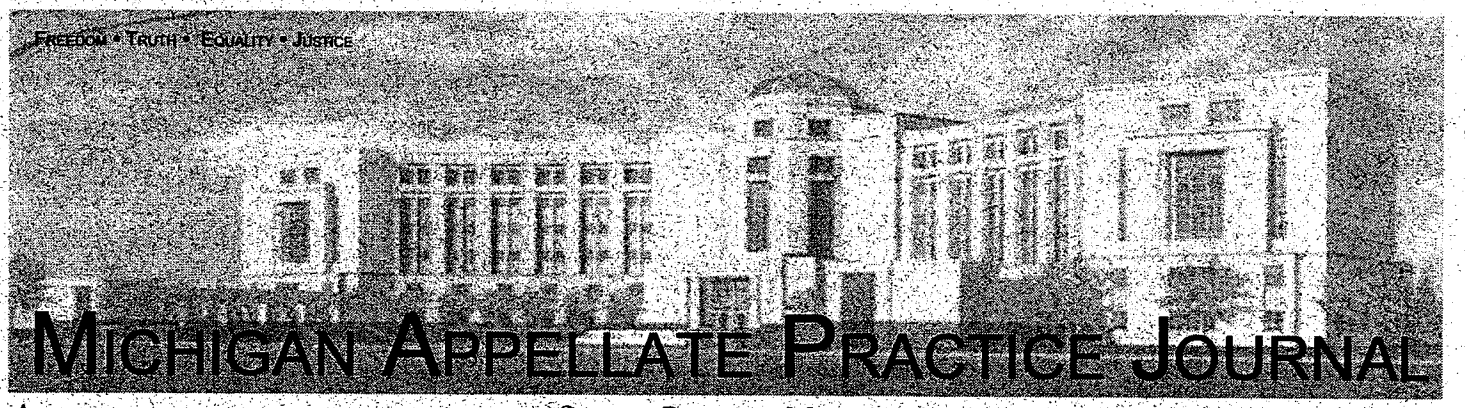

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From the Chair

By Christina A. Ginter

The Thrill of Victory/The Agony of Defeat: How Appellate Attorneys can be Inspired by Olympic Athletes

I love watching the Olympics. I am endlessly fascinated by the fact that these elite athletes practice and train for hours every day, for years, with huge investments of money, the assistance of coaches, and use of advanced technology and training techniques, for what might be (in some sports) less than two minutes of competition. The athletes and their families and friends travel huge distances, for just those few moments of focused effort.

The odds of obtaining a medal, for most competitors, are not good. Some of the athletes fail to complete their events, or are seriously injured. Some of the competitors' efforts are not even televised (at least in prime time) and are seen by relatively few spectators. Most of the athletes seem to be competing, not for media glory or a golden prize, but for the love of their sport, and the satisfaction of achieving a personal goal.

There is an inspiring camaraderie between these elite athletes from very different parts of the world. Fierce competitors congratulate each other after record-setting performances, and console each other after disappointing efforts. Athletes representing different countries mingle and celebrate during the closing ceremonies.

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In this Issue

Forgetting the Past: The Anticipated Metamorphosis of Michigan Law Under the "New" Supreme Court

By Stacey L. Heinonen, Janet C. Barnes and Jason R. Church

The replacement of former Chief Justice Clifford Taylor with Justice Diane Hathaway on the Michigan Supreme Court will undoubtedly result in significant changes to the Court's jurisprudence. Formerly dominated by a consistent conservative majority, the results of last November's elections have shifted the balance of power on the Court away from the former "majority of four"—which included former Chief Justice Taylor and Justices Corrigan, Young and Markman—in favor of a new voting bloc led by Chief Justice Kelly and Justices Cavanagh and Hathaway. Justice Weaver, a former member of the Court's conservative majority, is widely expected to be the swing vote, but has often aligned herself with the Court's more liberal members in recent years.

As evidenced by *US Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Assoc*, 482 Mich 414; 759 NW2d 154 (2008), rev'd on rehearing 2009 Mich. LEXIS 1573, this "new" Court will surely revisit numerous decisions issued by the former majority of four over the past decade—often by four to three votes—that were favorable to the insurance and business communities. It has been a year since the Journal last reported on issues likely to garner the Court's attention.[1] This article is intended to update and supplement that discussion.

Areas that may be impacted in one way or another by the recent change in the Court's composition include, among others, Michigan first-party no-fault law, third-party bodily injury cases, premises liability cases, construction site accident cases, and cases where the statute of limitations is impacted by discovery of an alleged wrongful act. There are many issues and sub-issues in these areas that are ripe for discussion; however, a few of the more significant opinions are set forth below.

