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**SUMMARY OF MICHIGAN WRONGFUL DEATH AND  
SURVIVAL ACTION LAWS**

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## **I. Pertinent Wrongful Death/Survival Law**

Michigan has developed a comprehensive system of law dealing with wrongful death. The pertinent case and statutory law will be discussed in the body of this brochure.

## **II. Standing, Forum, and Procedural Requirements**

### **A. Standing**

Pursuant to MCL 600.2922(2), the personal representative of the estate of the deceased person had standing to bring a wrongful death cause of action. MCL 600.2922(2) provides:

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person. Within 30 days of the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

### **B. Procedural Requirements**

The personal representative of the estate of the deceased person must be appointed or approved by the probate court before the wrongful death action is filed in the civil court. Once the civil action is filed, the personal representative of the estate must serve a copy of the Complaint and notice of the action within 30 days of filing on all individuals who may be entitled to damages. These procedural requirements are set forth in MCL 600.2922(2) (quoted above), and in MCL 600.2922(4), which provides as follows:

(4) The notice required in subsection (2) shall contain the following:

(a) The name and address of the personal representative and the personal representative's attorney.

(b) A statement that the attorney for the personal representative shall be advised within 60 days after the mailing of the notice of any material fact which may constitute evidence of any claim for damages and that failure to do so may adversely affect his or her recovery of damages and could bar his or her right to any claim at a hearing to distribute proceeds.

(c) A statement that he or she will be notified of a hearing to determine the distribution of the proceeds after

the adjudication or settlement of the claim for damages.

(d) A statement that to recover damages under this section the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6) and that failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds. MCL 600.2922(4).

A wrongful death action may be filed in the State of Michigan's circuit court or district court or in the United States District Court. The case should be filed in the Michigan circuit court if the amount in controversy exceeds \$25,000. MCL 600.605. The case should be filed in the Michigan district court if the amount in controversy is less than \$25,000. MCL 600.8301. Finally, the case may be filed in the U.S. District Court if the amount in controversy exceeds \$75,000 and there is diversity of citizenship, or if a federal question is involved. 28 USC 1332.

### **C. Venue**

Venue concerns the proper place in which a lawsuit may be filed and resolved. The county in which the original injury occurred is the primary consideration in determining venue. But there are several different considerations that may also be relevant. The pertinent provisions are set forth below.

MCL 600.1621 is a starting point for the venue consideration in most cases. It provides:

Except for actions provided for in sections 1605, 1611, 1615, and 1629,<sup>[1]</sup> venue is determined as follows:

(a) The county in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located, is a proper county in which to commence and try an action.

(b) If none of the defendants meet 1 or more of the criteria in subdivision (a), the county in which a plaintiff resides or has a place of business, or in which the registered office of a plaintiff corporation is located, is a proper county in which to commence and try an action.

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<sup>1</sup> MCL 600.1605 deals with venue in cases involving recovery of real property, partition of real property, foreclosure on real property and the recovery of tangible personal property. MCL 600.1611 deals with venue in actions on probate bonds. MCL 600.1615 deals with venue in actions against governmental units. MCL 600.1629 deals with causes of action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death. MCL 600.1629 will be discussed in more detail below.

(c) An action against a fiduciary appointed by court order shall be commenced in the county in which the fiduciary was appointed.

MCL 600.1627 indicates that, generally, the county in which all or a part of the cause of action arose is a proper venue:

Except for actions founded on contract and actions provided for in sections 1605, 1611, 1615, and 1629, the county in which all or a part of the cause of action arose is a proper county in which to commence and try the action. Suits against the surety of a public officer or his or her appointees are not excepted from the application of this section.

MCL 600.1629 is the pertinent venue provision for actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death. While the statute generally starts with a consideration in a similar fashion to MCL 600.1621, it provides more detail regarding what occurs when the initial venue considerations are not met. The statute provides:

(1) Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:

(a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(i) The defendant resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of a defendant is located in that county.

(b) If a county does not satisfy the criteria under subdivision (a), the county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:

(i) The plaintiff resides, has a place of business, or conducts business in that county.

(ii) The corporate registered office of a plaintiff is located in that county.

(c) If a county does not satisfy the criteria under subdivision (a) or (b), a county in which both of the

following apply is a county in which to file and try the action:

(i) The plaintiff resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(ii) The defendant resides, has a place of business, or conducts business in that county, or has its corporate registered office located in that county.

(d) If a county does not satisfy the criteria under subdivision (a), (b), or (c), a county that satisfies the criteria under Sec. 1621 or 1627 is a county in which to file and try an action.

(2) Any party may file a motion to change venue based on hardship or inconvenience.

(3) For the purpose of this section only, in a product liability action, a defendant is considered to conduct business in a county in which the defendant's product is sold at retail.

