

MEDICAL MALPRACTICE UPDATE

December 2003

MICHIGAN SUPREME COURT ADOPTS A NEW RULE FOR TOLLING THE STATUTE OF LIMITATIONS

By: *Cara L. Nieboer*

In *Gladych v. New Family Homes*, 468 Mich. 594, 664 NW2d 705 (2003) the Michigan Supreme Court announced a new interpretation of Michigan law that imposed additional requirements on plaintiffs to effectively toll the statute of limitations.

The Michigan Supreme Court rejected the long standing Michigan rule that the statute of limitations would not bar a claim so long as the complaint was filed before the limitations period expired. The Court held that under MCL 500.5805 and MCL 600.5856 the mere filing of a complaint is insufficient to toll the statute of limitations.

MCL 600.5856 provides that the statute of limitations is tolled only if (1) the complaint is filed and a copy of the summons and complaint are served on defendant; (2) jurisdiction is otherwise acquired over defendant; (3) the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service (but not longer than ninety days); or (4) if, during the notice of intent period in a medical malpractice action, a claim would be barred by the statute of limitations, but only for the number of days equal to that in the applicable notice period.

From a defense standpoint, it is important to pay particular attention to the methods employed by plaintiffs in effecting service of process. If they do not comply with one of these four requirements, the statute of limitations could expire, thereby barring the plaintiff's claim.

Of the four requirements, subsection (1) deserves the most attention. Under this requirement, the statute of limitations is not tolled until the complaint is filed and a copy of the summons and complaint

are served on the defendant. Although it appears relatively simple, compliance with subsection (1) requires *proper service* on a defendant to toll the statute of limitations.

The court rules govern service of process and impose different methods of service depending on the type of defendant i.e., individuals, partnerships, private corporations, partnership associations or unincorporated voluntary associations, insurance companies, or public corporations. For example, service on an individual requires the plaintiff to either (1) deliver a copy of the summons and complaint to the defendant personally; or (2) send a summons and a copy of the complaint by registered or certified mail, return receipt requested, with delivery restricted to the addressee. However, service on a private corporation requires the plaintiff to either (1) serve the summons and a copy of the complaint on an officer or the resident agent; or (2) serve the summons and a copy of the complaint on a director, trustee, or person in charge of the office or business establishment of the corporation *and* send the summons and a copy of the complaint by registered mail to the principal office of the corporation.

Because the methods for service are different depending on the type of defendant, it is important to understand the proper method of service for your organization. Although there is no current indication of how much leniency the courts will afford plaintiffs who do not strictly comply with the methods for service, improper service of process as a defense provides additional strength for dismissal of untimely claim.

CASE LAW UPDATE

Edited by: Robert W. Tubbs and Douglas G. Powe

Supreme Court of Michigan.

Margaret **JENKINS**, as Personal Representative of the Estate of
Mattie Howard,
Deceased, Plaintiff-Appellee,
v.

Jayesh Kumar PATEL, M.D., and
Comprehensive Health Services, Inc.,
a Michigan Corporation, d/b/a The Wellness
Plan, Jointly and Severally, Defendants-
Appellants.

On Nov. 21, 2003 the Michigan Supreme Court entered an order granting defendants' application for leave to appeal the judgment of the Court of Appeals. In *Jenkins*, the Court of Appeals held that the medical malpractice caps under MCL 600.1483 do not apply in an action for wrongful death.

SHRR will report all future developments.

Admissibility of Evidence

Tennyson v Botsford Hospital Group, Inc., Mich. Ct. App., July 24, 2003 (unpublished). Plaintiff's decedent brought a claim of medical malpractice alleging a failure to diagnose breast cancer. The principle issue to be decided by the jury was whether defendant's physicians recommended to plaintiff that she have a surgical biopsy in light of a palpable lump but a negative mammogram. Plaintiff's decedent was deposed for purposes of providing trial testimony (she did not survive to the time of trial), but the deposition was adjourned before defendant's attorney could cross examine plaintiff's decedent. Because defendant's attorney did not have an opportunity to cross examine the witness, the deposition did not meet the requirements of MRE 804(b)(5) and should not have been admitted into evidence. In addition, because there was no other evidence that defendant's physicians did not recommend a biopsy the court should have granted defendant's motion for directed verdict.

