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Robert A. Sedler
Wayne State University

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Abstract: In this paper, I have analyzed the right to trial by jury in civil cases as reflected in decisions of the Michigan Supreme Court over approximately a 20 year period dealing with three areas affecting the right to trial by jury in civil cases: (1) entitlement to a jury trial; (2) summary disposition; and (3) directed verdicts. The study was constructed to cover cases over a substantial period of time, so that it would be possible to analyze whether the changing composition of the Michigan Supreme Court, beginning in the late 1990's, impacted on the Court's decisions in these three areas.

The conclusion that emerges is that the Court, as currently constituted, has diminished the right to trial by jury in civil cases in Michigan. The Court is more inclined than it was prior to 1999 to hold in more cases that there is no genuine issue of material fact, justifying summary disposition, and has now heard cases in which it has held that the defendant is entitled to a directed verdict. And the fact that the Court is more inclined to uphold the granting of summary disposition and directed verdicts is likely to have a demonstrable impact on these kinds of cases when they are presented to the Court of Appeals and the trial courts. These courts, following the precedents of the Supreme Court and the results of the cases coming before that Court, will be more likely to rule in favor of granting motions for summary disposition and motions for directed verdicts.

Given the Court's view of the diminished role of the jury in resolving factual disputes in civil cases, litigating lawyers must make the best of a bad situation and do everything that they can in order to protect the right to trial by jury in civil cases. They must try to ensure in the early stages of the litigation that their cases are strong enough to survive a motion for summary disposition and get to the jury, and at the trial they must make a determined effort to present sufficient evidence to survive a directed verdict. Hopefully the Court's view of the diminished role of the jury will not have dealt a fatal blow to the right to trial by jury in civil cases in Michigan. Time will tell how well the lawyers of Michigan have succeeded in preserving this fundamental constitutional right.

THE MICHIGAN SUPREME COURT DIMINISHES THE RIGHT TO TRIAL BY JURY IN CIVIL CASES

by Professor Robert A. Sedler
Wayne State University Law School

I. Introduction

A number of lawyers in Michigan, who represent both plaintiffs and defendants in civil litigation, have expressed concerns about the right to trial by jury in Michigan. They have the impression that many cases are ended at the summary disposition stage. They also have the impression that this trend has increased in the last decade after the composition of the Court changed to a conservative majority. In response to this expression of concern, I decided to undertake a study of the right to trial by jury in civil cases in Michigan. I was able to obtain funding to engage a student research assistant to do the necessary research for this study.

The study involved analyzing decisions of the Michigan Supreme Court over approximately a 20 year period dealing with three areas affecting the right to trial by jury in civil cases: (1) entitlement to a jury trial; (2) summary disposition; and (3) directed verdicts. The student research assistant, Ms. Andrea Montbriand, a third year law student at Wayne State University, did an outstanding job in reviewing and summarizing all the decisions of the Michigan Supreme Court in these three areas. At my direction, she collected all the cases referring to jury trial in civil cases, summary disposition, and directed verdicts. This extensive research ensured that we would not overlook any cases that could be relevant to the subject of the study. From the large number of cases she collected, I selected only those that directly bore on the right to trial by jury. A number of cases involving summary disposition were not used in the study, because they involved essentially questions of law that were raised and decided on a motion for summary disposition. The summary disposition cases that were selected for the study were primarily those where there was no issue as to the applicable law, so that the question before the Court was whether or not there was a genuine issue of material fact, either entitling the moving party to summary disposition or entitling the non-moving party to proceed to trial before a jury.[1]

[1] In a few of these cases, the Court ruled that as a matter of law the plaintiff could not recover against the defendant, while the dissenting Justices, taking a different view of the applicable law,argued that there was a genuine issue of material fact precluding the granting of

summary disposition.

The study was constructed to cover cases over a substantial period of time, so that it would be possible to analyze whether the changing composition of the Michigan Supreme Court, beginning in the late 1990's, impacted on the Court's decisions in these three areas. For this reason, the cases in each of the three areas, are discussed in chronological order, with the earlier cases being discussed first. It may be noted in this regard that there were far-reaching changes in substantive tort law during this period that had the effect of limiting defendants' tort liability and making it more difficult for plaintiffs to succeed in torts cases. As a result fewer tort cases would be brought, and of those that were, there would be more cases where the defendant would be entitled to summary disposition on the ground that there was no genuine issue of material fact as to the defendant's liability. To take one example, as the Court expanded the scope of the open and obvious doctrine, which limits defendants' liability in premises liability cases,[2] there would be more cases where the defendant was entitled to summary disposition, because there would not be a genuine issue of material fact with respect to the "open and obvious" nature of the defect in the premises. Likewise, after the Court broadly interpreted the tort exemption provision of the Michigan No-Fault Act in Kreiner v. Fischer,[3] to limit the automobile accident victim to no-fault recovery unless the victim could demonstrate "serious impairment of bodily function affecting the general ability to lead a normal life," many fewer automobile accident tort cases would be brought. And since the Kreiner test is so strict, summary disposition would be proper in a number of the automobile accident cases that were brought, on the ground that the plaintiff could not satisfy the "inability to lead a normal life" test. In other words, to the extent that the Court, by its decisions in tort cases, and the Legislature, by the enactment of tort reform legislation, have significantly limited tort liability in Michigan, it follows that fewer tort cases will be brought, and that in those that have been brought, more will end in summary disposition for the defendant on the ground that there is no genuine issue of material fact with respect to the existence of liability.

I will review all of the cases involving these three areas affecting the right to trial by jury in civil cases. I will then posit some observations and conclusions from my review of the cases.

II. The Cases

[2] See *e.g.*, Riddle v. McClouth Steel Products Corp., 440 Mich 85; 485 NW2d 676 (1992).

[3] Kreiner v. Fischer, 471 Mich 109; NW2d (2004).

A. Entitlement to a Jury Trial

Comparatively few cases arising during the time period of the study have involved this issue. For the most part the issue arose in the context of the Court deciding whether a particular matter was a question of law for the court or a question of fact for the jury.

In Mull v. Abbott Laboratories,[4] the plaintiffs filed a products liability claim against a drug manufacturer. The undisputed facts showed that the three year statute of limitations for product liability claims had run. The plaintiff had argued that the question of whether the statute of limitations had run was necessarily a question for the jury, precluding the grant of summary disposition on this issue. The Court disagreed, holding that in the absence of disputed facts, the question of whether the statute of limitations had run is a question of law for the court. The Court emphasized that the right to trial by jury did not prevent the courts from deciding that there was no question of fact to be determined by the jury and so ruling on the issue as a matter of law.[5]

In Charles Reinhart Co. v. Winiemko,[6] the lawyer for the losing party in a damages action failed to timely file his brief on appeal and failed to take other actions necessary to prosecute the appeal. This resulted in a malpractice action against the

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[4] 444 Mich 1; 506 NW2d 816 (1993).

