

LEGAL EASE

Winter 2004

Hiring From The Competition: Are You Asking For Trouble?

By Rachel Brochert Roe, Attorney

SUMMARY

Legal agreements can complicate the process of hiring an employee from a competing firm. Here's what you need to know to keep yourself legally protected.

Confidentiality Agreements. Non-Solicitation Agreements. Non-Competition Agreements.

It has become increasingly common for businesses and professions to use these contracts in an effort to prevent employees from joining the competition. But are businesses risking a lawsuit when they consider hiring a hairstylist, lawyer, architect, consultant, or salesperson from a competing firm? There is no easy answer to this question. Yet it is possible to hire from the competition without creating legal issues.

If businesses are contemplating such a hire, it would be wise to seek professional counsel prior to the transaction. An attorney is the best resource for identifying and sidestepping potential legal pitfalls. However, there are steps businesses can take to help minimize the risk of litigation.

Always ask to see any contracts or agreements the employee has with his or her current employer. In today's business world, most employment arrangements are "at will," meaning that the employee or the employer can terminate the relationship at any time, no strings attached.

However, many employment contracts, especially for professionals or sales employees, have strings attached in the form of confidentiality agreements,

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Good Fences Make Good Neighbors? Maybe Not.

By Aileen M. Leipprandt, Attorney

SUMMARY

Do you know where your property begins and ends? Are you sure? Here's what can happen if you rely on assumptions rather than property surveys.

Long-time neighbors Al and Ed have always gotten along swimmingly. One day, however, Ed discovers that the fence separating their property is actually eight feet onto his property. The neighborly relationship sours. Ed now claims legal title to the eight feet and intends to move the fence to the property line. Al's peonies and the brick walkway he laboriously laid several years ago will be on "Ed's side" of the fence. Al files a lawsuit to "quiet title" and to settle the property line. What rights are implicated in this all-too common situation?

The Doctrine of Adverse Possession

Generally, two legal doctrines exist whereby one can obtain title to a neighbor's property. The first, Adverse Possession, requires that one occupies or possesses the neighboring property and that such possession be "actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted" for 15 years. The possession must be without permission of the owner and inconsistent with the right of the owner.

The doctrine of adverse possession is strictly construed, and the facts in support of such

claim must be shown by "clear and cogent" proof. The type of conduct sufficient to establish adverse possession is very fact-specific and largely dependent upon the character of the property – such as whether the property is undeveloped land or intensely inhabited. This conduct may include maintaining and installing improvements such as trees, gardens, a patio, or a parking area. Casually occupying property through occasional mowing without objection by a neighbor is generally not enough to claim adverse possession.

The Doctrine of Acquiescence

The second doctrine, Acquiescence, is a very different concept. It provides that, where adjoining property owners agree to an identifiable boundary line – such as a driveway, tree line or fence line – for at least 15 years, that boundary line, even if incorrect, becomes the actual boundary line.

Many acquiescence claims involve some sort of mistaken belief about the property line and a friendly or peaceful agreement between neighbors as to that line. Unlike adverse possession,

a claim of acquiescence requires proof by a preponderance of the evidence, a less stringent standard than required to obtain title by adverse possession.

An example of acquiescence is shown in *Sackett v Atyeo* (Mich App. 1996). There, Sackett and White, adjoining property owners, peacefully shared a driveway and mistakenly treated the center of the driveway as their common boundary.

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Property Tax Appeals: Following Procedures

By Ann-Mary Petroskey, Attorney

SUMMARY

Is your property tax assessment unfair? Businesses and individuals can appeal – but the appeals procedure is complex. Here's how to navigate your way through the process

Businesses and homeowners throughout the state of Michigan know property ownership comes with the added cost of property taxes. Many taxpayers do not fully consider these tax costs when making the decision to purchase property. Furthermore, the procedure for protesting tax assessments is unfamiliar to most. By following the proper procedures – set forth in the Michigan General Property Tax Act and the Michigan Tax Tribunal Act – taxpayers can preserve their rights to protest assessments and avoid dismissal of their appeal before it is even considered by the courts.

STEP 1 The Local Board of Review

The first step in the appeal process is also the most important. After receiving the notice of assessment from the local taxing authority, the taxpayer must protest the assessment to the local Board of Review.