Affidavit of Merit

Geralds v Munson Medical Center, ___ Mich App ___ (2003). Plaintiff's complaint for medical malpractice, arising out of the care and treatment of his son by a physician board certified in emergency medicine, was filed with an affidavit of merit signed by a physician who was not board certified. The Court held that counsel cannot reasonably believe that an expert meets the expert witness qualifications under MCL 600.2912d(1) without counsel either directly asking the expert his board certification status or reviewing the expert's curriculum vitae for a listing of board certifications. Because the non-conforming affidavit did not toll the statute of limitations and the statute of limitations had since run, the trial court properly dismissed plaintiff's claim with prejudice.

Nippa v Botsford General Hosp, 257 Mich App 387 (2003). Plaintiff filed her complaint against defendant hospital only, alleging malpractice by physicians who were board certified in general surgery and infectious disease. The affidavit of merit accompanying the complaint was executed by a physician board certified in internal medicine. On remand from the Michigan Supreme Court in light of *Cox v Flint Bd of Hosp Managers*, 467 Mich 1 (2002), the Court, in a 2 to 1 majority, held that in a claim "against an institutional defendant, the plaintiff must file an affidavit of merit executed by a physician who specializes or is board certified in the same specialty as the health professionals on whose conduct the action is based." Therefore, the order granting summary disposition in favor of the defendant was affirmed.

The Michigan Court of Appeals has also recently issued five unpublished opinions pertaining to issues involving the affidavit of merit. They are:

Mullaney v Kistler, et. al. (November 4, 2003) - Plaintiff's affidavit of merit signed by a pharmacist substantially complied with the statutory requirements.

Gregory v Knollwood Dental Care, P.C., et. al. (September 18, 2003) - Affidavit of merit is non-conforming

when signed by a specialist in prosthodontics when defendant is a periodontist.

Kyser v Hillsdale Community Health Center, et. al. (July 22, 2003) - Affidavit of merit signed by physician board certified in emergency medicine is non-conforming when defendant physician, although practicing in the emergency department, is board certified in internal medicine.

Wise v Shink, et. al. (June 24, 2003) - Affidavit of merit signed by orthopedic surgeon is non-conforming where defendant is a general practitioner in the field of podiatry.

Glancy v Steinberg, et. al. (June 24, 2003) - Affidavit of merit not confirmed by an oath or affirmation before a person authorized to issue the oath or affirmation is defective.

Discovery

Skowronski v Munson Medical Center, et. al., Mich. Ct. App., June 3, 2003 (unpublished). Defendants served plaintiffs with interrogatories regarding the opinions of their expert witnesses and subsequently filed a motion to compel answers. The trial court ordered that answers be provided by October 18, 2001. Plaintiffs did not timely provide interrogatory answers and defendants cancelled the deposition of plaintiffs' expert and moved to strike plaintiffs' experts. Where the court properly considered all of the options in determining a just and proper sanction, it did not abuse its discretion in ruling that those expert witnesses whose opinions were not set forth in answers to interrogatories would not be allowed to testify. The repeated serious violations in plaintiffs' failure to provide meaningful discovery merited the remedy imposed. Without the interrogatory answers defendants appropriately cancelled the depositions with little time to reschedule prior to case evaluation and trial. Lesser sanctions would not have solved the problem when trial was imminent.

Expert Witnesses

Massenberg v Henry Ford Health System, Mich. Ct. App., September 25, 2003 (unpublished). Plaintiff claimed damages arising out of a delayed diagnosis of liver abscesses. Defendant physician was board-certified in internal medicine and geriatrics. Plaintiff's expert witness was board-certified in internal medicine and gastroenterology. Plaintiff's expert was properly qualified to give standard of care testimony where it was found that a majority of his practice was devoted

to internal medicine even though a portion of that time was devoted to the subspecialty of gastroenterology. In an unrelated issue, the Court held that the trial court's instruction to the jury that they were not to consider evidence of earlier alleged malpractice, together with the verdict form, cured any prejudice caused by evidence suggestive of earlier malpractice.

