Michigan

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1. Introduction – History of Tort Reform in Michigan

Michigan was one of the first states in the country to pass tort reform legislation when it passed the Medical Malpractice Arbitration Act in 1975. While this Act was repealed by subsequent tort reform legislation, Michigan continues to be in the forefront of the tort reform movement.

The Michigan Legislature has enacted three sets of Tort Reform legislation. The first reform took effect in 1986. These reforms modified venue, imposed stringent criteria for medical expert witnesses in medical malpractice actions, and addressed joint and several liability concerns. These reforms did not address all of the concerns of the Michigan Legislature and, as a result, two more tort reform legislations were passed.

The 1993 tort reform legislation applied only to the area of medical malpractice and affected cases filed after April 1, 1994. The 1993 legislation placed a limit on non-economic damages, reduced the applicable statute of limitations for minors, stiffened the requirements of the affidavit of merit, and required all plaintiffs to file notice of their intent to file a lawsuit not less than 182 days before a complaint is filed.

The 1995 tort reform package overhauled Michigan's tort system. As discussed more thoroughly below, the Legislature enacted laws that abolished joint and several liability, imposed caps on non-economic damages, changed the standard for product liability cases, modified venue provisions, heightened the standard for expert witnesses and altered Michigan's No Fault Act. The 1995 tort reform package is set forth in 95 Pub. Act 161 and 95 Pub. Act 249 and applied to all cases filed after March 28, 1996.

2. Joint and Several Liability

Before tort reform was enacted in Michigan, Michigan law allowed for joint and several liability in tort actions. Joint and several liability recognizes that tortfeasors who act in concert – who independently contribute to a single, indivisible injury or who otherwise share responsibility for the wrongful act – can be held liable for the entirety of a plaintiff's damages. While joint and several liability was the law of the land in Michigan, an injured party could choose to sue only one of the multiple parties who had caused his injury and that individual defendant was liable for the entire amount of the judgment, regardless of the percentage of that individual defendant's fault.

The 1995 tort reform created "fair share liability" in Michigan. The 1995 legislation, in essence, eliminated joint and several liability in all actions seeking damages for personal injury, property damage, and wrongful death (with the exception of medical malpractice actions). The Act states that each defendant's liability for damages is several only and is not joint. As a result, under the new rule, each defendant's liability is directly proportioned to its percentage of fault, as determined by the trier of fact. Also, in determining the percentage of fault, the trier

of fact can now consider each party's fault, regardless of whether or not that party was actually named as a party to the action.

Joint and several liability still exists in Michigan. As previously stated and discussed more thoroughly below, the Michigan Legislature chose to retain joint and several liability in medical malpractice cases. Joint and several liability also exists by statute in personal injury, property damage, and wrongful death actions where a defendant's acts or omissions that caused the damages constitute a crime involving the use of alcohol or a controlled substance for which the defendant was convicted. Joint and several liability also applies where the acts or omissions that caused the damages constitute a crime where an element of the crime is gross negligence. MCL §600.6312.

3. Damage Caps

Both the 1993 and 1995 tort reform legislations placed caps on non-economic damages[1] in two specified tort actions – products liability and medical malpractice.

a.) Medical Malpractice

The 1993 legislation addressed damage caps in the area of medical malpractice. MCL §600.1483 limits the non-economic damages recoverable in a medical malpractice action to $280,000. However, in the event that the injured party is a hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, the injured party may recover $500,000[2]. This $500,000 damage cap also applies in the event that an injured party suffered permanent impairment of his/her cognitive capacity or damage to a reproductive organ resulting in the inability to procreate.

b) Product Liability

The 1995 legislation addressed damage caps in the area of products liability. In a product liability action, the total amount of damages should not exceed $280,000, unless the defect in the product caused either a plaintiff's death or permanent loss of a vital bodily function; in which case the total damages for non-economic loss may not exceed $500,000. MCL §600.2946a. However, these damage caps do not apply if the trier of fact determines by a preponderance of the evidence that the death or loss was the result of the defendant's gross negligence.

Under both reforms, plaintiffs who are more than 50% at fault for their own injuries may still recover, but they cannot recover non-economic (pain and suffering, reduced life quality, etc.) damages. The jury may not be told about the

[1] "Non-economic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other non-economic loss. MCL§600.1483(3).

[2] Both limitations on damages are to be adjusted yearly by the state treasurer to amounts reflected by the annual percentage change in the consumer price index as provided by MCL§ 600.1483.

limitations on the amounts recoverable; the judge adjusts the jury verdict after it is rendered so that the cap is not exceeded. MCL§ 600.2946a(2).

