TORTS

RONALD K WEINER†

I. INTRODUCTION

During this *Survey* period, there was a change on the jurisprudence horizon. At the end of 2008, Justice Diane Hathaway took the place of Chief Justice Clifford Taylor. It takes time for supreme court cases to be heard and then become binding decisions. Many opinions followed the residual sentiment of the Taylor Court era, but soon sensibility began to return to Michigan. The cases analyzed in this *Survey* show some restoration of individual rights by placing the onus of safety on profiting owners of businesses and property. Other cases show a desire on the part of appellate courts to further extend the rights of consumers, patients, and customers, but supreme court precedent has not yet been made. In all, there is a positive trend away from the outcome-determinative decisions of the past decade.

† Partner, Zamler, Mellen & Shiffman, P.C. B.A., 1983, University of Michigan; J.D., 1987, Syracuse University.

II. GOVERNMENTAL IMMUNITY

A. Highway Exception

The Michigan Court of Appeals considered two cases dealing with injuries resulting from structural defects in bridges.[1] The highway exception to governmental immunity requires a governmental agency to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.[2]

"'Highway' means a public highway, road, or street that is open for public travel and includes bridges."[3]

In *Moser*, "a chunk of concrete fell from the fascia of" the Cass Avenue bridge onto plaintiff's windshield who was traveling on I-75.[4] The defendant appealed when the trial court denied its motion for summary disposition, claiming that the fascia of a bridge is not included in the highway exception.[5] Defendant argued that the part of the bridge which fell onto plaintiff's car was not from the bridge deck or driving surface of the roadway.[6] The court relied upon the definition of "improved portion of the highway," as interpreted by the Michigan Supreme Court in *Nawrocki v. Macomb County Road Commission.*[7] That case held that the improved portion was not just the road surface but the "actual physical structure of the roadbed surface."[8] The *Moser* court reasoned that "roadbed surface" includes not just where tires meet pavement but also the construction components underneath.[9] Consequently, the trial court's ruling was affirmed.[10]

Adeleye had similar facts in that the plaintiff was injured when a piece of concrete fell through his windshield while driving on M-10.[11] The concrete had become detached from the M-39 bridge.[12] The appellate panel also relied on the *Nawrocki* court's holding that the highway exception only applied to "'the actual physical structure of the

---

1. *Moser v. City of Detroit,* 284 Mich. App. 536 (2009). *Adeleye v. Dep't Transportation*, No. 280585, 2009 WL 2136880 (Mich. Ct. App. July 16, 2009).
2. MICH. COMP. LAW ANN. § 691.1402 (West 2000).
3. MICH. COMP. LAW. ANN. § 691.1401(e) (West 2000).
4. *Moser*, 284 Mich. App. at 537.
5. *Id.* at 540.
6. *Id.*
7. 463 Mich. 143, 171 (2000).
8. *Id.* at 183.
9. *Moser,* 284 Mich. App., at 541.
10. *Id.* at 542.
11. *Adeleye*, 2009 WL 2136880, at *1.
12. *Id.*

roadbed surface' designed for vehicular travel."[13] However, the appellate panel expressed disagreement with *Moser*.[14] The court allowed plaintiff Adeleye to continue suit because it was alleged that the defect began at the surface of the road, forming cracks and allowing water to filter through to the bottom of the roadbed, causing concrete to dismantle.[15] This court reasoned that to meet the highway exception, the defect had to start in the concrete surface itself, not merely be a part of the structure supporting the road surface.[16]

The second opinion, *Adeleye*, tried to split the hairs of the statute and the ruling in *Nawrocki*.[17] The *Adeleye* court required the defect process to start at the surface of the bridge's road where the *Moser* court held it was sufficient to have a defect in the supporting structure of the road.[18] This is a difficult burden to place on a plaintiff. Now, it is incumbent on the plaintiff, who, through no fault of his own, driving innocently on a freeway, had a block of concrete smash his face through the windshield, to determine whether a neglected bridge defect started at the top or the bottom. It is ridiculous to differentiate a road defect on that basis and to saddle an individual plaintiff with that obligation.

