The New Michigan Supreme Court and the Law

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Following the 2008 election, which saw Justice Diane Hathaway (Democrat) ascend to our state's highest court in place of former Chief Justice Clifford Taylor (Republican), many observers began contemplating the effect of the shift on Michigan substantive law. This past decade saw a spate of controversial opinions by predominantly conservative jurists, often decided by a vote of 4 to 3. While the Republican-nominated justices still comprise the Court's majority, Justice Elizabeth Weaver has more often aligned in recent years with the dissenters, and her independent thinking is expected by many to play an important role as the Court moves forward in the face of precedent created by the former conservative majority. Indeed, in a recent order issued in *Sazima v Shepherd Bar & Restaurant*, ___ Mich ___ (2008), Justice Robert Young observed that "it is entirely likely that I will soon be in the philosophical minority on this Court."

What follows is a brief summary of some of the more prominent opinions and issues in civil litigation that may earn re-examination by this newly comprised Court. *It is not intended, however, and should not be viewed as an editorial on the propriety or wisdom of the legal authority addressed.*

The Common Law Discovery Rule

In *Trentadue v Gorton*, 479 Mich 378 (2007), the former majority overruled several decades of common law that allowed tolling of statutes of limitations pending discovery of the cause of action [e.g., discovery of the wrongful act or of the manifestation of damages]. *Trentadue* rejected the rule applied in *Johnson v Caldwell*, 371 Mich 368 (1963) and in other opinions holding that a statute of limitations does "not start to run until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act." 371 Mich at 389. The former majority reviewed the relevant statutory language afresh and concluded that "the statutory [limitations] scheme is exclusive and thus precludes this common law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." 479 at 389.

Justices Weaver, Marilyn Kelly and Michael Cavanagh dissented in *Trentadue*, preferring to adhere to precedent under the doctrine of *stare decisis*. They wrote for the continued application of the common law discovery rule.

Most recently, the Michigan Court of Appeals applied *Trentadue* in *Terlecki v Silver Lake*, 278 Mich App 644 (2008). Leave to appeal in *Terlecki* was denied by the Supreme Court on November 21, 2008 (Docket No. 136509), with Justices Kelly, Cavanagh, and Weaver dissenting.

Future consideration of the common law discovery rule seems likely. [In fairness, the author discloses that he prepared and filed a brief in *Trentadue* on behalf of *amicus curiae* favoring the continued enforcement of the discovery rule].

Open and Obvious Doctrine

In *Lugo v Ameritech Corporation, Inc.*, 464 Mich 512 (2001), the Michigan Supreme Court re-emphasized that a premises possessor's duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land does not extend to "open and obvious dangers." The logic behind this doctrine is that open and obvious dangers are avoidable and thus really no danger to a reasonably careful person.

The majority in *Lugo* limited exceptions to this "no duty" rule to circumstances in which the "special aspects of a condition make an open and obvious risk unreasonably dangerous." *Id.*, at 517. Examples of special aspects that would cause even an open and obvious condition to become actionable are those that make the condition "effectively unavoidable" or those that "impose an unreasonably high risk of severe harm." *Id.*, at 518.

Various commentators have criticized *Lugo* for ignoring the dictates and import of Michigan's comparative fault statute, MCL 600.2957. Others point to the concurrences in *Lugo*, which observed that the "special aspects" standard set forth by the majority was more restrictive and otherwise contrary to Michigan's common law. *Id.*, at 544.

It should be pointed out, however, that whatever concerns there may be over *Lugo*, the concurring justices did agree with the majority that, as a general rule, a premises possessor does not owe a duty to protect against open and obvious dangers. They differed instead on the restrictive "special aspects" test adopted by the majority in considering exceptions to the "no duty" rule. Justices Cavanagh, Weaver, and Kelly advocate a more liberal approach toward this question of duty where the invitee is unable to protect himself or herself even if the danger is discovered or realized. *Id.*, at 530.

This author does not anticipate abrogation of the open and obvious danger doctrine by the new Supreme Court. What we will more likely see is a softening in its application. Indeed, one scenario that might be revisited is the slip and fall on snow and ice case, which is largely non-actionable under *Lugo*. The former majority preferred an objective view of open and obvious, and believed that the risks presented by a snow-covered surface during Michigan winters are always open and obvious, absent some special aspect. See, e.g.,

Kenny v Kaatz Funeral Home, Inc., 472 Mich 929 (2005). This approach may well be revisited by the "new majority," in the "black ice" cases. Whether black ice should be deemed open and obvious as a matter of law was recently rejected by the Michigan Court of Appeals in *Slaughter v Blarney Castle Oil Company*, 281 Mich 474 (2008). Leave to appeal is pending before the Michigan Supreme Court.