[5] At that time, the Court had interpreted the statute of limitations as running from the time the plaintiff could reasonably be expected to be aware of the injury, and the dissenting Justices argued that the facts regarding the date that the plaintiffs were aware of their injuries were susceptible to various inferences, so that it was a question for the jury whether the plaintiffs exercised due diligence. The Michigan Supreme Court has recently abolished the discovery rule in statute of limitations cases, see Trentadue v. Gorton, 2007 Mich LEXIS 1622, July 25, 2007, so in all cases it is now a question for the Court whether the statute of limitations has run.

[6] 444 Mich 579, 313 NW2d 773 (1994).

lawyer in which the element of proximate cause depended on the likelihood of success on appeal. The Court, in an opinion by Justice Riley, held that in a legal malpractice action alleging negligence the question of proximate cause was a question for the court rather than the jury. The Court said that the right to a jury trial was not infringed when the court evaluated the legal merits of an appeal in a legal malpractice action, because determining the likely success of an appeal depended on an analysis of legal doctrine and procedural rules, an analysis that was beyond the competence of the jury. Justices Brickley and Levin dissented on the ground that there were factual questions for the jury to determine, such as what was the state of the law at the time of the acts in question, and as how the law applied to the facts of the legal malpractice claim.

In the consolidated cases of Trivis v. Dreis and Krump Manufacturing Co and Golec v. Metal Exchange Corporation,. [7] the Court dealt with jury trial questions relating to the intentional tort exception to the Worker's Disability Compensation Act. The Court, in an opinion by Justice Boyle, held that whether the facts alleged in the complaint were sufficient to constitute an intentional tort within the meaning of the Act's exception was a question of law for the court, but whether the facts alleged were in fact true was a question for the jury.[8] In contrast, in Fire Insurance Exchange v. Diehl,[9] the Court dealt with the intentional acts exclusion from coverage under an insurance policy, where the act was committed by a 7 year old child. The child performed sexual acts on a younger child, the victim's mother sued the insured, and the insurer claimed it had no duty to defend or indemnify the insured because of the intentional acts exclusion in the policy. The Court, in an opinion by Chief Justice Brickley, held that it would not rule that as a matter of law, the exclusion applied, and that it was a question of fact for the jury whether the child had the intent to harm the victim. Justices Riley, Boyle and Weaver dissented on the ground that on the facts of this case, intent to injure should be inferred as a matter of law.

With respect to interpretation of contracts, where the terms of the contract are clear, the application of the contract to the undisputed facts is a question of law for the Court. But where the terms of the contract are ambiguous, the interpretation of the contract's ambiguous language is a question of fact to be decided by the jury on the basis of extrinsic evidence.[10] In cases brought under the Whistleblowers Act, the right to

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[7] 453 Mich 149; 551 NW2d 132 (1996).

[8] In *Trivis* the Court held that the facts were insufficient to show intent to injure. Justices Levin and Cavanagh dissented in *Trivis*. In Golec, the Court held that the facts were sufficient to show intent in that the employer disregarded actual knowledge that an injury was certain to occur. Justices Riley, Brickley and Weaver dissented in *Golec*.

[9] 450 Mich 678; 545 N.W.2d 602 (1996).

[10] Klapp v. United Insurance Group Agency, 468 Mich. 459; 663 NW2d 447 (2003).

trial by jury has been specifically authorized by the legislature, so the Court did not have to decide whether the constitutional right to trial by jury applies to these cases.[11]

[11] Anzaldua v. Rudolph, 457 Mich 530; 578 NW2d 306 (1998).

In the most recent case involving the constitutional right to trial by jury, Phillips v. Mirac,Inc.,[12] the Court has held that the right to trial by jury is not violated by the statutory imposition of caps on damages. The Court majority, in an opinion by Justice Taylor, reasoned that the statute only limited the consequences of the jury's finding of liability and that under the statute the amount that the plaintiff receives was not within the purview of the jury. The dissent by Justices Cavanagh and Kelly argued that since the damages cap was applied automatically without regard to the jury's assessment of damages, the damages cap violated the right to trial by jury.

B. Summary Disposition

My analysis of the cases will be divided into the periods pre-1999, and post-1999, using 1999 as the point where the composition of the Michigan Supreme Court changed to a conservative majority.[13] The analysis will state the Court's holding on

[12]470 Mich 415; 685 NW2d 174 (2004).

[13] The conservative majority, as I have defined it, consists of Justices Weaver, Taylor, Corrigan, Young and Markman, although in recent years Justice Weaver has disassociated herself from that majority and in some cases has voted with Justices Cavanagh and Kelly. Justice Weaver was elected in 1994. Justice Taylor was appointed by Governor John Engler in 1997 and elected in 1998. Justice Corrigan was appointed by Governor Engler in 1999 and elected in 2000. Justice Markman was appointed by Governor Engler in 1999 and elected in 2000. Justice Young was appointed by Governor Engler in 1999 and elected in 2002. The pre-1999 period for

whether or not there was a genuine issue of material fact in the particular case and will state the contrary position of any dissenting Justices. In addition to these cases, I have done an analysis of in lieu of leave cases involving questions of summary disposition for the years 2005-2007, ending in the summer of 2007.

Pre-1999

Velmer v. Baraga Area Schools[14]

A student was injured while working on a milling machine during metal shop class at the Baraga area schools. The school asserted governmental immunity. The plaintiff tried to bring the claim within the public building exception to governmental immunity. Deposition testimony showed that the machine was very large and had not been bolted or permanently affixed to the floor. The Court, in an opinion by Chief Justice Riley, held that the dangerous or defective condition of a fixture, without regard to whether it is actually or constructively attached to the floor, could support a claim of liability under the public building exception to governmental immunity. The Court further held that there was a factual question as to whether the particular machine constituted a fixture, rendering summary disposition inappropriate. Justice Griffin dissented on the ground

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purposes of this study begins in 1988. At that time, the Justices of the Court were as follows: Justice Brickley, elected in 1982; Justice Griffin, elected in 1986; Justice Riley, elected in 1982; Justice Levin, elected in 1972; Justice Archer, appointed by Governor Blanchard in 1986; Justice Cavanagh, elected in 1982; and Justice Boyle, appointed by Governor Blanchard in 1984, and elected in 1988. Justice Levin was replaced by Justice Kelly, elected in 1996. Justice Archer was replaced by Justice Mallet, who was appointed by Governor Blanchard in 1990, and elected in 1996. Justice Mallet was replaced by Justice Young. Justice Riley was replaced by Justice Taylor. Justice Boyle was replaced by Justice Corrigan; Justice Brickley was replaced by Justice Markman. Of the Members of the current Court, only Justice Cavanagh was on the Court during the entire period covered by this study.

[14] 430 Mich 385; 424 NW2d 770 (1988).

that as a matter of law, the milling machine did not constitute a fixture.