The local Board of Review is responsible for approving tax assessment rolls and hearing protests of taxpayers on assessments, classifications of property, and exemptions for qualified agricultural property. Protests are usually heard in early March of each year, but the dates for each local jurisdiction may vary and will be included in the actual notice.

If a taxpayer is not satisfied with the decision at the Board of Review, he or she must submit a written letter appealing the decision to the Michigan Tax Tribunal. The letter must be postmarked by first-class mail or delivered in person no later than June 30 of that tax year. A facsimile is insufficient to invoke the Tribunal's jurisdiction!

While uncommon, there are exceptions that may allow the Tax Tribunal to hear a case even though the assessment was not protested to the local Board of Review. These exceptions include, but are not limited to:

- a failure to receive notice of an assessment change in time to protest to the Board of Review;
- the revision of the property's assessed or taxable values by a July or December Board of Review;
- a clerical error or mutual mistake made by the assessing officer and the taxpayer resulting in an unlawfully excessive assessment.

These are exceptions, however, and the general rule should be to protest the assessment before the local Board of Review.

STEP 2 Appeal to the Michigan Tax Tribunal – How to Get Your Case Heard

The Michigan Tax Tribunal is a quasi-judicial administrative agency (i.e., tax court) in the Michigan Department of Consumer and Industry Services. The Tax Tribunal hears assessment appeals relative to both property and non-property tax matters. Like a court, the Tax Tribunal conducts hearings and renders written decisions based on the evidence submitted by all parties to an appeal.

The Tribunal is divided into two divisions – the Entire Tribunal and the Small Claims Division. All property appeals may be filed in the Entire Tribunal, but only certain property appeals may be filed in the Tribunal's Small Claims Division. These appeals exclusively involve homestead or other residential or agricultural real property; and any appeal involving commercial or industrial real or personal property if the state equalized value in contention is not more than \$100,000.

After receipt of the initial appeal letter, the Tribunal processes the letter and sends the taxpayer a petition form. The petition form must be completed and returned to the Tribunal on or before the date specified on the form. Once the petition form has been returned to the Tribunal, an answer form is sent along

ON THE WATERFRONT...

By Robert W. Parker, Attorney

SUMMARY

As available waterfront property becomes more and more scarce, legal issues inevitably arise between those who have and those who want. Here are some recent cases impacting property owner's rights.

With 3,251 miles of Great Lakes shoreline, 11,037 inland lakes, and an estimated 215,958 vacation homes, it's no wonder Michigan is widely known as the "Third Coast." Our state is fast becoming the epicenter of the last dash to "get on the water." As people in Michigan buy up property and elbow each other for access to lakes, laws relating to water rights (riparian and littoral rights) and land use (zoning and restrictive covenants) have taken center stage. Evidence of this can be found in the types of cases emerging from the trial and appellate courts.

s Can Preserve Your Rights

with a copy of the petition to the assessor of the local unit of government. The answer form must also be completed and returned to the Tribunal on or before the date specified on that form. The case is then ready to be scheduled for a hearing.

Entire Tribunal Hearings

The Entire Tribunal utilizes a formal hearing process to resolve the more complicated appeals filed with the Tribunal. There is a formal record made of the hearing and attorneys typically represent the parties. Entire Tribunal hearings can range in length from one day to two months or more. Most are conducted over a five-day period. Entire Tribunal hearings are held in Lansing and the presiding judge is either a Tribunal member or a hearing officer (i.e., an administrative law judge).

Small Claims Hearings

Unlike the Entire Tribunal, the Tribunal's Small Claims Division utilizes an informal hearing process to resolve the majority of all appeals filed with the Tribunal. There is no formal record maintained of Small Claims hearings and the parties typically represent themselves. In addition, Small Claims hearings are held in the county in which the property is located or in an adjoining county. The presiding judge is a hearing referee, an administrative law judge, or a Tribunal member.

The Tribunal typically sends both the petitioner (the taxpayer) and the respondent (the local unit of government) a notice indicating the date, time, and location of the hearing at least 28 days prior to the scheduled date. If a petitioner or respondent cannot attend the hearing on the scheduled date, they must contact the Tribunal in writing to request an adjournment of the hearing.

Adjournments are granted upon a showing of "good cause" if the request for adjournment is submitted more than 14 days before the date of the scheduled hearing. If the request is submitted 14 days or less before the date of the scheduled hearing, adjournments are granted only upon a showing of extenuating circumstances.

