

LEISURE SUIT

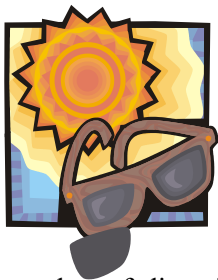
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From the Editor by Nathan A. Dodson

SUMMER BUMMER

Tis' the season for child injuries



It's the middle of summer. Ah yes, sun, fun, beaches, and barbeques. Unfortunately, summer also means one more thing – children are bound to get hurt. Fact is, most sports and recreational-related injuries to children occur in the days of summer when many kids begin to involve themselves in a number of diversified outdoor pursuits. Activities such as swimming, baseball, soccer, tennis, cycling, and golf (yes, even golf!) are just some of the summertime activities where young outdoor enthusiasts often get injured. In fact, according to Safe Kids USA, two-thirds of child drownings, forty-one percent of all fatal child falls, and almost half of all bike-related deaths occur in the summer. Even child deaths from car accidents are at their highest level in the peak summer months.

Obviously, not all accidents can be avoided. But prevention is still the best medicine. Safe Kids USA provides an extensive list of summer safety tips for preventing child injuries (see <http://www.usa.safekids.org/>). And as always, Garan Lucow Miller, P.C. is here to assist you. We are happy to answer any questions you may have, and provide any further information that might assist you, should you be faced with such an unfortunate occurrence. Please feel free to call me directly at 313.446.5523 or any of the attorneys at Garan Lucow Miller, P.C. And remember that while kids will be kids, and “play hard or go home” will be a mantra that will be echoed forever, safety still has to be a top priority.

DECISIONS, DECISIONS

*Highlighting recent court decisions
that affect your business*

WAIVE GOODBYE... TO YOUR CASE

Michigan Court of Appeals rules signed waiver and release bars plaintiff's suit against racetrack even though injury did not occur during race



In the case of *Theodore v. Horenstein*, ____ Mich App ____, 2009 WL 1506791, the plaintiff was injured while working as a volunteer at a raceway. She claimed that she was injured when she was struck by a trailer being pulled by the defendant as he was leaving the paddock area of the raceway. Prior to the accident,

the plaintiff executed a waiver and release that provided, in relevant part, that she:

HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE... FOR ANY AND ALL LOSS OR DAMAGE... ON ACCOUNT OF INJURY... ARISING OUT OF OR RELATED TO THE EVENT(S)...

The defendant filed a motion for summary disposition pursuant to the waiver and release and the trial court granted the motion. The plaintiff appealed. The Court of Appeals affirmed.

On appeal, the plaintiff argued that the term “EVENT(S)” in the waiver and release referred only to races and, therefore, the waiver and release only applied to injuries or claims resulting from an actual race, not accidents when a race was not occurring. According to the plaintiff, her injury did not arise out of or relate to an actual race. The Court of Appeals disagreed. It held that the waiver and release applied to injuries “*ARISING OUT OF OR RELATED TO*” the events. So, while the plaintiff was injured while she was directing the defendant out of the paddock area in preparation for a race, the

plaintiff's claim, although not directly associated with an actual race, *related to* the events at the raceway.

CAUGHT IN A PICKLE

Michigan Court of Appeals rejects plaintiff's shot at YMCA for injuries sustained while engaged in recreational game



Recently, in the case of *Hetherington v. Great Lakes Orthopaedic Center, PC*, ____ Mich App ____, 2009 WL 691873, the Michigan Court of Appeals affirmed the trial court's grant of summary disposition to the defendant YMCA in this negligence and premises liability action because there was neither

evidence of proximate cause, nor evidence of a defect on the premises.

In the case, the plaintiff reserved one-half of a basketball court for solo basketball practice. After about fifteen minutes of shooting baskets, the plaintiff was joined in the gym by pickleball (a cross between ping-pong and tennis, played on a badminton sized court with paddles and wiffle-ball-type balls) players, who began to play the game in a center area in the gym that overlapped the basketball court. At some point, the plaintiff was asked whether he would like to be a fourth player in the pickleball game and he agreed to play.

The evidence revealed that two of the pickleball players taught the plaintiff how to play the game. Later on, in the midst of an actual game, the plaintiff fell on another pickleball that he asserted had rolled onto the court during the game.

The plaintiff filed a complaint that alleged that the YMCA was negligent for allowing pickleball and basketball to be played simultaneously in the same gym area. It was also alleged that the premises were defective and that this caused or allowed the ball to roll under his foot, thereby causing his fall. The YMCA filed a motion for summary disposition, arguing that a failure to take precautionary measures was not the proximate cause of the plaintiff's injury. The motion was granted.