B. Motor Vehicle Exception

In *Tucker v. Capital Area Transportation Authority*, the plaintiff fell due to a defective wheelchair lift on a city bus.[19] Defendant argued that the claim did not fall within the motor vehicle exception to governmental immunity.[20] The exception provides that governmental agencies shall be liable for negligent operation of a motor vehicle which they own.[21] Although defendant argued that the bus was not in operation because it was not being driven at the time of the injury, the court of appeals disagreed.[22]

The court differentiated *Tucker*[23] from *Chandler v. County of Muskegon*.[24] In *Chandler*, the government vehicle was parked in a bus

13. *Id.* at *2 (citing *Nawrocki*, 463 Mich. at 183).
14. *Adeleye*, 2009 WL 2136880, at 4 n.2.
15. *Id.* at *3-4.
16. *Id.*
17. MICH. COMP. LAW ANN. § 691.1401, 1402; *Nawrocki*, 486 Mich. at 150-51.
18. *Adeleye*, 2009 WL 3136880, at *3; *Moser*, 284 Mich. App. at 541-42.
19. No. 288367, 2009 WL 3931692, at *1 (Mich. Ct. App. Nov. 19, 2009).
20. *Id.* at *1-2; MICH. COMP. LAW ANN. § 691.1405 (West 2000).
21. MICH. COMP. LAW ANN. § 691.1405.
22. *Tucker*, 2009 WL 3931692, at *2-3.
23. *Id.* at 2-3.
24. 467 Mich. 315 (2002).

barn, and the plaintiff was injured while cleaning it.[25] The court noted a decision of the Michigan Supreme Court in which it held that the operation of shuttle buses included loading and unloading passengers.[26] Because the plaintiff in *Tucker* was injured during the loading process, the court held that her claim fell within the immunity exception.[27]

III. INDEPENDENT CONTRACTOR LIABILITY

The Michigan Court of Appeals reluctantly affirmed a trial court's decision regarding a contracting party's duty to third parties in *Carrington v. Cadillac Asphalt, L.L.C.*[28] West Side Concrete, in performing their duties, pouring the cement for a curb, negligently left a "deep gap between the curb and the grass."[29] Plaintiff fell and was injured due to this defect at night with no streetlights nearby.[30] The court relied on *Fultz v. Union-Commerce Associates*,[31] which held that a contractor had to create a new hazard in the performance of its duties in order to be held liable to a plaintiff who was not part of the contract.[32] *Fultz* does not permit tort liability unless there is a duty to act, which is separate and distinct from the contract.[33]

This panel wanted to adopt the conclusions reached by the Court of Appeals for the Sixth Circuit in *Davis v. Venture One Construction, Inc.*[34] There, Judge Kennedy wrote "a contract between two parties does not determine those parties' obligations with respect to the rest of the world. Contractual duties do not limit separately existing common law tort duties."[35] The *Carrington* court found that the contract called upon West Side to "take precautions to protect the safety of the public" and because that covered the situation where plaintiff was injured, it held that West Side did not owe a separate and distinct duty to the plaintiff.[36]

This is yet another sorry example of tort law in Michigan. Having to follow the dictates of the poorly reasoned decision in *Fultz*, the court of appeals was compelled to allow contractors to endanger the public

25. *Chandler*, 467 Mich. at 316.

26. *Tucker*, 2009 WL 3931692, at *3 (citing *Martin v. Rapid Inter-Urban Transit P'ship*, 480 Mich. 936, 936 (2007)).

27. *Id.* at *3.

28. No. 289075, 2010 WL 446096, at *1 (Mich. Ct. App. Feb. 9, 2010).

29. *Id.* at *2.

30. *Id.*

31. 470 Mich. 460 (2004).

