

LEGAL EASE

Spring/Summer 2004

Watch Your Step:

Open and Obvious Doctrine Does Not Apply to Independent Statutory Violations

By Benjamin H. Hammond, Attorney

SUMMARY

Did you know? Michigan property owners are generally not liable for injuries arising from everyday, "obvious" dangers on their properties. Still, you should seek to remedy hazardous situations at your home and business. Here's why.



The "open and obvious danger" doctrine is a powerful tool in defending premises liability cases in Michigan. The doctrine generally absolves property owners from liability for open and obvious dangers on their property.

In 2001, the Michigan Supreme Court clarified the open and obvious doctrine in Lugo v Ameritech Corp, Inc. Lugo held that trial courts must determine (1) whether there was an open and obvious condition, and (2) whether the condition was unreasonably dangerous despite being open and obvious. When determining whether the condition is open and obvious, trial courts must look objectively at the nature of the condition, not the subjective belief of the plaintiff. ***A condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection.*** The court does not ask whether the plaintiff should have known the condition was hazardous, but whether a reasonable person would have foreseen the danger.

In determining whether the condition was unreasonably dangerous, the courts look to see if the condition contains any "special aspects" that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." In Lugo, the court noted two examples where special aspects of the condition would preclude application of the open and obvious doctrine: (1) "an unguarded, thirty-foot deep pit in the middle of a parking lot" and (2) standing water at the only exit of a commercial building where no alternative route is available.

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APPEALS IN THE MICHIGAN COURTS

By Jon VanderPloeg, Attorney

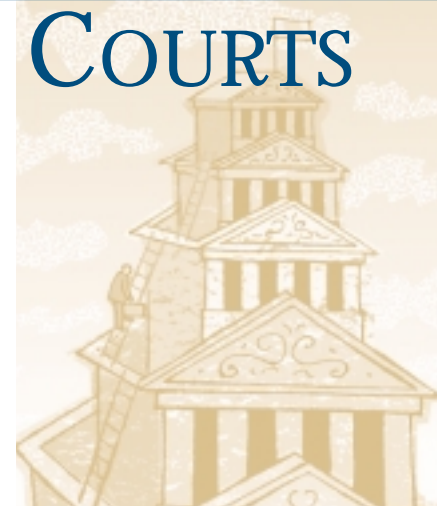
SUMMARY

Appealing a ruling or verdict is much different than trying a case. This article outlines some of the differences, and explains Smith Haughey Rice & Roegge's decision to maintain a separate Appellate Department.

Litigation proceeds through three distinct stages. The first is the discovery phase, during which the parties seek to learn what evidence the other has to support his or her position. The second phase is the trial. These first two phases of a litigated matter occur in the trial court.

The third phase of litigation – which may or may not follow, depending upon the outcome in the trial court – is appeal. When a party to the litigation is dissatisfied with the result in the lower court, he or she may appeal – first to the Michigan Court of Appeals, then, if appropriate, to the Michigan Supreme Court.

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FINDING

By Timothy D. Vandenberg, Attorney

SUMMARY

Under Michigan's no-fault insurance system, an individual's rights, remedies and defenses are not always obvious – or even based on common sense. This article highlights some of the issues you should know regarding no-fault law and coverage.

Most of us know someone who has been in a motor vehicle collision or “accident.” Over the last several decades, Michigan law has operated a “no-fault” system for handling the financial consequences of these occurrences. While the system seems simple in theory, the details are actually exceedingly complex. A basic familiarity with the system is necessary to understand the rights, remedies and defenses available under the no-fault act.

Individuals injured in an accident are

Supreme Court Hears Argumen

By William L. Henn, Attorney

SUMMARY

Michigan's Contribution Statute was enacted to promote the equitable sharing of liability between two or more plaintiffs.

But a current case may change the legal perspective on what is “equitable” – and that could have a major effect on litigation strategies.

