TORTS

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I. INTRODUCTION

The purpose of this article is to review significant developments in tort law during the period of June 1, 2006 to May 31, 2007. During this period, Michigan's appellate courts issued decisions in the following eight areas: medical malpractice, governmental immunity, respondeat superior, product liability, Michigan's Ski Area Safety Act,[1] premises liability, strict liability for dog owners, and defamation. As more fully developed below, different panels of the Michigan Court of Appeals disagreed on two major legal issues: (1) whether a successor personal representative can file suit in reliance on a predecessor's notice of intent to sue, and (2) whether the wrongful death savings provisions grant a successor personal representative the opportunity to file a new action to overcome the untimeliness of his predecessor's actions. The former was resolved by a special conflict panel shortly after the *Survey* period

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1. MICH. COMP. LAWS ANN. §§ 408.321-.344 (West 1999).

ended.[2] That court held that a notice of intent to sue sent by a predecessor personal representative can support a complaint filed by a successor personal representative.[3] To date, no special panel has been convened to resolve the second issue.

The Michigan Court of Appeals also decided two major issues of first impression. In *Vance v. Henry Ford Health System*,[4] the court held that a personal representative of a minor's estate is governed by the wrongful death savings provisions as opposed to the minor disability provisions.[5] In *Costa v. Community Emergency Medical Services, Inc.*,[6] the court held that a defendant in a medical malpractice suit who is asserting the defense of governmental immunity is not required to file an affidavit of meritorious defense unless an order has been entered denying his defense of governmental immunity.[7]

II. MEDICAL MALPRACTICE

A. Wrongful Death Actions

During the period under review, Michigan courts struggled with the proper interpretation and interplay between certain statutes governing the period of limitations, the notice of intent requirements, the terms and conditions under which the statute of limitations is tolled, the personal representative savings provisions, and the provisions regarding successor personal representatives. To understand the confusing and sometimes inconsistent opinions of the courts, it is helpful to begin with an overview of the relevant statutory scheme.

Generally, under MCL section 600.5805(6), a medical malpractice action must be filed within two years of the accrual of the cause of action.[8] MCL section 600.5852 operates as an exception to this general rule.[9] It states:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of

2. *See* Braverman v. Garden City Hosp., 275 Mich. App. 705, 740 N.W.2d 744 (2007).

3. *Id.* at 715-16, 740 N.W.2d at 750.

4. 272 Mich. App. 426, 726 N.W.2d 78 (2006).

5. *See id.* at 433-34, 726 N.W.2d at 82-83.

6. 475 Mich. 403, 716 N.W.2d 236 (2006).

7. *See id.* at 406, 716 N.W.2d at 238.

.8. *See* MICH. COMP. LAWS ANN. § 600.5805(6) (West 2000 & Supp. 2007) ("Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.").

9. *See* MICH. COMP. LAWS ANN. § 600.5852 (West 2000).

> limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.[10]

Under this provision, the personal representative may file a wrongful death/medical malpractice complaint within two years of receiving his letters of authority.[11]

Prior to filing a complaint, the plaintiff must serve a written notice of intent on each of the prospective defendants.[12] The notice of intent must be served at least 182 days before the complaint can be filed and it must contain certain specific information.[13] MCL section 600.2912b states:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.[14]

MCL section 600.2912b(4) requires that the notice of intent contain the following information:

> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or carfe was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.[15]

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10. *Id.*
11. *See id.*
12. *See* MICH. COMP. LAWS ANN. § 600.2912b(1) (West 2000).
13. *See id.*
14. *Id.*
15. MICH. COMP. LAWS ANN. § 600.2912b(4) (West 2000).

The notice of intent can also suspend the running of the statute of limitations.[16] MCL section 600.5856 states:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> . . . .
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.[17]

With this statutory language constantly in mind, I turn to the relevant cases.

The Michigan Court of Appeals decided *Braverman v. Garden City Hospital*[18] on August 15, 2006. In *Braverman*, the dominant issue presented to the court was whether MCL section 600.2912b requires that the same personal representative, or human being, who filed the notice of intent also file the complaint.[19] This, of course, has serious statute of limitations implications. The facts in *Braverman* can be briefly summarized. The complaint alleged that the decedent died as a result of negligent medical treatment she received between April 18, 2000 and November 29, 2001.[20] The decedent's mother, Grace Fler, was appointed personal representative of her estate on October 29, 2002.[21] Ms. Fler sent her notice of intent to the defendants on July 8, 2004.[22] She resigned and plaintiff was appointed as the successor personal representative on or about August 18, 2004.[23] The plaintiff filed the complaint on January 25, 2005.[24] It was undisputed that plaintiff failed to file the complaint within the two-year limitation period required under MCL section 600.5805(6).[25]

The defendants moved for summary disposition on the grounds that the plaintiff's medical malpractice action was time-barred by the two-year statute of limitations under MCL section 600.5805(6) and the

16. *See* MICH. COMP. LAWS ANN. § 600.5856(c) (West 2000 & Supp. 2007).
17. *Id.*
18. 272 Mich. App. 72, 724 N.W.2d 285 (2006).
19. *See id.* at 75-76, 724 N.W.2d at 288.
20. *Id.* at 75, 724 N.W.2d at 287.
21. *Id.* at 75, 724 N.W.2d at 287-88.
22. *Id.* at 75, 724 N.W.2d at 288.
23. *Id.*
24. *Braverman*, 272 Mich. App. at 75, 724 N.W.2d at 287.
25. *Id.* at 75, 724 N.W.2d at 288.

plaintiff was not entitled to the benefit of the wrongful death savings provisions of MCL section 600.5852.[26] The trial court denied the motion for summary disposition finding that the action was timely.[27] The court of appeals affirmed the trial court's ruling that the action was timely, but reversed it in part and remanded it to the trial court for further proceedings pursuant to *Verbrugghe v. Select Specialty Hospital*.[28] On March 23, 2006, less than five months earlier, the *Verbrugghe* court had held that, under MCL section 600.2912b(1), the same personal representative, or human being, who filed the notice of intent has to file the complaint.[29]

While the *Braverman* court disagreed with both the rationale and holding of the *Verbrugghe* court, it felt obligated to accept it as controlling precedent.[30] In its opinion, the court stated:

> We recognize that the holding in *Verbrugghe* is based on this Court's earlier decision in *Halton v. Fawcett*, 259 Mich. App. 699, 675 N.W.2d 880 (2003), which arguably is controlling authority with respect to the notice of intent issues in both *Verbrugghe* and this case. Nonetheless, the factual circumstances in these cases are sufficiently distinguishable to raise a question whether the result in *Verbrugghe* or this case properly follows from the holding in *Halton*. Given our concern with the result in this case, and the likelihood of unjust consequences in future cases, we declare a conflict, MCR 7.215(J)(2), so that the precedent established by *Halton* and *Verbrugghe* may be more fully considered in the circumstances that are now presented. Were we not required to follow the precedent established by *Verbrugghe*, MCR 7.215(J)(1), we would affirm.[31]

Both *Verbrugghe* and *Braverman* involved factual situations where the notice of intent and complaint were filed by different personal representatives.[32] In *Halton v. Fawcett*[33] the same human being filed both the notice of intent and complaint. The plaintiff simply filed the notice of intent before she was appointed as personal representative.

