



NEWS YOU CAN USE:

Are Winter Car Accidents The Drivers' Or God's Fault?

Winter is just about over (we hope!) and so are winter car accidents. We've seen a lot of them this winter. It has been a snowy, icy one. Our clients often ask us, "if the wintery conditions of the road made me lose control, is it still my fault?"

The answer, in most cases, is "yes". Even though insurance defense lawyers often raise the "it was an act of God" defense to weather related accidents, that defense usually works only where the driver is totally blameless, which is hardly ever the case.

Always remember that you, as the driver of your vehicle, have an absolute duty to your passengers and to other motorists or pedestrians to *keep control of your vehicle*.

Usually, "the road was real icy" or "I hit a snowy patch" are not valid excuses in Court. The only common exception is where there was no ice or snow anywhere on the roadway before you hit an unexpected patch. If you already know there is snow and ice on some areas of the roadway, you have a duty to drive at a speed and in a manner that allows you to control your car even given those conditions.

Almost nothing is harder to live with than causing the death of a loved one—your passenger—because you did not drive at a prudent speed for the conditions. Please drive carefully!

WELCOME TO THE

Michaels & Smolak newsletter!

Don't hesitate to send your comments (*the good, the bad and the ugly!*) to Mike Bersani at bersani@michaels-smolak.com.

And if you like what you see, please add us on Facebook, follow us on Twitter ([@cnylawyers](https://twitter.com/cnylawyers)) and subscribe to our blog (centralnewyorkinjurylawyer.com).

Our Team



Lee Michaels



Jan Smolak



Michael Bersani



David Kalabanka

the

MICHAELS

SMOLAK

pledge

we deeply appreciate the trust our clients have placed in us and we will strive to uphold that trust by working hard and fighting for our clients' rights.

NEW LAWS

Governor Cuomo Wants To Nix NY State Website That Helps Patients Doc Shop And Avoid NY Medical Malpractice

If you wanted to hire a driver to drive you on a long trip, would you want access to an easily searchable website where his and other licensed professional drivers' traffic convictions and accidents were posted?

If your answer is yes, then safety is important to you. And it is safe to assume that, if you were going to have major surgery, you would also like an easily searchable website that gives you details about your surgeon's medical malpractice records, hospital affiliations, and other background information.

Right now, New York State has such a website (<http://www.nydoctorprofile.com>). It was mandated by a Statute in the year 2000 in response to several high profile medical malpractice failures by doctors with bad—but not easily discoverable—track records.

Now, however, that website is in jeopardy. A two-sentence item buried deep in Governor Cuomo's proposed budget would eliminate the New York State Physician Profile. The budget savings? \$1.2 million annually—chump change in the context of New York State's annual budget of about \$140 billion.

The site—operated by the New York State Health Department—is a big hit with patients. Last December alone 35,000 clicked onto the site.

Governor Cuomo justifies nixing the site by claiming that the same information is available elsewhere on the web. That's mostly true, but finding it requires sleuth-like skills and patience that many medical consumers don't have. If you are lucky or persistent enough you might find all the same information on other sites. But why not have one-stop easy "doc shopping" at such a low cost?

The author of the 2000 law creating the State website, Assemblyman Richard Gottfried, summarized the problem: "As we move towards more transparency and public access to healthcare information, this proposal takes us in the opposite direction."

LITERARY CORNER

Did Shakespeare Hate Lawyers?

As long as there are lawyers, there will be lawyer jokes and lawyer insults. You can probably think of three lawyer jokes off the top of your head. We sure can. (Don't worry—we won't tell any in this article!)



But was William Shakespeare among the insult-hurling lawyer joke makers? Was the best writer of the English language among the mud-slinging anti-lawyer crowd? We ask this because of the famous line from one of his plays where one of his characters says, “the first thing we do, let's kill all the lawyers”. This phrase is often bandied about as proof that the great bard hated us lawyers. And if Shakespeare—the greatest writer in the English language—hated us, shouldn't all reasonable but less skilled writers and thinkers hate us as well?

In the opinion of many Shakespeare scholars, Shakespeare did not despise lawyers! Shakespeare's famous “kill all the lawyers” line was uttered by Dick the Butcher in “Henry VI,” Part II, act IV, Scene II, Line 73. Dick the Butcher followed rebel Jack Cade who thought that if he got rid of law and order, he could become king. Thus, when Shakespeare has Dick say, “the first thing we do (to take over government), let's kill all the lawyers”, he is really giving a kind of backhanded compliment to lawyers. He is saying, “if you want to illegally take power and set up a totalitarian regime, you need to first get rid of lawyers who will stand in your way”.

Yet this quote from Shakespeare has instead been used by many to slam lawyers. It is used to insinuate that lawyers are an annoying and drab lot who get in the way of the legitimate pursuits of mankind. Nonsense! In fact, Shakespeare is saying “thank God for lawyers, who are the guarantors of the rule of law and order and who protect us against mob or totalitarian rule”.