32. *Carrington*, 2010 WL 446096, at *2.

33. *Id.* (citing *Fultz*, 470 Mich. at 469-470).

34. 568 F.3d 570 (6th Cir. 2009); *Carrington*, 2010 WL 446096, at *1 n.1.

35. *Davis*, 568 F.3d at 575.

36. *Carrington*, 2010 WL 446096, at *3.

without fear of responsibility.[37] In this setting, the hiring company could simply require West Side to return to the site to make repairs to the curb, but nobody is held responsible for plaintiff's injuries.

IV. PREMISES LIABILITY

The court of appeals grappled with the concept of notice in *Herrera v. Romp Entertainment, Inc.*[38] Plaintiff was at defendant's nightclub where she was permitted and assisted by defendant's employee to dance while standing on a box.[39] The box allowed her to reach the top of a corrugated metal wall, which, unknown to her, had an extremely sharp top edge.[40] When she put her hand on top of the wall, her fingers were nearly sliced off.[41]

The trial court granted summary disposition, finding that defendant did not install the wall and did not know of its condition.[42] The court of appeals discussed the law on notice, stating that liability can arise by the "active negligence of the owner" or if "the owner knows or should have known of the unsafe condition."[43] The landowner has further duties, including warning of dangers, making the premises safe by inspecting it and making necessary repairs.[44] The court reversed and remanded the matter for further proceedings.[45]

The concurring opinion was even stronger and explained why constructive notice was not even an issue in the case.[46] Judge Gleicher explained why a business owner's obligations to his customers includes becoming notified of dangers:

> [T]he obligation of reasonable care is a full one, applicable in all respects and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, *but he must also inspect the premises to discover possible dangerous conditions of which he does*

37. *Id.*
38. No. 285471, 2010 WL 539814, at *1 (Mich. Ct. App. Feb. 16, 2010).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*, (citing Hampton v. Waste Mgmt. of Mich., Inc., 236 Mich. App. 598, 604 (1999)).
44. *Herrera*, 2010 WL 539814, at *2 (citing Stitt v. Holland Abundant Life Fellowship, 462 Mich. 591, 597 (2000)).
45. *Id.* at *3.
46. *Id.* at *3 (quoting Conerly v. Liptzen, 41 Mich. App. 238 (1972)).

not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangements or use.[47]

This opinion, and especially the comments of Judge Gleicher, is a refreshing response to Michigan premises liability jurisprudence in the past several years. The *Herrera* court correctly focused on persons in the best possible position to avoid injury instead of shielding them with judicially-created anomalies such as the "open and obvious danger" rule.[48]

V. MEDICAL MALPRACTICE

A. Swanson I

Heather Swanson, at age 16, went to the Port Huron Hospital emergency room complaining of severe lower abdominal pain and, after an ultrasound showed an ovarian cyst, was admitted to the hospital.[49] Swanson was discharged from the hospital two days later even though her pain and symptoms were continuing.[50] In a laparoscopic procedure to drain the cyst, defendant Dr. Rowe punctured Swanson's aorta causing significant bleeding, complications, scarring and disability.[51]

Despite a jury trial judgment in plaintiff's favor, the court of appeals reversed.[52] The court found that the notice of intent (NOI) that plaintiff sent prior to the institution of litigation was not sufficiently specific.[53] The court relied on *Miller v. Malik*.[54] In the *Miller* case, the NOI was insufficient in providing information regarding how the standard of care was breached and the actions that should have been taken to comply with it.[55] Further the section on proximate cause was deemed insufficient.[56] In *Swanson*, the court found the plaintiff's NOI similarly deficient in that it failed to describe the manner in which the failure of the defendants caused her injury.[57] The NOI failed to explain how determining the

47. *Id.* at *3 (Gleicher, J., concurring) (quoting *Conerly*, 41 Mich. App. at 241 (emphasis in original)).

