TORTS

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I. INTRODUCTION

This *Survey* found that narrow interpretations of words and phrases are the vehicle our appellate courts use to engage in outcome determinative decisions. In many cases, the motivation is to remove a case from the docket instead of striving to allow a plaintiff her day in court with a jury. Analyses of cases involving premises liability, medical malpractice, and governmental immunity demonstrate anti-individual bias in favor of corporate, insurance, and government interests.

II. PREMISES LIABILITY

A. Snow and Ice in a Landlord's Parking Lot

The Michigan Supreme Court considered a premises case where the rights of the parties were determined through statutory analysis.[1] The plaintiff, a tenant at an apartment complex, fractured his ankle while traversing a snow-covered icy parking lot.[2] Plaintiff claimed damages

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1. Allison v. AEW Capital Management, L.L.P., 481 Mich. 419, 751 N.W.2d 8 (2008).

2. *Id.* at 423, 751 N.W.2d at 10.

pursuant to M.C.L.A. section 554.139[3] and for negligence.[4] Known commonly as the "Landlord-Tenant" statute, M.C.L.A. section 554.139 has two components: keeping the premises and common areas fit for the uses intended by the parties, and keeping the premises in reasonable repair.[5] The court found that a parking lot is a common area because many tenants use it and the landlord retains control of it.[6] Because it is a common area, the landlord must keep the parking lot fit for its intended uses.[7]

At this point in the analysis, any logic was halted in favor of outcome-based decision making. The court decided that a parking lot is constructed for the primary purpose of storing vehicles.[8] Justice Markman explained that "fit" is defined as "adapted or suited."[9] He then limited the landlord's duty to "keep[ing] a parking lot adapted or suited for the parking of vehicles."[10] Ludicrously, the court held that the landlord was obligated to clear the lot of snow so "that vehicles can access parking spaces, *and that tenants have reasonable access to their parked vehicles*," yet ruled that the lot could be used for parking and that tenants could walk on it.[11] The court stated further, "[w]e recognize that tenants must walk across a parking lot in order to access their vehicles. However, plaintiff did not show that the condition of the parking lot in this case precluded access to his vehicle."[12] The court ignored reality, safety and logic in reaching this conclusion. Hidden and unsafe conditions do not provide pedestrians with "reasonable access."

B. Black Ice at a Gas Station

In *Slaughter v. Blarney Castle Oil Co.*,[13] three judges of the court of appeals took a very courageous stand in considering the invisibility of black ice.[14] Plaintiff was exiting her truck from the running board at a gas station.[15] When she stepped onto the asphalt pavement, her foot

3. MICH. COMP. LAWS ANN. § 554.139 (West 2005).
4. *Allison*, 481 Mich. at 425, 751 N.W.2d at 12.
5. MICH. COMP. LAWS ANN. § 554.139(1)(a)-(b).
6. *Allison*, 481 Mich. App. at 428, 751 N.W.2d at 12-13.
7. *Id.* at 429, 751 N.W.2d at 13-14.
8. *Id.* at 429, 751 N.W. 2d at 14.
9. *Id.*
10. *Id.*
11. *Id.* (emphasis added).
12. *Allison*, 481 Mich. at 430, 751 N.W.2d at 14.
13. 281 Mich. App. 474, 760 N.W.2d 287 (2008).
14. *Id.* at 476, 760 N.W.2d at 289.
15. *Id.* at 475, 760 N.W.2d at 288.

immediately slipped on black ice which caused her to fall and injure herself.[16] It had started to rain and the ice was not visible.[17]

Judge Batzer of the Manistee County Circuit Court ruled against defendant on its motions for summary disposition.[18] Judge Batzer, quoted in the opinion, asked the defense attorney the same questions that have led to head-scratching among plaintiffs and their lawyers for many years during the Taylor-Court era:

> Except, what if you look and you can't see it? Does that mean you don't dare walk? . . . Or should we all carry ski poles with spikes in them? Crampons on our boots? What do we do? What do we do if we look and can't see it? That's my question.[19]

The court discussed the open and obvious danger doctrine and stated that "an obvious danger is no danger to a reasonably careful person."[20] The court differentiated that circumstance from one in which hazards were hidden.[21] Duty is imposed "upon the premises possessor for hidden or latent defects" because that burden "should rest upon the [person] who is in control or possession of the premises, and, thus, is best able to prevent the injury."[22]