Bullock v. Automobile Club of Michigan [15]

This was an action for breach of an employment contract, in which the plaintiff alleged that as a consequence of the employer's breach of express oral promises, the plaintiff lost a job that was guaranteed for a lifetime and in which he was told he would be able to earn large commissions. The employer moved for summary disposition on the ground that the plaintiff continued his employment after the employer changed its employment manual with respect to minimum production requirements and that the plaintiff failed to meet those requirements. The Court, in an opinion by Justice Boyle, held that the motion should be denied on the ground that there was a genuine issue of material fact as to the effect of the change in the manuals on the plaintiff's claim of an oral promise of continued employment based on the pre-existing policy. Justice Griffin and Chief Justice Riley dissented on the ground that the allegations of the complaint were insufficient as a matter of law to provide a basis for an employment contract that was not terminable at will.

Polkow v. Citizens Insurance Co. of America[16]

The insured brought an action against the insurer to determine coverage for groundwater contamination under a comprehensive general liability policy. The insurance contract contained a pollution-exclusion clause with an exception for a discharge was that was "sudden and accidental." The insurer invoked the pollution-exclusion clause to avoid a duty to defend, and the insured argued that the discharge that was the basis of the suit against it was "sudden and accidental." There was some evidence in the depositions that there had been frequent spillage over the years during the transfer process from the tanker truck to underground tanks, so that the trier of fact could conclude that the insured "expected" the release of the contaminants. But there was also some evidence in the depositions that the contaminants in issue were not from those oil leaks and may have been unrelated to the insured's operations. The Court, in

[15] 432 Mich 472;444 NW2d 114 (1989).

[16] 438 Mich 174; 476 NW2d 382 (1991).

an opinion by Chief Justice Cavanagh, held that without proof of the source of the discharge, it could not be determined whether the discharge fell within the pollution exclusion clause, or whether there was an unknown source of the discharge that brought the case within the "sudden and accidental" exception to the exclusion clause. The Court went on to hold that this uncertainty created doubt as to coverage, rendering summary disposition inappropriate. Justices Riley, Mallett, and Griffin dissented on the ground that the undisputed facts showed that the discharge was due to the spillage, so that the pollution exclusion clause applied.

McKart v. J. Walter Thompson USA,Inc.[17]

In a wrongful discharge claim by a high-ranking executive of an advertising agency, the employer had informed the plaintiff that his position was being eliminated as part of a workforce reduction. The employer conceded that the plaintiff had an oral contract of permanent employment terminable only for cause, and contended that the workforce reduction constituted cause. The plaintiff contended that his discharge was for personal reasons, but did not introduce any evidence to this effect in opposition to the employer's motion for summary disposition. This being so, the Court, in an opinion by Chief Justice Cavanagh, held that summary disposition was properly granted. Justice Levin dissented on the ground that the true reason for the plaintiff's discharge was in issue and that this presented a question of fact for the jury.

Trager v. Thor [18]

This case involved a claim of liability for a dogbite against a person in temporary possession of the dog. The Court, in an opinion by Justice Boyle, held that liability could be imposed on the basis of negligence. There was evidence that the caretaker knew that the dog had bitten a child prior to this incident, but there also was evidence that the owner put the dog in a back bedroom, thus satisfying his duty to the plaintiffs, and evidence that in the prior incident the dog had been provoked. The Court held that summary disposition on the negligence claim was improper, because the allegations

[17] 437 Mich 109; 469 NW2d 284 (1991).

[18] 453 Mich 149; 551 NW2d 132 (1996).

were sufficient to enable the trier of fact to find that the caretaker accepted responsibility for the care of the child while the child was in his home and had been negligent in allowing the child to be exposed to an animal with known dangerous propensities.

Owens v. Auto Club Insurance Association[19]

In a no-fault claim involving coordinated, benefits from Veterans Administration, the Court, in an opinion by Justice Levin, reversed a grant of partial summary disposition for the claimant. The Court held that there was a genuine issue of material fact as to whether the insured sought to obtain outpatient services from the Veterans Administration and whether it was necessary for him to remain at in-patient facility for the entire two year period.

[19] 444 Mich 314; 506 NW2d 850 (1993)

Skinner v. Square D Company [20]

This was a products liability case brought against the manufacturer of a switch that the decedent had installed on his homemade tumbling machine. The decedent was electrocuted while using the machine. The Court, in an opinion by Justice Levin, held that there was no genuine issue of material fact as to whether the alleged defect in the switch could have caused the decedent's death, so that summary disposition for the defendant was proper. The Court found that the plaintiff's evidence did not afford a reliable basis from which reasonable minds could infer that it was more probable than not that but for the defect in the switch, the decedent could have been electrocuted. Justice Levin dissented on this point.

Bertrand v. Alan Ford,Inc. and Maurer v. Oakland County Parks and Recreation Department[21]

These consolidated cases involved the application of the open and obvious doctrine. In Maurer, the plaintiff alleged that as she was leaving a rest room area in a county park, she fell on an unmarked stone step. She further alleged that the county was negligent in failing to mark the step with a contrasting color, and by failing to warn of the additional step. The Court, in an opinion by Justice Cavanagh, held that the plaintiff failed to establish anything unusual about the step that would take it out from under the open and obvious doctrine, so that summary disposition for the county was proper. Justice Levin dissented on this point. In Bertrand, the plaintiff fell backwards off a step at the defendant's place of business and alleged that the defendant breached its duty to maintain reasonably safe premises by failing to place a guardrail along the step or to post a sign warning of the step down. The Court held that while there was no genuine issue of material fact that the danger of falling was open and obvious, there was a genuine issue of material fact as to whether the construction of the step, when considered with the placement of the vending machines and the cashier's window, along with the hinging of the door, created an unreasonable risk of harm despite the obviousness of the danger of falling off the step. Here, because of this awkward placement, the plaintiff was forced to step backwards after holding the door open for others, and lost her balance and fell. Justice Weaver dissented on this point.

[20] 445 Mich 153; 516 NW2d 475 (1994).

[21] 449 Mich 606; 537 NW2d 185 (1995).

Champion v. Nationwide Security[22]

In this case an employee brought an action against the employer under the Michigan Civil Rights Act for quid pro quo sexual harassment, resulting in her constructive discharge. The basis of her claim was that she was raped by her supervisor after her refusal to submit to the supervisor's sexual requests. The Court of Appeals granted the employer's motion for summary disposition on the ground that the employer was not liable under the Act. The Supreme Court reversed, holding, in an opinion by Chief Justice Brickley, that the employer is liable for such rapes where they were accomplished through the use of the supervisor's managerial powers. The Court also held that the employer had made sufficient admissions to establish liability under this rule, and so ordered the trial court render summary disposition for the plaintiff under MCR 2.116(I)(2).[23] Justice Boyle, joined by Justices Levin and Cavanagh, concurred in the ruling on the legal question, but would have remanded the case to the trial court with directions to make findings to determine whether, on the state of the record, the plaintiff was entitled to summary disposition.

