



NEGLIGENCE LAW SECTION

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Respectfully submits the following position on:

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ADM File No. 2014-09

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The Negligence Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Negligence Law Section only and is not the position of the State Bar of Michigan.

The State Bar position on this matter is to take no position on the proposed amendments to MCR 7.215(A) and MCR 7.215(B); to oppose the proposed amendments to MCR 7.215(C) for the reasons stated in Justice Markman's dissent; and to authorize Sections and Committees to transmit non-conflicting positions to the Court.

The total membership of the Negligence Law Section is 1,995.

The position was adopted after a discussion and vote at a scheduled meeting. The number of members in the decision-making body is 15. The number who voted in favor to this position was 11. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Negligence Law Section

Contact person:

Tim Diemer

E-Mail:

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Proposed Court Rule or Administrative Order Number:

2014-09 - Proposed Amendment of MCR 7.215

The proposed amendments of MCR 7.215(A)-(C) were submitted by the Court of Appeals. Proposed MCR 7.215(A) would clarify the term "unpublished" as used in the rule. The proposed amendment of MCR 7.215(B) would provide more specific guidance for Court of Appeals judges regarding when an opinion should be published. Finally, in response to what the Court of Appeals describes as an increased reliance by parties on unpublished opinions, the proposed revision of MCR 7.215(C) would explicitly note that citation of unpublished opinions is disfavored unless an unpublished decision directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.

Date position was adopted:

February 25, 2015

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting

Number of members in the decision-making body:

15

Number who voted in favor and opposed to the position:

11 Voted for position

0 Voted against position

0 Abstained from vote

4 Did not vote (absent)

Position:

Oppose the proposed amendment of MCR 7.215(C).

Explanation of the position, including any recommended amendments:

The Negligence Law Section agrees with Justice Markman's dissent on the proposed change to MCR 7.215(c). The section opposes the amendment to subsection c because it would designate the citation to unpublished opinions as "disfavored."

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2014-09_2015-02-18_formatted%20order_with%20SJM%20stmt%20with%20RC.pdf



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Mr. Larry S. Royster
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Re: ADM File No. 2014-09

Dear Mr. Royster:

As a Section of the State Bar consisting of a roughly equal number of lawyers for plaintiffs and lawyers for defendants, the Negligence Law Section often struggles to reach a consensus on issues that impact the practice of tort litigation in Michigan. The proposed amendment to MCR 2.715 is not one of those instances.

The Negligence Law Council unanimously voted to oppose the proposed changes to MCR 7.215(C). There was a consensus agreement with Justice Markman's Dissenting Statement on the proposed changes to MCR 7.215(C), particularly as to the concerns with moving toward a "no citation" policy where the underlying rationale for a "no citation" rule (the unavailability of unpublished opinions) is non-existent in the age of Find Law and Google Scholar and where the Court of Appeals makes all of its opinions freely available on its publicly accessible website.

Members of the Michigan Bar can now even subscribe to have each and every opinion of the Court of Appeals, both published and unpublished, delivered to their e-mail inbox twice per week. If anything, the Negligence Council would more likely support movement toward a more relaxed citation rule because unpublished opinions are now equally accessible to everyone, regardless of the size of the law firm and regardless of an ability to pay for expensive subscriptions to Westlaw or Lexis.

As strongly as the Negligence Council agreed with Justice Markman's Dissenting Statement, instead of repeating those arguments against the changes to MCR

7.215(C), we instead offer our own unique analysis for the Supreme Court's consideration in deciding whether to adopt the proposed changes to MCR 7.215.

With Fewer and Fewer Published Opinions Being Released by the Court of Appeals, the Negligence Council Opposes Added Restrictions on the Body of Law Available for its Members to Rely Upon

Before delving into a statistical analysis concerning the shrinking supply of published opinions for both the Bench and Bar, many lawyers, particularly those who specialize in appellate work, if limited only to published opinions for briefing, would find themselves primarily limited to historic case law stretching back decades before many of the current judges and justices were sitting on an appellate bench or involved in appellate decision-making. Quite simply, there are not as many published opinions currently being released by the Court of Appeals as there used to be.

This concern is particularly glaring for some sub-specialties of Negligence Law, including professional (non-medical) malpractice, not to speak of the concerns of non-negligence lawyers, such as those who specialize in trust, probate or real property matters, areas of the law with very few published authorities to guide decision-making. In auto negligence litigation, a specialty of many Negligence Law Section Members, unpublished opinions construing the "serious impairment of bodily function" under MCL 500.3135 are tremendously useful where, for example, previous cases involving similar injuries and similar restrictions on a claimant's ability to lead his or her life can be cited to as guiding templates for a particular case.