MCL 600.1641 details venue in cases where there has been a joinder of more than one cause of action. The statute makes special provision for cases involving tort or another legal theory seeking damages for personal injury, property damage or wrongful death. If one of the causes of action joined in the complaint or added by a subsequent amendment is based on such a legal theory, the rules for venue determination set forth in MCL 600.1629 control. MCL 600.1641 provides:

(1) Except as provided in subsection (2), if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change as provided by court rule.

(2) If more than 1 cause of action is pleaded in the complaint or added by amendment at any time during the action and 1 of the causes of action is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue shall be determined under the rules applicable to actions in tort as provided in Section 1629.

The venue statutes do not create jurisdiction. MCL 600.1601. Therefore, a court may still issue orders in a case even though venue is not appropriate under the Revised Judicature Act. "No order, judgment, or decree shall be void or voidable solely on the ground that there

was improper venue.” MCL 600.1645. MCL 600.1651 specifically indicates that a court may still try a case even though venue is not appropriate. The case continues in the inappropriate venue unless a defendant moves for a change of venue within the time and manner provided by the court rule. MCL 600.1651 provides:

An action brought in a county not designated as a proper county may nevertheless be tried therein, unless a defendant moves for a change of venue within the time and in the manner provided by court rule, in which case the court shall transfer the action to a proper county on such conditions relative to expense and cost as provided by court rule and Sec. 1653. The court for the county to which the transfer is made shall have full jurisdiction of the action as though the action had been originally commenced therein.

A motion for change of venue must be filed before or at the same time as the defendant files an answer. MCR 2.221(A). A defendant may bring an untimely motion if the court is satisfied that the facts on which the motion is based were not, and could not have been with reasonable diligence, known to the moving party more than 14 days before the motion was filed. MCR 2.221(B). If the venue in a civil action is improper the court shall order a change of venue if the defendant files a timely motion. MCR 2.223(A)(1). A court may, in fact, order a change in venue on its own initiative if the venue is inappropriate if the court gives notice to the parties and provides the parties with an opportunity to be heard. MCR 2.223(A)(2). If venue is changed due to improper venue, the action may be transferred only to a county in which venue would have been proper. MCR 2.223(A). If venue is changed because venue is improper, the court “shall” order the change at the plaintiff’s cost. These costs shall include the statutory filing fee applicable to the court to which the action is transferred and may include reasonable compensation for the defendant’s expenses, including reasonable attorney fees in attending the wrong court. MCR 2.223(B). MCL 600.1653 also provides for the awarding of expenses if a party brings a motion for change of venue in an action based on tort. MCL 600.1653 provides:

If a party brings a motion for a change of venue in an action based on tort alleging improper venue, the court shall award expenses and costs as follows:

- (a) If the motion is granted, the court shall, after opportunity for a hearing, require the party who opposed the motion to pay to the moving party the reasonable expenses, including reasonable attorney fees, incurred in obtaining the order and to pay the statutory filing fee applicable to the court to which the action is transferred unless the court orders the change of venue for the convenience of the parties and witnesses or when an impartial trial cannot be had where the action is pending.
- (b) If the motion is denied, the court shall, after opportunity for a hearing, require the moving party to pay

to the party who opposed the motion the reasonable expenses, including reasonable attorney fees, incurred in opposing the motion, unless the court maintains venue for the convenience of the parties and witnesses.

#### **IV. Those Who May Recover In A Wrongful Death/Survival Action**

MCL 600.2922(3) lists the individuals who may recover in a wrongful death/survival action:

(3) Subject to section 2802 to 2805 of the Estates and Protected Individuals Code, 1998 P.A. 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased's spouse.

(c) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

#### **V. Potential Damages, People Who Are Entitled To Recover Those Damages, And The Procedure For Court Approval**

##### **A. Summary**

The individuals who are entitled to recover wrongful death damages in Michigan are set forth in MCL 600.2922(3), as quoted above. A wide variety of economic and noneconomic damages may be recovered in a wrongful death action. As set forth in the cases discussed below, recovery may be permitted for loss of society and companionship, loss of consortium, loss of love and affection, pain and suffering sustained by the decedent while conscious between the time of injury and death, loss of financial support, loss of future earnings, pre-injury fright and terror, property damage, and reasonable medical, hospital, funeral, and burial expenses for which

the estate is liable.

MCL 600.2922(6) provides a list of potential damages as well as the procedure for distribution of damages to the beneficiaries of the estate in the event that a cause of action is filed:

(6) In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

(a) The personal representative shall file with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

(b) Unless waived, notice of the hearing shall be served upon all persons who may be entitled to damages under subsection (3) in the time, manner, and method provided in the rules applicable to probate court proceedings.

(c) If any interested person is a minor, a disappeared person, or an incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated individual.

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the

persons and the estate of the deceased. If there is a specific verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(e) If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated individual and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

Persons entitled to wrongful death damages must make a claim for damages to the personal representative of the decedent's estate before the time set for hearing on the motion for distribution discussed in subsection (6). MCL 600.2922(7) provides:

(7) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds. MCL 600.2922(7).