Sanchez v. Michigan Department of Mental Health[24]

In this case a patient committed suicide after having been involuntarily admitted to a state psychiatric hospital. A claim based on negligent supervision would be barred by governmental immunity, but a true building defect claim would come within the public building exception to governmental immunity. The claim was that the defendant failed to design the restroom in a manner that would allow proper supervision of patients. The Court, in an opinion by Justice Boyle, first held that the plaintiffs were not

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[22] 450 Mich 702; 545 NW2d 596 (1996).

[23] Under this rule, if it appears to the court that the opposing party rather than the moving party is entitled to summary disposition, the court may render judgment in favor of the opposing party.

[24] 455 Mich 83; 565 NW2d 358 (1997).

required to negate a claim of negligent supervision in order to assert their building defect claim. The Court then held that the allegations of the complaint were sufficient to allege a building defect claim, so that the grant of summary disposition to the state was improper. Justices Riley and Weaver dissented on the ground that the allegations of the complaint were not sufficient to allege a building defect claim.

Town v. Michigan Bell Telephone Co. and McConnell v. Rollins Burdick Hunter[25]

These were consolidated cases involving the question of whether the plaintiffs presented sufficient evidence of age or sex discrimination to overcome a motion for summary disposition. In Town a woman sought a transfer from her position, and was granted a transfer as a market administrator after she turned town a position with the assessment center upon learning of the center's schedule. A year later, her supervisor notified her that she was being transferred to the assessment center because her position was being consolidated with that of another manager. The person who held the other position left the company. A 35 year old male assumed the consolidated position. The plaintiff, who was 49 years old, resigned from the company, because the assessment center's schedule was incompatible with her personal situation. She alleged age and gender discrimination. The Court, in an opinion by Justice Brickley, held that the employer's motion for summary disposition should be granted on the ground that the employer had advanced a nondiscriminatory explanation for the transfer, and that the plaintiff's evidence did not create a genuine issue of material fact regarding whether this nondiscriminatory explanation was a pretext for age or gender discrimination. In McConnnell, the plaintiff was hired when he was 55 years old, and a year into his employment, he was informed that he needed to improve his sales production. He failed to do so and was discharged. He claimed age discrimination on the ground that his replacement, a much younger person, was held to a different standard. However, his replacement was paid much less than the plaintiff and generated sales in an amount that was twice her smaller salary, while the plaintiff's sales failed to cover his salary. In addition, the plaintiff had been hired and fired by the same person in a relatively short period of time. The Court again held that the plaintiff failed to present sufficient evidence that his age was a determining factor in the employer's decision to terminate him, so that the employer was entitled to summary disposition. Justices Mallet, Cavanagh, and Kelly dissented in Town, saying that the evidence was sufficient for the jury to find that the employer had discriminated against the plaintiff.

[25] 455 Mich 688; 568 NW2d 64 (1997).

Sewell v. Southfield Public Schools[26]

The plaintiff was injured in high school swimming class alleged that school maintained a dangerous and defective swimming pool, so as to come within the public building exception to the governmental immunity doctrine. The plaintiff alleged and produced supporting affidavits showing that the pool depth markers were mismarked, that the pool floor was uneven, that the pool depth was less than the 5 feet it was supposed to be, and that unlike most pools, this pool had an upslope near where a person might dive. The Court, in an opinion by Justice Cavanagh, held that the allegations and affidavit were sufficient to raise a genuine issue of material fact with respect to the public building exception, precluding the grant of summary disposition to the public school.

[26] 456 Mich 670; 576 NW2d 153 (1998).

Vargo v. Sauer[27]

The Court, in an opinion by Justice Brickley, held that state university's medical residency program at private hospital was not a "hospital" within the hospital exception to governmental tort immunity. However, the Court then held there was a genuine issue of material fact as to whether a medical school professor who instructed residents and treated private patients at the private hospital was simultaneously operating both as an agent of the university and of the private hospital, thereby precluding summary disposition in favor of professor on issue of whether he was entitled to governmental immunity.

Lytle v. Malady[28]

The plaintiff, who was terminated from her employment, claimed that she had a justification of "just cause" employment and also claimed that her termination was due to her gender. The employer claimed that her discharge was due to a reduction in force. The Court, in an opinion by Justice Weaver, held that summary disposition should be granted to the employer on both counts. On the "just cause" employment claim, the Court noted that the language of the employer handbook stated that the contents did not establish any contract between employer and employee. As to the discrimination claim, the Court noted that the plaintiff could not show that she was treated differently from other employees, since the two new employees hired were not similarly situated to her in terms of job qualifications and functions. The Court also said that the employer submitted evidence of a dire economic forecast that led to the reduction in force. Justice Brickley, in a concurrence, took the position that the plaintiff had failed to raise a genuine issue of material fact on the question of whether the employer had just cause to terminate the plaintiff as part of its reduction in force. Justices Cavanagh and Kelly dissented, saying that reasonable minds could differ as to the reading of the employee handbook and that evidence of conflict between the plaintiff and her supervisor was sufficient to raise a question of fact with respect to plaintiff's claim of gender discrimination. Chief Justice Mallett agreed with Justices Cavanagh and Kelley with respect to the gender discrimination claim.

Morales v. Auto-Owners Insurace Co.[29]

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[27] 457 Mich 49; 576 NW2d 656 (1998)

[28] 458 Mich 153; 579 NW2d 906 (1998).

[29] 458 NW2d 288; 582 NW2d 776 (1998).

The no-fault auto insurer and the insured had a relationship over a six year period in which the insured would regularly fall behind in his payments, the insurer would send a notice of intent to cancel, and the insured would pay the balance owed before the cancellation date. In this case, there was a dispute as to whether the policy had been cancelled before the insurer was involved in a serious accident. The Court, in an opinion by Justice Cavanagh, held that collateral estoppel applied against the insurer in this case, and that there were genuine issues of material fact with respect to whether the insurer complied with the policy's notice provision and whether the insured reasonably relied on the reinstatement notice in not seeking other insurance. Justices Taylor and Weaver dissented on the ground that collateral estoppel should not be applied in this case.

1999-2007

Clark v. United Technologies Automotive[30]

The defendants owned a die casting corporation and a circuit board part manufacturing plant. The plaintiff performed work for both businesses and was injured while working at the manufacturing plant when a power punch press machine malfunctioned. He obtained workers compensation from the die casting corporation and then brought a tort action against the manufacturing plant. The defendants moved for summary disposition on the ground that the plaintiff was employed by both companies, and so precluded from bring a tort action against his employer. The Court, in an opinion by Justice Taylor, held that whether the plaintiff was also an employee of the manufacturing plant was a question of fact for the jury, precluding summary disposition for the employer in the tort action. The Court found that the plaintiff presented evidence that the two businesses were operated as two separate companies, while the defendants presented conflicting evidence that under the economic realities test the manufacturing company was a co-employer of the plaintiff.