Nelson v Gray, M.D., et. al., Mich. Ct. App., August 26, 2003 (unpublished). In this appeal following a jury verdict in favor of defendant, the Court held that the trial court properly excluded testimony from plaintiff's experts who were board certified in family practice but did not practice emergency medicine. Although board certified in family practice and not board certified in emergency medicine, the defendant worked full time in emergency medicine and was practicing emergency medicine at the time he treated plaintiff in the emergency department. Because the proposed witness' specialties did not match the specialty being practiced at the time of the alleged malpractice, their testimony was properly excluded. In addition, the trial court properly limited cross-examination of defendants' expert precluding plaintiff from eliciting testimony that the witness primarily reviewed cases for "insurance companies." To have allowed the testimony would have suggested to the jury that defendant was insured and represented by insurance company lawyers.

Hatchett v Surapaneni, M.D., et. al., Mich. Ct. App., November 6, 2003 (unpublished). Plaintiff's decedent suffered a cardiac arrest, anoxic encephalopathy and related injuries following her admission to the hospital, under the care of defendant psychiatrist, while she was intoxicated with a blood alcohol level of 411 mg/dl. With respect to several issues involving expert witness testimony the Court first held that plaintiff's expert psychiatrist, an expert in alcohol withdrawal syndrome, could testify as to the causal relationship between alcohol withdrawal syndrome and the patient's cardiac arrest. The witness met the requirements of MCL 600.2169 and MRE 702 and was, therefore, qualified to give expert testimony. Physicians commonly testify about a plaintiff's resulting injuries even though they may not be specialists in the involved area of medicine. Any 'gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility.' Defendants

may rebut the testimony with testimony from expert witnesses whom they believe are more qualified. Ultimately, causation is generally an issue for the trier of fact. Second, defendant's expert met the qualifications of MCL 600.2169 because, although he spent fifty percent of his time doing research, it was clinical research involving patient care and treatment. "He was engaged in the active clinical practice of psychiatry in most if not all facets of his professional time." Finally, the trial court did not abuse its discretion in allowing plaintiff to amend her witness list to add a cardiologist. The delay in making the request was not willful or accidental, but rather was a response to the trial court's decision, reversed on appeal, to limit the causation testimony of plaintiff's expert psychiatrist.

Governmental Immunity

Olrich v Ram, et. al., Mich. Ct. App., October 28, 2003 (unpublished). Plaintiff claimed that Defendants' were negligent when they rendered perinatal treatment in 1982. In upholding the trial court's order granting summary disposition on the basis of governmental immunity, the Court held that at the time the claim accrued in 1983 the governmental immunity statute stated that governmental agencies were immune from tort liability when they were engaged in the exercise or discharge of a governmental function. A governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute, or other law. The governmental agency is immune from tort law unless the activity is proprietary or falls within one of the other statutory exceptions. At the time the claim accrued, the defendant medical centers were operated by the City of Pontiac pursuant to authority granted by city charter. Although the Court previously ruled in *O'Neal v Annapolis Hosp*, 183 Mich App 281 (1989), that the reading of fetal monitor strips was ministerial in nature, no individual nurses were named in this suit. Vicarious liability cannot be imposed where the defendants and their employees were engaged in the exercise or discharge of a governmental function.

HMOs

Care Choices HMO v Engstrom, 330 F.2d786 (6th. Cir. 2003). Plaintiff paid medical expenses for injuries sustained by Defendant in a slip and fall. Following defendant's recovery of damages from settlement of the underlying tort claim, plaintiff brought suit to recoup the medical expenses it paid on defendant's

behalf. The Court of Appeals affirmed the District Court and held that 42 U.S.C. § 1395mm(e)(4) does not confer a private right of action for Medicare-substitute HMOs. A Medicare-substitute HMO may, however, include a provision in their own policies making them a secondary insurer. If such language is included, then its remedy is based on a standard insurance contract claim and not on any federal statutory right.

