Comparative/Contributory Negligence and Joint and Several Liability

A State by State Summary

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MICHIGAN

By Ronald C. Wernette, Jr. and Nicholas G. Even

Comparative / Contributory Negligence

In 1979, Michigan common law abandoned contributory negligence and replaced it with a rule of pure comparative negligence, reducing a plaintiff's recovery to the extent that plaintiff's negligence contributed to the injury. *Placek v Sterling Hts.*, 405 Mich 638, 650, 275 NW2d 511 (1979). In 1996, Michigan enacted tort reform and created a statutory modified comparative fault scheme, as well as a related non-party fault scheme.

Statutory Comparative Fault

Under the Act, the trier of fact must determine the percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability, in any action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than one person (including third-party defendants and non-parties). MCL 600.2957(1); MCL 600.6304(1). When a plaintiff is assigned a percentage of fault, the total judgment amount is reduced by an amount equal to the percentage of that plaintiff's fault. MCL 600.2959; MCL 600.6306(3).

Statutory exceptions to the general rule of pure comparative fault are:

- A plaintiff is barred from recovering *non-economic* damages if fault is found to be greater than 50%. MCL 600.2959 (generally); MCL 500.3135(2)(b) (motor vehicle accident claims).

- A plaintiff is barred from recovering *any* damages if found to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability was found to be greater than 50% at fault. MCL 600.2955a.

- In motor vehicle accident cases, a plaintiff is barred from recovering *non-economic* damages if plaintiff was operating his or her own vehicle at the time the injury occurred and did not have in effect for that vehicle the mandatory no-fault insurance required by MCL 500.3101. MCL 500.3135(2)(c).

Note: Comparative negligence is an affirmative defense which must be pled in a defendant's first responsive pleading to be preserved. *Riddle v McLouth Steel Products Corp.*, 440 Mich 85, 98, 485 NW2d 676 (1992).

Statutory Non-Party Fault

MCL 600.2957, MCL 600.6304, and MCR 2.112(K) require that fault must be allocated by a fact-finder to all parties and non-parties involved in an action provided certain procedural requirements are satisfied. Generally:

- A defendant must file a notice of non-party fault within 91 days of filing its first responsive pleading. MCR 2.112(K)(3)(c);

- The notice must contain a designation of each non-party's name and last known address, and a brief statement of the basis for believing the non-party is at fault. MCR 2.112(K)(3)(b). Only the best identification possible of the non-party is required, even if not specifically identifiable by name. *Rinke v Potrzebowski*, 254 Mich App 411; 657 NW2d 169 (2003);

- A party "served with a notice" may file a motion seeking leave to file an amended pleading within 91 days of service of the notice of non-party fault and the court shall grant leave to serve an amended pleading stating a claim(s) against the non-party. MCL 600.2957; *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000);

- A cause of action added following the filing of a notice of non-party is not barred by the applicable statute of limitations unless it would have been barred by the statute of limitations at the time of the filing of the original action. *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2007); and

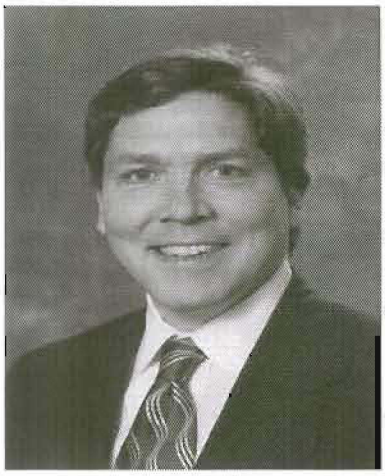
- For claims based on negligence, proof that a non-party owed plaintiff a legal duty is required before fault may be allocated to the non-party. *Romain v Frankenmuth Mut Ins Co*, No. 135546, __ NW2d __, 2009 WL 838129 (Mich March 31, 2009). A trier of fact may not apportion fault to a co-defendant that was dismissed, or to a non-party, if the court has determined that no legal duty was owed to the plaintiff. *Id.*

Joint and Several Liability

Michigan has *generally abolished* joint and several liability. MCL 600.2956; MCL 600.6304(4). With few exceptions, in any action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant is several only and it not joint. This is consistent with Michigan's statutory comparative negligence and non-party fault scheme.

Statutory exceptions to the general rule of several liability only, in which a defendant is still jointly liable, are:

- An employer's vicarious liability for an employee's act or omission. MCL 2956.
- Medical malpractice claims in which the plaintiff is determined to be without fault. MCL 600.6304(6)(a).
- Where the defendant has been convicted of a crime, an element of which is gross negligence. MCL 600.6312(a); MCL 600.6304(4).
- Where the defendant has been convicted of a crime involving the use of alcohol or a controlled substance and that is a violation of certain other Michigan statutes. MCL 600.6312(b); MCL 600.6304(4).