For example, if a Panel of the Court of Appeals previously held that a claimant's broken leg and 6 week absence from work met the serious impairment of bodily function threshold, a lawyer with a similarly injured and work restricted plaintiff would be wise to cite to that opinion, even if unpublished, given the factual and analytical parallels. Even though the opinion may not be precedentially binding under *stare decisis*, we do not see why the Court of Appeals should actively discourage a lawyer from citing its own legal decision that construes a key statutory enactment to a trial court or the Court of Appeals, itself.

The anecdotal concerns of a shrinking supply of published authorities shared by many Negligence Lawyers are supported by the data. The Negligence Law Section notes that very few Court of Appeals Opinions are actually being published currently. In the

past 5 years, roughly 8% of all Court of Appeals opinions were published, a total of 1,077 published opinions among 13,319 total opinions. For the most recent year with available data (2014), 247 published opinions were released across all case types including civil, criminal, family, tax, administrative, etc.¹

This low publication rate of 8% coincides with a significant reduction in the overall number of filings and opinions actually being released by the Court of Appeals (from 3,424 total opinions in 2004 down to 2,843 in 2014) which effectively means that fewer and fewer published opinions are being released each and every year, even if publication rates remained constant. Furthermore, if the current trend of fewer Court of Appeals filings and opinions continues, then the body of law to guide lawyers and judges will only become further diluted.

Many of the Key Supreme Court Decisions That Affect the Practice of Negligence Law in Michigan Sprung from Unpublished Court of Appeals Opinions

It also did not escape the attention of the Negligence Council that a high number of the landmark decisions of the Supreme Court of Michigan over the past decade have arisen out of opinions that were unpublished in the Court of Appeals. This strongly suggests that the Justices of the Supreme Court do not view unpublished opinions as second-class judicial decisions or non-binding rulings of limited concern to the state's highest court.

For example, of particular interest to the Negligence Law Section, we note the following significant Supreme Court of Michigan decisions that emanated from opinions deemed by the Court of Appeals not significant enough to publish:

- Gilbert v DaimlerChrysler Corp, 407 Mich 749, 685 NW2d 391 (2004) (landmark decision on expert witness admissibility standards under MRE 702, judicial review standards over proposed expert witness opinions, grounds for remittitur or new trial based on excessiveness of damages)
- Ward v Consolidated Rail Corp, 472 Mich 77, 693

¹ Unofficial publication statistics for the years 2010-2014 were obtained from many sources, including Annual Reports of the Court of Appeals, the Clerk's Office as well as the Court's website. Unfortunately, at this time, the publication rates for years prior to 2010 are not available.

NW2d 366 (2005) (spoliation of evidence standards)

- McCormick v Carrier, 487 Mich 180, 795 NW2d 517 (2010) ("serious impairment of bodily function" threshold test under the No Fault Act, MCL 500.3135)
- Pellegrino v AMPCO Systems Parking, 486 Mich 330, 785 NW2d 45 (2010) (use of race during *voir dire*)

In addition to attracting the attention of the Supreme Court, unpublished opinions are also relied upon and followed by subsequent Court of Appeals panels. One recent example includes the Court of Appeals Panel in Figurski v Trinity Health, COA Docket Nos. 318115 and 319086, expressly adopting the reasoning and accepting the legal conclusions reached in another unpublished opinion from the Court of Appeals in VanSlembrouck v William Beaumont Hospital (COA Docket No. 309680). It would be an odd system where a Court of Appeals Panel can cite to and rely upon its previous unpublished rulings while at the same time codifying a rule that tells the lawyers appearing before it not to cite these same unpublished opinions.

Whether to Cite a Non-binding Unpublished Opinion Should Remain Within the Professional Discretion of Members of the Bar

While all lawyers know that a published authority is preferable to an unpublished decision, oftentimes, an unpublished opinion bears directly on the particular case a lawyer is working on. Knowing full well that an unpublished opinion is non-binding, it is a matter left to the lawyer's judgment as to whether to raise an unpublished opinion that the Court might follow but is free to ignore. We do not see the benefit of circumscribing our members' professional discretion by adopting a policy advising lawyer advocates that the citation of the vast majority of decisions from the Court of Appeals (roughly 92% the last 5 years) is a "disfavored" policy.

Furthermore, there is no corresponding proposed rule that disfavors the citation to case law from federal courts, other states, law reviews, treatises, etc. We do not support passage of a Court Rule where the Michigan Court of Appeals would tell the lawyers before it not to cite to its own opinions, but that it remains a favored policy for a lawyer to cite to a host of other non-binding authorities that do not even arise out of or invoke principles of Michigan law.

Conclusion

While the Negligence Council does not oppose the proposed amendments to subsections (A) and (B) of MCR 7.215 which may be useful in clarifying what is "published" and what is "unpublished," the Negligence Council unanimously voted to oppose the proposed changes to subsection (C), which we believe would further dilute a dwindling body of case law that is available to our lawyer members to use to advocate their respective legal positions and advance the legal interests of their clients.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "TAD" followed by a stylized flourish.

Timothy A. Diemer
On Behalf of the Negligence Law
Section of the State Bar of
Michigan