Shortly after this *Survey* period ended, the Michigan Court of Appeals, pursuant to MCR 7.215(J), convened a special panel to resolve

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26. *Id.* at 77, 724 N.W.2d at 289.

27. *Id.* at 76, 724 N.W.2d at 288.

28. *Id.* at 86-88, 724 N.W.2d at 294-95 (citing *Verbrugghe*, 270 Mich. App. 383, 715 N.W.2d 72 (2006)).

29. *Verbrugghe*, 270 Mich. App. at 397, 715 N.W.2d at 81.

30. *See Braverman*, 272 Mich. App. at 74-75, 724 N.W.2d at 287.

31. *Id.*

32. *See generally Braverman*, 272 Mich. App. 72, 724 N.W.2d 285; *Verbrugghe*, 270 Mich. App. 383, 715 N.W.2d 72.

33. 259 Mich. App. 699, 675 N.W.2d 880 (2003).

the conflict between the opinions in *Verbrugghe* and *Braverman*.[34] The court stated that the proper issue before it was whether a successor personal representative could file suit in reliance on his predecessor's notice of intent to sue.[35] The court stated that this issue was never presented to either the *Verbrugghe* court or *Halton* court, nor was it answered by the opinion in either case.[36] Basically, the court held that the *Braverman* court had misconstrued the scope and application of the *Verbrugghe* holding.[37] The court then sought to resolve the confusion by holding that a notice of intent to sue sent by a predecessor personal representative can support a complaint filed by a successor personal representative.[38]

B. The Substantive Content of the Notice of Intent

The Michigan Court of Appeals decided *Boodt v. Borgess Medical Center*[39] on October 31, 2006. In *Boodt*, the court was presented with two major issues: (1) What level of specificity is a plaintiff required to include in her notice of intent to sue? and (2) Where the complaint is dismissed because of the plaintiff's failure to comply with MCL section 600.2912b(4), should the dismissal be with or without prejudice?[40]

As indicated above, MCL section 600.2912b(4) states:

> (4) The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

.34. *Braverman*, 275 Mich. App. at 706, 740 N.W.2d at 745.
35. *Id.* at 711, 740 N.W.2d at 748.
36. *Id.* at 714-15, 740 N.W.2d at 749-50.
37. *See id.* at 705, 740 N.W.2d at 744.
38. *See id.* at 716, 740 N.W.2d at 750.
39. 272 Mich. App. 621, 728 N.W.2d 471 (2006).
40. *See generally id.*

> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.
>
> (f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.[41]

In the instant case, the trial court granted the defendants' motion for summary disposition with prejudice holding that the plaintiff's notice of intent to sue was inadequate and failed to comply with the requirements of MCL section 600.2912b(4).[42] On appeal, the court held that the notice of intent should be examined "as a whole" when deciding whether it meets its intended purpose of adequately informing the defendant of the grounds for the lawsuit.[43]

In this particular case, the plaintiff's notice of intent provided, in part, as follows: "'If the standard of care had been followed, Mr. Waltz would not have died on October 11, 2001.'"[44] The court held that:

> This perfunctory statement, taken by itself, would be insufficient to explain how defendant's alleged violations of the standard of care resulted in the death, as required by MCL 600.2912b(4)(e). However, it must be viewed in the context of the *entire* document, the facts underlying the case, and the proper pleading standard. The notice of intent *as a whole*, reveals that Dr. Lauer was conducting a procedure on a major blood vessel that involved inserting a wire into that vessel, and that during the procedure Dr. Lauer perforated the blood vessel. Dr. Lauer then failed to take steps that might have permitted him or a surgeon to repair the vessel, such as stopping the administration of an anticoagulant, performing a pericardiocentesis, notifying a surgeon, and maintaining access to the blood vessel.[45]

Based on this analysis, the court held that the notice of intent was adequate with respect to Dr. Lauer but not to the two other medical facility defendants, Borgess Medical Center and Heart Center for Excellence.[46] In dismissing plaintiff's claims against these other two defendants, the court was faced with the question of whether the wrongful death savings provisions in MCL section 600.5852 required that the complaint be dismissed with or without prejudice, so as to allow

41. MICH. COMP. LAWS ANN. § 600.2912b(4) (West 2000).
42. *Boodt*, 272 Mich. App. at 623, 728 N.W.2d at 474.
43. *Id.* at 630, 728 N.W.2d at 477.
44. *Id.* at 631-32, 728 N.W.2d at 478.
45. *Id.* at 632, 728 N.W.2d at 478 (emphasis added).
46. *Id.* at 629, 728 N.W.2d at 476.

the successor personal representative enough time to commence a new suit against the medical facility defendants.[47]

Although Michigan's Supreme Court had previously interpreted the statute to grant the successor personal representative with a new, independent two-year period in which to begin suit, as long as he does so within the five year statute of repose,[48] this case asked the more specific question of whether the wrongful death savings provisions grant a successor personal representative the opportunity to file a new action "*to overcome the untimeliness of his or her predecessor's action.*"[49]

In *Boodt*, the court noted that *McLean v. McElhaney*[50] and *Verbrugghe* provided conflicting and irreconcilable opinions on this issue.[51] The operative facts in *McLean*, which was decided on December 13, 2005, can be briefly summarized. The decedent's last day of medical treatment was on February 12, 2001.[52] The decedent died on February 14, 2001 and letters of authority were issued to the plaintiff on March 13, 2001.[53] On October 29, 2002 the defendants were served with the notice of intent and the complaint was filed on September 5, 2003.[54]

Pursuant to the holding of *Waltz v. Wyse*,[55] the *McLean* court held that the two year statute of limitations for medical malpractice cases, under MCL section 600.5805(6), began to run on February 12, 2001.[56] Because the notice of intent was served within 182 days of the expiration of the period of limitation, the running of the relevant period of limitation was tolled for 182 days.[57] *Waltz* held that the tolling provision of MCL section 600.5856(c) only applies to the statute of limitations or repose and does not toll the additional period for filing that a personal representative receives under MCL section 600.5852.[58] Under this rationale, the statute of limitations would have started to run again on April 29, 2003 and it would have run out on August 15, 2003. As stated above, the complaint was not filed until September 5, 2003.[59]

Verbrugghe was decided on March 23, 2006, approximately three months after *McLean*, and reached the opposite conclusion.[60] In

47. *See id.* at 633-35, 728 N.W.2d at 479-80.

48. *See* Eggleston v. Bio-Medical Applications of Detroit, Inc., 468 Mich. 29, 32, 658 N.W.2d 139, 141-42 (2003).

49. *Boodt*, 272 Mich. App. at 634, 728 N.W.2d at 479 (emphasis added).

50. 269 Mich. App. 196, 711 N.W.2d 775 (2005).

51. *See Boodt*, 272 Mich. App. at 634, 728 N.W.2d at 479.

52. *McLean*, 269 Mich. App. at 197, 711 N.W.2d at 777.

53. *Id.*

54. *Id.*

55. 469 Mich. 642, 677 N.W.2d 813 (2004).

56. *McLean*, 269 Mich. App. at 199, 711 N.W.2d at 778.

57. *Id.*

58. *Id.* at 198-99, 711 N.W.2d at 788.

59. *Id.* at 197, 711 N.W.2d at 777.