Next time you quote Shakespeare's “let's kill all the lawyers” line, just remember: Shakespeare meant that, if you want tyranny or anarchy, you have to kill the lawyers first!

CELEBRITIES IN THE NEWS
AND IN THE COURTHOUSE**The Joan Rivers Medical Malpractice Debacle**

Joan Rivers went in to the clinic for a routine throat examination and came out near death. She died after she was anesthetized and after her renowned medical team took souvenir “selfies” of themselves posing with her. Meanwhile, the doctors did not notice her vital signs trailing off. Fifteen minutes went by. Joan Rivers then went into the cardiac arrest, which deprived her brain of oxygen, which in turn led to her death eight days later.

Investigators have found numerous violations and irregularities during Ms. Rivers' treatment.

Joan Rivers may be more famous than the rest of us, but her family's New York medical malpractice lawyers will have to prove the same things in Court as the rest of us. Essentially, the family's lawyers will have to prove that the medical treatment Rivers received at the clinic fell below an acceptable level of medical care, and that this failure—rather than something else—caused her to die.

What can the family sue for? When medical malpractice kills a patient, the family can sue for basically two kinds of relief: (1) compensation for the pain and suffering their loved one suffered before death and

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(2) “economic” damages, i.e., funeral costs, medical costs, and loss of income or inheritance to the heirs (among other things).

Here there is probably no provable pain and suffering because Ms. Rivers was sedated when things took a turn for the worse. And most 81-year olds can’t prove much economic loss because they are retired and not earning anything. But Joan Rivers is not like most 81-year olds. Anyone who has seen the movie “Joan Rivers — A Piece of Work” knows that, behind the makeup, behind the plastic surgery, behind the jokes, she was a ridiculously hard worker, someone whose life and self-image were wrapped up in her career. She was “raking it in” and had no intentions of retiring—ever.

Rivers’ family will thus have a strong argument that she would have continued to make heaps of money for several years, which would have grown her bank accounts, which in turn would have grown the family’s future inheritance. And that could add up to a lot of money that the family has lost out on because of the malpractice.

Joan Rivers’ doctors may have been smiling as they took those selfies of themselves with her under sedation, but Joan Rivers will likely have the last laugh...

Rick Springfield Trial in Syracuse Demonstrates Difficulty Of Brain Injury Cases

Traumatic brain injury cases are statistically among the toughest to win for a plaintiff’s lawyer, as a very recent—and well reported — Syracuse New York brain injury verdict bears out.

First, why are some brain injury cases so tough? The symptoms of mild traumatic brain injury are often “invisible” to a jury: headaches, cognitive slowdown, depression, blurred vision, memory or concentration problems, mood swings, confusion, and balance issues. Nothing you can show the jury on an MRI slide.

Worse, the injured plaintiff usually looks and talks “normal”. It is easy for a jury to conclude—especially in this post-McDonald’s case environment—that the plaintiff is “faking” or at least exaggerating.

The press was all over the recent Syracuse traumatic brain injury trial because it involved a famous entertainer—Rick Springfield. A fan at his 2004 NYS Fair performanc claimed that, while dancing on stage, he had fallen on her, knocked her down, and caused her to suffer a traumatic brain injury. She claimed that Springfield had been “careless and negligent” during the course of his concert by “performing, hopping and/or jumping” on chairs and benches.

After a week of testimony and only about an hour of deliberations, a jury determined that the singer and actor was not responsible for any brain injuries—or any injuries at all.

Paintiff’s credibility quickly and repeatedly came under fire. Although credibility attacks are typical in brain injury cases, this case presented even greater hurdles for the plaintiff. She had no witnesses to back up her story that Springfield had fallen on her. There were no videos showing what happened. She conceded that she did not leave the concert or seek medical attention at the time.

The defense pointed out that, although she had emailed the NYS Fair about the incident, she did not mention specific injuries but rather asked only for Springfield’s contact information. She also attended a Cyndi Lauper concert a week after the Springfield concert, which probably convinced the jury she could not have suffered a brain injury at all.

Although plaintiff's lawyer tried to explain all these seeming contradictions away, he failed. This case was a perfect storm for a plaintiff's brain injury case: No good proof of what happened, post-accident behavior that could lead a jury to conclude the plaintiff was not very hurt—if at all—and only “invisible” symptoms that could not be clearly demonstrated on the stand.

There are of course ways to win traumatic brain injury cases, and each case turns on its own facts. If you or your loved ones have suffered a traumatic brain injury through the negligence of others, give us a call for more information.

What Do Honda Motors And Foxes Have In Common?

Big auto companies are legally required to self-report to the government (the National Highway Traffic Safety Administration a/k/a/ NHTSA) fatal accidents and injuries caused by their vehicles. This mandatory self-reporting helps regulators identify safety defects, which in turn helps them decide on recalls to save our lives.

But requiring auto makers to disclose to Uncle Sam their own safety problems is kind of like requiring the fox to report to the farmer how many hens he ate. The fox is likely to under-report.

Same with Honda. Honda ran afoul of the law by failing to report hundreds of death and injury claims as well as certain warranty and other claims. Honda's lack of reporting put its customers' lives on the line.

