

MEDICAL MALPRACTICE UPDATE

February 2009

What's New in the New Year?

By Maria T. Saez, Attorney

By all accounts, 2009 promises to be one of the most interesting years in Michigan jurisprudence in decades.

The latest incarnation of the Michigan Supreme Court has the potential to significantly change the tenor of the Court, and some of the Michigan Legislature's unfinished business from 2008 will undoubtedly be revisited in 2009.

Does a New Justice Signal a New Court?

For the last nine years, the Michigan Supreme Court has been dominated by a fairly conservative voting block. With the historic upset of former Chief Justice Clifford Taylor by Wayne County Circuit Court Judge Diane Hathaway in November 2008, (the first-ever ouster of a sitting chief justice of the Michigan Supreme Court) the balance of the Court has changed significantly. Exactly how Justice Hathaway's presence will affect the Court's decisions remains to be seen, but some educated guesses can be made.

The Court's majority under Justice Taylor adhered to a philosophy self-described as "judicial restraint," meaning the Court deferred to the state's Legislature and Governor on policy and avoided judicial expansion of statutory or constitutional rights. As a consequence, the Supreme Court under Taylor reversed a number of previous decisions which the Court viewed as violating these principles, including cases that had expanded the rights of some injured parties to

sue for damages. Many of the decisions of the Court under Taylor's leadership were viewed as favorable to corporations and insurance companies. With the addition of Justice Hathaway, the Court's long-time "constructionist" view of the law that requires decisions based on the law's plain language and the intent of the Legislature may be coming to an end.

Justice Hathaway has made it clear she intends to reverse the trend promulgated by the Court in recent years. She is not likely to vote with conservatives to limit lawsuits filed by injured parties, workers or environmentalists. Her appointment brings the number of Democrats on the Court to three and puts the spotlight directly on Justice Elizabeth Weaver, a Republican who has consistently disregarded party lines. Justice Weaver now becomes a potential swing vote on the Court, a change that may well lead to a reduction in pro-corporation and pro-business decisions from the Court. Of course, only time will tell how much of an impact Justice Hathaway will have on the Court's decisions but businesses, employers and insurance companies should brace themselves for a significant change in the legal climate in the years to come.

Tort Reform - HB 6277 Revisited

In 2008, State Representative Mark Meadows (D-East Lansing) sponsored HB 6277 which was aimed at changing several aspects of Michigan's tort reform laws. Generally, the

bill related to three separate areas of law affecting medical malpractice cases in Michigan: requirements for a notice of intent, qualifications of expert witnesses, and provisions regarding affidavits of merit and affidavits of meritorious defense. The Michigan Legislature ran out of time in 2008 to consider HB 6277, but it is likely that the legislation will be reintroduced in 2009. A look at what HB 6277 proposed last year provides a glimpse of what might be offered in the bill, this year.

Notice of Intent Requirements

At present, before commencing a medical malpractice action, a plaintiff must provide a 182 day notice to the health professional or health care facility via written notice of intent (NOI). Current law does not allow revisions to an insufficient NOI to “relate back” to the date of its original mailing. There are also no time limits on a defendant’s ability to object to the sufficiency of an NOI.

HB 6277 would significantly alter this process. Under the proposed law, an insufficient NOI would not necessarily condemn a plaintiff’s case. If a court determined that a NOI did not comply with the statutory requirements, the specific basis for that determination would have to be set forth by the court and the court would have to allow the plaintiff 14 days to amend the NOI. If amended, the NOI would then relate back to the date the original NOI was mailed. This 14-day window of opportunity would also apply to deficient responses to NOIs filed by health professionals or facilities. HB 6277 would also require that any objection to the form or content of a notice of intent be made in writing and filed with the court within 28 days of service of the complaint on all defendants, or it is otherwise waived. If HB 6277 (or a 2009 version) becomes law, medical malpractice defendants will waive any objections to the form or content of a notice of intent if they do not respond to the notice of intent within the

154-day time period provided by law. Currently, with the expiration of the 154-day time period, and a defendant’s failure to respond to the notice of intent, a plaintiff may simply commence their action. There are no sanctions. If HB 6277 returns this year, it would substantially impact the legal flexibility of a nonresponsive defendant.

Expert Witness Qualifications

Presently, only a licensed health care professional meeting the exact qualifications of the physician defendant may serve as an expert witness. HB 6277 would have eliminated the requirement that the expert’s qualifications match the defendant’s exactly. No longer would a proposed expert witness have to be board certified in the same specialty in which the defendant is board certified. Instead, the proposed language would have required that the expert witness be a practitioner of the same type of medicine in which the defendant is a specialist, or a practitioner of the same type of medicine that is the subject of the malpractice claim.

Affidavits of Merit and Meritorious Defense

HB 6277 proposed a significant change to MCL 600.2912d and MCL 600.2912e, which outline the requirements for affidavits of merit and meritorious defense, respectively. Under HB 6277, an opposing party would have 28 days from the date of service to object to the form or content of an affidavit of merit or meritorious defense. Any objections filed after that time period would be waived. In addition, any objection that the affiant did not meet the requirements for an expert witness would be waived if the defendant failed to identify the specialties and board certifications relevant to the case. Also, defendant physicians would no longer be able to sign an affidavit of meritorious defense on their own behalf. Perhaps the most significant proposed change would allow a party whose affidavit of merit or meritorious defense was

found to be insufficient by the Court 56 days to correct the deficiencies. This is a marked departure from current law, which provides for dismissal of a suit for a faulty affidavit of merit and similar challenges to an insufficient affidavit of meritorious defense.

HB 6277 also proposed a change to the tolling provisions provided in the law. Currently, the statute of limitations for a medical malpractice action is tolled at the time the notice of intent is served if during that period of time a claim would be barred by the statute of limitations. The statute is tolled no longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. HB 6277 would have allowed the statute of limitations to be tolled for 182 days from the date notice is given.