If a petitioner or respondent cannot attend the hearing on the scheduled date, but does not want the hearing adjourned, they must contact the Tribunal in writing prior to the date of the scheduled hearing to request the Tribunal hear the case "on the file." Then the Tribunal will conduct the hearing to take the testimony of the opposing party and render a decision based on that testimony and all documentary evidence and written statements submitted by both parties.

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Higgins Lake Community Center

Mr. and Mrs. Soupal and Mr. and Mrs. Hay had it made. Both couples owned property on Higgins Lake in Gerrish Township. Between their two properties was a single-family cabin, which was used as a seasonal retreat. It was an idyllic spot, with sun sparkling off the water, birds chirping in the trees, and the drone of an outboard motor in the distance.

And then the Soupals' and Hays' peaceful retreat was invaded. The lot between the two couples was bought by an outfit known as Shady View Inc. – a legal entity comprised of 19 property owners within the subdivision who did not have frontage on the lake. Shady View turned the cabin into a "community center" and applied to the DEQ for a permit to install a 160-foot-dock with 20 boat slips.

What Shady View was attempting to do is described as "funneling" or "key-holing." The lot was in an area zoned residential. The question before the Michigan Supreme Court: Did Shady View's plans comply with residential use requirements in the Gerrish Township zoning ordinance? The answer is no, according to Soupal v Shady View, Inc., Michigan Supreme Court No 123698, 12/11/03.

Shady View was enjoined from constructing a dock and operating a marina.

Torch Lake Virtual Motel

Several residents on Torch Lake in Antrim County found their Eden similarly compromised. A couple bought two lots on Torch Lake. They erected a dormitory-type structure of six-plus bedrooms that housed, anywhere from 20 to 30 vacationers on a weekly basis during the summer. The property was described by plaintiff's counsel in the ensuing lawsuit as a "virtual Motel 8."

The question: Is this a single-family residential use as required by the township's zoning ordinance and a "private residence" as required by the deed restrictions? The case is currently before the Michigan Court of Appeals. Torch Lake Protection Alliance et al v. Ackermann, Antrim County Circuit Court No. 02-7840.

Pine Lake Easements

In the mid 1970's, the C.A. Muer Corporation subdivided property it owned in Bloomfield Township into six residential lots. Lots A to B fronted on Pine Lake. Lots B through F (the back lots) had no frontage, but were granted a 66-foot easement over one

of the lakefront lots for "access to and use of the riparian rights to Pine Lake."

In 1988, one of the back lot owners proposed to build a "boat dock" within the easement to moor his boat. The lakefront property owner contended that the easement did not authorize the erection of a dock. The question: Does the term "riparian rights" include the right to put up a dock? Can one assign their riparian rights to another property owner? Little v. Kin, 468 Mich 699 (2003). The Michigan Supreme Court has remanded this case to the trial court for further proceedings.

While other real estate values have remained somewhat flat over the past two to three years, water frontage continues to appreciate at rates exceeding the rate of inflation. As the value of waterfront property and the rights associated with that property continue to escalate, so does the need for obtaining sound legal advice when acquiring, selling, or developing waterfront property. By partaking in an early consultation with an attorney many of the above situations might have been avoided.

Introductions Are in Order



Michael J. Roberts has practiced law in the Grand Rapids area for more than 30 years. He now brings his valued experience to SHRR as a shareholder.

Mike's area of specialty is the representation of design professionals – including architects, structural and civil engineers, environmental and geotechnical consultants, and landscape architects, as well as contractors and suppliers of products used in the construction of both commercial and residential structures.

Mike served in the United States Air Force from 1962-1966 prior to completing his Associate of Science degree at Schoolcraft College in 1967. He completed his Bachelor of Arts degree at the University of Michigan in 1969 and his Juris Doctorate at the University of Michigan in 1972.

Mike served as a state court mediator, facilitator, and federal arbitrator. He has also lectured on product liability, tort reform, and design professional liability. Mike can be reached at 616.458.1212 or by e-mail at mroberts@shrr.com.