Informed Consent

Stampwala v Zamiri, M.D., et. al., Mich. Ct. App., June 3, 2003 (unpublished). During the course of a lumpectomy, the defendant physician discovered additional, unexpected cancerous growth in plaintiff's breast. Defendant proceeded to perform a mastectomy. Plaintiff brought claims for malpractice, based on the physician failure to obtain informed consent for the mastectomy, and for assault and battery. There was conflicting testimony whether prior to the surgery plaintiff was informed that there was a possibility she would need a mastectomy. Prior to trial plaintiff voluntarily dismissed the malpractice claim, but within a few hours sought to have the claim reinstated. The trial court refused to reinstate the malpractice claim and the jury returned a verdict in favor of defendants on the claim of assault and battery. Unless stated otherwise, a voluntary dismissal is without prejudice. Because reinstatement of the malpractice claim would not have prejudiced defendants and the trial court did not give any valid reason for refusing to reinstate the claim, the trial court abused its discretion. Although implied consent may be a defense to a claim of assault and battery, plaintiff's expert testified that the standard of care required the physician to obtain the patient's consent in writing unless the patient was too ill or unfit to consent. Therefore, a defense verdict on the claim of assault and battery does not necessarily imply a defense verdict on the malpractice claim. As a result, the case was remanded to the trial court for trial on the malpractice claim. The jury verdict on the assault and battery claim was affirmed.

Laches

Sizemore v Raimi, et. al., Mich. Ct. App., October 14, 2003 (unpublished). After reaching the age of majority, plaintiff brought this claim for malpractice arising out of the medical care and treatment provided at the time of his birth. The trial court granted defendants' motion for summary disposition

ruling that the complaint was barred by laches. In reversing the decision of the trial court, the Court held that minors cannot be guilty of laches for the failure to act during their minority. Laches only applies if the plaintiff unreasonably delays asserting his claim once he reaches the age of majority. Such was not the case here.

Miscellaneous

Humpert, et. al. v Bay Medical Center, Mich. Ct. App., October 28, 2003 (unpublished). The Court affirmed several rulings of the trial court made during the course of trial, which resulted in a plaintiffs' verdict. Most significantly, the trial court did not abuse its discretion in precluding defendant from calling a witness who was neither named on its witness list nor named in updated answers to interrogatories after defendant learned of the true identity of the witness. The hospital's practices and procedures were contingent upon the status of the employee. Where the witness was a nursing student, the failure to disclose the true identity of the witness was beneficial to defendant and prejudiced plaintiff. The trial court also did not err in denying defendant's motion for a new trial, which was based upon plaintiff's reference to the term "incident report." The brief reference was immediately addressed by a curative instruction. Furthermore, the jury was aware of the documentation of plaintiffs' decedent's fall as it was presented in the form of medical records and the testimony of witnesses.

Noneconomic Damages Cap

Green v Knazik, D.O., et. al., Mich. Ct. App., July 31, 2003 (unpublished). The Court held that the wrongful death act, rather than the medical malpractice cap, governed the award of noneconomic damages where death resulted from medical malpractice and affirmed an award of \$990,911.87. The Court also held that while "a health care professional's failure to keep adequate records is not a breach of the standard of care unless the failure contributes to the patient's injuries" the 'failure to keep adequate records may raise issues regarding credibility or burden of persuasion.' Where the physician's testimony regarding his physical examination was based upon his asserted custom and practice, the sufficiency of his charting is "highly relevant in regard to the credibility of ... [his] testimony about this particular examination." There was sufficient evidence presented to support a

conclusion that there was a breach of the standard of care.

Wiley v Henry Ford Cottage Hospital, et. al., 257 Mich App 488 (2003). Defendant appealed a jury verdict in this action arising out of the amputation of plaintiff's leg following a laceration injury to the leg while the plaintiff was being transferred from the toilet to her wheelchair while in the hospital. Following *Zdrojewski v Murphy*, 254 Mich. App 50 (2002), the Court reversed the holding of the trial court which had held that the statutory caps on noneconomic damages under MCL 600.1483 were unconstitutional. In the majority opinion, however, the Court indicated that but for the prior *Zdrojewski* decision, it would have held the caps to be unconstitutional as an impermissible violation of the right to trial by jury as guaranteed by the Michigan Constitution. The Court also concluded that plaintiff's claim sounded in malpractice because the ordinary layman does not know the methods and techniques for transferring patients.