On April 21, 2004, the Michigan Supreme Court heard oral argument in Gerling Konzern Allgemeine Versicherungs AG v Lawson, a case that should determine the scope and effect of recent tort reform legislation on Michigan's contribution statute. The Court has yet to issue a decision, and is not likely to do so for several months. Nevertheless, the case is worthy of a watchful eye – because the outcome is almost

certain to have a significant impact on litigation strategy.

Plaintiff Gerling had been a defendant in a personal injury suit. Gerling settled the suit and then brought a separate contribution action pursuant to the contribution statute, *MCL 600.2925(a)*, against defendant Lawson and various others. Put simply, Gerling contended that by settling the case for the full amount demanded by the plaintiff, it had paid more than its “fair share” of common liability, and was now entitled to litigate the extent to which the others could be held liable and “contribute” to the settlement.

The defendants moved to dismiss the claim, arguing that Gerling's right to contribution had been abolished by 1996 tort reform

legislation that eliminated in nearly all circumstances the longstanding doctrine of “joint and several” liability (allowing a plaintiff to recover all or any part of a judgment from any one defendant who could pay).

For example, with joint and several liability in effect, a plaintiff with a \$1 million judgment against two defendants – one rich and one poor – can collect his judgment in full from the rich defendant. The rich defendant then may try to recover (through a contribution action) from the poor defendant for his share. But the practical reality is that most times the rich defendant is stuck with the overpayment.

Under the tort reform system, however, each potentially responsible party – whether named

FAULT WITH NO-FAULT

frequently concerned about who is responsible to pay for the costs of medical treatment. Even if an injured individual has health insurance, the insurance often contains some type of exclusion or limitation of coverage for medical expenses arising from a motor vehicle incident.

Michigan's no-fault law sets forth a priority list detailing the medical expenses for which an automobile insurance company is responsible. Fault or freedom from fault for the collision does not affect this priority – nor does it affect which insurance company is ultimately responsible to provide coverage for related medical expenses.

Generally, your own automobile insurance is responsible for your medical expenses – even if you are a passenger in another person's motor vehicle and your own automobile is totally uninvolved. But there are several exceptions. For instance, a passenger of a motorcycle involved in a collision with a

motor vehicle will typically turn to the insurance company insuring the motor vehicle for his or her coverage for medical expenses. Oddly enough, although motorcycles are "vehicles" that have motors, no-fault law does not consider them to be "motor vehicles" under the Act.

Unfortunately, identifying a proper automobile insurance company is only one hurdle in the quest to obtain complete medical coverage. You also need to identify or discover any and all additional insurance companies that may provide additional or coordinated coverage for such medical expenses. For example, many individuals have health insurance that may or may not provide coverage for automobile related medical expenses.

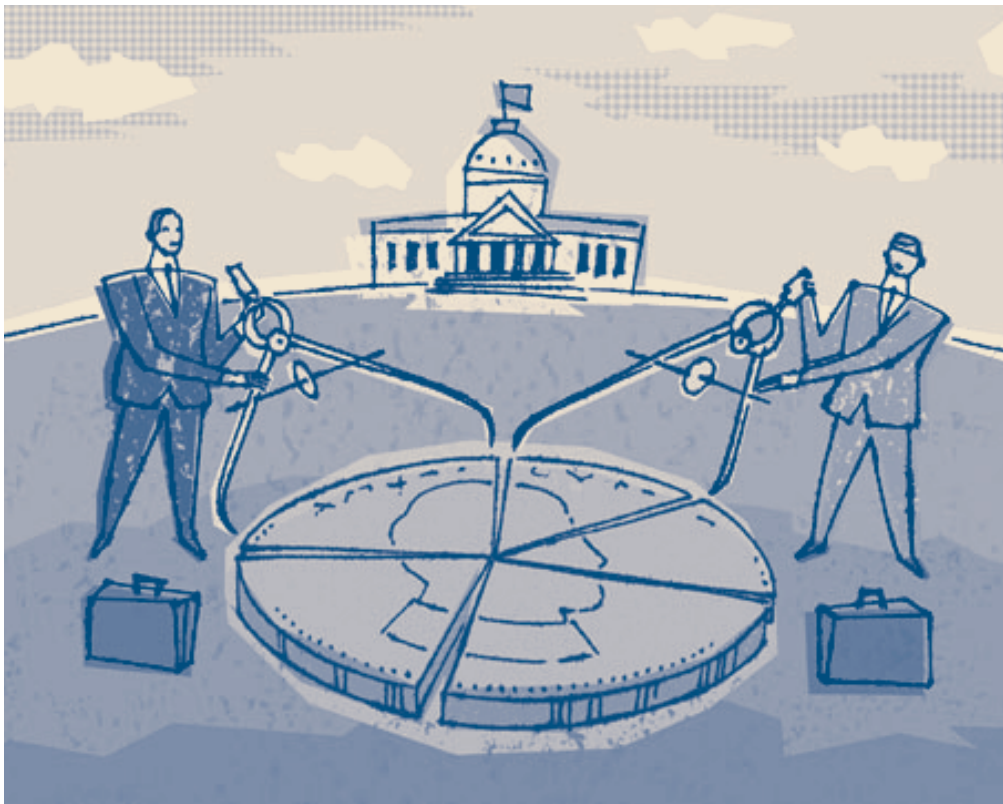
Assuming that the health insurance does provide such coverage, the issue remains: Which insurance company is primary? Often, both companies will have some type