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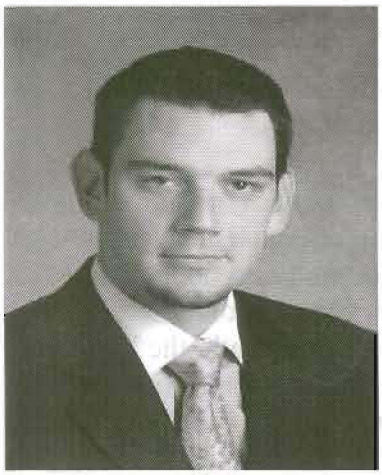

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ARIZONA

*By **Dustin A. Christner***

Contributory / Comparative Negligence

The Arizona legislature adopted a pure comparative fault tort system as part of its enactment of the Uniform Contribution Among Tortfeasor's Act ("UCATA"), A.R.S. § 12-2501, *et seq.* The purpose of UCATA is to ensure a fair liability apportionment system in which "each tortfeasor in a personal injury action is liable only for his or her share of fault." *Sanchez v. City of Tucson*, 191 Ariz. 128, 133, 953 P.2d 168, 173 (1998) (citing A.R.S. § 12-2506)); *Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 404, 904 P.2d 861, 866 (1995).

Under UCATA, a jury must consider the fault of all persons who contributed to the alleged injury, death or property damage, regardless of whether a person was or could have been named as a party. A.R.S. § 12-2506(B). The fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with that nonparty or if the defending party gives notice before trial that a nonparty was wholly or partially at fault. A.R.S. §12-2506(B). A defendant can name a nonparty at fault even if the plaintiff cannot directly sue or recover from the nonparty. *See Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 821 P.2d 166 (1991) (joint tortfeasor may require employer's negligence to be considered for assessment of fault under A.R.S. § 12-2506 when employer negligently contributes to employee's injury). However, the assessment of fault against a nonparty does not subject that nonparty to liability in the adjudicated or any other action and it may not be introduced as evidence of liability in any action. *Id.*

UCATA defines "fault" as "an actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product." A.R.S. § 12-2506(F)(2). Under this definition, each party is liable only for the percentage of fault assigned to it by the trier of fact, who assesses "degrees of fault, not just degrees of causation." *Larsen v. Nissan Motor Corp. in U.S.A.*, 194 Ariz. 142, 145, 978 P.2d 119, 122 (App. 1998), review denied.

In an indivisible injury case (where more than one cause produces a single injury in an accident), the fact-finder must multiply the total amount of damages sustained by the plaintiff by the percentage of fault of each tortfeasor to determine the maximum amount recoverable against each tortfeasor. A.R.S. § 12-2506(A); *Larsen*, 194 Ariz. at 146. As explained by the Arizona Supreme Court, "we see no reason to employ a different rule if the injuries occur at once, five minutes apart, or as in the present case, several hours apart. The operative fact is simply that the conduct of each defendant was a cause and the result is indivisible damage." *Piner v. Superior Court*, 192 Ariz. 182, 189, 962 P.2d 909, 196 (1998).

Joint and Several Liability

In 1987 the legislature amended UCATA to abolish joint and several liability among joint tortfeasors in most circumstances. The 1987 amendment, codified at A.R.S. § 12-2506, establishes a system of comparative fault, making "each tortfeasor responsible for paying his or her percentage of fault and no more." *Dietz v. Gen. Elec. Co.*, 169 Ariz., 510, 821 P.2d 166, 171 (1991).

Under this system of several-only liability, plaintiffs, not defendants, bear the risk of insolvent joint tortfeasors. Each tortfeasor whose conduct caused injury is severally liable only for its percentage of the total damages recoverable by the plaintiff, the percentage based on each actor's allocated share of fault. A.R.S § 12-2506(A) and (F)(2).

A.R.S. § 12-2506(D) provides only three exceptions to several-only liability: 1) where the parties were acting in concert; 2) where one party was acting as an agent or servant of another party; and 3) where a party's liability for the fault of another person arises out of a duty created by the federal employers' liability act, 45 U.S.C. § 51. A.R.S § 12-2506(F)(1) defines acting in concert as "entering into a conscious agreement to pursue a common plan or design in commit an intentional tort and actively taking part in that intentional tort." The acting in concert exception applies only to intentional conduct, not to negligent conduct in any of its degrees. A.R.S. § 12-2506(F)(1).

In *State Farm Insurance Cos. v. Premier Manufactured Systems Inc.*, 217 Ariz. 222, 172 P.3d 410 (2007), the Arizona Supreme Court recently held that the legislature's abolishment of joint and several liability extends to strict product liability actions and to each separate defendant in the chain of manufacture and distribution of a product. Consequently plaintiffs, not defendants, also bear the risk of insolvent joint tortfeasors in strict liability actions.

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