60. *See* Verbrugghe v. Select Specialty Hosp., 270 Mich. App. 383, 383, 715 N.W.2d 72, 72 (2006).

overruling the trial court, the *Verbrugghe* court held that, under MCL section 600.5852, a successor personal representative may file a medical malpractice/wrongful death case at any time within the two year period following the issuance of his letters of authority regardless of whether the statute of limitations has run.[61] The only restriction is that the complaint must be filed within two years after the letters of authority were issued to the plaintiff and within three years after the expiration of the statute of limitations.[62]

After discussing *McLean* and *Verbrugghe*, the *Boodt* court stated:

> Under our court rules, "[w]hen a panel is confronted with two conflicting opinions published after November 1, 1990, the panel is obligated to follow the first opinion issued." *Auto-Owners Ins Co v. Harvey*, 219 Mich. App. 466, 473, 556 N.W.2d 517 (1996). We are therefore bound to follow the result reached by the *McLean* panel.
>
> Under the dictates of *McLean*, because plaintiff brought an untimely action against the corporate defendants as a result of filing a defective notice of intent with respect to them, any successor personal representative is precluded from bringing a new suit. Accordingly, we are required to affirm the dismissal with prejudice of the claims against the corporate defendants.[63]

The court went on to make it clear that it disagreed with the *McLean* decision: "However, we believe, as did the *Verbrugghe* panel, that *McLean* was incorrectly decided because it simply failed to follow the plain rule articulated in the statute and by our Supreme Court."[64]

The *Boodt* court also recommended that the Court of Appeals convene a special panel to resolve this conflict.[65] On November 13, 2006, however, the court stated that it would not convene a special panel to resolve the issue.[66] To date, the conflict between *McLean* and *Verbrugghe* remains unresolved. It is almost a virtual certainty that this dispute will surface again.

In *Tousey v. Brennan*[67], the court of appeals once again faced the issue of how much specificity is required in a notice of intent under MCL section 600.2912b.[68] The plaintiff's notice in this case provided, in

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61. *Id.* at 389-90, 715 N.W.2d at 77.
62. *Id.*
63. Boodt v. Borgess Med. Ctr., 272 Mich. App. 621, 635, 728 N.W.2d 471, 479-80 (2006).
64. *Id.*
65. *Id.* at 637, 728 N.W.2d at 480-81.
66. Boodt v. Borgess Med. Ctr., 272 Mich. App. 801, 727 N.W.2d 402 (2006).
67. 275 Mich. App. 535, 739 N.W.2d 128 (2007).
68. *Id.* at 539, 739 N.W.2d at 130.

relevant part, as follows: "'[d]ue to the negligence and/or breaches of the . . . standard of care or practice by Dr. Gerard Brennan, Gordon Tousey suffered a life ending myocardial infarction.'"[69] It must be noted that this is strikingly similar to the language contained in the notice at issue in *Boodt*. In fact, the court of appeals affirmatively cited *Boodt* when holding that "[w]hen viewed as a *whole* . . . the notice of intent at issue here similarly involves 'no real guesswork' regarding the grounds upon which 'plaintiff believes recovery [to be] justified.'"[70] The court reiterated the standard that as long as the notice of intent serves its intended purpose, it is legally adequate.[71]

In addition, the defendants in *Tousey* argued that the affidavits offered by plaintiff that had been authenticated by out-of-state notaries failed to contain the special certification required by MCL section 600.2102(4).[72] The court of appeals pointed out that the lower court had correctly relied on *Apsey v. Memorial Hospital*[73] in striking these out-of-state affidavits, but noted that its opinion in *Apsey* had since been overruled by the Michigan Supreme Court when it held that the special certification provisions of MCL section 600.2102(4) are merely alternative means of authenticating these documents.[74]

C. Tolling

In *Ward v. Siano*[75], the court of appeals convened another special panel to resolve a conflict between *Mazumder v. University of Michigan Regents*[76] and *Ward v. Siano*.[77] Although the Michigan Supreme Court held in *Waltz v. Wyse*[78] that the two-year period contained in the wrongful death saving statute was not tolled by serving a medical malpractice defendant with notice to sue and, furthermore, that its decision applied retroactively,[79] the *Mazumder* court effectively circumvented its decision.[80] Specifically, in *Mazumder*, the court applied the doctrine of equitable tolling to a plaintiff who had relied on his understanding of the law as it existed before *Waltz*.[81] The Court of Appeals used this as its opportunity to reinstate the original ruling and

69. *Id.*
70. *Id.* at 541, 739 N.W.2d at 131 (emphasis added).
71. *Id.* at 540-41, 739 N.W.2d at 131.
72. *Id.* at 537, 739 N.W.2d at 129.
73. 266 Mich. App. 666, 702 N.W.2d 870 (2005).
74. *Tousey*, 275 Mich. App. at 542, 739 N.W.2d at 131.
75. 272 Mich. App. 715, 730 N.W.2d 1 (2006).
76. 270 Mich. App. 42, 715 N.W.2d 96 (2006).
77. 270 Mich. App. 584, 718 N.W.2d 371 (2006), *vacated in part*, 270 Mich. App. 801, 718 N.W.2d 371 (2006).
78. 469 Mich. 642, 677 N.W.2d 813 (2004).
79. *See generally id.*
80. *See generally Mazumder*, 270 Mich. App. 42, 715 N.W.2d 96
81. *See id.* at 60, 715 N.W.2d at 106.

reasoning applied in *Waltz* and further held that any attempt to excuse nonconformity with the statute would amount to amending it from the bench, which, according to the court, is clearly not a function of the judiciary.[82] In addition, the court provided, "[t]o allow a wholesale disregard of *Waltz's* retroactive application on the basis of individual 'unfairness' to each plaintiff would allow the constant exceptions collectively to swallow the rule."[83]

Glisson v. Gerrity[84] involved another medical malpractice claim reviewed by the Michigan Court of Appeals during this timeframe. In *Glisson*, the affidavit of merit that accompanied the plaintiff's complaint was challenged by one of the defendants because it failed to specifically name her or assert any wrongdoing on her part, thus not conforming to the requirements of MCL section 600.2912(d).[85] The defendant argued that because the plaintiff failed to cure this defect in a timely manner, her claim should be dismissed with prejudice.[86] The Michigan Court of Appeals agreed and, relying on *Mouradian v. Goldberg*[87] and *Geralds v. Munson Healthcare*,[88] held that the affidavit failed to comply with the requirements of MCL section 600.2912d, did not toll the statute of limitations, and therefore, dismissal with prejudice was appropriate.[89]

After the *Survey* period, the Supreme Court, in lieu of granting plaintiff's request for leave to appeal, reversed and vacated portions of the *Glisson* opinion.[90] The court explained that it had overruled both *Mouradian* and *Geralds* (relied upon by the *Gerrity* panel) in *Kirkaldy v. Rim*.[91] There the court held:

> [U]nder MCL 600.5856(a) and MCL 600.2912d, the period of limitations is tolled when a complaint and affidavit of merit are filed and served on the defendant" . . . Even a defective affidavit of merit will "toll the period of limitations until the validity of the affidavit is successfully challenged in 'subsequent judicial proceedings.'" . . . Accordingly, we [dismiss] without prejudice those claims concerning [this defendant] . . . and we remand this

82. *See Ward*, 272 Mich. App. at 719, 730 N.W.2d at 2-3.

83. *Id.* at 719, 730 N.W.2d at 3.

84. 274 Mich. App. 525, 734 N.W.2d 614 (2007), *rev'd and vacated in part*, 738 N.W.2d 237 (2007).