Personal Protection Insurance (PIP) Benefits

Tolling of the One-Year Back Rule

One of the most highly anticipated and watershed opinions of the Michigan Supreme Court in the PIP arena was *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 719 NW2d 784 (2006), wherein the Court addressed whether the minority/insanity tolling provision of the Revised Judicature Act ("RJA")[2] applied to the one-year back rule of the No-Fault Act[3]. In a four to three decision, the majority of the Court determined that it did not and emphasized that any recovery is specifically limited under MCL 500.3145 to losses incurred during the year before the action was filed and forward. *Cameron*, 476 Mich at 61.

The dissenting Justices (Cavanagh, Kelly, and Weaver) expressed extreme disagreement in that case, and it is anticipated that the newly-convened Supreme Court will overrule/vacate the majority decision in *Cameron* as soon as the opportunity presents itself. According to Justices Cavanagh and Kelly, the current majority opinion flies in the face of precedent that had effectively balanced the rights of the insurer and insured for nearly 20 years and improperly interprets legislative intent based on an incorrect analysis of MCL 500.3145 and MCL 600.5851. *Id.* at 88, 96. In Justice Weaver's opinion, the one-year-back rule is inextricably linked with the tolling provision of MCL 500.3145[4], and applies only when a claimant raises the tolling provision as a defense to the otherwise "late" filing of a suit.

The Supreme Court recently granted leave in *University of Michigan Regents v Titan Ins Co*, Supreme Court Docket No. 136905, to address whether *Cameron* was appropriately decided. Should *Cameron*, ultimately be rejected by the current Court, it will, of course, dramatically affect the handling of suits since they will potentially encompass claims spanning decades, during

which time Michigan no-fault law, and the benefits available under that law have evolved.

Judicial/Equitable Tolling – Insurer's Failure to Formally Deny Claim

Again dividing four to three, the Michigan Supreme Court abandoned the judicial/equitable tolling doctrine in the no-fault context in *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).[5] According to the majority (Justices Young, Corrigan, Taylor, and Markman), judicial/equitable tolling directly contradicts the express language of MCL 500.3145(1), particularly the last portion of that sub-section which provides that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." *Id.* at 564. The majority determined that statutory or contractual language must be enforced according to its plain meaning, and judicial/equitable tolling amounted to impermissible judicial legislation.

If the Supreme Court is presented with this issue again, *Devillers* will likely fall by the wayside if only because, in the dissenting justices' opinion, it impermissibly departed from earlier precedent. In their dissent, Justices Cavanagh and Kelly wrote that equitable tolling is a time-honored, purposeful, and carefully crafted rule of equity that is employed when rare but compelling circumstances justify its use. *Id.* at 594. They determined that, "in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, or because of fraudulent concealment, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." *Id* at 595. They further determined that circumstances where an insurer may take "as long as it wants" to approve or deny a claim are ripe for application of equitable tolling. *Id.* at 601-602.

Of note, Justice Weaver wrote in her dissent that had she been presented with this issue in 1986 when the Court first applied judicial/equitable tolling to no-fault claims, she would have held that tolling was not appropriate. In *Devillers,* however, she concluded that, due to the passage of time, "there is no need to unsettle the law and disregard the doctrine of stare decisis." *Id.* at 620.

If the Court overrules *Devillers,* it will likely result in insurers being required to come forward with a formal, written denial of a claim before they will be permitted to rely upon the applicable period of limitations as a defense.

Incurring Attendant Care Expenses

In *Burris v Allstate Ins Co*, 480 Mich 1081; 745 NW2d 101 (2008), the majority of the Michigan Supreme Court determined that a claimant must do more than simply claim he or she received attendant care services in order for such services to be considered "incurred" under the no-fault law. Rather, the claimant must present evidence to establish that his or her care provider expected to be paid for such services. *Id.*

Characterizing the majority's analysis as unnecessarily and improperly equating "incurred" with "a legal obligation to pay," Justices Kelly, Cavanagh, and Weaver dissented from the majority opinion. According to Justice Kelly, who wrote for the minority, "the determinative question should be whether the attendant care was provided...". *Id.* at 1090. If care is provided, then attendant care expenses are incurred. *Id.*

The facts of the *Burris* case were somewhat unusual in that the insured and all of the care providers testified that there was no expectation nor promise of payment. Nevertheless, it is anticipated that if confronted with this issue again, the Court will merely require a claimant to establish that attendant care services were provided in order to receive no-fault benefits for such services.

Uninsured Motorist Provisions

Contractual Periods of Limitation

In *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), a four-member majority of the Supreme Court strictly enforced a one-year contractual limitations period set forth within the uninsured motorist provisions of an insurance contract. In doing so, it determined that judicial assessments of the "reasonableness" of a limitations period have no place in an analysis of whether the provision itself is valid. *Id.* at 461. Rather, according to the majority, unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy. In fact, only traditional defenses to the enforcement of a contract, such as duress, waiver, estoppel, fraud, or unconscionability,

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may be used to avoid enforcement of a contractual provision. *Id.* at 470, n23.