of coordination provision that attempts to make it secondary to the other. While these two companies "point the finger" at each other, an insured is left with unpaid medical bills, upset medical providers and the ongoing frustration that comes with the realization that sometimes "dual" insurance coverage is a curse in disguise.

Once the proper insurance carrier has been identified, no-fault law provides that medical expenses must be submitted to the appropriate no-fault insurer within one year from the time it is incurred. Further, if the bill is not paid, a suit that is filed is generally limited to seeking redress for bills that are less than one year old. Thus, time may be of the essence and appropriate legal counsel should be sought sooner as opposed to later. Borrowing from the old cliché, a stitch in time may save nine.

For more information about Michigan's No-Fault laws, please contact Tim Vandenberg at (616) 458-6458.

t in Contribution Statute Case



as a defendant or not – is allocated a portion of "fault" by the jury. Any resulting judgment is then satisfied by the various parties in the same proportion. If it should happen that a defendant is unable to satisfy his portion of the judgment, then in nearly every instance the loss is shouldered by the plaintiff.

The trial court agreed with the defendants and dismissed the claim. The Court of Appeals affirmed the dismissal, concluding that for purposes of settlement, a party must assess its own "pro-rata" share of liability before arriving at the settlement amount. According to the court, because the tort reform legislation ensures that no defendant is ever exposed to more than its "fair share" of liability, a defendant's decision to pay more than its

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Introductions Are in Order



Cara L. Nieboer was admitted to the State Bar of Michigan in 2003 and is now an associate at Smith Haughey Rice & Roegge. She received her Bachelor of Science in Interpersonal

& Public Communication from Central Michigan University and her Juris Doctor, magna cum laude, from Michigan State University - DCL College of Law, where she was a King Scholar and Senior Editor of the Law Review. She practices litigation and medical malpractice in Grand Rapids. Cara can be reached via phone at 616.458.0437 and by e-mail at cnieboer@shrr.com.



Jason R. Sebolt was admitted to the State Bar of Michigan in 2003 and practices litigation and medical malpractice as an SHRR associate in Grand Rapids. He received his

undergraduate education from Eastern Michigan University and his Juris Doctor from Wayne State University Law School, where he graduated cum laude, was a Bronze Key award winner, and a member of the Moot Court team. Jason served as

an intern in the office of General Counsel for the University of Michigan Health Systems, as a law clerk with Reach, Ranney and Carpenter in Ann Arbor, and as a student attorney for the Free Legal Aid Clinic in Detroit.

In his spare time, Jason enjoys playing golf, attending professional sporting events, restoring his 1970 AAR 'Cuda, and spending time with his wife, Tara (not necessarily in that order). He can be reached via phone at 616.458.3628 and by e-mail at jsebolt@shrr.com.