Smith v. Global Life Insurance Co.[31]

In a suit for breach of contract under a life insurance policy, the Court, in an opinion by Justice Young, held that there was no genuine issue of material fact that the insured had misrepresented his health in the insurance application. In the application,

[30] 459 Mich 681; 594 NW2d 447 (1999).

[31] 460 Mich 446; 597 NW2d 28 (1999).

the insured stated that he did not have a court condition, and the insurer submitted medical records showing that he had been diagnosed with coronary heart disease six years before he applied for the policy. The Court also held that it was not necessary for the insurer to show that it relied on the misrepresentations in issuing the policy. Justices Kelly and Cavanagh dissented on this point. Finally, the Court then held that private actions against the insurer arising out of misconduct made unlawful by the Insurance Code are permitted by the Michigan Consumer Protection Act.

Foster v. Cone-Blanchard Machine Co.[32]

The case involved a design defect claim against the corporate purchaser of the assets of the corporate manufacturer of an allegedly defective feed screw machine for injuries sustained while the plaintiff was using the machine. The plaintiff had settled with the predecessor, and the Court, in an opinion by Chief Justice Weaver, held that this settlement made the continuity of enterprise theory of successor liability inapplicable. With respect to summary disposition, the Court held that the plaintiff did not produce sufficient evidence showing a relationship between the successor corporation and the plaintiff's employer or that the successor employer was actually aware of the alleged design defect in the type of machine owned by the plaintiff's employer. Justices Brickley, Cavanagh and Kelly dissented on both issues. With respect to summary disposition, they pointed out that the evidence showed that the successor corporation had access to the predecessor's customer lists and that the plaintiff's employer possessed a business card of the successor corporation on the premises. They maintained that this evidence was sufficient to raise a question as to whether the successor corporation had knowledge of the defect in the predecessor's machine and that it had been in contact with the plaintiff's employer about the machine in question. They emphasized that on a motion for summary disposition, the Court was required to look at the evidence in the light most favorable to the plaintiff. The majority took the position that all that this evidence showed was that the successor corporation was soliciting business from the plaintiff's employer, and that this showing was insufficient to raise a question as to the successor corporation's knowledge of the alleged defect.

Maiden v. Rozwood and Reno v. Chung[33]

These consolidated cases involved the quantum of proof necessary to survive a motion for summary disposition in gross negligence actions against governmental employees. In Maiden, the decedent was a resident at a state mental health facility.

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[32] 460 Mich 696; 597 NW2d 506 (1999).

[33] 461 Mich 109; 597 NW2d 817 (1999).

When he became physically and verbally abusive, an aide escorted him back to the building, where he began knocking over furniture and throwing things and attempted to bite the aides who were trying to restrain him. The aides held him down for 5 minutes. He died shortly thereafter due to positional asphyxia. The Court, in an opinion by Justice Corrigan, held that the plaintiff's proofs in opposition to the defendants' motion for summary disposition failed to raise a genuine issue of material fact that the employees' conduct was so reckless as to demonstrate a substantial lack of concern for whether injury would result. Justices Kelly, Cavanagh and Brickley dissented on the ground that the plaintiff presented evidence that the employees violated their training procedures for subduing a patient, knowing the possible consequences, and that this evidence was sufficient to raise a genuine issue of material fact with respect to gross negligence.

In Reno, the Court found that there was sufficient evidence that a medical examiner was grossly negligent in concluding that a dying murder victim was unable to speak. That conclusion contributed to the plaintiff's being charged with the victim's murder, since the plaintiff's claim that the victim identified another person as her killer was disregarded. The Court held, however, that the medical examiner did not owe a duty to a person charged with a crime, so that the medical examiner was not substantively liable for the gross negligence. Justices Kelly, Brickley, and Cavanagh dissented on this point.

Hall v. Consolidated Rail Corporation[34]

This was a per curiam decision. In a train crossing accident, the issue was whether the crossing signals were working. The railroad presented uncontradicted evidence that the signals were working the day before the accident. The Court held that there was no genuine issue of material fact on the question of whether the railroad had notice of the signals not working, so that the railroad was entitled to summary disposition.

Michalski v. Bar-Levav[35]

In an action brought under the Handicappers Civil Rights Act (HCRA), the plantiff claimed that she had been discharged after she informed her employer that she had been tentatively diagnosed with multiple sclerosis. The employer claimed that he was unaware of her medical condition until she left the employment. The Court, in an opinion by Justice Weaver, held that under HCRA, the employee must be regarded as presently having a physical or mental characteristic that substantially limits one or more life activities. The Court went on to hold that the evidence showed that the plaintiff was capable of performing her job duties and that there was no evidence that the employer

[34] 462 Mich 179; 679 NW2d 112 (2000) (per curiam).

[35] 463 Mich 723; 625 NW2d 754 (2001).

regarded her as unable to perform the tasks of ordinary life. Therefore, the Court held, the employer was entitled to summary disposition on the plaintiff's HCRA claim. Justices Kelly and Cavanagh dissented, contending that there was sufficient evidence to raise a genuine issue of material fact on the question of whether the employer discriminated against the plaintiff because she thought the plaintiff was handicapped, and that, if true, this would establish a violation of HCRA.

Haliw v. City of Sterling Heights[36]

The plaintiff claimed that she slipped and fell on a patch of ice that had formed in a depression on sidewalk, and tried to bring her case within the highway exception to governmental immunity. The Court, in an opinion by Justice Markman, held that the plaintiff was unable to demonstrate that the claimed depression was the proximate cause of her fall. Thus, the reason for her fall was the accumulation of ice on the sidewalk, and the highway exception was inapplicable. Justices Kelly and Cavanagh dissented on the ground that there were genuine issues of material fact relating to whether the claimed depression in the sidewalk rendered the sidewalk no longer reasonably safe, whether the ice or snow on which the plaintiff fell was a "natural accumulation," and whether the plaintiff's injuries were proximately caused by the sidewalk's condition

Oade v. Jackson National Life Insurance Co.[37]

The Court, in an opinion by Justice Young, held that the insured's failure to inform the insurer of hospitalization for chest pains between the time of application and the time of delivery of the policy was a "material misrepresentation" within the meaning of the statute permitting the insurer to avoid the policy for a "material misrepresentation." This being so, the insurer was entitled to summary disposition. Justices Kelley and Cavanagh, dissented on the ground that a genuine issue of material fact existed as to whether the representations were "material," since the plaintiff proffered evidence that his health did not change in any way between the date he applied for the insurance policy and the date it was delivered. The majority countered this point by contending that since there was no dispute that at a minimum, the insurer would have charged a higher rate had this fact been known, the misrepresentation was "material" within the meaning of the statute.

Rose v National Auction Group,Inc.[38]

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[36] 464 Mich 297; 627 NW2d 581 (2001).

[37] 465 Mich 244; 632 NW2d 126 (2001).

[38] 466 Mich 453; 646 NW2d 455 (2002).