Where to find us in Ann Arbor

The boxes are packed and the moving trucks are on their way. By February, our Ann Arbor office will be up and running in a new space just blocks from the former location. The new location is **213 S. Ashley, Ste. 400**. The new fax number is **734.332.0971**. The telephone numbers will remain the same. Attorneys Ed Stein, Veronica Marsich, Ashley Taylor, and Sharon Kelly welcome everyone to stop by and see the new space which is located in a newly renovated historical building in Downtown Ann Arbor.

Have You Heard The News?



T.J. Ackert presented a seminar titled "Limited Liability Companies in Michigan" to the National Business Institute on January 21. The seminar addressed the formation, governance, operation, and tax issues relating to a Limited Liability Company.



Chip Behler and Aileen Leipprandt will speak at a February 26 seminar for Berends

Hendricks & Stuit Insurance Co. The topic: Transferring the risk of liability and financial exposure on construction projects.



Richard Kraus prepared a publication entitled "Health Professional Licensing in Michigan" that provides an extensive summary of the law and practice relating to investigations and complaints against physicians, dentists, psychologists, nurses and other health care professionals. Copies are available upon request.

Richard was also certified as a facilitative mediator for the Ingham County Circuit Court. He has been a member of the voluntary facilitative mediation panel for the United States District Court for the Western District of Michigan since its inception.



Adam Lett has been invited to make a presentation to the Land Trust Alliance Midwest Conference in Madison, Wisconsin. He'll speak on legal and tax considerations in conservation easement transactions.



Tom McCarthy was recently inducted as a Fellow into the American College of Trial Lawyers. Fellowship in the College is extended only to those experienced trial lawyers who have demonstrated exceptional skill as advocates and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, and civility.



Larry Mulvihill was re-elected to the Ferrysburg City Council.



Craig Noland recently completed an update of the "Michigan Vehicular Liability Claims Outline." This comprehensive outline is an informative and valuable tool to those who deal with auto liability issues, including attorneys, members of the transportation industry, claims adjusters, risk managers, insurance agents, etc. The manual is available upon request.



Jack Oostema was recently selected to represent the State Bar of Michigan in three challenges to the Bar's admission procedures and to the Character and Fitness Committee specifically.



Ann-Mary Petroskey was named the chair of the Ingham County Bar Association's Business and Corporate Law Section.



Rachel Brochert Roe presented a seminar on "Preventing Workplace Violence" for the entire staff of Grand Traverse County in January.



Tom TerMaat recently completed an update of the "First-Party No-Fault Manual." This manual provides a road map for handling and resolving issues relating to PIP and property protection benefits. It is the companion piece to the "Michigan Vehicular Liability Claims Outline." This manual is also available upon request.



Randall Velzen was elected to the board of the family law section of the Grand Rapids Bar Association.

non-solicitation agreements, or non-competition agreements. Review of the employee's current employment contract will identify the exact nature of the arrangement he or she has with their current employer, and what limitations may exist on his or her professional activities when changing employers.

There are three basic types of contracts casually referred to as "non-competes" dealing with these issues.

Confidentiality Agreements

Confidentiality agreements, which may also be found as policies in the employee's handbook, identify certain company information as "confidential" and prohibit the employee from using that confidential information after termination of employment.

Most of the time, confidentiality agreements identify client lists, pricing information, marketing know how, and other specialized business techniques as confidential. This means that if the employee goes to work for the competitor, the employee cannot continue to use the methodologies learned from the previous employer.

Most often, the information employers are most interested in when they hire from the competition is the client contact information. Courts typically frown upon the practice of taking client lists or other information collected and maintained by the competitor. At the same time, courts understand that many of the client contacts made by salespeople or other professionals are made at the personal level, and an employee cannot be forced to alter all of their personal relationships when they change employers.

Thus, if an employee can recreate his or her client list by memory, by reference to a public record such as a phone book, or by looking through a personal collection of business cards, then the courts typically will not prohibit that type of practice, even in the face of a confidentiality agreement.

Non-Competition Agreements

Non-competition agreements typically prohibit an employee from working in the same industry within a certain geographic area for a certain

amount of time – sometimes for up to three years. Non-competition agreements are enforceable in Michigan *if they are reasonable*. The trick is to closely analyze the non-competition agreement to see if it is unreasonable and therefore unenforceable in Michigan.