Other cases were cited to differentiate black ice standing alone from other facts which might arguably give notice of a hazardous condition. In *Kenny v. Kaatz Funeral Home, Inc.*, a woman slipped and fell on black ice after seeing three of her companions hold onto a vehicle to keep their balance.[23] The Supreme Court reversed, adopting Judge Griffin's dissent[24] which held that a "Michigan resident should be aware that ice frequently forms beneath the snow during snowy December nights."[25]

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16. *Id.* Judges Beckering, Borello, and Davis were appointed by Governor Jennifer Granholm.

17. *Id.* at 475-76, 760 N.W.2d at 288.

18. *Id.* at 476-77, 760 N.W.2d at 289.

19. *Slaughter*, 281 Mich. App. at 476, 760 N.W.2d at 289.

20. *Slaughter*, 281 Mich. App. at 478, 760 N.W.2d at 289-90 (internal quotation marks omitted) (quoting Novotney v. Burger King Corp., 198 Mich. App. 470, 474, 499 N.W.2d 379 (1993)).

21. *Id.* at 478, 760 N.W.2d at 289-90.

22. *Id.* at 478 n.2, 760 N.W.2d at 290 (internal quotation marks omitted) (citing Riddle v. McClouth Steel Products Corp., 440 Mich. 85, 91, 485 N.W.2d 676 (1992)).

23. Kenny v. Kaatz Funeral Home, Inc. (*Kenny I*), 264 Mich. App. 99, 101-02, 119, 689 N.W.2d 737, 740 (2004).

24. Kenny v. Kaatz Funeral Home, Inc., 472 Mich. 929, 697 N.W.2d 526 (2005).

25. *Slaughter*, 281 Mich. App. at 479-80, 760 N.W.2d at 290 (citing *Kenny I*, at 119).

The court of appeals in *Ververis v. Hartfield Lanes*,[26] has also determined that snow-covered ice without any other circumstances of notice is open and obvious.[27] *Ververis* held that "as a matter of law, that by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."[28] Finally, in *Royce v. Chatwell Club Apartments*,[29] the court held that black ice concealed by snow is open and obvious.[30]

In the above decisions, plaintiffs have been deprived of their days in court because of icy dangers which they could not see but the knowledge of which was attributed to them by appellate judges. Combating these ridiculous analyses, the panel in *Slaughter* stated: "To determine whether black ice is open and obvious, one must consider the *logic* behind the open and obvious danger doctrine . . . ."[31] The court explained that "[t]he overriding principle behind the definitions of black ice is that it is invisible or . . . transparent, . . . [which] is inconsistent with the open and obvious danger doctrine."[32] Without evidence of the ice's visibility on casual inspection or other potentially hazardous conditions, the court logically declined to extend the doctrine.[33] The judges would not buy the argument that in the wintertime Michigan residents are essentially at their own peril.[34] They explained that "each day can bring dramatically different weather conditions."[35]

This court was constrained by precedent, and the issue of concealed ice was not before it. Consequently, we are left with absurd situations. If there is black ice with snow nearby, it is open and obvious. If there is black ice underneath snow, and it is not only invisible but completely concealed, it is open and obvious. If there is black ice nearby that is causing others to fall then the black ice you fall on is open and obvious to you. However, if there is black ice standing alone, it is not open and obvious. Perhaps this panel will be selected again to rule on these aberrations.

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26. 271 Mich. App. 61, 718 N.W.2d 382 (2006).

27. *Slaughter*, 281 Mich. App. at 480, 760 N.W.2d at 290-91 (citing *Ververis*, 271 Mich. App. at 66, 718 N.W.2d at 385).

28. *Id.* at 480-481, 760 N.W.2d at 291 (citing *Ververis*, 271 Mich. App. at 67, 718 N.W.2d at 386).

29. 276 Mich. App. 389, 740 N.W.2d 547 (2007).

30. *Slaughter*, 281 Mich. App. at 481, 760 N.W.2d at 291 (citing *Royce*, 276 Mich. App. at 394, 790 N.W.2d at 550).

31. *Id.* at 482, 760, N.W.2d at 292 (emphasis added).

32. *Id.* at 483, 760 N.W.2d at 292.