Patient Abandonment

Tierney v University of Michigan Regents, 257 Mich App 681 (2003). Defendant physician, providing obstetrical care to plaintiff, cancelled a surgical procedure after he learned that plaintiff had filed a medical malpractice claim against his office mate. Although plaintiff obtained a referral to another physician, who performed the procedure four days later, she subsequently suffered a miscarriage. The trial court denied leave to amend her complaint to bring a claim of patient abandonment on the basis that Michigan did not recognize such a cause of action. In reversing the trial court's decision, the Court cited the general rule governing patient abandonment set forth in *Fortner v Koch*, 272 Mich 273 (1936), which states,

"When a physician takes charge of a case and is employed to attend a patient, the relation of physician and patient continues until ended by the mutual consent of the parties, or revoked by dismissal of the physician, or the physician determines that his services are no longer beneficial to the patient and then only upon giving to the patient a reasonable time in which to procure other medical attendance."

Plaintiff alleged that defendant was negligent in not performing the surgical procedure on the day

scheduled. The alleged abandonment occurred during the course of the professional relationship between plaintiff and defendant and, therefore, the claim is clearly one of malpractice. Whether the alleged abandonment rises to a breach of the applicable standard of care is a matter for the trier of fact.

Proximate Cause

Parr v Dutt, M.D., et. al., Mich. Ct. App., July 22, 2003 (unpublished). Defendant brought a motion for summary disposition following the deposition of plaintiff's expert wherein the expert testified that he did not know whether plaintiff's eye would have needed to be removed (exenteration) if her cancer had been diagnosed at the time of the initial visit with defendant. In response to the motion, plaintiff filed an affidavit signed by the same witness wherein he stated that "to a reasonable degree of medical certainty, it is more likely than not that exenteration would have been avoided." Because the affidavit raised a genuine issue of material fact, the trial court incorrectly granted the motion for summary disposition. Although a party may not raise an issue of fact by submitting an affidavit that contradicts the party's prior clear and unequivocal testimony, in this case the testimony and affidavit of the expert do not contradict each other. The deposition question, phrased in absolutes, is materially different from the question whether it was more likely than not that plaintiff would have avoided the exenteration if she had been earlier diagnosed with cancer.

Gilmore v Jankowski, M.D., et. al., Mich. Ct. App., June 19, 2003 (unpublished). In this malpractice action, the Court affirmed the trial court's granting of defendants' motions for summary disposition based upon the lack of proximate cause between the alleged malpractice and plaintiff's damages. Plaintiff claimed that as a result of a delay in the diagnosis of a non-malignant tumor he suffered a more invasive surgical procedure resulting in a loss of smell. Plaintiff claimed that his treating physicians should have referred him to an ENT and that, subsequently, at the time of his second visit with the ENT, the ENT should have ordered more diagnostic studies which would have disclosed the presence of the tumor. Where plaintiff's expert testified that the ENT did not breach the standard of care at the time of the initial visit, there is no proximate cause between any delay in the referral to an ENT and plaintiff's damages. It is mere speculation to assert

that an earlier referral would have led to a diagnosis on the initial visit when the standard of care did not require the ENT to make the diagnosis at that time. Furthermore, given the expert's testimony that he could not determine the rate of growth of the tumor, it was speculative to suggest that an earlier diagnosis would have led to a less invasive surgery with a different outcome.