As to the ordinary negligence claims, the Court of Appeals sided with the YMCA. According to the Court, the plaintiff's claim that had the YMCA not allowed basketball and pickleball to be played simultaneously in the same gym, he would not have been invited to play pickleball, established only but-for causation as it went only to whether the activity would have taken place, not to any particular danger in that activity or the way in which it was conducted. Thus, the YMCA's alleged failure to take precautionary measures could

not, as a matter of law, have been the proximate cause of the plaintiff's injury.

In regard to the premises liability aspects of the plaintiff's claims, the Court found there was no evidence that the ball on which the plaintiff allegedly slipped and fell was present as a result of any defect on the premises. The Court went on to rule that even assuming the plaintiff's various allegations of premises defect had merit, unless the defects could be linked to the injury-causing event, they did not provide a basis for recovery.

In the end, the trial court's decision on the YMCA's motion for summary disposition was deemed appropriate.

MORE THAN JUST A LITTLE ELBOW ROOM

Question of material fact found in battery and negligence claims arising out of soccer match tussle



In *Esshaki v. Millman*, ____ Mich App ____, WL 692451, the plaintiff, a sixty year old recreational soccer player, broke his jaw during a league game when he was struck by a player on the opposing team. At his deposition, the plaintiff testified that at one point during

the match, the defendant had the ball and began to approach the plaintiff's team's goal. The plaintiff stated that the defendant lost control of the ball and he ran up from behind the defendant and "hustled" the ball away from him. The plaintiff testified that the defendant then became upset and punched him in the jaw with his fist.

At his deposition, the defendant testified that the strike to the plaintiff's jaw was accidental. The defendant testified that as the ball play was going, he turned abruptly to try to make a play on the ball and inadvertently struck the plaintiff with his elbow.

The plaintiff brought an action against the defendant for battery, negligence, and intentional infliction of emotional distress. The defendant moved for summary disposition on the grounds that it had not been proven that his conduct was an intentional act that went beyond what is ordinarily permissible in the game, or that otherwise amounted to reckless misconduct. The motion was granted. The plaintiff appealed.

On appeal, the Michigan Court of Appeals ruled that the evidence clearly established a question of fact as to whether the defendant intentionally committed an act that went beyond "what is ordinarily permissible" in soccer. Even assuming that

soccer included a degree of intentional – and potentially harmful – contact, the Court concluded that, as a matter of law, a participant's consent to the risks inherent to participating in a soccer match does not include consent to be attacked by a coparticipant. In the instant case, the Court found that when viewed in the light most favorable to him, the plaintiff's testimony established that the defendant's intentional contact was not part of the ordinary contacts that accompany playing soccer.

For those reasons, the Court reversed the trial court's grant of summary disposition.

KEEPING UP WITH THE JONES'
A look at recent decisions from other jurisdictions that could affect your Michigan case
 by Fareed Saba

TOO CLOSE FOR COMFORT

New York court declares proximity to mosh pit an assumed risk



In the New York Supreme Court (civil trial court of unlimited original jurisdiction) case of *Schoneboom v B B King Blues Club*, the plaintiff patron sued to recover for personal injuries allegedly sustained during a heavy metal concert at the defendant club. The plaintiff alleged he witnessed, but did not participate in, a form of dancing called “slam dancing,” on the lower level of the club. He later went downstairs to watch a band and was standing near the stage. At this same time, people were “moshing” behind him. The plaintiff alleged that sometime soon thereafter, he was shoved from behind, resulting in a torn ACL.

The defendant filed a motion for summary disposition arguing that the plaintiff assumed the risk of injury. The plaintiff responded by arguing that he was not engaged in the rowdy activity, but was merely an observer.

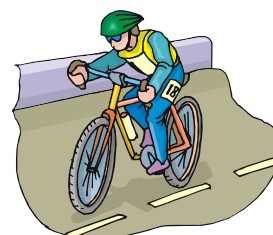
Summary disposition was granted to the defendant club based on the plaintiff's assumption of the risk involved. The court held that the plaintiff was knowledgeable of the risks involved, which included the risk that proximity to the "pit" could result in injury. Relying on case law that spectators of sports assume the risk inherent to the activity, the court found plaintiff's argument that he was not an actual participant unpersuasive.

This decision affirms that spectators and not just participants, especially those with knowledge of the risks associated with the activity, assume risk of injury.