33. *Id.*

34. *Id.*

35. *Id.*

III. MEDICAL MALPRACTICE

A. Psychiatric Liability For Known Dangerous Patients

In *Dawe v. Dr. Reuvan Bar-Levav & Associates,* the court of appeals considered a case where a former patient entered defendants' psychiatric office and fired a gun, injuring plaintiff and others.[36] The court agreed with defendants that the only duty a psychiatrist has to protect others from a patient is the duty under M.C.L.A. section 330.1946,[37] and that all other common law duties were abrogated.[38] The statute was interpreted as requiring four elements:

> (1) a mental-health professional is presently treating a patient, (2) that patient communicates a threat of physical violence to the mental-health professional, (3) that threat of physical violence is directed against a readily identifiable third person, and (4) the patient has the apparent intent and ability to carry out the threat in the foreseeable future.[39]

The court found that the shooter, Brooks, was a known dangerous person to the defendants.[40] It stated: "We acknowledge that the evidence presented at trial was compelling proof that defendants knew or should have known that Brooks posed a danger to the other patients in his therapy group and, therefore, should not have been placed in group therapy."[41] The majority felt that under common law principles and common sense that it would be justified to hold defendants accountable.[42] However, the court declined to do the right thing and interpreted the statute to deny plaintiff a remedy, instead leaving the task to the legislature.[43] Most revealing (and troubling) is the majority's statement that,

> [A]lthough Stanislaw's testimony, even taken in the light most favorable to Dawe, established that Brooks probably indicated that he wanted to hurt *someone* at the practice, his testimony did not establish that Brooks made a threat of physical violence

36. 279 Mich. App. 552, 554, 761 N.W.2d 318, 320 (2008).
37. MICH. COMP. LAWS ANN. § 330.1946 (West 1999).
38. *Dawe*, 279 Mich. App. at 557, 761 N.W.2d at 322.
39. *Id.* at 558-59, 761 N.W.2d at 323 (citing MICH. COMP. LAWS ANN. § 330.1946(2)).
40. *Id.* at 568-69, 761 N.W.2d at 328.
41. *Id.*
42. *Id.* at 569, 761 N.W.2d at 328.
43. *Id.*

against Dawe, either individually or as a member of the therapy group.[44]

In making this ruling, the court opened the door for every sniper, gun-toting psycho and aggrieved postal worker to spray masses of people with gunfire. A gunman can tell his psychiatrist that he is going to fire an automatic weapon in a packed football stadium or subway platform, without designating anyone specifically as a target, and the silent psychiatrist will be shielded from any liability.

B. Notice of Non-Party Fault

In a case involving a delayed diagnosis of uterine cancer, a woman's chances of survival plummeted from 90 percent to less than 15 percent.[45] Plaintiffs sent a notice of intent (NOI) to sue the hospital, its employees and several doctors, including Dr. Williams.[46] Four months later, after reviewing medical reports and consulting with experts, plaintiffs sent an amended notice of intent which omitted the hospital and Dr. Williams as potential parties.[47]

After filing the lawsuit, discovery was held, which included the deposition of Dr. Williams.[48] He stated that although he initially deemed the uterine mass to be a lipoleiomyoma, because the mass was malignant, it could not be a lipoleiomyoma.[49] Another physician, Dr. Alexander, criticized Dr. Williams' radiological interpretation and would have stated there was a standard of care violation had Dr. Williams been named as a defendant.[50] It was at this point in time, twenty months after the complaint had been filed, that defendants filed a motion for leave to file a notice of non-party fault against Dr. Williams.[51] Defendants must file a notice of non-party fault within ninety-one days of its first responsive pleading unless they can show that they could not have known of the non-party's potential liability beforehand with reasonable diligence.[52]

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44. *Dawe*, 279 Mich. App. at 570, 761 N.W.2d at 329.

45. Snyder v. Advantage Health Physicians, 281 Mich. App. 493, 495, 760 N.W.2d 834 (2008).

46. *Id.* at 495, 760 N.W.2d at 836. Notice of Intent was sent pursuant to statutory requirement. *See* MICH. COMP. LAWS ANN. § 600.2912b (West 2000).

47. *Id.* at 495-96, 760 N.W.2d 836.