Steven K. Stawski holds a Bachelor of Arts in Politics from Princeton University, a Master of Health Services Administration from the University of Michigan, and a Juris Doctor, cum laude,

from Michigan State University - DCL College of Law, where he was the executive director of Moot Court. Steve was admitted to the State Bar of Michigan in 2003 and practices business litigation as an SHRR associate in Grand Rapids.

Prior to joining SHRR, Steve served as an intern for the Hon. David McKeague of the Federal District Court for the Western

District of Michigan and as a Law Clerk for the Hon. David L. Jordon in the 54-B District Court. He also has an extensive background as a consultant to the healthcare industry.

Steve, his wife Michelle and their son Matthew live in Grand Rapids. Steve enjoys sports, camping, hiking, fishing and woodworking. He can be reached at 616.458.4394 or by e-mail at stawski@shrr.com.



Shawn C. Worden was admitted to the State Bar of Michigan in 2004. A native of Petoskey, Michigan, Shawn earned an Associate of Arts degree from North Central

Michigan College and a Bachelor of Arts in Marketing from Michigan State University. He received his Juris Doctor from the University of Maine School of Law, where he served as Production Editor for the Law Review. Shawn will practice Health Law out of SHRR's Traverse City office. He and his wife, Kendra, live in Traverse City, where Shawn enjoys playing golf and basketball, and duck hunting. Shawn can be reached at 231.486.4505 or by e-mail at sworden@shrr.com.

Statutory Violations from page 1

Recently, the open and obvious doctrine has been expanded to apply in a host of situations. In fact, the doctrine has been used to bar lawsuits brought by blind individuals who have slipped in bathroom stalls and fallen down stairs. Regardless of the fact that the plaintiffs were blind, the courts focused on the nature of the condition and held that the open and obvious doctrine barred their claims.

Cases such as these have led many to believe that almost any case can be dismissed because of the open and obvious nature of the alleged hazard. This is not true.

While the open obvious doctrine has been greatly expanded since 2001, it does not apply to independent violations of statutory duties.

Two recent cases illustrate this point. In *Jones v Enertel*, plaintiff was injured when she fell on a sidewalk. She filed suit against the City of South Lyon for failure to fulfill its statutory duty under *MCL § 691.1402(1)* of the governmental tort liability act to maintain sidewalks in reasonable repair. The Supreme Court held that "the open and obvious doctrine is inapplicable to a claim that a municipality has violated its duty to maintain a highway (including a sidewalk on a highway)."

Also, in *O'Donnell v Garasic*, plaintiff fell down a flight of stairs at an inn and was injured. Plaintiff sued alleging that the inn violated *MCL § 554.139(1)(a)* and *(b)*. *MCL § 554.139(1)* states in part that "[i]n every lease or license of residential premises, the lessor or licensor covenants: (a) That the premises and all common areas are fit for the use intended by the parties. (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable

health and safety laws of the state and of the local unit of government where the premises are located...."

The *O'Donnell* court held that, "[t]he open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in *MCL § 554.139(1)(a)* and *(b)*."

Since the powerful defense of the open and obvious doctrine is invalidated where there is a violation of an independent statutory duty, it is imperative that entities susceptible to premises liability actions reevaluate the condition of the areas under their control and ensure that they are in compliance with all applicable statutory duties.

BUSINESS AND CORPORATE LITIGATION



Aileen Leipprandt obtained summary disposition in two cases where property owners alleged that township actions/ordinances resulted in an unconstitutional taking of their property.

In one case, the Zoning Board of Appeals granted a variance and an adjoining property owner alleged that the variance resulted in a taking. In the other case,



for which **Craig Noland** drafted the Motion for Summary Disposition and Aileen argued the motion, the court rejected the argument that the township's litter and

debris ordinance was unconstitutional, and that the enforcement of same resulted in a taking.

PERSONAL LITIGATION



Jay Hardin and **Tom McCarthy** effectively used pre-litigation facilitative

mediation to obtain a significant settlement for clients in a wrongful death case – without filing a lawsuit, and thus preserving the confidentiality expectations of our clients and opponents.