85. *Id.* at 529, 734 N.W.2d at 616.

86. *Id.*

87. 256 Mich. App. 566, 664 N.W.2d 805 (2003).

88. 259 Mich. App. 225, 673 N.W.2d 792 (2003).

89. *Glisson*, 274 Mich. App. at 537, 734 N.W.2d at 621.

90. *See* Glisson v. Gerrity, 480 Mich. 883, 738 N.W.2d 237 (2007).

91. 478 Mich. 581, 734 N.W.2d 201 (2007).

case to the Wayne County Circuit Court for further proceedings with regard to the amended pleadings.[92]

D. Minor Disability Time Provisions v. Wrongful Death Savings Provisions

In an issue of first impression in Michigan, the court of appeals in *Vance v. Henry Ford Health System*,[93] was also faced with the question of whether the personal representative of a minor's estate may rely on the minor disability time provisions in MCL section 600.5851(7) rather than the time provisions under the wrongful death savings statute.[94] *Vance* stemmed from the August 1, 2002 death of a seven-year-old boy who allegedly died from a morphine overdose one day after being admitted to the defendant hospital for treatment of pain caused by sickle cell anemia.[95] The plaintiff in this case was appointed personal representative of the boy's estate on August 20, 2002 and filed the required notices of intent to sue against the hospital and various doctors and nurses in November and December of 2003.[96] However, she waited to file the corresponding medical malpractice, wrongful death action until September 13, 2004, two days before the decedent would have celebrated his tenth birthday.[97]

The defendant argued that because this was a wrongful death claim, plaintiff's claim was time-barred pursuant to the two-year grace period extension set forth in MCL section 600.5852.[98] MCL section 600.5852 requires a suit to be filed no later than two years from the date a personal representative receives his or her letters of authority.[99] Plaintiff's argument, however, was that MCL section 600.5851(7) governed this case and, accordingly, her suit was timely filed.[100] MCL section 600.5851(7) provides, in pertinent part, as follows:

> [I]f, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's

92. *Glisson*, 480 Mich. at 883, 738 N.W.2d at 237 (quoting *Kirkaldy*, 478 Mich. 581, 734 N.W.2d 201 (2007)).
93. 272 Mich. App. 426, 726 N.W.2d 78 (2006).
94. *See generally id.*
95. *Id.* at 427, 726 N.W.2d at 79.
96. *Id.*
97. *Id.* at 427-28, 726 N.W.2d at 79.
98. *Id.* at 428, 726 N.W.2d at 79.
99. MICH. COMP. LAWS ANN. § 600.5852 (West 2000).
100. *See Vance*, 272 Mich. App. at 428, 726 N.W.2d at 79.

> tenth birthday or within the period of limitations set forth in section 5838(a), whichever is later.[101]

In a thorough analysis of the legislature's intent, the court held that the definition of the word "birthday," as used in the above-referenced statute, was not meant to include the "anniversary" of a deceased minor's birth.[102] Specifically, the court provided that "a person who died before his eighth birthday lacks the power, capacity, or ability to act, and, therefore, cannot effectively have a 'tenth birthday.' In short, a deceased minor no longer continues to age for purposes of MCL 600.5851(7)."[103] Therefore, according to the court, the statutory timeframe set forth in the wrongful death savings provisions governed the plaintiff's case, meaning that her complaint was untimely filed.[104]

E. General Negligence Claims v. Medical Malpractice Claims

In *Kuznar v. Raksha Corp.*,[105] the plaintiff had a prescription for 0.125-milligram tablets of Mirapex refilled at defendant pharmacy.[106] According to the plaintiff, defendant Randall, who was an employee of defendant pharmacy but who was not herself a pharmacist, refilled the prescription with one-milligram tablets of Mirapex.[107] Defendant Randall was also not acting under the supervision of a pharmacist at the time.[108] Plaintiff, therefore, filed an ordinary negligence claim against said defendants as opposed to a medical malpractice claim.[109] The court of appeals was faced with the question of whether this action fell within the realm of ordinary negligence or whether plaintiff's claim should have been characterized as a medical malpractice action.[110]

In holding that a pharmacy is not a licensed health facility subject to medical malpractice claims, the court reasoned that the time frame for pursing medical malpractice actions is set forth in MCL section 600.5838a.[111] MCL section 600.5838a(1)(a) defines a qualifying licensed health facility or agency as "a health facility or agency licensed under article 17 of the public health code . . . being sections 333.20101 to 333.22260 . . . ."[112] Since article 15 of the public health code[113] sets forth

101. MICH. COMP. LAWS ANN. § 600.5851(7) (West 2000).
102. *Vance*, 272 Mich. App. at 434, 726 N.W.2d at 82.
103. *Id.*
104. *Id.* at 434-35, 726 N.W.2d at 83.
105. 272 Mich. App. 130, 724 N.W.2d 493 (2006).
106. *Id.* at 131, 724 N.W.2d at 494.
107. *Id.*
108. *Id.*
109. *Id.* at 132, 724 N.W.2d at 495
110. *Id.* at 133, 724 N.W.2d at 495.
111. *Kuznar*, 272 Mich. App. at 135, 724 N.W.2d at 496-97.
112. MICH. COMP. LAWS ANN. § 600.5838a(1)(a) (West 2000).
113. MICH. COMP. LAWS ANN. § 333.17741 (West 2001).

the licensure requirements applicable for pharmacies, the court concluded that they are not subject to medical malpractice claims.[114]

F. Medical Malpractice Expert Qualifications

During the *Survey* period, the court also provided a more detailed explanation of an expert witness' required qualifications in a medical malpractice action. In *Reeves v. Carson City Hospital*,[115] the Court of Appeals applied the controlling Supreme Court decisions of *Woodard v. Custer*[116] and *Hamilton v. Kuligowski*[117] to a new set of facts.[118] In both *Woodard* and *Hamilton*, the defendant physicians were board certified in particular areas of medicine, with additional practice experience in other areas.[119] The experts offered by plaintiffs did not match all of the defendant's board certificates or specialties. For example, in *Woodard*, the defendant was board-certified in pediatrics and had certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine.[120] Although the plaintiff's proposed expert witness in *Woodard* was board-certified in pediatrics, he did not have the other certificates of special qualifications.[121]

In these companion cases, Michigan's Supreme Court held that the plaintiff's expert did not need to have all the other certificates of special qualifications. The expert just needs to have the same "specialty" that the defendant was engaged in at the time of the alleged malpractice.[122] Furthermore, if the defendant is board certified in that "specialty," the plaintiff's expert also needs to be board certified in that "specialty."[123]

Under *Woodard's* definition of "specialist," any physician that can potentially become board certified in a branch of medicine or surgery is defined as a specialist.[124]

Neither *Woodard* nor *Hamilton*, however, addressed a factual situation like the one the court faced in *Reeves*, where the defendant was practicing outside of her board certification when the alleged malpractice occurred.[125] In *Reeves*, the defendant was board certified in family practice but was practicing in the emergency room during the time in question.[126] The court held that because she potentially could have