48. *Id.* at 496, 760 N.W.2d at 836.

49. *Id.* at 497-98, 760 N.W.2d at 836-37.

50. *Id.* at 498-99, 760 N.W.2d at 837-38.

51. *Snyder*, 281 Mich. App. at 499, 760 N.W.2d at 838.

52. *Id.* at 500-01, 760 N.W.2d at 838 (citing MICH CT. R. § 2.112(K)(3)(c) (West 2009)).

The court was swayed by plaintiffs' argument that Dr. Williams was named in the original notice of intent which presumably defendants had reviewed.[53] The court observed that the NOI stated Dr. Williams interpreted the ultrasound to show a benign mass; that the mass was discovered to be cancerous; that he misinterpreted the ultrasound and passed on his misinterpretation to another doctor.[54] Because of this advance notice, reasonable diligence required defendants to investigate this potential defense at that time.[55] Consequently, they reversed the trial court and struck the notice of non-party fault as untimely.[56]

This is a well-reasoned decision. The NOI must be extremely specific regarding facts and causation.[57] Defendants' claim of surprise regarding Dr. Williams' potential liability was correctly disregarded. Defendants had another remedy. They could have moved the court to file a third party claim against Dr. Williams, but apparently found suing another doctor distasteful. They wanted to have jury apportionment for Dr. Williams' negligence without having to support it. Fortunately the court deemed their request untimely.

IV. ACCOUNTING MALPRACTICE — VENUE

The Michigan Supreme Court considered a case which was filed in Wayne County Circuit Court where a change of venue to Oakland County was sought.[58] Dimmitt received financial backing for its business through unsecured promissory notes from various investors.[59] In 2003 Dimmitt was in default on its repayment obligation to the bank and could not pay its investors.[60] Dimmitt discovered that many of its assets were overvalued in the financial statements that defendants prepared.[61] Plaintiff filed suit based upon accounting malpractice, breach of fiduciary duty and several other theories.[62] Defendants moved to change venue to Oakland County where they had performed the work in question at plaintiff's offices.[63] Denying the motion, the trial court

53. *Id.* at 505, 760 N.W.2d at 841.
54. *Id.*
55. *Id.*
56. *Id.* at 505-06, 760 N.W.2d at 841.
57. MICH. COMP. LAWS ANN. § 600.2912b (West 2000).
58. Dimmitt & Owens Fin., Inc. v. Deloitte & Touche (ISC), L.L.C., 481 Mich. 618, 620, 752 N.W.2d 37 (2008).
59. *Id.* at 621-22, 752 N.W.2d at 39.
60. *Id.* at 622, 752 N.W.2d at 39.
61. *Id.*
62. *Id.* at 623, 752 N.W.2d at 40.
63. *Id.*

agreed with the plaintiff that venue was proper in Wayne County from where engagement letters and other documents originated.[64]

The court of appeals reversed, holding that the original injury occurred at Dimmitt's Oakland County office by relying on information gained from the defendants.[65] The Supreme Court ordered oral arguments on plaintiff's application for appeal.[66]

The Michigan Supreme Court cited the tort venue provision provided in M.C.L.A. section 600.1629(1) in determining what constituted an original injury.[67] The Court determined that it is the injury, not the breach of the standard of care that establishes tort venue.[68] Finding that the court of appeals reached the right result, but for the wrong reasons, the majority affirmed the decision to change venue to Oakland County.[69] The court of appeals, according to the majority, had focused on where plaintiff relied on defendants' work product rather than where plaintiff suffered the actual injury.[70] Under the tort venue statute Oakland County was the proper venue because both plaintiffs' and defendants' principal places of business where the original injury occurred were in Oakland County.[71]

Determining the proper venue can be an important factor in the success of a case as parties and their attorneys may prefer the proclivities of one county's citizens and judges. This was a case between different business interests and delaying a hearing on the merits for several years appears excessive. Certainly tens of thousands of dollars in professional time and fees were incurred by the parties and attorneys for the privilege of crossing Eight Mile Road. Then the Michigan Supreme Court delayed the case further for a year to go to great lengths to admonish the court of appeals for reaching the right decision for the wrong reason.