BUSINESS AND PROPERTY LAW



Robert Parker and **Heather Blanton-Dykstra** assisted a new radio

station, WLJN-AM, with the purchase of property on which three radio towers and a transmitter building reside. They also assisted in the gifting of the towers and transmitters from Midwestern Broadcasting Company to WLJN-AM.

GOVERNMENTAL LAW



Lance Mather and **Craig Noland** obtained a favorable judgment and subsequent

appellate decision for a township in a case involving a drowning off a pier in Lake Michigan. Craig obtained summary disposition in the trial court when the court dismissed the plaintiff-estate's claims that the township was obligated to maintain life ring buoys along the pier under a third-party beneficiary theory and that governmental immunity did not apply to bar the estate's claim. Lance later convinced the Court of Appeals to affirm the summary dismissal of the estate's complaint.

LEGAL MALPRACTICE



Mark Bickel obtained summary disposition in a legal malpractice case in which it was alleged that the defendant attorney had failed to properly handle an underlying

commercial dispute. The judge found that there were no facts to support the claim and granted summary disposition and awarded the defendant attorney fees and costs.

MEDICAL MALPRACTICE LAW



Paul Oleniczak and **Brian Molde** obtained summary disposition

of an action based on the plaintiff's failure to properly notarize an affidavit of merit signed by plaintiff's standard of care expert. For the case, the plaintiff retained an expert from Maryland to sign the

affidavit. Based on the expert's testimony that he was not in Michigan on the date the affidavit was notarized, a motion was filed for summary disposition – arguing that the affidavit could not have been properly notarized. Because the statute of limitations had long since expired, plaintiff's wrongful death claim was dismissed with prejudice.

TRANSPORTATION AND NO-FAULT



Tom TerMaat and **Jason Sebolt** recently secured summary disposition

for an insurance company client in a No-Fault action where the plaintiff argued that her claim for \$100,000 in property damage should be compensated pursuant to MCL 500.3123. Tom and Jason pointed out that section 3123 only allows for property protection benefits if a vehicle is damaged while parked. Since the plaintiff's vehicle was not parked when damaged, the judge agreed with Tom and Jason's position and dismissed plaintiff's cause of action.



Mark Bickel and **Rob Tubbs** recently received a "no-cause" verdict in

Saginaw. Plaintiff originally claimed to have suffered a closed head injury, cervical disk herniation, lumbar disk herniation, and TMJ as a result of a motor vehicle rear end collision and at trial requested a verdict in excess of \$1 million. Although the defendant admitted liability, the jury found that the plaintiff was not injured in the accident.

Have You Heard The News?

Elizabeth Arenas, Karl Butterer, Nicole Dykstra, Pat Geary, Cathy Greer, Bill Jack, Doug Powe, Francine Robinson, Jan Rowland and Tom TerMaat attended a two-day Community Institutes for Healing Racism seminar. Their attendance was sponsored by Smith Haughey Rice & Roegge.



George Bearup moderated a discussion on "Drafting Irrevocable Life Insurance Trusts" for the Probate and Estate Planning Section of the State Bar of Michigan at its Annual Meeting in May.

George was selected for the 12th year for inclusion in the "Best Lawyers in America" publication. He was also elected as Vice President of the Munson Healthcare Foundation Board.



Chip Behler recently joined the Diversity Committee of the Grand Rapids Bar Association. He also recently assumed the presidency of the State Board of Law Examiners. Chip was also

selected for inclusion in the "Best Lawyers in America."



Chuck Judson and Tom McCarthy recently completed

Advanced Mediation skills training conducted by the Alternative Dispute Resolution Institute. Tom and Chuck maintain active practices throughout western Michigan involving facilitation and mediation of complex litigation matters.



Heather Blanton-Dykstra was appointed to the Board of Crooked Tree Girl Scout Council.



Joe Engel was reappointed to the State Bar District C Character and Fitness Committee. He has served on the committee since 2001.



Paul Jarboe, a Traverse City attorney and SHRR shareholder, has announced his candidacy for the 86th District Court. Paul has been in practice for 21 years.