AFTER FURTHER REVIEW
A closer look at the law
 by William J. Brickley

STEERING CLEAR OF THE PERILS ON TWO WHEELS

A little information can go along way into turning that uphill trek into a leisurely ride



Whether it be the nice weather, the desire to get in better physical condition, wanting to save a bit of gas money, or the dream of becoming the next Lance Armstrong, the summer season traditionally sees a great increase in the number of bicycle riders on the roads. Unfortunately, that also means accidents and injuries. According to the State of Michigan in its publication Michigan Pedestrian and Bicycle Safety Action Plan, in 2006 there were 2,026 accidents between bicyclists and motor vehicles and of those, 1,654 bicyclists were injured, with 28 fatalities. In 2007 the accidents totaled 2,160, with 1,775 injuries and 18 fatalities.

While the goal is to educate people on bicycle safety to eliminate accidents in the first place, it is inevitable that accidents and the claims that follow will continue to occur. We felt this would be a good time to review some of the laws that cover bicycles on the road ways in Michigan, so when you encounter these claims, you will have some information to assist in properly analyzing the responsibilities of the parties.

In this article we will discuss three subjects. Bicycles on the roadway, helmets, and other equipment. Please note that as we discuss these topics, some areas are governed by statute, and some are not. Please note that the violation of a statute by a motorist or by one riding a bicycle can be considered as evidence of negligence by a jury. A jury is still permitted to find, if it so chooses, no negligence even if a statute was violated. One the other hand, the absence of a statute on a subject does not mean that a person is free from negligence. Common sense and the proverbial "what is reasonable" under the circumstances will always apply.

Bicycles on the Roadway

Bicycles have the right to be on the roadway pursuant to Michigan Law. In MCLA 257.657 a bicycle rider "shall be granted all of the rights" that drivers of motor vehicles have. At the same time a bicycle rider has all of the duties of a driver of a motor vehicle. The legislature provides in MCLA 257.660 that a bicycle rider shall ride "as near to the right side of the roadway as practicable." The legislature also provides that if a designated bike bath is made available a local ordinance could require the use of that bike path. If there are multiple bicycle riders, they are not allowed to ride more than 2 abreast.

A common bicycle/motor vehicle accident in Michigan occurs when a motor vehicle comes from behind a bicyclist and attempts to pass the slower moving bicycle. Most of the time the motor vehicle does not recognize the right of the bicyclist to be on the road and does not move to the left far enough to safely pass. A motor vehicle operator should treat a bicycle like any other vehicle on the road and not attempt a pass until they can sufficiently move to the left so it is safe for all.

Many times a motor vehicle operator will point to the adjacent sidewalk and claim that the bicyclist should have been on that path. They don't have to be. In fact many bicycle organizations strongly advise against riding on sidewalks. This tends to increase the accidents between pedestrians and bicyclists and it causes safety issues with vehicles backing out of driveways.

Please remember that a bicycle rider has to adhere to the laws of motor vehicles as well. A common tactic of a bicyclist is to coast or outright run through red lights and stop signs. They are not supposed to. While most bicycles do not have turn signals, a bicyclist must signal his or her turn with their hands and arms. While speed laws are not an issue for most bicyclists, there is the occasional rider that can generate speed, especially down hills, that could exceed the speed limit. That again would be a violation of Michigan Law. Oftentimes the novice bicyclist will confuse the rules for pedestrians with the rules for bicycles and ride their bicycles against traffic. This too is a violation.

Helmets

Michigan law has no provision that requires a bicyclist to wear a helmet. At the same time, there is a great wealth of information that strongly recommends that all bicycle riders should wear a helmet. This is one of the common sense items we discussed above. There is no doubt that a very persuasive argument can be made that a rider without a helmet who

suffers a head injury is guilty of some negligence. Most bicycle helmets are relatively inexpensive and if properly worn can prevent many head injuries.

Equipment

If a bicyclist is riding at night, he or she is required to have proper lighting. Per MCLA 257.662, a front light is required. It must be white and be visible from 500 feet. On the rear, there is a requirement of a red reflector visible at all angles from 100 feet, and from behind at 600 feet. A red lamp visible from 500 feet is acceptable in the rear. Bicyclists are also required to have working brakes that would allow the operator to stop on dry pavement.

We have attempted to touch upon some of the common issues that arise in bicycle/motor vehicle accidents. If you encounter issues not addressed in this brief article feel free to contact us and we will be glad to assist you in getting the answer to your specific question.

Remember that Garan Lucow Miller, P.C. has nine offices throughout the State of Michigan to serve all of your municipal needs:

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Washtenaw County Office. 1-800-878-5600
Ingham County Office. 1-888-910-0300
St. Clair County Office. 1-800-875-4400
Oakland County Office. 1-800-875-7600
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Kent County Office. 1-800-494-6312
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