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Amendments to medical malpractice statutes are a common legislative topic, and even small changes to existing statutes can have far-reaching implications. HB 6277 was an ambitious attempt to address many issues of concern to those individuals and groups representing plaintiffs' interests. Although the Legislature failed to take action on HB 6277 in 2008, it is likely that the issues addressed in this bill will resurface again in 2009 in similar legislation. If all or any portion of this bill reaches Governor Granholm's desk, the impact – in conjunction with Justice Hathaway's presence – could alter the medical malpractice landscape in Michigan for years to come.

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CASE LAW UPDATE
September 2, 2008 – January 27, 2009
Edited by: Brian M. Pearson, Attorney

Court of Appeals Decisions

Martin v Ledingham, January 27, 2009
(Published Opinion - **CAUSATION**)

In appealing the trial court's granting of summary judgment to defendant, the plaintiff alleged that the hospital's nurses were negligent in their failure to report her worsening post-surgical condition to physicians and that such negligence was the proximate cause of her injuries. However, the court disagreed in concluding that there was no evidence that the plaintiff's treatment would have been changed if better reporting had occurred. The facts presented by plaintiff did not support a reasonable inference of causation, thus summary judgment was appropriate.

Pannell v Hawasli, December 23, 2008

(Unpublished Opinion – **WITNESS LISTS**)

Plaintiff filed her complaint alleging that defendants committed medical malpractice by inflicting a burn to the middle of her forehead during gall bladder surgery. Plaintiff failed to file her witness list prior to the discovery cutoff and accordingly the trial court dismissed her action. Plaintiff appealed claiming that the trial court abused its discretion by failing to apply the lesser sanction of barring plaintiff from presenting expert testimony. The Court of Appeals affirmed the dismissal as it had little tolerance with the plaintiff who filed her witness list over six months late.

Thorn v Mercy Memorial Hospital Corp, December 11, 2008 (Published Opinion - **DAMAGES**)

This wrongful death action primarily

concerned the trial court's granting of the defendants' motions to strike plaintiff's claim of economic damages for the loss of household services. Plaintiff retained an expert in the field of economics who opined that the cost to replace the services to decedent's children was \$1,450,000. The trial court granted the defendants' motion to preclude the claim for economic damages because it concluded damages for loss of service were not specifically recoverable under the law. The Court of Appeals reversed the decision of the lower court and held that a claim for loss of services must be available in a wrongful death action.

Holman v Rasak, November 18, 2008
(Published Opinion - **DISCOVERY**)

In this wrongful death action, plaintiff signed a waiver allowing the release of medical records, but she refused to provide a release for oral communications. Defendant moved for a qualified protective order to permit the ex parte communication with decedent's treating physician, but the circuit court denied the motion. The Court of Appeals reversed and held that the circuit court erroneously concluded that oral interviews could not be the subject of qualified protective orders under HIPAA. Accordingly, this decision settles the

long-standing debate between plaintiffs and the defense bar. It is now clear that a defendant may conduct an ex parte oral interview with a plaintiff's treating physician if a conforming qualified protective order is first put in place.

Decosta v Gossage, September 2, 2008
(Unpublished Opinion - **NOTICE OF INTENT**)

Plaintiff's malpractice claim arose from allegedly unnecessary cataract surgery which resulted in vision problems and subsequent surgery. The trial court barred plaintiff's claim based on the statute of limitations. Defendant did not receive adequate notice within the period of limitations because plaintiff sent her notice of intent to defendant's prior business location. Since plaintiff had been treated at the defendant's newer location on at least seven occasions (two years prior to sending the notice), she had knowledge of defendant's location. Based on this knowledge, the court held that plaintiff's notice sent to the wrong address was ineffective to toll the statute of limitations. The Court of Appeals upheld the dismissal with prejudice based on plaintiff's failure to comply with the statute of limitations.

SHRR NEWS & SUCCESS

Cindy Boer has been invited to serve on the Legal Issues Committee for a Spectrum Health Center for Disease Control grant entitled "How to Deliver Essential Health Care Services During an Influenza Pandemic".

Carol Carlson recently spoke to nursing students at Baker College on "Legal Issues for Nurses".

Gary Eller has been appointed to serve on the

State Bar District G Character and Fitness Committee by the Board of Commissioners.

Joe Engel and **Cindy Boer** obtained summary disposition on behalf of a cardiologist after establishing that the care at issue (Coumadin management) occurred more than two years before the claim was filed, and plaintiff's claims were barred by the statute of limitations.

Joe Engel and **Cindy Boer** also successfully obtained dismissal of a malpractice suit against an orthopedic surgeon because the plaintiff's attorney failed to file an Affidavit of Merit with the Complaint. The court dismissed the action with prejudice even though plaintiff's counsel argued that the mistake was due to "clerical error".

Dale Hebert has been accepted as a member of the Ann Arbor Area Chamber of Commerce's Leadership Ann Arbor program.

Brian Molde has been elected a shareholder of the firm.

Jack O'Loughlin obtained a no cause verdict on behalf of our client hospital following an 8-day jury trial in Grand Rapids, arising from allegations of delayed triage and treatment of

an infant presenting to the emergency department with meningitis.

Jack O'Loughlin obtained a no cause verdict on behalf of our client obstetrician following a two-week jury trial in Muskegon. The case involved a forceps delivery and included claims of failure to obtain informed consent and improper application of forceps.

Paul Oleniczak and **Joe Engel** will co-chair the firm's medical malpractice practice group in 2009.

Brian Pearson has joined the firm as a litigation associate and will practice in part in the area of medical malpractice defense.

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