Res Ipsa Loquitur

Woodard v Custer, M.D., et. al., Mich. Ct. App., October 21, 2003 (unpublished). Plaintiff's minor son, aged 15 days, was admitted to defendant hospital for treatment of retrosyncytial virus bronchiolitis, a life-threatening respiratory disease. During the course of treatment numerous invasive procedures were performed. It was subsequently discovered that the infant developed deep venous thrombosis, secondary to a venous catheter insertion, and x-rays confirming the diagnosis also showed a fracture of the left femur. A subsequent skeletal survey also revealed a fracture of the right leg. In a divided opinion the Court first held that plaintiff's expert, board certified in pediatrics, was not qualified to give standard of care testimony given the fact that defendant physician was board certified in both pediatric critical care and pediatric emergency medicine and was practicing pediatric critical care at that time of treatment. The Court further held, however, that expert testimony was not required where the infant presented to the hospital for treatment of RSV bronchiolitis and developed two broken femurs. Because the evidence must be viewed in the light most favorable to the non-moving party and because there was no evidence to the contrary, the inference must be granted that the femurs were healthy at the time of admission. In a dissenting opinion on the issue of res ipsa loquitur, Judge Talbot held that expert testimony was required because the factors necessary for a res ipsa loquitur claim were not met. For example, even looking at the evidence in the light most favorable to plaintiffs one cannot rule out that the fractures may have occurred before the infant was admitted to the hospital.

Statute of Limitations

Mitchell v Haranath Policherla, M.D., et. al., Mich. Ct. App., May 22, 2003 (unpublished). In reversing in part the trial court's grant of summary disposition, the Court held that the statute of limitations did not time bar all of plaintiff's claims where there were independent instances of alleged malpractice that

occurred within the two years prior to the filing of plaintiff's amended complaint and affidavit of merit. With allegations of multiple acts or omissions, different accrual dates are involved. This is not a continuing-wrong or continuing-treatment theory of accrual, which the Court in *McKiney v Glayman*, 237 Mich App 198 (1999), rejected in the context of time-bar analysis in a medical malpractice action.

Plaza v Crawford, D.O., et. al., Mich. Ct. App., July 22, 2003 (unpublished). Plaintiff underwent surgery on her ankle on January 20, 1997. In November 1998 she told another physician that she felt the pin inserted in her ankle had been incorrectly placed, but defendant surgeon continued to tell her that her ankle was fine. Eventually, however, in February 2000 defendant told her she would need to have the surgery redone. On July 31, 2000 plaintiff served defendants with a notice of intent and filed her complaint on January 29, 2001. In its opinion that the statute of limitations had run prior to the filing of the complaint, the Court held that once a person is aware of an injury and its possible cause, they are aware of a possible cause of action. In this case, plaintiff should have known about her possible cause of action when she told another physician that she thought the pin was incorrectly placed. Furthermore, there was nothing in the record to support a claim that the defendant physician did anything specifically to prevent inquiry or escape investigation of the potential claim.

Spektor v Sinai Hosp., et. al., Mich. Ct. App., August 21, 2003 (unpublished). Plaintiff was admitted to defendant hospital on September 13, 1997 for a blood clot in her leg. She was readmitted on September 20, 1997 and again on October 24, 1997 at which time she was treated for gangrene in her left foot. In early 1998 she was informed that her leg problems may have resulted from the premature discharge from the hospital and/or a premature change in blood thinning medication. In April 2000 she was told that the deterioration of her leg was "a complete mystery." According to plaintiff's testimony, this last statement confirmed that defendants had failed to adequately treat her blood clot in September 1997. She served defendants with

a notice of intent on June 30, 2000 and filed suit on January 2, 2001. The Court held that plaintiff should have discovered her cause of action by April 1998 and, therefore, the statute of limitations had run prior to the commencement of the action. The Court noted that plaintiff was aware of an injury and the deterioration in the health of her leg at the time of discharge on September 18, 1997, was aware of the "persistence" of her blood clot despite medical treatment, and by April 1998 she was aware of the manifestations of her injury and understood that it resulted from the blood clot. Finally, she was told that her condition may have resulted from a premature discharge from the hospital and/or premature change in the blood thinning medication.

Sosinski v Trosin, et. al., Mich. Ct. App., August 26, 2003 (unpublished). In affirming defendant's motion for summary disposition, the Court followed the holding in *Barlett v North Ottawa Community Hosp*, 244 Mich App 685 (2001) and held that the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. Rather, it is the granting of the motion for the additional 28 days to file the affidavit of merit which tolls the statute of limitations.