Even if the agreement is deemed reasonable, employers may still be able to hire said employee *and* fulfill the terms of the agreement. For example, the employee could be assigned for the duration of the non-compete to an outlying area that is outside the geographic scope of the agreement. Or, if it's a salesperson being hired, he or she may be permitted to work in a non-sales capacity for the duration of the non-compete, and then phase into a sales position upon expiration of the non-competition agreement.

Non-Solicitation Agreements

Non-solicitation agreements are agreements that do not prohibit an employee from competing, but do prohibit the employee from soliciting the clients away from his or her former employer. As with non-competition and confidentiality agreements, courts generally uphold these types of agreements, reasoning that they are entered into between sophisticated employees and their employers, and the employees signing these agreements typically have some bargaining power.

The key to avoiding liability when hiring an employee subject to a non-solicitation agreement is to avoid making the first contact with the client. In other words, a court will generally deem it to be a violation of a non-solicitation agreement if the new hire contacts a customer from a former employer to tell the customer that he or she has moved to the competition. It's a different story if the move is announced in a passive manner – such as through an announcement in a business publication – and the client then takes the initiative to contact the new hire. Courts will generally tolerate this kind of activity because the client was not "solicited" away by the employee.

No Agreements?

What if the employee doesn't have a written agreement, or the written agreement does not

contain a confidentiality, non-competition, or non-solicitation provision? Can employers rest assured that the former employer will not sue them?

Unfortunately, the answer to this question is, "no." Several cases in Michigan have recognized that sometimes – due to the employee's position with the competition or the manner in which certain information was treated by the competition – the competition has an expectation that certain knowledge will not be plundered by an employee if he or she changes jobs.

Thus, even if there is no outright prohibition on competing, a new employer should proceed with caution when hiring from the competition.

When the new employee had projects in progress with the competition, and the new employer would like to obtain these projects, the decision to switch must be made solely by the project's client. Businesses should also keep in mind that there may be a written contact between the competition and the competition's client – and a contractual obligation may prevent the client from switching firms mid-project. Also, in this situation, the competition may make a claim that the new employer tortuously interfered with one of its contracts.

Similarly, with the competition's file materials, the general rule of thumb is that file materials may be taken in the absence of a non-competition agreement *if those items are also available through other sources*. For instance, if the documents in the file are maintained by a public governmental agency and could be obtained in that manner, then the documents likely could be taken or copied from the employee's files without recourse. However, if the item is proprietary – such as blueprints, etc. – it would be better to obtain the items directly from the employee's client if the client decides to follow the employee to his or her new firm.

The Bottom Line

Employers should seek the advice of a professional who is well versed in employment law *before* negotiating with an employee from the competition. This will ensure that businesses don't inadvertently increase their chance of costly and time-consuming litigation.

A survey confirmed that the driveway actually was located entirely on White's property. After White passed away, the new neighbor erected a fence around the property and instructed Sackett to discontinue using the driveway. Sackett sued to quiet title. Given there was no hostile act or dispute, the doctrine of adverse possession did not apply.

Instead, the court determined, based upon acquiescence, that the legal boundary line between the properties was the center of the driveway.

Those who are uncertain as to the boundaries of their property, should have it surveyed. If a neighbor is encroaching on their property, via a fence or otherwise,

they should take affirmative steps to communicate their ownership in the property. Otherwise, the right to assert the true boundary may be lost over the passage of time.

raising the bar: Recent SHRR Achievements

BUSINESS AND CORPORATE LITIGATION



Mark Gilchrist recently argued in Washtenaw County Circuit Court that the complicated case of *Laster vs. Oakridge Apartments* was deserving of dismissal due to the fact that the plaintiff was a licensee (not an invitee) and therefore our client owed no duty to the plaintiff. The court granted the motion and dismissed the action with prejudice.



Ben Hammond drafted and argued a motion for summary disposition with a supporting brief based on the three-year statute of limitation found in MCLA600.5805. Plaintiff argued that the six-year statute applicable to property damage resulting from the improvement to real property found at MCLA600.5839(1) applied. The Court agreed with Ben on the basis that our client's work did not fit the definition of an improvement to real property as that term was used in the statute.



Aileen Leipprandt and Jeff VanderLaan successfully prepared and argued a motion for summary disposition on behalf of a regional retailer resulting in seven out of eight claims being dismissed. Although one count remains on contract, the case has been significantly narrowed and approximately \$800,000 of damage claims has been eliminated.