48. *Id.* at *2.

49. *Swanson v. Port Huron Hosp.*, Nos. 275404, 278491, 2009 WL 1556516, at *1 (Mich. Ct. App. June 2, 2009).

50. *Id.* at *1.

51. *Id.* at *1-2.

52. *Id.* at *1.

53. *Id.* at *4.

54. 280 Mich. App. 687, 695-96 (2008).

55. *Id.* at 696-98.

56. *Id.* at 697-98.

57. *Swanson*, 2009 WL 1556516, at *4.

appropriate amount of force would have prevented injury to the aorta.[58] The court then took the matter to an illogical extreme and found that because the NOI was deficient, the claim was not properly commenced, and she was never authorized to proceed with the filing of a complaint.[59]

Foreshadowing the supreme court's review of a similar issue, the dissenting opinion cautioned against such a sweeping decision, suggesting that the matter be held in abeyance pending the supreme court's then upcoming decision in *Bush v. Shabahang*.[60]

B. Bush

As forecasted, the supreme court issued its decision in *Bush v. Shabahang* two months later on July 29, 2009.[61] The newly reconstituted court, including majority opinion-writer Justice Diane Hathaway, held that the statute of limitations is tolled during the waiting period for filing the complaint, even though defects (such as lack of specificity) may be present in the Notice of Intent.[62] The court looked to the legislative history to determine what should be done when there is a defective notice of intent (NOI).[63] The statute is silent regarding the consequences of filing a defective NOI.[64] There was a version of the bill that provided for dismissal of a claim that did not comply with the notice requirement.[65] Because this provision did not pass, the court found that it was not the legislature's intent to include a dismissal requirement.[66] The court further found that dismissal would frustrate the legislative purpose of promoting settlement without the need for litigation and reducing the costs of medical malpractice litigation.[67]

The *Bush* court also looked at the situation where defendant filed a defective response to an NOI.[68] Defendant Shabahang's response was one page and "utterly lacking in a good faith attempt to comply."[69] The statute requires specificity from the defendant as it does the plaintiff.[70] If

58. *Id.*
59. *Id.* at *5.
60. *Id.* at *5 (referencing Bush v. Shabahang, 278 Mich. App. 703 (2008), *leave to appeal granted*, 482 Mich. 1105 (2008).
61. 484 Mich. 156 (2009).
62. *Id.* at 170.
63. *Id.* at 172-73.
64. MICH. COMP. LAWS ANN. § 600.2912b (West 2000).
65. *Bush*, 484 Mich. at 173 (citing S.B. 270, 87th Leg. (Mich. 1993)).
66. *Id.*
67. *Id.* at 174-75.
68. *Id.* at 181.
69. *Id.* at 182.
70. MICH. COMP. LAWS ANN. § 600.2912b(7).

a defendant fails to respond to an NOI within 154 days, a plaintiff may file a lawsuit then, instead of waiting 182 days.[71] Because defendant's response in *Bush* was defective, the plaintiff was permitted to file suit after 154 days.[72] However the court cautioned that plaintiffs who assume that a response to an NOI is deficient do so at their own peril, because it may be determined later that the response was sufficient, and the plaintiffs complaint was filed too early.[73]

C. Swanson II

Five months after the decision in *Bush,* the supreme court vacated the court of appeals' decision in *Swanson.*[74] The case was remanded to the court of appeals for reconsideration in light of *Bush.*

On remand, the court of appeals panel reexamined the notice of intent.[75] Although the court believed that Swanson's NOI failed to meet the statutory requirements, it looked at the NOI as a whole rather than dissecting individual parts.[76] The court concluded that looking at the NOI as a whole, it constituted a good faith attempt to comply with the content requirements of the statute.[77] As such, dismissal was unwarranted.[78] Unfortunately for the plaintiff, the remand decision did not uphold the jury's verdict.[79] The court found that a jury instruction on res ipsa loquitur was improperly given.[80]