4. Punitive Damages

The Michigan legislature has not passed any tort reform laws that attempt to cap or limit tort punitive damages. In *Casey v. Auto-Owners Ins. Co.,* 273 Mich. App. 388, (2006), this Court stated that "[p]unitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan." There is, however, an exception where punitive damages are authorized by statute. *Id.*

5. Medical Malpractice Reform

The Michigan Legislature enacted the 1993 tort reform package in response to a reported crisis in health care. The legislature's stated primary purpose was to guarantee that adequate and affordable health care was available to Michigan citizens. The legislature reasoned that the traditional medical liability system was threatening citizen's access to health care, at least partly through excessively large jury verdicts.

As a result, the 1993 tort reform legislation included stringent caps on non-economic damages in medical malpractice actions. These caps and their exceptions are set forth in more detail under section 3 above. The statute further mandated that no one was allowed to tell the jury about the cap and stated that application of exceptions to the cap was a question of law to be determined by the judge, not the jury. These new caps replaced a previous cap imposed by the 1986 tort reform package and eliminated the seven exceptions to the cap's application set forth in that package.

Before Michigan passed tort reform legislation**,** a victim alleging medical malpractice in Michigan could simply go to court and file a claim. Today, an injured party asserting a claim of medical malpractice must first notify any foreseeable defendant, with a written notice[3] of his/her intent to file a claim 182 days before

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[3] The written notice must contain a statement which includes the following information: The factual basis for the claim, the applicable standard of practice or care alleged by the claimant, the manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility, the alleged action that should have been taken to achieve compliance with the alleged standard of practice or care, the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice, and the names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim. MCL§ 600.2912b(4).

commencing the action. After the 182 days has elapsed, the injured party may file his/her Complaint[4], however it must be accompanied by an Affidavit of Merit, signed by a medical expert who meets the 1993 tort reform's narrowly drawn criteria. MCL§ 600.2169.

The 1993 Legislation also set strict requirements for expert witnesses in medical malpractice actions. The statute requires that all expert witnesses must have been a specialist in the same specialty as the defendant at the time of the occurrence at issue. MCL§ 600.2169(1)(a). Also, for at least one year prior to the alleged malpractice, the expert must have spent most of his/her time in either the active clinical practice of the same specialty as the defendant, or in teaching students in the defendant's field of practice at an accredited professional school, residency, or clinical research program.

Despite the elimination of joint and several liability in most Michigan tort actions, joint and several liability for medical malpractice actions still exists in Michigan. In passing the 1995 tort reform, the legislature specifically excepted medical malpractice actions from the statutory provisions abolishing joint and several liability. As a result, a medical malpractice defendant is still liable for 100% of a plaintiff's damages, even if the trier of fact determines that he/she is only 10% at fault.

In the wake of the 1993 tort reform legislation, several plaintiff attorneys filed suits, questioning the constitutionality of the Legislation. In a suit to challenge the damage cap provisions, the Sixth Circuit Court of Appeals determined that the provisions survived rational-basis scrutiny.[5] The Court reasoned that controlling healthcare costs was a legitimate governmental purpose. The Court concluded that by limiting at least one component of health care costs, the non-economic damage limitation was rationally related to its intended purpose. The Sixth Circuit Court of Appeals also rejected a Seventh Amendment challenge to the damage cap provisions, holding that the limitation on non-economic damages did not implicate a protected jury right[6].

6. Products Liability Reform

As defined in Michigan, a product liability action is "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." MCL§ 600.2945(h).

Under the amended law, defendants are not liable for the failure to warn of risks that should be obvious to a reasonably prudent product user or that are matters of

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[4] A Complaint may be filed before the 182 day period elapses if: (a) after 154 passes from the date the notice was given and the noticed party fails to provide the required response under MCL§ 600.2912b(8), or (b) any time during the 182 days if the noticed party informs the claimant, in writing, that they do not intend to settle within the notice period. MCL§ 600.2912b(9)

[5] *Smith v Botsford Gen Hosp*., 419 F3d 513 (6th Cir. 2005).

[6] See Id.

common knowledge to persons in the same or similar position as the plaintiff. MCL§ 600.2948(2). In addition, manufacturers and sellers are not liable for (1) the failure to warn or to instruct unless the plaintiff can prove that the manufacturer knew or should have known of the risk of harm based on the scientific, technical, or medical information reasonably available when the product left its control, MCL §600.2948(3); or (2) the failure to provide a warning to a sophisticated user, unless a warning is required by state or federal statute or regulation, MCL§ 600.2947(4).[7]

The 1995 tort reform package also contained new venue provisions for product liability cases. The provisions limited venue primarily to the county where the injury occurred and where the manufacturer or seller conducted business. Other possible venue locations can only be used if the county in question does not satisfy the afore-mentioned criteria.