BUSINESS AND PROPERTY LAW



T. J. Ackert counseled and advised a new Internet business in the formation of the business, financing agreements, negotiation of the website development and hosting agreements, and structuring the agreements for operation and sales on the site.

T. J. also served as Michigan counsel to an international plastics manufacturer in the successful reorganization of the company. The reorganization provided the manufacturer with the ability to merge with other entities, restructure its financing, and improve its competitive market position.



Aileen Leipprandt and T.J. Ackert have assisted a bank in finalizing the purchase of

West Michigan real estate as part of the bank's strategic plan to add multiple branch offices within the region.



Charles Judson and Adam Lett served as local counsel for an international manufacturing

company in a multi-million dollar asset acquisition involving a northern Michigan business. The duo provided legal services and timely advice on a number of real estate, business, and tax issues. Their contributions in completing the necessary due diligence and transactional documentation allowed this deal to close quickly – exceeding expectations and protecting the client's strategic advantage.



Ann-Mary Petroskey recently obtained a favorable ruling for a client in a dispute with the Internal Revenue Service over unpaid employee withholding taxes. Her client was not an owner or officer of the business, but did possess check-writing authority for the business.

Because of this authority, the clients had been considered a responsible party for the non-payment. After submitting a formal written protest, which thoroughly analyzed the technical aspects of the law, Ann-Mary ultimately persuaded the IRS to discharge the client from responsibility without a hearing.

GOVERNMENTAL LAW



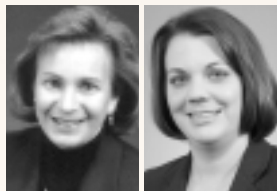
Craig Noland received a favorable opinion from Judge Fisher of the Barry County Circuit Court granting a no cause for action in favor of a

Township client, against a large and aggressive mobile home developer. Judge Fisher denied plaintiff's claim that the Township's zoning resulted in an impermissible restriction of the use of the plaintiff's property in violation of the due process clause of the Constitution. The legal issue was vigorously pursued by the plaintiff and was of significant interest to various governmental entities in Michigan that have had issues with the developer. The opinion followed a presentation by Craig, SHRR, and the Township on the intricate zoning, constitutional, and real estate issues presented in the case.

HEALTH LAW

SHRR's Health Care and Business Lawyers in Grand Rapids successfully advised and negotiated the merging of the obstetrics and gynecological clinical care practices between two area hospitals. The agreement brings together the joint cooperation of area obstetrics and gynecological physician groups in serving the merged clinic under one hospital.

MEDICAL MALPRACTICE LAW



Carol Carlson and **Cindy Boer** obtained dismissal of the claims against a family physician in

a medical malpractice claim involving multiple defendants in St. Joseph County Circuit Court. The plaintiff filed affidavits of merit by experts against the other defendants, but none of these were by a family practice expert. The court ruled that it was not sufficient to file an affidavit by an expert in another specialty, and granted summary disposition on this basis.



Brian Kilbane and **Kevin Lesperance** recently procured a dismissal of a

wrongful death case in Emmet County Circuit Court for a local midwife client. Previously, the court had dismissed the plaintiff's complaint for failure to file a sufficient affidavit of merit. Plaintiff re-filed with a new AOM with the original notice of intent and the defense again moved for summary disposition arguing that plaintiff's original NOI mirrored her original AOM and was also legally insufficient. The court agreed and dismissal followed. Any further complaints should now be time-barred by the statute of limitations.



John Kruis and **Jo Beth Earl** obtained a defense verdict in a medical malpractice wrongful

death trial against a hospital client in December 2003. Plaintiff alleged a nurse and a physician's assistant employed by the hospital improperly allowed a patient to be discharged home. Plaintiff alleged that the patient suffered from the beginning stages of a very serious surgical complication when discharged, which ultimately led to her death. The plaintiff proceeded to trial against the hospital, seeking a seven-figure damage award. The Muskegon County jury deliberated less than two hours before returning a verdict in favor of the hospital.



Brian Molde obtained the dismissal of a claim on behalf of a hospital because the plaintiff failed to file an affidavit of merit. The claim alleged that the hospital's nurses had failed to properly monitor the patient.