And as a result, the NHTSA has fined Honda a record \$70 million for its gross under-reporting of fatalities and injuries. This penalty is double the one slapped on General Motors just last year for being slow to identify safety problems.

Will Honda continue to under-report fatalities, injuries and warranty claims? Or will the fine slapped on them—the largest ever—act as a deterrent? In our opinion, not likely. What's a measly \$70,000,000 to a multi-billion dollar global company like Honda? A drop in the bucket. A slap on the wrist. Choose your metaphor. In any event, a well fed fox won't miss a few hens.

areas in which WE CAN HELP

our attorneys can help with all personal injury & malpractice cases such as:

- Motor Vehicle Accidents
- Catastrophic Injuries
- Construction Accidents
- Slip/Trip and Falls
- Wrongful Death
- Medical and Legal Malpractice
- Defective Products
- Almost any Accident or Malpractice Case of Any Kind

attention attorneys

INJURY & MALPRACTICE REFERRALS

a lot of lawyers and law firms refer all their injury and malpractice cases to Michaels & Smolak. Why?

- (1) We are known for getting top dollar (in settlement or verdict) for the referred case
- (2) We carry all expenses of the case
- (3) We give personal attention to your clients

Consider referring your cases to us!



ATTORNEY SPOTLIGHT **Jan Smolak**

Besides our senior attorney Lee Michaels, Jan Smolak has been with the firm longer than any other lawyer. We pinned Jan down during one of his busy days at the office to interview him about his career:

So how did you get started at Michaels & Smolak?

Gee, I started with Lee Michaels even before I was sworn in as a new lawyer. I started “clerking” for him sometime around September of 1986. In 1992 I became a partner of the firm that would later be known as Michaels & Smolak.

So you’ve been practicing law for around 28 years. Has the practice of personal injury and medical malpractice law changed at all over those years?

It sure has! In the “old days” insurance adjusters would actually come to our office to try to settle their cases with us. We had more personalized relationships with the adjusters back then.

Certain insurance adjusters, who were well known to the plaintiffs’ bar and very knowledgeable, would come to the office to discuss maybe a half dozen files or so that were ready for possible settlement. It was very cordial and professional. If an agreement could be reached on the value of a case the adjuster would draft a handwritten check on the spot and the case would be settled.

The manner in which cases get resolved now is totally the opposite. It is all by phone or email, and it is more contentious. You have to fight tooth-and-nail to get a fair settlement for your client these days.

What about in the courtroom? Has anything there changed?

Has it ever! Back 25 years ago, “trial lawyers” like us were actually trying case after case. I remember in one October probably 25 years ago how I was scheduled to try four cases back to back over a four week stretch. Two got settled but the other two got tried. It’s just the way it was. I was constantly in trial. I learned a lot.

Nowadays you rarely see lawyers trying cases in central New York unless it is a medical malpractice case. Almost all decent cases settle, and primarily the weak ones get to trial. Clients like it like this because they really don’t want to go to trial, but it’s a shame for young lawyers because they aren’t getting the experience, knowledge and maturity that comes with trying many cases early in their career.

After all these years, do you still like your job?

Definitely yes! I love representing individuals who have been hurt. It is the David and Goliath aspect of the job that still keeps me doing battle every day. The insurance companies would crush the average person who has no clue how the process works. They truly would not stand a chance without plaintiffs’ lawyers like me to protect their rights. The insurance companies would roll them up and smoke them before lunch. Seriously they would.

I know that we personal injury lawyers are the butt of many jokes, but the reality is that if we didn’t exist the world would be a much more dangerous place to live. We make the world safe by making those who negligently injure our clients pay for the damage they have done.

What do you do when you are not battling insurance companies and their lawyers?

My wife Jackie and I love to travel. Now that our children are grown and attending college, we have a lot more time for it. We are enjoying the “empty nest”!

Snapshot of Jan Smolak**1978**

Eagle Scout

1979Graduated from
Auburn High School**1983**Graduated cum laude from University
of Buffalo**1986**Graduated from University of Buffalo
Law School where he was a recipient
of the Robert J. Connolly Award for
excellence in trial practice.**1987**Admitted to the U.S. District Court
for the Northern District and the New
York and Georgia bars.**1988–1992**Served on Board of Directors for
the Auburn Community College/
Cayuga Community College
Alumni Association**1994–1996**Served on Board of Directors Big
Brother/Big Sisters of Cayuga County**1996–2005**Served on Board of Directors for the
Cayuga County Boy Scout Council**2000–2004**Zoning Board of Appeals for the Town
of Owasco**2005–2007**Scoutmaster of Boy Scout Troop 1,
Auburn**2003–Present**Served on Board of Directors for the
Merry–Go–Round Playhouse Theater
(2004–present; 2nd V.P. 2007–2008;
1st V.P. 2013 to present)

IN THIS ISSUE

NEWS YOU CAN USE:

Are Winter Car Accidents The Drivers' Or God's Fault?

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