114. *Kuznar*, 272 Mich. App. at 135, 724 N.W.2d at 497.
115. 274 Mich. App. 622, 736 N.W.2d 284 (2007).
116. 476 Mich. 545, 719 N.W.2d 842 (2006).
117. 473 Mich. 858, 701 N.W.2d 134 (2005).
118. *See generally Reeves*, 274 Mich. App. 622, 736 N.W.2d at 284.
119. *Id.* at 625-26, 736 N.W.2d at 286.
120. *Id.* at 626, 736 N.W.2d at 286-87.
121. *Id.* at 625, 726 N.W.2d at 286.
122. *See Reeves*, 274 Mich. App. at 627, 736 N.W.2d at 287.
123. *Id.*
124. *Id.* at 628, N.W.2d at 288-89.
125. *Id.* at 624, 736 N.W.2d at 285.
126. *Id.* at 628-29, 736 N.W.2d at 287-88.

obtained a board certification in emergency medicine, she was a "specialist" in emergency medicine pursuant to *Woodard* and, therefore, plaintiffs would need a specialist in emergency medicine as their expert witness.[127]

Citing this opinion affirmatively, the court further held in *Gonzalez v. St. John Hospital*,[128] that a doctor who has not yet finished his residency fits the definition of a "specialist" just like a doctor who is practicing outside his or her specialty.[129] Therefore, where defendant was a third-year surgical resident at the time of the alleged malpractice, plaintiff's use of a board certified general surgeon as an expert witness was not inappropriate as a matter of law.[130]

III. GOVERNMENTAL IMMUNITY

In *Costa v. Community Emergency Medical Services, Inc.*,[131] the Michigan Supreme Court was confronted with an issue of first impression. The issue was whether a defendant in a medical malpractice claim who is asserting the defense of governmental immunity is required by MCL section 600.2912e to file an affidavit of meritorious defense.[132] MCL section 600.2912e reads, in pertinent part, as follows:

> In an action alleging medical malpractice . . . the defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit [of merit], an affidavit of meritorious defense signed by a health professional.[133]

Under MCL section 691.1407(2), a governmental employee is immune from tort liability if each of the following conditions is met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

127. *Id.* at 630, 736 N.W.2d at 289.
128. 275 Mich. App. 290, 739 N.W.2d 392 (2007).
129. *Id.* at 295, 739 N.W.2d at 395.
130. *Id.* at 307-08, 739 N.W.2d at 401-02.
131. 475 Mich. 403, 716 N.W.2d 236 (2006).
132. *Id.* at 406, 716 N.W.2d at 238.
133. MICH. COMP. LAWS ANN. § 600.2912e (West 2000).

> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.[134]

After acknowledging the legislative intent to spare public entities the expense of defending a lawsuit where they are protected by governmental immunity,[135] the court held that a defendant asserting governmental immunity is not obligated to submit an affidavit of meritorious defense unless an order has been entered denying their defense of governmental immunity.[136] Furthermore, the requirements of MCL section 600.2912e will be stayed during appeal of an order denying governmental immunity.[137]

The court reasoned that it would not only be inconsistent with legislative intent, but it would also be too expensive and burdensome on taxpayer resources to force defendants asserting governmental immunity to submit the required affidavits when they were technically not liable for the tort anyway.[138] Specifically, the court held as follows:

> [A] "central purpose" of governmental immunity is to "prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity." We believe that the expense and burden of obtaining an expert to prepare an affidavit of meritorious defense fall squarely within this purpose. It would be incongruous to conclude that the failure to comply with a pleading requirement of this nature would subject a defendant to tort liability, where such a defendant is already immune from tort liability by virtue of his or her status as a governmental employee. Allowing governmental employee defendants to raise an immunity defense while simultaneously requiring that they disrupt their duties and expend time and taxpayer resources to preparer an unnecessary affidavit of meritorious defense, would render illusory the immunity afforded by the GTLA.[139]

While this approach seems very logical and serves the purpose of furthering legislative intent, one can only wonder if this sort of rule is going to create an incentive for defendants to claim governmental immunity, even in situations where they know it is inapplicable, in an effort to buy time to submit their affidavit of meritorious defense.

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134. MICH. COMP. LAWS ANN. § 691.1407(2) (West 2000 & Supp. 2007).
135. *Costa*, 475 Mich. at 409-10, 716 N.W.2d at 239-40.
136. *Id.* at 414, 716 N.W.2d at 242.
137. *Id.*
138. *Id.* at 410, 716 N.W.2d at 239-40.
139. *Id.* at 410, 716 N.W.2d at 240 (citation omitted).

In *Rowland v. Washtenaw County Rd. Commission*,[140] the court summarized the dominant issue as "whether a notice provision applicable to the defective highway exception to governmental immunity, MCL 691.1404(1), should be enforced as written."[141] MCL section 691.1404(1) reads, in pertinent part, as follows:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.[142]

The plaintiff in this case did not serve her notice on the defendant, a governmental entity, until 140 days after the incident occurred.[143] Because this exceeded the 120 day window set forth in the statute, the defendant sought summary disposition.[144] The trial court denied the defendant's motion on the ground that the governmental defendant is required to show prejudice before the above-referenced statute can be enforced.[145] In doing so, it relied on the court's previous holdings in *Hobbs v. Michigan State Highway Department*[146] and *Brown v. Manistee County Road Commission*.[147]

In *Rowland*, the Michigan Supreme Court overruled *Hobbs* and *Brown*, and held that no such prerequisite exists.[148] It labeled those cases as "anomalies" and explained that by "reading an 'actual prejudice' requirement into the statute, [the] Court [had] . . . usurped the Legislature's power . . . ."[149] The court also stressed the fact that such a straightforward reading of the statute was both required and constitutional because it was rationally related to, among other things, the legitimate government purpose of repairing the road promptly to prevent further injury.[150] In other words, the court returned to strict application of the longstanding rule which dictates that when the words of a statute are clear and unambiguous, they should be given their plain meaning and applied as written.[151]

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140. 477 Mich. 197, 731 N.W.2d 41 (2007).
141. *Id.* at 200, 73 N.W.2d at 44.
142. MICH. COMP. LAWS ANN. § 691.1404(1) (West 2000).
143. *Rowland*, 477 Mich. at 200, 731 N.W.2d at 45.
144. *Id.*
145. *Id.*
146. 398 Mich. 90, 247 N.W.2d 754 (1976).
147. 452 Mich. 354, 550 N.W.2d 215 (1996).
148. *See generally Rowland*, 477 Mich. 197, 731 N.W.2d 41.
149. *Id.* at 213, 731 N.W.2d at 51.
150. *Id.* at 212, 731 N.W.2d at 51.
151. *Id.* at 202, 731 N.W.2d at 45.

The next issue facing the court was whether its decision should have retroactive effect. The threshold question in making this determination is "whether 'the decision clearly established a new principle of law.'"[152] In holding that its decision should have full retroactive effect, the court insisted that it was not creating new law, but merely returning law back to the way it was supposed to be.[153] According to the court, "'our decision here is not a declaration of a new law, but a return to an earlier rule and a vindication of controlling legal authority' - enforcing the language of MCL 691.1404(1). Further, overruling precedent that usurped legislative power restores legitimacy to the law."[154]

In *Kik v. Sbraccia*,[155] the court convened another conflict panel to deal with the issue of whether loss of consortium damages are recoverable against a defendant being sued under the motor vehicle exception to governmental immunity, MCL section 691.1405.[156] The court held that MCL section 691.1405 should not be so narrowly read as to provide that it can only compensate a plaintiff for physical harm.[157] According to the court, such an interpretation thoroughly confuses the two concepts of liability and damages.[158] Specifically, the court held as follows: "MCL 691.1405 establishes when the government is liable: whenever the negligent operation of a motor vehicle owned by it causes bodily injury or property damage. The statute does not limit the recovery of any type of damages that arise out of that bodily injury."[159]

IV. RESPONDEAT SUPERIOR

In *Zsigo v. Hurley Medical Center*,[160] the Michigan Supreme Court clarified its opinion in *Champion v. Nation Wide Security, Inc.*[161] The *Zsigo* court stated that it did not implicitly adopt Restatement (Second) of Agency § 219(2)(d) [hereinafter Restatement § 219(2)(d)] in that case.[162] This Restatement section is an exception to the general rule that an employer is not liable for torts committed by its employee while acting outside the scope of his employment.[163] Specifically, it provides

152. *Id.* at 220, 731 N.W.2d at 55 (citing Pohutski v. City of Allen Park, 465 Mich. 675, 641 N.W.2d 219 (2002)).