V. ADDITUR

Plaintiff was bitten by a dog and she claimed economic and noneconomic damages.[72] The jury awarded her past medical expenses but nothing for her pain and suffering or fright and shock.[73] Plaintiff

64. *Dimmitt*, 481 Mich. at 623, 752 N.W.2d at 40.
65. *Id.* 623-24, 752 N.W.2d at 40.
66. *Id.* at 624, 752 N.W.2d at 40.
67. *Id.* at 625, 752 N.W.2d at 41.
68. *Id.* at 630, 752 N.W.2d at 44.
69. *Id.* at 632, 752 N.W.2d at 44-45.
70. *Dimmitt*, 481 Mich. at 632, 752 N.W.2d at 44-45.
71. *Id.*, 752 N.W.2d at 45.
72. Taylor v. Mobley, 279 Mich. App. 309, 760 N.W.2d 234 (2008).
73. *Id.* at 311-12, 760 N.W.2d at 236.

sought additur or a new trial because the jury ignored evidence of pain and suffering which was not challenged by the defendant.[74] The majority opinion, authored by Chief Justice Saad, noted that a new trial may be granted if a verdict is clearly or grossly inadequate or excessive, or against the great weight of the evidence.[75]

The court relied on the verdict form, prepared by plaintiff's attorney which had the conditional statement, "*[i]f you find* that Ms. Taylor's injuries resulted in noneconomic damages . . . what is the total amount of Ms. Taylor's noneconomic damages to the present date?"[76] The court explained that the jury was free to consider many factors including plaintiff's testimony, credibility as well as the delay and paucity of medical treatment.[77] The court held that awarding damages for medical expenses did not obligate the jury to award noneconomic damages.[78]

The dissent stated that the jury's failure to award damages in light of "unrebutted, unchallenged, and undeniable evidence that plaintiff suffered pain, fright, and shock," was a verdict that was against the great weight of the evidence warranting a new trial pursuant to MCR 2.611(A)(1)(e).[79] Judge Gleicher made a persuasive point when talking about "great weight" under the court rule. The defense put forward no argument of any weight at all to counter plaintiff's noneconomic claims. Therefore, the verdict could not possibly be justified.

VI. INSURANCE AGENT LIABILITY

An agriculture equipment business which sold and serviced lawn and snow machines had a fire in its building.[80] Zaremba had purchased its insurance policy from defendants, which provided coverage of $525,000 for the building.[81] The replacement cost turned out to be over twice as much.[82] Plaintiff sued Harco and its agent Musall who represented that the business would be fully insured for the loss of building and contents.[83] At trial, the jury awarded Zaremba for several losses, but the

74. *Id.* at 310-11, 760 N.W.2d at 236.

75. *Id.* at 311 n.3, 760 N.W.2d at 236 n.3 (citing MICH. CT. R. § 2.611 (A)(1)(d),(e) (West 2009)).

76. *Id.* at 312, 760 N.W.2d at 237.

77. *Id.* at 312-313, 760 N.W.2d at 237.

78. *Taylor*, 279 Mich. App. at 315, 760 N.W.2d at 238.

79. *Id.* at 316-317, 760 N.W.2d at 239 (Gleicher, J., dissenting).

80. Zaremba Equip., Inc. v. Harco Nat'l Ins. Co., 280 Mich. App. 16, 19-20, 761 N.W.2d 151, 155 (2008).

81. *Id.* at 20, 761 N.W.2d at 155.

82. *Id.*

83. *Id.*

issue on appeal was the money awarded for the building and contents under the theories of "negligence, fraud, or innocent misrepresentation, and promissory estoppel."[84] The trial court had refused to give an instruction on comparative negligence for the plaintiff's failure to read the insurance policy.[85] The law requires an insured to read the policy and ask questions close in time to the issuance of a policy, so that corrections can be made prior to a coverage dispute.[86]

The court found that some of plaintiff's claims would be subject to comparative fault and others would not.[87] However plaintiff had submitted all of its claims to the jury bundled as one and it was impossible to separate which liability claims were adopted by the jury.[88] Consequently, the verdict based on negligence was reversed and remanded for a new trial.[89]

VII. GOVERNMENTAL IMMUNITY: MOTOR VEHICLE AND GROSS NEGLIGENCE

An electrician employed by Michigan State University left his truck running and unlocked momentarily while he walked into a campus building.[90] A 19 year old, who became highly intoxicated in an MSU dormitory, saw the truck running, drove it away and caused a collision, killing plaintiff's decedent.[91]

To hold the employee liable when performing a governmental function, plaintiff had to prove gross negligence.[92] Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."[93] The court held that no reasonable juror could find that Almy's conduct reached that level of recklessness and reversed the trial court which had denied summary disposition.[94]

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84. *Id.* at 25, 761 N.W.2d at 158.

