom from $769.00
Cat 10 Inside Stateroom from $579.00
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Prices are subject to change until booked

Seminar on Sunday March 18 (program to be announced)
Seminar fee $150.00 per person

Reservations Deposit of $300.00 per person is required to secure a reservation. Final payment is due 12/10/06
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Legislative Update

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.

Todd N. Tennis
Capitol Services Inc.
526 Townsend
Lansing, MI 48933
P: (517) 372-0860
F: (517) 372- 0723

It's 2007, and everything is new again. The legislature is beginning its brand new session with new leaders, new committees, and many new faces. For the first time in a decade, the Democratic party is in control of the state House, while Governor Granholm will remain at the helm of the ship of state for another four years. The Republicans maintain control of the state Senate and the very important Supreme Court. The mix is a recipe for compromise or gridlock.

The individuals who will play major roles in shaping the 2007-2008 session were chosen by their legislative colleagues shortly after the November election. House members elected Representative Andy Dillon (D-Redford) to be the Speaker of the House. On the Senate side, Senator Mike Bishop (R-Rochester Hills) will become the Senate Majority Leader. Both Speaker Dillon and Majority Leader Bishop are known as moderate voices within their caucuses, so many are optimistic that compromise will rule the day, rather than gridlock.

The Negligence Section has a number of legislative goals that, frankly, have not fared well under the quite conservative legislative leadership of the past several years. Reforms to the Affidavit of Merit, relief from the *Apsey* decision, and calls to slow down the constant barrage of new liability immunity legislation have had limited success. The new look of the Michigan legislature gives reason for cautious optimism.

One issue that will likely be on the fast track in the House is the repeal of liability immunity for pharmaceutical manufacturers. This issue played heavily in many House races this year, and was blamed for the defeat of at least one Republican member. House Democrats will likely move quickly to address this issue in 2007.

Another area that will likely see more serious attention is reform to Michigan's No-Fault Auto Insurance law. A great deal of work was done by members of the Coalition to Protect Auto No-Fault (CPAN) over the last two years to draft amendments to protect consumers who are injured in auto accidents. A primary goal is passage of legislation to address the controversial *Kreiner* decision, which drastically increased the injury threshold for third-party suits. Talks on the issue broke down in 2006, but new legislative leaders may be more willing to readdress the issue in 2007.

It is still too early to tell how the new legislature will work with the Governor and each other. There will certainly be challenges, but there is also hope. There is hope that the voices for civil justice and access to the courts will be stronger this year. There is hope that efforts to make the judicial process work more smoothly for everyone will be easier this year. May it be a happy and prosperous new year for all of us.

Trial Practice Book Available

About the Author

David R. Parker is a shareholder in the firm of Charfoos & Christensen, P.C.

He is an appellate specialist who became associated with the firm in 1983. In his present role with the firm, he has primary responsibility for appeals in the Michigan Supreme Court, the Michigan Court of Appeals, the United States Sixth Circuit Court of Appeals, and the United States Supreme Court. He also heads the firm's research department, assists in briefing dispositive motions in trial court, and prepares seminar material. Parker's keen interest in the art of writing briefs and his strong presentational skills have earned him the well deserved respect of the state legal community.

Parker assisted in researching, drafting, and editing the widely used book *Personal Injury Practice: Technique and Technology*, which he updates periodically for the publisher. His other works include *Starting the Case in the 90's: A Current Manual of Michigan Complaints, Michigan Medical Malpractice Cases Annotated: 1987-1993, Still Starting the Case-2001: An Updated Collection of Michigan Complaints, The Works: Medical Malpractice 1993-1997*, and *The Works Part II: Medical Malpractice Cases 1998-2003*.

David R. Parker
Charfoos & Christensen, P.C.
5510 Woodward Ave
Detroit MI 48202
(313) 875-8080 -- Phone
(313) 875-8522 -- Fax
drparker@c2law.com

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Negligence Law Section Members

Cindy Merry, past chair, and husband Gene Eshaki

Robert Siemion, immediate past chair, with wife Jacqueline

Honorable Richard Suhrheinrich (6th Circuit Court of Appeals), Robert Siemion, Jules Olsman, and Dick Kitch

Member Profiles

Cheryl Auger was born in Detroit Michigan. Cheryl knew she wanted to be an attorney from a young age, inspired by a movie about a group of civil defense attorneys. She received a bachelor's in criminal justice from Ferris State University, and attended the University of Detroit School of Law, where she received her law degree. Cheryl has been with her current firm, Levine Benjamin, since 1984. Her practice focuses on civil liability and social security disability, on behalf of plaintiffs.

One of the greatest challenges she's found in her practice has been the numerous tort reforms that have dramatically altered the rights of recovery for the victims she represents. She recalls one of her most significant accomplishments in her career as being a favorable published decision from the Court of Appeals in a case in which the homeowner's insurance company attempted to reduce the jury verdict received from an incident involving a minor who suffered a dog bite. In that case, the Court of Appeals ruled that the comparative negligence of a third party did not come into play, and the minor-plaintiff's verdict could not be reduced.

Cheryl's involvement with the section began last year, when she was invited to join. She commends the Section for how it strives to protect the continued viability of negligence law in Michigan and how it closely follows all legislation concerning negligence law, providing this invaluable information to section members.

Outside of the office, Cheryl enjoys running with her Yellow Labrador, playing tennis, and spending time with her husband and two sons.

Cheryl J. Auger
Levine Benjimin
100 Galleria Office Center #411
Southfield, MI 48034-4780
P: (248) 352-5700
F: (248) 352-1312
E: *Cauger@levinebenjamin.com*

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David Christensen was born in Southern California and attended San Francisco State University. He moved to Ann Arbor to attend the University of Michigan for graduate school, where he earned a master's degree in chinese studies and his juris doctorate. David's original motivation for pursuing a career as an attorney was the prospect of a secure and interesting profession, but he has since come to find the humanitarian aspect of work to be very gratifying.

After a stint with Honigman, Miller, Schwartz & Cohn, David moved to his current firm, Gursten, Koltonow, Christensen & Raitt, in 1992. His practice focuses almost exclusively on automobile negligence and no-fault litigation. The greatest threat to David's practice has been the attacks on the American jury system. He feels very strongly about the importance of our constitutional right to trial by jury. David has also found his practice to have opened a door to working in the nonprofit sector, in which he, otherwise, may not have become involved. This has given him an outlet to work with the human services agency HelpSource, which helps people of all ages, provides Big Brothers and Sisters, substance abuse treatment and prevention, as well as many other services to the community. David is the president of the board of Helpsource.

His position on the Executive Board of the Michigan Trial Lawyers Association brought him into contact with several council members of the Negligence Section, through which he became familiar with the benefits of membership. David feels the section provides great resources to michigan lawyers. His practice has benefitted from the relationships he's created with both plaintiff and defense attorneys, and also by the education programs offered by the section.

Christensen strongly encourages involvement in the Negligence Section for lawyers who do any negligence work. He feels the representation it offers in the interest of both plaintiff and defense lawyers is a great asset.

In his spare time, David enjoys skiing, marathon running, scuba diving, and flying.

David E. Christensen
Gursten, Koltonow, Gursten,
Christensen & Raitt PC
26555 Evergereen Road #1530
Southfield, MI 48076
P: (248) 353-7575
F: (248) 353-4504
E: *dechristensen@gurstenlaw.com*

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