In a negligent auctioneer claim, the Court, in an opinion by Justice Taylor, held that the plaintiffs' claims for breach of fiduciary duty were not supported by the evidence, since the plaintiffs could not have reasonably believed that it was appropriate to engage in a "shill bidding" scheme. Justices Cavanagh and Kelly dissented on the ground that there were genuine issues of material fact as to whether the plaintiffs could reasonably rely on the auctioneer to conduct the auction lawfully and as to whether the auctioneer enticed the plaintiffs into the "shill bidding scheme."

Klapp v. United Insurance Agency,Inc.[39]

An insurance agent brought suit against the insurance company, claiming that under the employment contract, he was entitled to the vesting of a large number of his renewals. The Court, in an opinion by Justice Markman, held that the grant of summary disposition to the insurance company was improper, since there was an irreconcilable conflict between the vesting schedule in the contract and the definition of retirement in the agent's manual. As a result, the language of the contract was ambiguous, and the meaning of the contract was a question of fact, to be decided by the jury.

GC Timmis & Co. v. Guardian Alarm Co.[40]

The plaintiff, a registered investment buyer, but not a licensed real estate broker, entered into an oral contract under which the plaintiff would receive a "success fee" for any company that the plaintiff contacted on the defendant's behalf and that the defendant subsequently purchased. When the plaintiff claimed a "success fee," the defendant contended that the plaintiff was precluded from bringing suit, because he was an unlicensed real estate broker. The plaintiff contended that the transaction did not involve real estate and so did not come within the Real Estate Brokers' Act (REBA). The Court, in an opinion by Justice Markman, held that summary disposition in this case was improper because (1) if the purchase did not involve a real estate transaction, there was a genuine issue of material fact as to whether an oral contract existed, and (2) if the purchase did involve a real estate transaction, there was a genuine issue of material fact as to whether the plaintiff "negotiated" the transaction. Justices Young and Weaver dissented on the ground that REBA applied to the transaction in issue, precluding the plaintiff's suit for a "success fee."

Anderson v. Pine Knob Ski Resort,Inc.[41]

A skier was injured when he lost his balance and collided with the timing shack. The Court, in an opinion by Justice Taylor, held that recovery was barred by the

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[39] 468 Mich 459; 663 NW2d 447 (2003).

[40] 468 Mich 416; 662 NW2d 710 (2003).

[41] 469 Mich 20; 664 NW2d 756 (2003).

Michigan Ski Safety Act, which barred recovery for injury caused by a danger that was obvious and necessary. This being so, the ski operator was entitled to summary disposition. Justices, Cavanagh, Kelly and Weaver dissented on the ground that there was a genuine issue of material fact with respect to the necessity of the timing shack and its location, as well as whether the placement of the timing shack near the finish line of the racecourse at the bottom of the hill was "obvious and necessary" within the meaning of the statute.

West v. General Motors Corporation[42]

In a suit under the Whistleblowers Act, the plaintiff claimed that he was discharged in retaliation for reporting to the police an alleged assault at the plant by a union committee person. The employer discharged the plaintiff on the stated ground that he had repeatedly violated the employer's policies for reporting time worked. The Court, in a per curiam opinion, held that the plaintiff had failed to introduce any evidence showing a causal connection between the plaintiff's discharge and his reporting of the assault incident to the police. Justices Kelly and Cavanagh dissented on the ground that there was a genuine issue of material fact as to whether the plaintiff actually misrepresented the time worked on his timesheet. In addition, they maintained that if the jury found that the plaintiff actually worked the time reported on the timesheet, and that the discharge occurred after the report, these facts would be sufficient to support a claim under the Whistleblowers Act.

Nastal v. Henderson & Associates Investigations,Inc.[43]

In this case, the plaintiff, who had brought a negligence actionagainst an insured driver, alleged stalking by private investigators employed by the insurance company to conduct surveillance of the plaintiff. The surveillance continued after it had been discovered by the plaintiff. The Court, in an opinion by Justice Taylor, held that the defendant's surveillance of the plaintiff after it had been discovered continued to serve a legitimate purpose within the meaning of the Private Detective License Act, so that the defendant was entitled to summary disposition on the plaintiff's stalking claim. Justices

[42] 469 Mich 177; 665 NW2d 468 (2003).

[43] 474 Mich 712; 691 NW2d 1 (2005).

Cavanagh and Kelly dissented on the ground that there was a genuine issue of material fact as to whether the surveillance served a legitimate purpose after it was discovered, particularly in light of the manner in which the surveillance was conducted.

Wilson v. Alpena County Road Commission[44]

In a negligence action against a county road commission, the county contended that it was entitled to summary disposition on the ground that there was no genuine issue of material fact as to whether it had notice of the claimed defect. The Court, in an opinion by Justice Taylor, held that the plaintiff presented sufficient evidence to create genuine issues of material fact concerning whether the deteriorated condition of the road made the road not reasonably safe for public travel and whether the road commission had actual or constructive notice of that fact at the time of the accident.

[44] 474 Mich 161; 713 NW2d 717 (2006).

Greene v. A. P. Products,Ltd.[45]

In this products liability action, an unattended infant died when he ingested and inhaled a bottle of hair oil. The bottle did not contain a warning that the product could be harmful if ingested and that it should be kept out of the reach of small children. The Court, in an opinion by Justice Corrigan, held that the manufacturer had no duty to warn of this danger, because it was open and obvious to a reasonably prudent person. Justice Cavanagh dissented on the ground that there was a genuine issue of material fact as to whether ingesting the product posed a risk of death in addition to a risk of illness. Justice Kelly dissented on the ground that there was a genuine issue of material fact as to whether, in the absence of any warning, the plaintiff was aware of the specific danger of serious harm or death.

The 2007 Leave to Appeal Cases

As of the summer, 2007, when this was study concluded, there were no summary disposition cases that were decided by the Michigan Supreme Court with published opinions. However, there were two cases involving questions of summary disposition where the Court, in lieu of granting leave to appeal, reversed the decisions of the Court of Appeals. In Lanzo Construction Co. v. Wayne Steel Erectors,[46] there was an indemnity claim arising from an underlying injury accident. In considering the motion for leave to appeal, the Court found that the victim's negligence was at least partially responsible for the accident, so that the indemnity plaintiff was not solely responsible for the accident. This being so, the Court held that the indemnity plaintiff was entitled to summary disposition on its claim for indemnity. In Banks v. EXXON Mobile Corporation,[47] the plaintiff was injured at a gas station when the pump he was using to put gasoline in his automobile burst and sprayed gasoline in his face. The plaintiff sued the owner and manager of the gas station, and the Court of Appeals granted the defendants' motion for summary disposition. The Michigan Supreme Court held that based on the facts presented, a reasonable jury could conclude that the defendants should have discovered the defect in the pump, and so reversed the grant of summary disposition for the defendant.

[45] 475 Mich 502; 717 NW2d 855 (2006).

[46] 477 Mich 983; 725 NW2d 454 (2007).

[47] 477 Mich 983; 725 NW2d 453 (2007).