D. Green

In another post-*Bush* decision, the court of appeals considered an NOI which was alleged to be defective.[81] The statute requires that a plaintiff state, in the NOI, the manner in which the alleged breach was the proximate cause of the injury.[82] Green's statement indicated, "[t]imely and proper compliance with the standard of care would have

71. MICH. COMP. LAWS ANN. § 600.2912b(8).
72. *Bush,* 484 Mich. at 183-84.
73. *Id.* at 184.
74. Swanson v. Port Huron Hosp., 485 Mich. 1008 (2009).
75. Swanson v. Port Huron Hosp., ___ N.W.2d ___, Nos. 275404, 278491, 2010 WL 2541078 (Mich. Ct. App. Sept. 28, 2010).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. Green v. Pierson, No. 289588, 2010 WL 446090, at *3 (Mich. Ct. App. Feb. 9, 2010).
82. MICH. COMP. LAWS ANN. § 600.2912b(7) (West 2000).

prevented [the decedent], from untimely demise."[83] Holding that the mere correlation between malpractice and an injury is insufficient to establish proximate cause, plaintiff's dismissal was affirmed.[84]

VI. EVIDENCE

A. Spoliation

The court of appeals considered whether to allow a private cause of action against an insurer for spoliation of evidence in *Teel v. Meredith.*[85] After fire broke out in an apartment owned by Meredith, plaintiff's wife was killed.[86] Without notifying the plaintiff, an Allstate insurance representative inspected the scene, removed items, and altered the scene to such an extent that, allegedly, the cause and origin of the fire was undeterminable.[87] The court noted that few other states recognize a tort for spoliation of evidence by a third party and that recognizing such a tort would cause numerous persons and entities to use wasteful and burdensome evidence and record retention practices.[88] The majority justified its holding by concluding that there was no statutory duty, no promise by Allstate to retain the evidence, and no special relationship between the parties.[89]

In the dissent, Judge Davis chided the majority for failing to recognize the judiciary's role in developing new remedies when rights are violated.[90] He noted that Michigan law gives a presumption to one party when the opposing party destroys evidence that it would have been harmful to the destroying party.[91] A litigant is entitled to "integrity of evidence in a lawsuit" and spoliation is regarded as a legally wrongful act.[92] Judge Davis astutely pointed out that Allstate, as the insurer and agent of the defendant, knew of the possibility of litigation and, while one plaintiff was dead and the other hospitalized, it won the race to the scene.[93]

---

83. *Green*, 2010 WL 446090, at *7.
84. *Id.* at *7-8.
85. 284 Mich. App. 660, 661 (2009).
86. *Id.*
87. *Id.* at 661-62.
88. *Id.* at 668-69.
89. *Id.* at 672-73.
90. *Teel*, 284 Mich. App. at 674 (Davis, J. dissenting).
91. *Id.* at 675 (citing Pitcher v. Roger's Estate, 199 Mich. 114, 121 (1917)).
92. *Id.* at 677.
93. *Id.* at 679-80.

The majority in this case perpetuates the fiction that lawsuits are against individuals. The insurer is really the party in interest, if not in name. The insurer normally pays the attorney and pays the damages. The insurer frequently calls the shots on settlements and dictates discovery practices. The insurer typically guides every phase of pre-litigation and the lawsuit itself for the defense. When the insurance investigator goes unannounced to the scene of an accident and alters the contents to its advantage, it is doing so as a party to the litigation, with more interest in the outcome than the named party. Spoliation of evidence as a tort is more appropriate here than in any situation.