The minority (Justices Cavanagh, Kelly, and Weaver) disagreed and argued (in an opinion written by Justice Kelly) that insurers are in a position of power and control over the people purchasing their product. Careful judicial review, therefore, is imperative so that power is not abused. *Id.* at 495. Moreover, "because the overriding intent of a contract of insurance is to provide protection, the contract should not be read so as to eliminate that protection unreasonably[;] otherwise, the insurer would collect money without providing coverage." *Id.* at 496. Due in large part to an apparent lapse of time in establishing whether a person is "permanently impaired" or "seriously impaired," the minority appeared to advocate, at the very least, a three-year period of limitations. *Id.* at 499. Moreover, while the majority relied upon the discretion of the Insurance Commissioner in approving a policy containing a one-year contractual period of limitations, Justice Kelly stated that that does not rob the judiciary of its ability to consider the reasonableness of the limitations period. *Id.* at 504-505.

Like with the other decisions discussed above, it is anticipated that the Court will hearken back to earlier precedent endorsing judicial review of contractual limitations periods for reasonableness. Notably, however, any such analysis would occur in connection with older policies since the Insurance Commissioner recently prohibited insurers from providing a policy with a uninsured motorist contractual period of limitations less than three years.[6]

Third Party Liability and the Serious Impairment Standard

Kreiner v Fischer

"Serious impairment of body function," a predicate for recovery of non-economic damages in tort under Michigan's No-Fault Act, is statutorily defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). When issuing its opinion in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the usual four-member majority of the Michigan Supreme Court transformed previous application of this definition. Specifically, the majority directed that courts "engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 133. "*Any* effect" on the plaintiff's life is insufficient; rather the "course or trajectory" of a plaintiff's life must be affected. *Id.* at 131, 133.

The majority's opinion effectively gutted the ability of many plaintiffs to pursue a third-party liability claim arising out of an automobile accident. Justices Cavanagh, Kelly, and Weaver dissented from the majority opinion, and argued that the majority impermissibly imposed additional requirements on plaintiffs that the Legislature never envisioned when enacting MCL 500.3135(7).

It is generally accepted in the legal community that the continued viability of the serious impairment analysis established by *Kreiner* will be short-lived. In fact, the Court is set to revisit this issue in *McCormick v Carrier,* Supreme Court Docket No. 136738, which was argued on January 12, 2010. The Court is not expected to hold that merely *any* effect on a person's life will constitute a serious impairment of a body function. However, it is anticipated that it will expressly endorse the argument that even a short period of recuperation may be evidence of a serious impairment of a body function, and, ultimately, trial courts will liberally treat these cases as involving questions of fact ripe for resolution by a jury.

Premises Liability

Narrowing The Open and Obvious Defense in Premises Liability Claims

A possessor of land is not liable to an invitee for conditions which are open and obvious. In *Kenny v Kaatz Funeral Home*, 472 Mich 929; 697 NW2d 526 (2005), the Michigan Supreme Court emphasized that the open and obvious defense involves an assessment of whether an average user of ordinary intelligence

would discover the danger and the risk presented upon casual inspection. This is an objective standard, rather than a subjective one. *Kenny*, 264 Mich App at 119-120. Furthermore, by adopting the Court of Appeals' dissent,[7] the Supreme Court extended the open and obvious defense to black ice.

Recently, however, a trend has emerged where the Michigan appellate courts are finding that questions of fact exist as to whether black ice presents an open and obvious danger. For example, in *Slaughter v Blarney Castle Oil*, 281 Mich App 474; 760 NW2d 287 (2008), the Michigan Court of Appeals refused to determine that the presence of black ice is open and obvious as a matter of law and determined that a question of fact existed as to whether the ice in that case was open and obvious. The current Supreme Court refused to grant leave to appeal, thereby upholding the Court of Appeals' determination. *Slaughter v Blarney Castle Oil*, 483 Mich 984; 764 NW2d 270 (2009).

Beyond paving the way for questions of fact, the current Supreme Court may also adopt previously rejected exceptions to the open and obvious doctrine, thereby limiting its application. For example, plaintiffs have often attempted to use the "distracted customer" argument as an exception to the open and obvious defense.

Construction Site Accidents

Liability for the Negligence of Independent Contractors

Under traditional common law rules, landowners and general contractors generally cannot be held liable for the negligence of independent contractors and their employees. Over the past 30 years, however, courts have crafted several exceptions to this general rule of nonliability. These exceptions are: (1) the "common work area" doctrine, (2) the "retained control" doctrine, and (3) the "inherently dangerous activity" doctrine. The former majority issued several decisions interpreting and limiting the scope of these exceptions, each of which is a *potential* target for the new Court.