Burton v Reed City Hospital Corp, et. al., ___ Mich App___ (2003). Plaintiff claims malpractice arising out of a surgical procedure which occurred on January 25, 1998. A notice of intent was dated October 18, 1999 and a complaint with affidavit of merit was filed on February 10, 2000. On August 24, 2000 defendants moved for summary disposition claiming that the filing of the complaint was defective because it was filed before the end of the notice period and that the defective filing did not toll the statute of limitations. Although the Court agreed that the filing was defective, it held that dismissal without prejudice is the appropriate remedy for noncompliance with the notice requirements. Furthermore, because the affidavit of merit was filed with the complaint, the tolling provisions of MCL 600.5856(d) (tolling during the notice period) and MCL 600.556(a) (tolling upon the filing of the summons and complaint) apply such that plaintiff may re-file his complaint within the statutory period.

RECENT MEDICAL MALPRACTICE DEPT. SUCCESS

In August 2003, **Chris Genter**, **Kevin Lesperance**, and **Cindy Boer** obtained summary disposition for a hospital client on the issue of causation in Kent County Circuit Court. Plaintiff alleged that defendants failed to diagnose acute bacterial endocarditis in her husband causing his death. However, all three of plaintiff's experts testified in deposition that the decedent's opportunity to survive with and without the alleged diagnosis was less than 50%. Accordingly, plaintiff could not meet her burden as set forth in MCL 600.2912(a)(2), and summary disposition followed.

Kevin Lesperance obtained a defense verdict for a hospital client and general surgeon in Oceana District court in September 2003. This was not a medical malpractice action, however, and plaintiff actually agreed that her laparoscopic cholecystectomy was a complete success. Notwithstanding plaintiff's good result, she claimed common law invasion of privacy alleging that defendants allowed a high school student to observe her surgery without prior consent as part of a job shadowing program. In an effort to circumvent the Medical Malpractice Reform Act, plaintiff did not plead lack of informed consent or breach of the physician-patient privilege. That decision proved to be fatal as she could not satisfy any of the elements of the common law tort, and the jury was out in less than an hour.

In September, **John Kruis** and **Kevin Lesperance** obtained summary disposition for a hospital client in Van Buren County in a premises liability case involving an alleged unwitnessed fall from the

hospital's loading dock. Plaintiff, a Federal Express driver, had used the dock and steps on many prior occasions, including fifteen minutes before the fall. On her way back down the steps, the plaintiff, who was admittedly in a hurry, failed to notice that an unknown driver had placed a dark flat metal dock plate over the white tubular handrail while she was waiting for her pick-up. When she grabbed the plate it began to fall, she let go and fell to the ground allegedly severely injuring her back causing her to quit her job. The defense moved for summary disposition arguing a lack of notice and the open and obvious doctrine, the Court agreed and summary disposition followed.

In September, **Jack O'Loughlin** and **Brian Molde** obtained summary disposition in favor of the client hospital in Kalamazoo County Circuit Court. The Court granted summary disposition on the basis that plaintiff's claim was barred by the six-year statute of repose, even though the claim had been filed within six-months of its discovery and was not barred by the statute of limitations.

In August, **Jon Vanderploeg** and **Jack O'Loughlin** obtained a favorable ruling in the Court of Appeals, reversing the trial court's denial of summary disposition. The Court of Appeals held that plaintiff's affidavit of merit signed by an emergency medicine specialist was non-conforming in a case against a board certified internist working in an emergency department. The trial court has now entered a dismissal in the case and no further appeal was pursued by the plaintiff.

OUT AND ABOUT

On September 25, 2003, **Rob Tubbs** gave a presentation on the "Legal Aspects Involving Care of the Diabetic Patient" to the Munson Medical Center Family Practice Residency Program.