No-Fault Threshold Injury

In *Kreiner v Fisher*, 471 Mich 109 (2004), the former majority issued what might be its most controversial opinion, at least in the field of personal injury litigation, where it interpreted the statutory term "serious impairment of a body function" for purposes of Michigan's No-Fault Act. *Kreiner* continued the decades-old debate about the scope of this legislatively imposed limit on tort recovery under no-fault. The majority applied its favored "textualism" approach to interpreting the statutory phrase "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). It concluded that such a threshold requires that "the objectively manifested impairment of an important body function must affect the course of a person's life." 471 Mich at 130. An injury that results in minor changes in how the injured person performs daily activities would not suffice to satisfy the threshold.

Kreiner has been greatly criticized. It even triggered efforts by some Democrats in the state legislature to amend the statutory language, efforts which to date have been unsuccessful. Expect the new Supreme Court to continue to grapple with the parameters of threshold injuries under no-fault, a system designed to limit but not bar tort litigation in exchange for unlimited PIP benefits. One hint at how a new majority might view the rule of *Kreiner* is Justice Cavanagh's dissent, joined by Justices Weaver and Kelly, in which he states that the majority decision "serves as a chilling reminder that activism comes in all guises, including so-called textualism." 471 Mich at 157. See also *Benefiel v Auto Owners Insurance Company*, 482 Mich 1077 (2008) (Cavanagh, dissenting).

Strict Enforcement of Statutory Notice Provisions

The Governmental Immunity Act provides that, to invoke certain exceptions to the defense of governmental immunity, a plaintiff must provide notice of the claim in accordance with requirements of the Act. For some 30 years, the Michigan Supreme Court has held that failure to provide notice within the specified period does not bar suit against a governmental agency unless the agency has been prejudiced by the lack of such notice. See, e.g., *Hobbs v Department of State Highways*, 398 Mich 90 (1976) (addressing the notice provision applicable to the "public highway" exception to governmental immunity). In *Rowland v Washtenaw Road Commission*, 477 Mich 197 (2007), the majority overruled *Hobbs* and its progeny, and held that the notice provision of MCL 691.1404 must be strictly enforced regardless of whether the failure to timely provide pre-suit notice resulted in prejudice. *Rowland* was given full retroactive effect, notwithstanding *Hobbs* and other cases that relaxed the statutory requirement upon a showing of the absence of prejudice.

Rowland was recently applied by the former majority to strictly enforce the notice provision applicable to the public building exception in *Chambers v. Wayne County Airport Authority*, 482 Mich 1136 (2008). Again, Justices Weaver, Cavanagh, and Kelly dissented, with Justice Kelly in particular voting to reconsider the dictates of *Rowland*. Plaintiff in *Chambers* has filed a motion for reconsideration. With the potential shift in the judicial philosophy of the majority of justices on the bench, *Chambers* may indeed serve as a vehicle to re-examine *Rowland*.

The One-Year-Back Rule and the Doctrine of Judicial Tolling

The statutory one-year-back rule limits the recovery of first party (PIP) benefits to losses incurred within one year of the date an action for PIP benefits is commenced. MCL 500.3145(1). Overruling nearly 20 years of case law beginning with *Lewis v DAIIE*, 426 Mich 93 (1986), the Michigan Supreme Court in *Devillers v ACIA*, 473 Mich 562 (2005) held that the one-year-back rule must be strictly enforced and did not allow common law judicial tolling. Prior decisions had permitted tolling from the time a PIP claim was submitted to the insurer until the time the insurer denied the claim. The majority in *Devillers* did reaffirm that Michigan courts retain the equitable power to toll a limitations period or estop a limitations defense in "unusual circumstances," including but not limited to the existence of fraud or mutual mistake. 473 Mich at 590. But it determined that equity did not warrant tolling in that case.

The majority opinion in *Devillers* triggered stinging dissents from Justices Cavanagh, Kelly and Weaver. Justice Cavanagh in particular observed that "equitable tolling has a venerable history in federal and state jurisprudence that today's majority ill-advisably chooses to disregard in favor of denigrating the purposes of the No-Fault Act.... The citizens of Michigan, and the Legislature, deserve better." *Id.*, at 572.

Expect the new Michigan Supreme Court to take an early opportunity to re-evaluate the breadth and limits of judicial tolling in Michigan.

Conclusion

Brace yourselves, ladies and gentlemen. This could get interesting!