153. *Id.* at 222, 731 N.W.2d at 56.

154. *See generally Rowland*, 477 Mich. at 222, 731 N.W.2d at 56.

155. 272 Mich. App. 388, 726 N.W.2d 450 (2006).

156. *Id.* at 390, 726 N.W.2d at 451.

157. *See id.* at 391, 726 N.W.2d at 451 (adopting, in part, the reasoning of the court of appeal's prior decision in *Kik v. Sbraccia*, 268 Mich. App. 690, 708 N.W.2d 766 (2005) [hereinafter *Kik I*]).

158. *See id.*

159. *See Kik I*, 268 Mich. App. at 711, 708 N.W.2d at 771.

160. 475 Mich. 215, 716 N.W.2d 220 (2006).

161. 450 Mich. 702, 545 N.W.2d 596 (1996).

162. *Zsigo*, 475 Mich. at 225, 716 N.W.2d at 224.

163. *Id.* at 217-18, 716 N.W.2d at 221.

that an employer is vicariously liable for its employee's actions when an employee is aided in intentionally and recklessly accomplishing a tort by virtue of the existence of the agency relationship.[164]

This general rule and several exceptions are listed in Restatement (Second) of Agency § 219(2), which reads as follows:

> A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> (a) the master intended the conduct or consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation.*[165]

The Michigan Court of Appeals first considered adopting Restatement § 219(2)(d) in *McCann v. Michigan.*[166] There were four distinct opinions issued in *McCann*, but none of them received enough concurrences to qualify as a majority opinion.[167] Although the majority court declined to adopt this exception at that time, numerous appellate court decisions have cited the plurality's reference to the exception in subsequent tort suits.[168] In fact, in *Champion*, the court referenced Restatement § 219(2)(d) in a footnote to its opinion where it held that an employer was liable for his employee supervisor's act of raping a subordinate.[169] In reaching its decision the court provided that the employer's "construction of agency principles [had been] . . . far too narrow."[170]

Due to the confusion as to whether the court of appeals had implicitly adopted this exception to the doctrine of respondeat superior in *Champion*, the court decided to directly address this issue in *Zsigo*. The court held: "[w]e now clarify that the reference to § 219(2)(d) in

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164. *Id.*

165. RESTATEMENT (SECOND) OF AGENCY § 219(2) (2007) (emphasis added).

166. 398 Mich. 65, 247 N.W.2d 521 (1976).

167. *Zsigo*, 475 Mich. at 222, 716 N.W.2d at 224.

168. *Id.*

169. *Id.* at 223, 716 N.W.2d at 224.

170. *Id.* (quoting Champion v. Nation Wide Security, Inc., 450 Mich. 702, 712, 545 N.W.2d 596, 601 (1996).

Champion . . . was made only in passing and on the basis of very distinct facts . . . . We did not, by that reference, adopt § 219(2)(d)."[171]

In making this declaration, the court seemingly ignores the context in which reference to the Restatement exception had been made in *Champion*. According to Justice Kelly in her dissent:

> [T]he citation of § 219(2)(d) was not just a cursory statement. This Court's citation of § 219(2)(d) in *Champion* was in response to one of the defendant's arguments in that case. The defendant-employer had asserted that it could not be responsible for its supervisor's rape of the plaintiff-employee because it never authorized the supervisor to rape the employee. In direct response, this Court stated, "This construction of agency principles is far too narrow." The reader is then directed to § 219(2)(d) to determine how a court should determine the proper scope of agency principles.[172]

The majority's attempt to discredit this analysis simply by stating that the comment was made "in passing" and should be overlooked seems disingenuous at best.

Not only did the court stress that it had not previously adopted Restatement § 219(2)(d) in its majority opinion, but it refused to do so on the facts of this case as well. The court reasoned that allowing such an exception would, in essence, be the equivalent of subjecting employers to strict liability.[173] Specifically, the court provided:

> [T]he exception swallows the rule and amounts to an imposition of strict liability upon employers. Indeed, it is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always "aided in accomplishing" the tort. Because the exception is not tied to the scope of employment but, rather, to the existence of the employment itself, the exception strays too far from the rule of respondeat superior employer nonliability.[174]

Although this may appear, at first glance, to be a valid, legitimate reason to reject Restatement § 219(2)(d), the dissent's logic seems more compelling on this point as well. According to Justice Kelly, not only does the majority's generic rationale of "swallowing the rule" misunderstand the scope of § 219(2)(d), but it avoids acknowledging that

171. *Id.* at 223-24, 716 N.W.2d at 224-25.
172. *Id.* at 234-35, 716 N.W.2d at 231 (Kelly, J., dissenting) (citations omitted).
173. *Zsigo*, 475 Mich. at 226, 716 N.W.2d at 226.
174. *Id.*

the court has the ability to adopt a narrow interpretation of the rule as well.[175] In other words, fear that a rule will be applied too broadly should never be a reason to sweepingly decline its adoption when you hold in your hands the ability to narrowly tailor it accordingly.

The dissent provides a few examples of other courts that have adopted this employer nonliability exception narrowly in an effort to show the majority and others that it can be done without opening Pandora's Box.[176] Justice Kelly's favored approach is one explained by the Supreme Court of Vermont in *Doe v. Forrest*.[177] *Doe* provides that the following three factors should be considered in an employer-employee relationship to correctly balance the scope of Restatement § 219(2)(d): "(1) the opportunity created by the relationship, (2) the powerlessness of the victim to resist the perpetrator and prevent the unwanted contact, and (3) the opportunity to prevent and guard against the conduct."[178] According to Justice Kelly, failing to adopt this type of approach is simply bad public policy because it "create[s] a situation where an employer has much less reason to monitor its employees' use of authority."[179]

V. PRODUCT LIABILITY

In *Greene v. A.P. Products*,[180] the plaintiff lost her 11-month-old son who died after inhaling and ingesting a product called Wonder 8 Hair Oil.[181] Plaintiff sued the manufacturer on a theory of product liability.[182] Specifically, the plaintiff alleged that, pursuant to MCL section 600.2948, the defendant had a duty to warn consumers that ingesting and inhaling its product could cause death.[183]

The Michigan Supreme Court held that no such duty existed and that a seller does not have a duty to warn of open and obvious dangers.[184] The court further held that the material risk associated with inhaling and ingesting hair oil is obvious to a reasonable prudent person.[185]

The Court of Appeals agreed that the objective reasonable prudent person standard should be used when assessing whether a particular danger is open and obvious, thus eliminating the need for a warning.[186] However, it held that "it could not conclude that 'as a matter of law, the