In October, **Jack O'Loughlin** participated in the Litigation Stress Management program presented by Michigan Professional Insurance Exchange to

its insured physicians. This meeting of physicians and spouses involved in litigation is part of a comprehensive litigation support program developed by MPIE with input from SHRR.

On October 7, 2003 **Rob Tubbs** presented a seminar on "Documentation" to the staff at Otsego Memorial Hospital.

On November 3 and 4, **Douglas Powe**, along with other personnel from Oaklawn Hospital, Marshall, Mich., made presentations to health care personnel at Oaklawn Hospital, regarding the importance of medical record documentation, legal issues associated with patient care, Hospital policies and their use at trial and pitfalls associated with a poorly documented record.

Carol Carlson was invited to present a full-day seminar to nurses from across Michigan at

Munson Medical Center's Annual Perinatal Conference on November 11. Assisted by **Rob Tubbs**, the seminar focused on medical malpractice issues of concern for perinatal nurses, including charting and giving depositions.

If you are interested in having one of SHRR's Medical Malpractice Department attorneys make a presentation to your organization, please contact Lisa Young, Client Services Director, at (616) 458-3636 for a list of topics and to locate a speaker.

PLEASE WELCOME

Smith Haughey Rice & Roegge is pleased to announce that the following individuals have joined the Medical Malpractice Department:

Cindy C. Boer recently joined SHRR as a medical malpractice Associate. Cindy comes to us from Denver, Colorado, where she practiced for five years in the areas of medical malpractice and products liability defense, specializing in drug and medical device claims. Cindy received her undergraduate degree from Calvin College in Grand Rapids, Michigan. She graduated *summa cum laude* from Thomas M. Cooley Law School, where she was an editor for the law review and an intern for federal judge David McKeague. Cindy and her husband, Charlie, live in Sparta, Michigan with their two children, Jake and Trevor. She can be reached in the Grand Rapids office at (616) 458-1331 or cboer@shrr.com.

Jennifer Skriba recently joined the Grand Rapids

office as a medical malpractice Legal Assistant. She obtained her associates degree in Legal Assistance in 1997, and has worked in medical malpractice defense for the last five years on behalf of both hospitals and physicians. Jennifer has also worked in the Michigan House of Representatives and the Michigan Department of Management and Budget, Director's office. She has been a member of the State Bar Legal Assistant's Section since 1999. She can be reached at (616) 458-9291, jskriba@shrr.com.

Kari S. Allen has joined the medical malpractice department as a Legal Assistant. Kari's experience includes serving as a legal assistant for an insurance defense firm in Kentucky and real estate firm in Pennsylvania. She holds a BA degree from Lycoming College and a Paralegal Certificate from Pennsylvania State University. She can be reached at the Grand Rapids office at (616) 458-4273 or kallen@shrr.com.

The Members of
SMITH HAUGHEY RICE & ROEGGE'S
Medical Malpractice Department are:

William R. Jewell, Chair	(616) 458-8203	Grand Rapids
Mark P. Bickel	(231) 486-4506	Traverse City
Cindy C. Boer	(616) 458-1331	Grand Rapids
Carol D. Carlson	(616) 458-9289	Grand Rapids
Jo Beth Earl	(616) 458-3642	Grand Rapids
A. Joseph Engel, III	(616) 458-6247	Grand Rapids
Christopher R. Genther	(616) 458-0222	Grand Rapids
Mark A. Gilchrist	(517) 318-5654	Lansing
William W. Jack, Jr.	(616) 458-6243	Grand Rapids
Brian J. Kilbane	(616) 458-0296	Grand Rapids
John M. Kruis	(616) 458-8304	Grand Rapids
Kevin M. Lesperance	(616) 458-3443	Grand Rapids
Brian A. Molde	(616) 458-1499	Grand Rapids
Paul M. Oleniczak	(616) 458-5461	Grand Rapids
John C. O'Loughlin	(616) 458-9370	Grand Rapids
Douglas G. Powe	(517) 318-5655	Lansing
L. R. Roegge	(616) 458-7425	Grand Rapids
Edward R. Stein	(734) 913-5387	Ann Arbor
Robert W. Tubbs	(231) 486-4535	Traverse City