A Further Note: A Two-Year Analysis of In Lieu of Leave Cases Involving Questions of Summary Disposition

Since the plan of the study involved analyzing only reported opinions of the Michigan Supreme Court, the Court's in lieu of leave decisions involving questions of summary disposition were not included in the study. However, after looking at the two decsions for 2007 discussed above, I decided to take a look at such decisions for the two year period from 2005-2006 to get some sense of what the Court was doing in this regard. Without going into detail about the decisions,[48] the research found there was 28 such decisions in this period, which seemed to me to be a surprisingly high number. In 21 of the cases, the Court directed the entry of an order of summary disposition. In 5 of them the Court held that summary disposition was improperly granted, and in 2 of them, the Court directed a reconsideration of the action of the Court of Appeals in denying the defendant's motion for summary disposition. In the cases where the Court ordered summary disposition, 18 of the decisions were in favor of the defendant, and 3 were in favor of the plaintiff.

However, a number of these cases involved questions of substantive law, and so are not directly relevant to our analysis. As best as could be determined by the decisions of the Supreme Court, supplemented with looking to the unpublished decisions of the Court of Appeals when available, 7 of the cases involved the matter of whether the evidence was sufficient to present a genuine issue of material fact. In 6 of the cases, the Court held that the evidence was not sufficient, and reversed the decision of the Court of Appeal holding that the defendant's motion for summary disposition should be denied. In the seventh case, the Court held that the Court of Appeals erred in granting the defendant's motion for summary disposition.

C. Directed Verdicts

The research disclosed only 5 cases in this area, beginning in 2000. It may be suggested that this reflects the fact that with the changing composition of the Court, defendants were more inclined to file such motions and/or that motions for leave to appeal from decisions of the Court of Appeals involving directed verdicts were more likely to be granted by the Court.

Wilkinson v. Lee[49]

[48] Copies of the decisions are on file with the author..

[49] 463 Mich 388; 617 NW2d 305 (2000).

A year and a half after an automobile accident case, the accident victim was diagnosed as having a meningioma brain tumor. The surgeon who removed the tumor testified that it was a slow growing tumor and that it was likely that the plaintiff had the tumor at the time of the accident. However, both he and the defendant's medical witness testified that the trauma to the plaintiff's head could have caused the tumor to grow or increase. The trial court denied the defendant's motion for a directed verdict, and the jury returned a verdict for the plaintiff. The Court of Appeals held that the defendants were entitled to a directed verdict. The Supreme Court held per curiam that there was sufficient evidence for the jury to find that the accident was the proximate cause of the injury, so that the grant of a directed verdict was improper.

Hord v. Environmental Research Institute of Michigan[50]

The plaintiff accepted a job with the defendant organization and moved to Michigan from New Jersey. He was laid off after one year and sued the organization, alleging that the organization had misrepresented its financial health and that he would not have accepted the position had he known the actual situation. The plaintiff's evidence showed that he was given an operating summary, which he claimed he took as a representation of the financial status of the organization. The plaintiff also introduced evidence that the director knew that the organization had some financial problems. The trial court denied the organization's motion for a directed verdict, and the jury returned a verdict for the plaintiff. The Supreme Court held per curiam that the plaintiff's evidence was insufficient to establish fraudulent misrepresentation or silent fraud and ordered a directed vedict for the defendant. Justices Kelly and Cavanagh dissented on the ground that the jurors faced a credibility contest between the director and the plaintiff and could have found the facts sufficient to establish the plaintiff's fraud claims.

In re Estate of Karmey v, Karmey[51]

The children of the decedent claimed that the beneficiary of the will, the decedent's second wife, had exercised undue influence over the decedent when he made her the sole beneficiary of his estate. The probate judge ruled that the plaintiffs had failed to present sufficient evidence of undue influence for the jury and directed a verdict for the wife. The Court of Appeals applied a presumption of undue influence on the ground that there was a fiduciary relationship between the decedent and his wife. The Supreme Court held per curiam that the presumption of undue influence was not applicable to the marriage relationship, and upheld the grant of the directed verdict for the wife.

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[50] 463 Mich 399; 617 NW2d 543 (2000).

[51] 468 Mich 68; 658 NW2d 796 (2003).

Sniecinski v. Blue Cross and Blue Shield of Michigan[52]

The plaintiff claimed that the defendant failed to hire her due to her pregnancy. The plaintiff had been employed as a telemarketing representative by a company that merged with the Blue Cross Network. When she became pregnant, she experienced problems that required her to take a medical leave for 7 months. After giving birth to a child, she returned to employment with the Blue Cross Network. When she became pregnant again, her supervisor asked her whether she would experience problems again and informed her that she would not be permitted to use sick time or unpaid leave because of her pregnancy. Plaintiff suffered a miscarriage and returned to work. At that point the marketing department of the Blue Cross network merged with the marketing department of Blue Cross/Blue Shield of Michigan. All the Blue Cross Network telemarketers were required to interview for an account representative position with Blue Cross/Blue Shield of Michigan. The plaintiff was offered the position and soon became pregnant again. She again had to take medical leave because of her pregnancy. Following a sequence of events, when the plaintiff was ready to return to work, the account representative position previously offered to her was not filled due to a hiring freeze. The Blue Cross/Blue Shield of Michigan account representative position required a college degree, which the plaintiff did not have. She was offered and accepted a position as a marketing representative that was unrelated to her previous work. In her suit claiming pregnancy discrimination, the jury found for the plaintiff, and the trial court denied the defendant's motion for judgment notwithstanding the verdict. The Court, in an opinion by Justice Corrigan, held that the motion should have been granted on the ground that the plaintiff failed to show a causal link between her pregnancy and the defendant's failure to hire her as an account representative. Justices Weaver and Kelly dissented on the ground that the evidence supported the inference that the defendant's failure to hire her was causally related to her pregnancy.

[52] 469 Mich 124; 666 NW2d 186 (2003).

Elezovic v. Ford Motor Co,[53]

The plaintiff brought a sexual harassment suit against her supervisor and her employer, contending that her supervisor engaged in sexual harassment by exposing himself to her while masturbating and by other conduct. The Court held that the supervisor was individually liable. With respect to her claim against her employer, the trial court and the Court of Appeals held that the employer was entitled to a directed verdict, because the plaintiff did not introduce sufficient evidence showing that the employer had notice of the harassing conduct. The plaintiff's evidence consisted of her telling two other supervisors in confidence about one incidence of the alleged conduct and her mentioning "harassment" and "hostile environment" in letters to the employer. The Supreme Court, in an opinion by Justice Taylor, held that the evidence was insufficient and affirmed the granting of a directed judgment to the employer. Justices Weaver, Cavanagh and Kelly dissented on this point, contending that the evidence presented by the plaintiff was sufficient to raise a question of notice to the employer.