85. *Id.*

86. *Zaremba*, 280 Mich. App. at 29, 761 N.W.2d at 160 (citing Farm Bureau Mut. Ins. Co. of Mich. v. Nikkel, 460 Mich. 558, 567-68, 596 N.W.2d 915, 980 (1999); Casey v. Auto-Owners Ins. Co., 273 Mich. App. 388, 394-95, 729 N.W.2d 277, 283 (2006)).

87. *Id.* at 35, 761 N.W.2d at 163.

88. *Id.*

89. *Id.* at 50, 761 N.W.2d at 171.

90. Hinz v. Almy, No. 285125, 285126, 2009 WL 1262877, at *1 (Mich. Ct. App. May 7, 2009).

91. *Id.* at *2.

92. *Id.* at *9-10.

93. *Id.* at *10 (internal quotation marks omitted) (citing MICH. COMP. LAWS ANN. § 691.1407(7)(a) (West 2009)).

94. *Id.* at *1, *12.

The court next reviewed the statutory requirement that a governmental employee's gross negligence must be "the," not "a" proximate cause of the injuries claimed.[95] The proximate cause of an injury is "the one most immediate, efficient, and direct cause preceding the injury."[96] In *Robinson* the Supreme Court held that the fleeing reckless driver who collided with the plaintiff's vehicle, was the proximate cause rather than the police officers who were involved in the high speed chase.[97] Relying on *Robinson,* which eliminated responsibility for police officers who negligently cause dangerous car chases to ensue, the court of appeals found that the intoxicated truck thief was the proximate cause of plaintiff's death.[98]

Finally, the court analyzed whether Michigan State University could be held liable under the motor vehicle exception to governmental immunity.[99] That section provides that governmental agencies are liable for negligent *operation* of a motor vehicle which the agency owns.[100] The court focused on "operation" and held that the exception only covers instances where the vehicle is being driven, not parked.[101]

This ridiculous analysis, used to deny compensation to a plaintiff's estate, was criticized in the dissent.[102] Judge Shapiro concluded that the act of leaving the truck, unfenced, unlocked and unattended, while the key was in the ignition and the motor was running, constituted operation of vehicle.[103] He further stated that turning on an engine for the purpose of driving it, is operation.[104] Judge Shapiro concurred in the dismissal of the individual defendant, but argued that MSU should remain liable for negligent operation of their vehicle.[105]

This is another example of an appellate court splitting hairs to limit the definition of a word. Whether the vehicle was in operation should be left to the trier of fact.

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95. *Id.* at *15.

96. *Hinz*, 2009 WL 1262877, at *15 (citing Robinson v. City of Detroit, 462 Mich. 439, 462, 613 N.W.2d 307 (2000)).

97. *Id.* at *16-17 (citing *Robinson*, 462 Mich. at 449, 462, 613 N.W.2d at 313, 319).

98. *Id.* at *17-18.

99. *Id.* at *18.

100. *Id.* at *18 (citing MICH. COMP. LAWS ANN. § 691.1405(5) (West 2009) (emphasis added)).

101. *Id.* at *19 (citing Chandler v. Muskegon Co. 467 Mich. 315, 320-321, 652 N.W.2d 224 (2002)).

102. *Hinz,* 2009 WL 1262877, at *22-23 (Shapiro, J., dissenting).

103. *Id.* at *23.

104. *Id.* at *24.

105. *Id.* at *24-25.

VIII. CONCLUSION

A parking lot only has to safely accommodate vehicles, not the people who are required to walk to them. A psychologically impaired gunman has to tell his psychiatrist exactly whom he intends to spray with gunfire. A truck with its motor in operation is not being operated. Hopefully, the new era of the Kelly Court will set an example for the court of appeals by publishing well-reasoned decisions, which paint definitions broadly. The public interest is better served by preserving individual and consumer rights instead of shielding wrongdoers from liability.