175. *Id.* at 237, 716 N.W.2d at 232 (Kelly, J., dissenting).
176. *Id.* at 233-36, 716 N.W.2d at 239-43 (Kelly, J., dissenting).
177. 176 Vt. 476, 853 A.2d 48 (2004).
178. *Zsigo*, 475 Mich. at 240, 716 N.W.2d at 234 (Kelly, J., dissenting).
179. *Id.* at 236-37, 716 N.W.2d at 232 (Kelly, J., dissenting).
180. 475 Mich. 502, 717 N.W.2d 855 (2006).
181. *Id.* at 505-06, 717 N.W.2d at 858.
182. *Id.* at 506, 717 N.W.2d at 858.
183. *Id.*
184. *Id.* at 504, 717 N.W.2d at 851.
185. *Id.* at 513, 717 N.W.2d at 857.
186. *Greene*, 475 Mich. at 510, 717 N.W.2d at 860.

risk of *death* from ingestion of Wonder 8 Hair Oil would be obvious to a reasonably prudent product user and be a matter of common knowledge, especially considering the lack of any relevant warning.'"[187] This is where, according to the Supreme Court, the Court of Appeals' reasoning was flawed. In its review of the lower court's opinion, the Supreme Court held that it is enough that *a* material risk is obvious to the reasonable prudent person.[188] The specific details or severity of that risk need not be known or disclosed.[189] One of the points more forcibly made by the court was that:

> Under the law, however, defendants owed no duty to warn of specific injuries or losses, no matter how severe, if it is or should have been obvious to a reasonably prudent product user that ingesting or inhaling Wonder 8 Hair Oil involved *a* material risk. We conclude that it is obvious to a reasonably prudent product user that *a* material risk is involved with ingesting and inhaling Wonder 8 Hair Oil.[190]

The court concluded that the open and obvious material risk associated with inhaling and/or ingesting hair oil is "the chance that injury could result . . . ."[191] This broad and sweeping definition is particularly troubling in that it is quite possible to take this approach with any product. This provides a shield to manufacturers against liability in virtually every warning defect claim. It is impossible to think of *any* product that can be used without *some* "chance that injury could result." In fact, the holding of this case makes one wonder if the demise of all warning requirements is lurking around the corner. This seems like a gigantic step backward for consumers in the area of product liability law and strips them of the protection intended by the creation of these rules. Justice Cavanagh picks up on this hidden but serious threat and articulates, in his dissenting opinion, that such an interpretation of MCL section 600.2948 "fails to effectuate the protection the Legislature intended."[192]

VI. SKI AREA SAFETY ACT

In *Rusnak v. Walker*,[193] the court of appeals, once again, found itself interpreting the purpose and meaning of the Ski Area Safety Act

187. *Id.* (emphasis added).
188. *Id.* at 511, 717 N.W.2d at 861.
189. *Id.*
190. *Id.* (emphasis added).
191. *Id.* at 514, 717 N.W.2d at 862.
192. *Greene*, 475 Mich. at 517, 717 N.W.2d at 864 (Cavanagh, J., dissenting).
193. 273 Mich. App. 299, 729 N.W.2d 542 (2006).

("SASA").[194] In this case, plaintiff, a downhill skier, was injured when she collided with the defendant, an uphill skier. The following is a brief summary of the facts taken directly from the court's opinion:

> According to plaintiff, at the time of the collision, she was making short, controlled slalom turns, moving ten to 12 feet laterally as she turned. The ski slope was wide open; there were no other skiers nearby. Plaintiff heard someone yell, "Watch out," and she was struck from behind and knocked down by defendant. She suffered fractures of her humerus and lubar spine.[195]

The plaintiff alleged that the defendant violated SASA regulations and, therefore, is subject to liability for the injuries plaintiff suffered as a result.[196] Contrariwise, the defendant argued that plaintiff's claims were barred by SASA and that she assumed the risk of a collision with another skier while engaging in the sport.[197] Among other things, SASA requires every skier to maintain control of their speed, ski within their abilities, and to refrain from skiing in a manner that could harm another skier.[198] Specifically, section 21 of SASA provides:

> A skier shall conduct himself or herself within the limits of his or her individual ability and shall not act or ski in a manner that may contribute to his or her injury or to the injury of any other person. A skier shall be the sole judge of his or her ability to negotiate a track, trail, or slope.[199]

In another portion of the statute, the Michigan legislature further dictates that:

> Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, *with other skiers*, or with

194. MICH. COMP. LAWS ANN. §§ 408.321-.344 (West 1999).
195. *Rusnak*, 273 Mich. App. at 302, 729 N.W.2d at 544-45.
196. *Id.* at 304-05, 729 N.W.2d at 546.
197. *Id.* at 302, 729 N.W.2d at 545.
198. *Id.* at 303, 729 N.W.2d at 545.
199. MICH. COMP. LAWS ANN. § 408.341 (West 1999).

> properly marked or plainly visible snow-making or snow-grooming equipment.[200]

Reading these two clauses together and focusing on SASA section 21(1), the court determined that while the Legislature's intent is that skiers assume the risk for any "open and obvious" dangers that may exist (such as those listed in the explicit language of the statute), it does not absolve those people from liability who violate their affirmative duty to act reasonably or comply with their duties under the Act and, as a result, cause someone else's harm.[201] In other words, even though a collision with another skier is an assumed risk, if the harm is caused by the defendant's identifiable negligence or violation of SASA, he is liable for it.[202]

VII. PREMISES LIABILITY

In *Allison v. AEW Capital Management*,[203] the court held that a Landlord's statutory duty to keep common areas in good repair and fit for their intended use, pursuant to MCL section 554.139(1), includes the removal of the natural accumulation of snow and ice.[204] The plaintiff in this case was a tenant of an apartment complex who fell on an accumulation of snow and ice while walking to his car in the parking lot.[205]

Plaintiff requested that the court extend its holding in *Benton v. Dart Properties Inc.*[206] to the present fact pattern.[207] In *Benton*, the plaintiff, a tenant in the defendant's apartment complex, fell while walking on an icy sidewalk from his apartment to his parking space in the apartment complex.[208] The court held that the landlord had a statutory duty to remove the ice from the sidewalk under MCL section 554.139 and that the sidewalk was a common area because, among other things, it was "located within the parameters of the apartment structure," it was "constructed or maintained by the landlord or those in [his] employ," and "all tenants who own and park their vehicles in the spaces allotted to them by their landlord rely on these sidewalks to access their vehicles and apartment buildings."[209] It further held that the open and obvious

200. MICH. COMP. LAWS ANN. § 408.342 (West 1999) (emphasis added).
201. *Rusnak*, 273 Mich. App. at 304-05, 729 N.W.2d at 546.
202. *See id.*
203. 274 Mich. App. 663, 736 N.W.2d 307 (2007).
204. *Id.* at 670-71, 736 N.W.2d at 311.
205. *Id.* at 665, 736 N.W.2d at 308.
206. 270 Mich. App. 437, 715 N.W.2d 335 (2006).
207. *Allison*, 274 Mich. App. at 666, 736 N.W.2d at 309.
208. *Benton*, 270 Mich. App. at 438-39, 715 N.W.2d at 337-38.
209. *Id.* at 442-43, 715 N.W.2d at 340.