Aileen Leipprandt was appointed to the board for the Associated Builders and Contractors, West Michigan Chapter (ABC.)



Kevin Lesperance was elected to the General Assembly of the Michigan State Bar Association.



Adam Lett and Robert Parker presented a seminar on Medicaid Planning

techniques to social workers at Munson Medical Center in Traverse City. The session focused on planning for asset protection and wealth preservation, and ensuring high quality care for a family member who requires long-term care in a nursing home.



Appeals from page 1

While most people have an understanding of the appellate process from watching films or television shows, script writers often take license to modify appellate procedure for the sake of good storytelling. Sam Waterston's character on "Law and Order" might take issue with the judge's pre-trial ruling on some matter. He vows to

appeal. In the very next scene, apparently on the following day, the lawyers stand in front of the justices of New York's highest court arguing their cause. That compression of procedural time would be impossible in Michigan. (Doubtless, it never happens in the State of New York either.) Generally, appeals in Michigan take years.

An appeal is not a re-trial of the case. The party making the appeal, the "appellant", contends that the trial court committed one or several legal errors that have caused an improper result. The appellant will ask the appellate court to reverse the judgment of the trial court and enter a judgment in his or her favor for a new trial, depending on the nature of the claimed error.

The other party, the "appellee," will contend otherwise – namely, that the lower court judge followed Michigan jurisprudence to the letter and made no mistakes at all.

The appeal is argued on the lower court record alone. Except in extraordinary circumstances, the appellate court will not consider any evidence that was not introduced in the lower court at the time of trial.

Lawyer advocacy in the appellate courts is presented in two forms: written briefs and oral argument. In briefing, the appellant's lawyer sets forth the issues and discusses the factual record relating to those issues. The brief then presents legal argument as to why the lower court judge was wrong. The brief offers statutes, court rules and prior case law precedent to support the appellant's positions. The appellee responds with a similarly organized brief urging the appellate court to conclude that appellant's position is wrong.

When briefing is completed, the appellate court examines the positions of the parties and eventually schedules oral argument. The time between briefing and oral argument is generally six to 18 months. Over the last two years, the



Tom McCarthy coached the Forest Hills Northern High School mock trial team to a second-place finish in the state tournament held in Lansing, Michigan on March 20.

Yvette Moody, an SHRR summer associate, earned a scholarship from the Floyd Skinner Bar Association.



Al and Brenda Quick were visiting professors of law at the Barry Law

School in Orlando for the 2004 spring semester.



Randy Velzen was re-elected to serve his eighth term on the Camp Roger Board of Directors. He was also elected to the board of the Family Law Section of the Grand Rapids Bar Association. And he was elected for a second term to the Board of Directors

for National Easter Seals. (He will concurrently serve his 22nd year on the Board of Directors for the Easter Seals of Michigan.)



Rob Tubbs and **Joe Engel**, attorneys, and **Francine Robinson**, secretary,

earned our congratulations (and awe) for successfully completing the Grand Rapids River Bank Run 25K road race.



Jeff Wonacott spoke at the Northwestern Mutual Life Insurance Company Advanced Estate Planning Techniques conference on May 20. He focused on "Advanced Directives and End-of-Life Decision-making" issues.

Smith Haughey Rice & Roegge was selected by the Michigan Business and Professional Association as one of "West Michigan's 101 Best and Brightest Companies to Work For." It is the second year in a row that SHRR has received this

honor, given to companies that excel in human resource practices and setting a standard of excellence.

For many years, SHRR has sponsored and participated in quarterly blood drives through the Michigan Community Blood



Center. According to event organizer and SHRR CIO, **Julie Moore**, the first two blood drives of 2004 yielded 61 pints of blood – providing valuable life-saving resources to the community.

SHRR welcomes **Electro-Optics Technology** (EOT) to its growing list of high-tech clients. SHRR was hired to provide general corporate legal counsel to the company. EOT principally manufactures Faraday isolators and photodetectors for its customers who are involved in the manufacturing of laser systems for materials processors, R&D and defense applications.