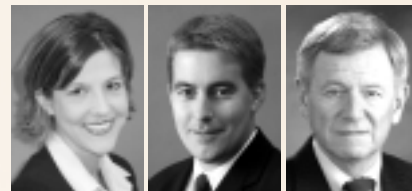
Paul Oleniczak and **Brian Molde** obtained the dismissal of a claim brought by a minor

against a hospital client on the basis of the statute of limitations. Plaintiff argued that the statute of limitations for a minor suffering mental incapacity as a result of the alleged malpractice was indefinite according to the governing statute. The trial court, however, agreed that the statute effectively carves out all medical malpractice plaintiffs from the operation of the "insanity" tolling provision and that, therefore, the minor plaintiff had only two years in which to bring his claim. The trial court also rejected plaintiff's assertion that this interpretation of the statute was unconstitutional. An appeal by the plaintiff is expected.



Ed Stein and **Richard Kraus** successfully tried a professional licensing case on behalf of a

prominent physician. They persuaded the Board of Medicine to dismiss the Attorney General's complaint alleging that he violated the standard of care in treating his patient.



In a matter involving a physician client, the Court of Appeals upheld the trial court's decision to dismiss a medical malpractice action because the action was time-barred. **Cara Nieboer** drafted the complex dispositive motion.

Mark Gilchrist successfully argued the motion and, on appeal, **Lance Mather** successfully convinced the Court of Appeals that this action was barred due to the Statute of Limitations.

TRANSPORTATION LAW



Mark Bickel received a no cause at trial in a wrongful death action. The accident occurred between a semi-truck and a farm tractor. The driver of the semi was killed in the accident.

The plaintiff's demand was for \$600,000. A highlight of the trial was Mark's cross-examination of the plaintiff's accident reconstructionist.

Mark also received a no cause at trial in a motor vehicle personal injury case. The defendant admitted negligence and the jury found that the plaintiff did not sustain a threshold injury under the No Fault Act.

STEP 3 What Does the Taxpayer Have to Show? - The Burden of Proof

Once the taxpayer has properly filed with the Tax Tribunal, the law provides that “[t]he petitioner has the burden of proof in establishing the true cash value of the property.”

To establish the property’s true cash value, it is important that the taxpayer submit documents or other tangible evidence in support of his or her contention. Testimony by the property owner by itself is often insufficient to carry the burden.

Also, a comparison of assessments is generally considered an unreliable indicator of a property’s true cash value. Rather, the courts in this State recognize three approaches in determining a property’s true cash value—the market/sales approach, the cost-less-depreciation approach, and the income approach.

Of these three, the courts consider the market/sales approach as the best evidence of a residential property’s true cash value. This approach compares the subject property to similar recently sold properties by making adjustments to the sales price of the other properties to reflect differences between the subject property and the other properties.

STEP 4 How Does the Taxpayer Submit Evidence?

The Tribunal’s Rules of Practice and Procedure require that “[a] copy of an appraisal report or other written evidence shall be submitted to the opposing party and the Tribunal not less than 14 days before the date of the hearing.”

The purpose of this rule is to avoid surprises, especially in informal, time-pressed Small Claims Division hearings. The rule is designed to provide both parties an opportunity to review and prepare an oral response to the other party’s evidence prior to the hearing.

STEP 5 Getting a Decision – And Beyond

The hearing referees are required to submit their proposed decisions to the Tax Tribunal within 60 days of the hearing date. The proposed decisions are reviewed by a supervising judge and then mailed to the parties. If unsatisfied with the decision, a party may request a rehearing of a decision issued by a hearing referee.

The rehearing request must be in writing and it must state the reason or reasons in support of the request (i.e., “good cause”). “Good cause” relative to a rehearing request is generally defined as an error of law, mistake of fact,

or fraud. If a request for a rehearing is granted, the parties will receive another hearing and be allowed to submit additional evidence. If a request for a rehearing is denied, the decision may be appealed to the Michigan Court of Appeals as provided by the Michigan General Court Rules.

While many matters before the local Board of Review and the Tax Tribunal may appear simple, the procedures for filing protests and appeals are actually quite complicated. Following these procedures closely will make the process more manageable. But the burden may be further lessened with the assistance of an attorney – even if the property owner is representing themselves. Representation by a lawyer can also prevent “simple” matters from becoming more complex than they need to be.

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