B. Polygraph Admissibility

An insurer denied plaintiff's claim for damages due to alleged theft and vandalism, determining that the crime scene appeared to have been fraudulently staged in *Dillard v. Farm Bureau Ins. Co.*[94] At trial, the court granted plaintiff's motion in limine to allow evidence that he passed a polygraph test, but only if the defense introduced evidence or argued that the plaintiff was complicit in the vandalism.[95] The jury returned a verdict in favor of the plaintiff.[96] The court of appeals held that because the Michigan Supreme Court and the U.S. Supreme Court have held that polygraph results are inadmissible in civil and criminal trials, the verdict could not be upheld.[97] It reasoned that a jury would be inclined to "attribute too much weight to a polygraph," the results of which have not proven sufficiently reliable for evidentiary admission.[98] Though the admission of these results was not per se grounds for reversal, because the plaintiff's credibility was a primary issue in the case, the court determined it was more probable than not that the jury would have reached a different result had they not been admitted.[99]

VII. ECONOMIC LOSS DOCTRINE

In *State Farm Fire & Casualty Co. v. Ford Motor Co.*,[100] the court of appeals considered whether the economic loss doctrine limited damages to Uniform Commercial Code remedies in the context of a consumer

94. No. 288134, 2010 WL 866150, at *1 (Mich. Ct. App. Mar. 11, 2010).
95. *Id.*
96. *Id.*
97. *Id.* at *1-2 (citing People v. Barbara, 400 Mich. 352, 364 (1977); United States v. Scheffer, 523 U.S. 303, 312 (1998)).
98. *Dillard*, 2010 WL 866150, at *2.
99. *Id.*
100. No. 287512, 2010 WL 866149, at *1 (Mich. Ct. App. Mar. 11, 2010).

transaction.[101] The court found that the economic loss doctrine is applicable when economic losses are suffered due to a product not meeting a purchaser's expectations.[102] This was a products liability action based upon a Ford F-150 that had a defective cruise control deactivation switch.[103] The truck caught fire and was destroyed, along with the underlying plaintiff's home, garage, and other vehicle.[104] The court found that the damages suffered were not ones resulting from lost expectations in the product but rather damages in tort suffered by the consumer.[105] In the concurring opinion, Judge Zahra concluded that the economic loss doctrine should not apply to consumer transactions at all.[106]

VIII. PROXIMATE CAUSE

In *Kotsonis v. Anglin*,[107] the court of appeals was asked to overturn a verdict for the defendant as against the great weight of the evidence.[108] Defendant installed a roof on plaintiff's home, after which problems developed with interior condensation.[109] Plaintiff attributed this to defendant's failure to install an appropriate ventilation system.[110] Defendant countered that the insulation was installed upside down with the expectation that the plaintiff would have it installed correctly during the drywall process.[111] The jury bought the defendant's explanation, finding that the installation was against industry standards but was not a proximate cause of the damages claimed.[112] The court of appeals refused to disturb the jury's conclusion on lack of proximate cause.[113] They found competent evidence to support the jury's verdict, namely that the defendant expected the insulation to be reinstalled. [114]

The trial court and the court of appeals had the opportunity to right an injustice, but instead crafted a legal argument to approve an absurd result. The defendant was permitted to blame the plaintiff and future

101. *Id.*
102. *Id.* at *3.
103. *Id.* at *1.
104. *Id.*
105. *Id.* at *5.
106. *State Farm*, 2010 WL 866149, at *6 (Zahra, J. concurring).
107. No. 284440, 2009 WL 2426321, at *1 (Mich. Ct. App. Aug. 6, 2009).
108. *Id.* at *1.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Kotsonis*, 2009 WL 2426321, at *1.
114. *Id.*

contracting parties for damages directly emanating from insulation that defendant admitted was installed upside down.

IX. CONCLUSION

It took over a decade for the Taylor-era court to decimate the rights of accident victims, patients and consumers. The cases summarized above showed an uplifting trend toward restoring individual rights. Unfortunately the tenure of the Kelly court was short-lived. Hopefully the newly constituted court will not revert to issuing result-oriented decisions benefitting generous campaign donors, wealthy insurers and large corporations. Courts should render impartial decisions based upon the law and the justice that all citizens can and should expect.