Also noteworthy was the effect of the 1995 tort reform on a manufacturer's duty to warn ordinary consumers of product dangers. Products having risks that are within common knowledge, or that are obvious, do not need to contain warnings about the product. This extends the "open and obvious" defense used in premises liability cases to product liability cases. The "open and obvious" issue now becomes a question of fact in any case in which a plaintiff asserts there was a duty to warn.

7. Attorneys Fees

The Michigan legislature has not passed any tort reform laws that attempt to address imposition of attorneys' fees in tort actions. Attorney fees are not usually available in tort actions except as sanctions authorized by court rule or statute.

8. Practice Pointers

A. Venue

The venue statute for tort actions, MCL §600.1629, was also amended for cases filed on or after March 28, 1996. Prior to the enactment of this Legislation, venue was proper in any county in which all or a part of the events giving rise to the cause of action occurred. The statute now provides that the first priority in determining where venue is proper is "[t]he county in which the original injury occurred." Under the amended MCL §600.1629(2), Motions for change of venue are allowed for reasons of hardship or inconvenience.

B. Expert Witnesses

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[7] The limitations contained in MCL§ 600.2947(4) and 600.2948 (2) do not apply if the court determines that the defendant willfully disregarded knowledge that the product was defective and that the defect was substantially likely to cause the injury. MCL§ 600.2949a.

The amendments to the Revised Judicature Act also affected expert witness qualifications in all tort actions. Before tort reform**,** expert testimony was allowed in Michigan whenever the court, guided by the Michigan Rules of Evidence and applicable case law, decided that an expert was competent to testify. This determination was made on the basis of whether a witness possessed knowledge that would assist the trier of fact in understanding the evidence or in determining a fact in issue.

Following the 1995 tort reform, a trial court must consider seven criteria before ruling upon the admissibility of expert testimony. A court must consider the following: whether the expert's opinion has been previously tested, whether the opinion has been subjected to peer review publication, whether the opinion is consistent with generally accepted standards, the known or potential error rate of the expert's opinion and its basis, whether the opinion has been generally accepted within the relevant expert community, whether the opinion is reliable and whether experts I the same field would rely on the same basis to reach the type of opinion being proffered, and whether the opinion has been relied upon outside the context of litigation. These requirements make it more difficult to introduce expert testimony. MCL§ 600.2955(1)(a)-(g).

C. No Fault

The 1995 tort reform also amended the Michigan no-fault act to prohibit an uninsured motorist from recovering non-economic damages in an action arising out of an automobile accident. The Act also stated that the question of whether or not an injury has resulted in a "serious impairment of body function" is now a question of law for the court, rather than one of fact for the jury. MCL§ 500.3135. Finally, a no-fault plaintiff under the new law cannot recover anything if the action for the death or injury of an individual is based on the Plaintiff's impaired ability to function due to the influence of intoxicating liquor or a controlled substance and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the impaired Plaintiff was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage. MCL § 600.2955a.

D. Actions under Michigan's Wrongful Death Act

According to the Michigan Supreme Court, the medical malpractice noneconomic damages cap applies in all medical malpractice actions, even those filed under Michigan's Wrongful Death Act.

9. <u>Special Issues</u>

A. Contribution

The elimination of joint and several liability has greatly reduced the role of contribution in Michigan, although, such claims have not been eliminated by the Act. A statutory right to contribution still exists under Michigan law. MCL§ 600.2925a - .2925d.

B. Asbestos Cases

On March 9, 2006, a new piece of tort reform legislation was introduced in the Michigan legislature. This bill, House Bill 5851, addresses civil actions that include asbestos and silica claims. The pertinent provisions of the bill would have the following effect:

- A person will not be allowed to assert an asbestos or silica claim unless the exposed person has a physical impairment to which asbestos or silica exposure was a substantial or contributing factor. "Substantial contributing factor" means:

    a) exposure is the predominant cause of the impairment

    b) exposure took place on a regular basis or over an extended time period

    c) a qualifying physician determines that the physical impairment would not have occurred but for the exposure

- Except in cases based on mesothelioma, a plaintiff must make certain prima facie showings in order to maintain an action.

- Limits total damages for non-economic loss to $ 250,000 (or three times the amount of damages).

- Limits total damages for non-economic damages based upon mesothelioma, the damage cap is $500,000 (or three times the amount of damages).

- Attorneys representing claimants could only receive 20 percent of the amount awarded by way of a settlement or judgment.

The Bill has passed the House of Representatives and was referred to the Committee on Judiciary in December of 2006.