The Court first recognized the common work area doctrine as an exception to the common law rule of nonliability in 1974. See *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974). For a general contractor to be held liable under the most recent incarnation of this doctrine:

> a plaintiff must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.
>
> *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004).

The plaintiff must establish all four factors to hold a general contractor liable. *Id.* "Retained control" is subordinate to the common work area doctrine, and is applicable only to landowners. That is, it "is not itself an exception to the general rule of nonliability." *Id.*

For the time being, the Court's treatment of the common work area and retained control doctrines should remain relatively stable. Justice Weaver joined the former majority in all of the major decisions in this area, and it therefore should not be subject to significant revision unless she or another member of the former majority reverses himself.

Nevertheless, if a shift occurs, the most significant consequence would likely be a recognition that the common work area and retained control doctrines are separate and distinct exceptions to the general rule of nonliability, an argument Chief Justice Kelly has advanced repeatedly. *See, Ormsby, supra* (Kelly, J., dissenting).

If the Court adopts Chief Justice Kelly's interpretation on this point it would significantly alter the current regime, which views the retained control doctrine as merely extending the scope of the common work area doctrine to encompass landowners under certain circumstances. This change would significantly expand the conditions under which landowners and general contractors can be held liable for the negligence of independent contractors and their employees.

Statute of Limitations

In *Trentadue v Gorton*, 479 Mich 378; 738 NW2d 664 (2007), the former majority held that Michigan's comprehensive statutory scheme

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governing periods of limitation and related tolling provisions precluded application of the common law "discovery rule." Over vigorous dissents by Chief Justice Kelly and Justices Weaver and Cavanagh, the Court overruled a century's worth of precedent which held that a statute of limitations does "not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." *Johnson v Caldwell*, 371 Mich 368; 123 NW2d 785 (1963).

According to the former majority, the Legislature intended the Revised Judicature Act's ("RJA") treatment of statutes of limitations and tolling doctrines "to be comprehensive and conclusive." *Trentadue, supra.* As such, in accordance with the maxim that where "a statutory provision and the common law conflict, the common law must yield," the Court held that the RJA preempted application of the common law discovery rule. *Id.*

The *Trentadue* opinion garnered immediate backlash from Justices Kelly, Weaver and Cavanagh. Central to the dissenters' argument was that there is nothing in the RJA to indicate that the Legislature intended to preempt the common law discovery rule. Further, the dissenters argued that, even if the Legislature had so intended, the resulting infringement of plaintiffs' rights to "have their day in court" was constitutionally suspect and may violate their rights to due process. *Id.*

Trentadue had a profound effect on Michigan law. The practical effect of the opinion was to bar otherwise potentially meritorious claims before the plaintiff even knew he or she had a cause of action. On January 20, 2010, the Supreme Court granted leave in *Colaianni v Stuart Frankel Dev Corp, Inc.*, directing the parties to "address whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007) was correctly decided."

Conclusion

Setting aside for the moment the debates that the Michigan legal community is currently engaged in regarding the propriety of the new majority's actions and to what extent its determinations will impact the doctrine of *stare decisis*, it is abundantly clear that the developments in Michigan case law, and the bases upon which they are made, will be fascinating. Furthermore, beyond sparking additional commentary, they will dramatically affect parties on both sides of the "v" and alter the ways suits are prosecuted and defended.

About the Authors

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Endnotes

1 Ron Lederman, *The New Michigan Supreme Court and the Law*, Michigan Appellate Practice Journal, Spring 2009, Vol. 13 No. 1.

2 MCL 600.5851(1).

3 MCL 500.3145(1).

4 "If notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent [loss]...was incurred." MCL 500.3145(1).

5 Tolling of the one-year period of limitations in MCL 500.3145(1) was tolled from the time a specific claim for benefits was filed until the date on which the insurer formally (i.e., in writing) denied liability. *Id.* at 564.

6 On December 16, 2005, the Office of Financial and Insurance Services issued a "Notice and Order of Prohibition" (OFIS Order No. 05-060-M), prohibiting uninsured motorist benefits policies with limitations period of less than three years. However, the "Notice and Order" also expressly states that it does not prohibit insurers from continuing to use policies that were legally in use before December 16, 2005. On April 4, 2006, OFIS issued a similar order addressing underinsured motorist benefits, and, in May 2007, OFIS added an administrative rule voiding shortened limitation-of-action clauses in new and revised policies. Mich Admin Code, R500.2212.

7 264 Mich App 99; 689 NW2d 737 (2004)