Court of Appeals has pursued a delay reduction program, and the court is turning out decisions at a more rapid pace than in the past.

Cases in the Michigan Court of Appeals are heard by a three-judge panel chosen at random from a current roster of 28. The panel will often ask many questions during oral argument, probing the strengths and weaknesses of each side's arguments. The Court never announces a decision at the argument. Rather, a written opinion arrives by mail sometime within the weeks or months that follow.

Litigants in Michigan may ask the Court of Appeals to consider hearing an appeal at anytime, but only have a right to appeal post-trial. This Court is considered the intermediate appellate court in Michigan. It has the task of correcting errors in a particular case. To the extent that it decides a legal issue of first impression, and chooses

to publish its decision, the decision is new law that will guide future cases after the completion of a post-trial.

The final word on the law in Michigan, however, comes from the Michigan Supreme Court. Litigants have no right to appeal to the Supreme Court. The Michigan Supreme Court generally does not concern itself with correcting legal errors impacting only a particular case. Rather, the Supreme Court grants Leave to Appeal where it sees the legal issue as one of significance to the State's jurisprudence – one that will guide future litigants in the prosecution of their cases. The Michigan Supreme Court grants Leave to Appeal in a rather small percentage of cases.

Smith Haughey Rice & Roegge understands that appellate advocacy is different in many ways from trial court advocacy. Thus, we have an Appellate Department of several attorneys who specialize in handling

appeals. In fact, we regularly handle appeals for other lawyers and law firms. Our appellate attorneys have developed a familiarity over the years with the Judges of the Court of Appeals and the Justices of the Supreme Court. They have made a study of what those courts expect and appreciate in briefing and oral argument.

These courts are "all business". Our appellate lawyers are in the business of providing our clients with services necessary to successfully advocate during the appellate process. Appellate courts deal with legal issues, and though they may be influenced by the equities or sympathies in a case, they want appellate counsel to move directly to the point on the legal issues at stake.

For more information about appeals or our appellate department, please contact Jon VanderPloeg at 616.458.1365, or any of the other department members.

Contribution Statute from page 3

share must be deemed voluntary, or at least attributable to its own erroneous assessment of fault, and cannot support a later contribution action.

At oral argument in the Supreme Court, plaintiff Gerling argued that the tort reform legislation could not apply to the case because no allocation of fault had ever been made by the jury. Without an allocation, Gerling argued that it was in fact exposed to an increased percentage of liability.

Justices Young and Markman posed several questions about the tort reform statute's definition of "pro rata." The Justices seemed in agreement that the term "pro rata" historically represented a fixed percentage of liability divided equally among tortfeasors (those who commit torts).

Thus, if there are four defendants found liable,

they would each be responsible for 25% of the damages. However, as pointed out by Justice Markman, for purposes of the tort reform statute, "pro rata" appears to mean "relative fault" in any proportion determined by the jury.

Justice Taylor asked questions regarding the disincentive to settle created by the lower courts' construction of the statute. According to the Justice, a hard-nosed defendant has the ability to prevent settlement, even if that defendant is expected to ultimately be responsible for only a small percentage of the damages. In such a circumstance, a "deep-pockets" defendant wishing to avoid trial would be forced to voluntarily pay the recalcitrant defendant's share of liability.

Justice Corrigan appeared to echo these concerns. At the conclusion of argument, Justice Taylor remarked that perhaps an

amendment to the statute would be required if the Legislature wished to eliminate the impediment to settlement in cases involving uncooperative defendants.

CONCLUSION

It is, of course, impossible to predict how the Court will decide the case. Nonetheless, oral argument can provide a unique glimpse into the way that the Justices think about the issues, and can be a useful tool for gaining understanding about the "big-picture" aspects that the Court must confront.

If you would like additional information on the oral argument, or would like to discuss how this case may affect litigation strategy, please contact William Henn at (616) 458-5456.

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This newsletter is provided for information purposes and should not be acted upon without professional advice.

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Printed on recycled paper.

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