III. Observations and Conclusions

The purpose of this study was to analyze the current status of the right to trial by jury in civil cases in Michigan. The study involved analyzing decisions of the Michigan Supreme Court over approximately a 20 year period dealing with three areas affecting the right to trial by jury in civil cases: (1) entitlement to a jury trial; (2) summary disposition; and (3) directed verdicts.

The law respecting entitlement to a jury trial seems well-settled. Comparatively few cases arising during the time period of the study have involved this issue. The Court's decisions in these cases establish fairly clear guidelines as to what constitutes a question of law for the Court and what constitutes a question of fact for the jury. In my opinion, these guidelines do not significantly erode the right to trial by jury in civil cases.

Where there has been change the right to trial by jury in civil cases is in the area of summary disposition. This change has diminished the right to trial by jury in civil cases, because the Michigan Supreme Court ,as presently constituted, has been more inclined to hold that in particular cases there was no genuine issue of material fact, so that the moving party, usually the defendant, was entitled to summary disposition. This change has taken place concurrently with far-reaching changes in substantive tort law limiting the liability of tort defendants. Thus, there will be more tort cases in which the defendant is entitled to judgment as a matter of substantive law, and for the same reason, there will be a decline in the number of tort cases brought in the first place.

[53] 472 Mich 408; 697 NW2d 851 (2005).

The Court's inclination to hold in more cases that there is no genuine issue of material fact, justifying summary disposition, as well as the Court's making far-reaching changes in substantive tort law, is due in large part to the changing composition of the Court. Beginning in 1999, the Court changed to a conservative majority, consisting of Justices Weaver, Taylor, Corrigan, Young, and Markman, with Justices Cavanagh and Kelly as the liberal minority.[54] With respect to summary disposition, our review of the reported cases[55] shows that pre-1999, there were 17reported opinions dealing with summary disposition. In 7 of these cases, the Court held that summary disposition was proper, and in 10 of them, the Court held that it was not.[56] In the period from 1999-2006, there were 17 reported opinions dealing with summary disposition.[57] In 12 of these cases, the Court held that summary disposition was proper, and in 5 of them, the Court held that it was not. In the period from 2005-2007, there were 9 cases involving questions of summary disposition in which the Court, in lieu of granting leave to appeal, reversed the decisions of the Court of Appeals. In 6 of these cases, the Court reversed a decision of the Court of Appeals denying a motion for summary disposition, and in 3 of these cases, the Court reversed a decision of the Court of Appeals granting a motion for summary disposition.

In the area of directed verdicts, the research showed that in the period from 2000-2005, there 5 such cases reaching the Supreme Court.[58] In 4 of them, the Court

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[54] I am using the terms "conservative" and "liberal"as they are popularly understood by lawyers in Michigan. The "conservative" Justices are Republicans, four of whom were originally appointed to the Court by Governor Engler, and the "liberal" Justices are Democrats. For present purposes, the "conservative" Justices are those who are philosophically in favor of limiting tort liability, while the "liberal" Justices are those who are philosophically in favor of expanding tort liability.

[55] As pointed out previously, the summary disposition cases selected for the study were primarily those where there was no issue as to the applicable law, so that the question before the Court was whether or not there was a genuine issue of material fact, entitling the moving party to summary disposition, or entitling the non-moving party to proceed to trial before a jury.

[56] Two of the opinions involved consolidated cases, which were counted as separate cases for purposes of the study. In one case, the Court ordered summary disposition for the plaintiff. In 5 of the cases where the Court held that summary disposition was improper, there was dissents by one or more of the "conservative" Justices on the Court during this period: Justices Riley, Griffin, Weaver and Taylor.

[57]One of the opinions involved a consolidated case, which was counted as a separate case for purposes of the study. Justices Cavanagh and Kelly dissented in a number of the cases where the Court held that summary disposition was proper.

[58] The research did not disclose any directed verdict cases decided by the Michigan Supreme Court in published opinions prior to 2000. It may be suggested that this reflects the fact

held that a directed verdict should have been granted.

The conclusion that emerges from the 20 year study of the reported decisions of the Michigan Supreme Court in the areas of summary disposition and directed verdicts is that the Court, as currently constituted, has diminished the right to trial by jury in civil cases in Michigan. The Court is more inclined than it was prior to 1999 to hold in more cases that there is no genuine issue of material fact, justifying summary disposition, and has now heard cases in which it has held that the defendant is entitled to a directed verdict. And the fact that the Court is more inclined to uphold the granting of summary disposition and directed verdicts is likely to have a demonstrable impact on these kinds cases when they are presented to the Court of Appeals and the trial courts. These courts, following the precedents of the Supreme Court and the results of the cases coming before that Court, will be more likely to rule in favor of granting motions for summary disposition and motions for directed verdicts.

However, this conclusion need some qualification. In the first place, the Court, as constituted prior to 1999, also held in a number of cases that summary disposition was proper. The difference is that the Court, as constituted after 1999, is inclined to so hold in a larger proportion of the cases coming before it. And in the last few years, in reversing decisions of the Court of Appeals in lieu of granting leave to appeal, the Court has reversed more decisions denying summary disposition than decisions granting it. Second, the Court, as presently constituted, is not completely one-sided. There are still cases, albeit fewer in number, where the Court has ruled against the granting of summary disposition or of a directed verdict.

The Court's decisions in the area of summary disposition send a strong message to litigating lawyers, the lawyers for the plaintiffs in tort cases and civil rights cases, and the lawyers for the defendants in contracts cases. That message is to have your facts in order before filing suit or before the opposing party is in a position to file a motion for summary disposition. My impression from reading some of the cases in the study is that the plaintiffs' lawyers did not plan their cases with reference to countering a motion for summary disposition by making sure at an early stage of the litigation that they would be able to prove the facts necessary to support their claim. Now that is it clear that a motion for summary disposition has a good chance of being granted, the time for proving a claim (or a defense in some contracts cases) effectively has been moved up from the trial stage to the pre-trial stage of the litigation. In the early stages of the litigation, the litigating lawyer must be sure that he or she has the evidence necessary to

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that with the changing composition of the Court, defendants were more inclined to file such motion and/or that decisions of the Court of Appeals involving such motions were more likely to be granted leave to appeal by the Supreme Court.

raise a genuine issue of material fact so as to be able to get the case to the jury.

In the final analysis, in my opinion, it is clear that the Court, as currently constituted, has diminished the right to trial by jury in civil cases in Michigan. Given the Court's view of the diminished role of the jury in resolving factual disputes in civil cases, litigating lawyers must make the best of a bad situation and do everything that they can in order to protect the right to trial by jury in civil cases. They must try to ensure in the early stages of the litigation that their cases are strong enough to survive a motion for summary disposition and get to the jury, and at the trial they must make a determined effort to present sufficient evidence to survive a directed verdict. Hopefully the Court's view of the diminished role of the jury will not have dealt a fatal blow to the right to trial by jury in civil cases in Michigan. Time will tell how well the lawyers of Michigan have succeeded in preserving this fundamental constitutional right.