doctrine is not available to deny liability when the defendant has a statutory duty to maintain the premises in reasonable repair.[210]

The defendant in *Allison*, however, argued that the court's decision in *Teufel v. Watkins*[211] was controlling.[212] In *Teufel*, the court reasoned that a landlord's duty to remove snow and ice from a *parking lot* was not controlled by MCL section 554.139 and that the open and obvious doctrine, therefore, barred the plaintiff's claim.[213]

In *Allison*, the court held that *Benton* was controlling and that *Teufel* was legally flawed because it did not include a thorough analysis of previous caselaw leading to the court's ultimate conclusion.[214] In short, the court in *Teufel* had failed to discuss relevant caselaw and provide a separate analysis for both MCL section 554.139(1)(a) and section 554.139(1)(b).[215] Furthermore, the court concluded that it was not bound by the decision in *Teufel* because its discussion of MCL section 554.139(1) appeared in a footnote rather than in the body of the opinion.[216] The court stated:

> It is generally ill advised for an opinion to render a holding in a footnote. Had our court in *Teufel* intended to create a rule of law regarding the availability of the open and obvious danger doctrine when a landlord has statutory duties under MCL section 554.139(1)(a) and (b), it would have done so in the body of the opinion rather than in a footnote . . . . Therefore, we conclude that *Teufel* did not create a "rule of law" regarding the availability of the open and obvious danger doctrine when a landlord has a statutory duty under MCL 554.139(1), and we are not bound to follow [it] under MCR 7.215(J)(1).[217]

Kennedy v. Great Atlantic & Pacific Tea Co.[218] is another premises liability case the court reviewed during this *Survey* period. In this case, while the plaintiff was shopping, he slipped on some crushed green grapes and/or grape residue that had been left on the defendant's grocery store floor.[219] Plaintiff reached for his shopping cart as he began to fall and sustained injuries.[220]

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210. *Id.* at 445, 715 N.W.2d at 341.
211. 267 Mich. App. 425, 705 N.W.2d 164 (2005).
212. *Allison*, 274 Mich. App. at 667, 736 N.W.2d at 310.
213. *Teufel*, 267 Mich. App. at 429, 705 N.W.2d at 166.
214. *Allison*, 274 Mich. App. at 668-69, 736 N.W.2d at 310.
215. *Id.*
216. *Id.* at 669, 736 N.W.2d at 310.
217. *Id.* at 669, 274 N.W.2d at 311.
218. 274 Mich. App. 710, 737 N.W.2d 179 (2007).
219. *Id.* at 712, 737 N.W.2d at 181.
220. *Id.*

The plaintiff argued, amongst other things, that he was distracted by the various displays in the store which caused him not to notice the spilled grapes and that the defendant should have expected this.[221] The court opined that the mere presence of supermarket displays and merchandise was not enough to override application of the open and obvious doctrine.[222] In fact, it vehemently refused to create a *per se* rule providing that every time someone slips and falls in a grocery store, displays would count as a distraction so as to bar the use of the open and obvious doctrine.[223] Furthermore, the court provided that it is not enough for the plaintiff to show that he was distracted, but that the distraction must be "unusual" so as to preclude application of the open and obvious doctrine.[224] The court went on to state that there is nothing unusual about spilled grapes.[225] The court also acknowledged that public policy played a role in helping it reach its decision because it requires individuals to take some degree of responsibility for their own safety.[226]

VIII. STRICT LIABILITY FOR DOG OWNERS

In *Hiner v. Mojica*,[227] the Michigan Court of Appeals evaluated what type of behavior puts a dog owner on notice that his or her pet has a dangerous propensity, thus subjecting the owner to strict liability.[228]

The dog at issue in this case was described by the plaintiff as being "very aggressive."[229] Not only did the plaintiff allege that the dog was constantly barking and snarling at him, but that it jumped and lunged at him, and even went so far as to nip at his toolbelt while he was at the defendant's home working on her cable equipment.[230]

The court held that the plaintiff need not establish that the dog had previously attacked people when unprovoked in order to prevail on a claim of strict liability.[231] After a thorough review of judicial decisions in foreign jurisdictions, the court also held that "the mere fact that a dog barks, growls, jumps, or approaches strangers in a somewhat threatening way is common canine behavior. Thus, such behavior by itself will ordinarily be insufficient to show that a dog is abnormally dangerous or unusually vicious."[232] Therefore, although the court found that there was sufficient evidence to establish that the defendant may have been

221. *Id.* at 717, 737 N.W.2d at 184.
222. *Id.*
223. *Id.* at 715, 737 N.W.2d at 183.
224. *Kennedy*, 274 Mich. App. at 717, 737 N.W.2d at 184.
225. *Id.*
226. *Id.* at 719, 737 N.W.2d at 185.
227. 271 Mich. App. 604, 722 N.W.2d 914 (2006).
228. *See generally id.*
229. *Id.* at 605, 722 N.W.2d at 917.
230. *Id.* at 606-08, 722 N.W.2d at 717-18.
231. *Id.* at 610, 722 N.W.2d at 919.
232. *Id.* at 612, 722 N.W.2d at 920.

negligent in restraining her animal, summary disposition of the strict liability count was affirmed.[233]

Although this opinion provides us with a parameter of what is and is not required to establish a dog owner's knowledge of a dangerous propensity, it fails to give an example of what type of conduct or past behavior of the dog actually falls into this category. All the court says is that something *more* than growling, jumping, or approaching strangers in a threatening way, but *less* than previous unprovoked attacks, is required to hold a dog owner strictly liable. It is not clear what sort of conduct falls in this narrow box.

IX. DEFAMATION

The court continued with its trend of liberally construing the judicial proceedings privilege in *Oesterle v. Wallace*.[234] At issue in this case is whether settlement negotiations fall under the judicial proceedings privilege so as to receive absolute protection in a defamation action.[235] The facts of this case specifically involve alleged defamatory statements contained in a letter proposing a settlement offer after the suit had commenced.[236]

In reaching its decision, the court explained that the absolute privilege of judicial proceedings exists "to promote the public policy 'of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.'"[237] The court went on to explain that this privilege "'should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation.'"[238]

Therefore, the court held that due to the timing of this alleged defamatory communication, the context in which it was made, and the court's desire to enforce the public policy motive behind the privilege, these statements were absolutely privileged.[239]

X. CONCLUSION

Over the past year, Michigan appellate courts have created and explained definitive rules of law involving medical malpractice, governmental immunity, respondeat superior, product liability,

233. *Id.* at 615-16, 722 N.W.2d at 922.
234. 272 Mich. App. 260, 725 N.W.2d 470 (2006).
235. *Id.* at 261, 725 N.W.2d at 472.
236. *Id.* at 261-62, 725 N.W.2d at 472-73.
237. *Id.* at 265, 725 N.W.2d at 474.
238. *Id.* (citing Couch v. Schultz, 193 Mich. App. 292, 295, 483 N.W.2d 684, 684 (1992)).
239. *Id.* at 268, 725 N.W.2d at 476.

Michigan's Ski Area Safety Act,[240] premises liability, strict liability for dog owners, and defamation. The one issue left unresolved during this timeframe involves the specific question of whether the wrongful death savings provisions grant a successor personal representative the opportunity to file a new action to overcome the untimeliness of his predecessor's action. As previously stated, it is a virtual certainty that this issue will surface again.

240. MICH. COMP LAWS ANN. § 408.321 (West 1999).