In addition, any person listed in subsection (3) who may be entitled to recover damages must advise the attorney for the personal representative of the decedent's estate of any evidence to support any claim for damages within 60 days after service of the Complaint and notice of the action. If that person fails to do so, his right to claim any proceeds at a hearing on a motion for distribution may be barred. MCL 600.2922(8) provides:

(8) A person who may be entitled to damages under this section shall advise the attorney for the personal representative within 60 days after service of the complaint and notice as provided for under subsection (2) of any material fact of which the person has knowledge and which may constitute evidence of any claim for damages. The person's right to claim at a hearing any proceeds may be barred by the court if the person fails to advise the personal representative as prescribed in this subsection.

Finally, in the event that a claim is settled before any wrongful death/survival action is filed, MCL 600.2922(9) sets forth the proper procedure for distribution through a proceeding in the probate court:

(9) If a claim under this section is to be settled and a civil action for wrongful death is not pending under this section, the procedures prescribed in section 3924 of the Estates and Probate

Individual Code, 1998 P.A. 386, MCL 700.3924, shall be applicable to the distribution of the proceeds.

MCL 700.3924 provides:

(1) For the purpose of settling a claim as to which an action is not pending in another court for damages for wrongful death or for a claim existing under this state's laws relating to the survival of actions, if a personal representative petitions the court in writing asking leave to settle the claim and after notice to all persons who may be entitled to damages as provided in section 2922 of the revised judicature act of 1961, being section 600.2922 of the Michigan Compiled Laws, the court may conduct a hearing and approve or reject the settlement.

(2) The proceeds of a court settlement of a cause of action for wrongful death shall be distributed in accordance with all of the following:

(a) The personal representative shall file with the court a petition for authority to distribute the proceeds. Upon the filing of the petition, the court shall order a hearing.

(b) Unless waived, notice of hearing must be given to all persons who may be entitled to damages as provided in section 2922 of the revised judicature act of 1961. A notice under this subdivision must contain both of the following:

(i) The name and address of the personal representative and of the personal representative's attorney.

(ii) A statement that, to recover damages under this section, the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the petition for distribution of the proceeds, and that failure to present a claim for damages within the time provided bars the person from making a claim to any of the proceeds.

(c) If an interested person is a minor, disappeared person, or incapacitated individual for whom a fiduciary is not appointed, the court shall first appoint a fiduciary or guardian ad litem, and the notice as provided in subsection (b) shall be given to the fiduciary or guardian ad litem.

(d) After a hearing on the personal representative's petition, the court shall order payment from the proceeds of the decedent's reasonable medical, hospital, funeral, and burial expenses for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the decedent's estate. The court shall then enter an order distributing the proceeds to those persons designated in section 2922 of the revised judicature act of 1961 who suffered damages and to the decedent's estate for compensation for conscious pain and suffering, if any, in the amount the court considers fair and equitable considering the relative damages sustained by each of the persons and the decedent's estate.

(e) If none of the persons entitled to the proceeds is a minor, disappeared person, or incapacitated individual and all of the persons entitled to the proceeds execute a sworn stipulation or agreement in writing in which each person's portion of the proceeds is specified, the court order shall be entered in accordance with the stipulation or agreement.

(f) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the petition for distribution of the proceeds. Failure to present a claim for damages within the time provided by this section bars the person from making a claim to any of the proceeds.

(g) If a claim for wrongful death is pending in another court, the procedures prescribed in section 2922 of the revised judicature act of 1961 [MCL 600.2922] are applicable to the distribution of proceeds of a settlement or judgment. MCL 700.3924 (emphasis added).

## **B. Recoverable Damages**

### **1. Loss of Consortium Damages**

Loss of consortium is an independent cause of action brought by a spouse for the lack of society and companionship of a deceased spouse. *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 662-663 (2008).

While loss of society and companionship and loss of consortium share certain components and have often been

erroneously used interchangeably, defendants are incorrect in asserting that the terms are equivalent in meaning. A loss of consortium is typically construed to encompass two aspects of the marital relationship – the loss of support and the loss of society. “Loss of consortium technically means the loss of conjugal fellowship. However, it is legally recognized as including loss of society, companionship, service, and all other incidents of the marriage relationship.” Although the loss of consortium includes loss of services and loss of society as components, that does not make the components interchangeable or determine whether they are economic or noneconomic in nature. [*Thorn*, 281 Mich App at 662, quoting *Kucken v Hygrade Food Products Corp*, 51 Mich App 471, 474-475 (1974) (further citation omitted).]

## **2. Damages for Loss of Society and Companionship**

In a wrongful death case, damages for loss of society and companionship are recoverable for relationships beyond husband and wife. The court looks at the relationship of the claimant with the decedent to determine the value of the loss.

In *Claim of Carr*, 189 Mich App 234; 471 NW2d 637 (1991), the court held that in a wrongful death action, the court should assess the type of relationship the decedent had with the claimant in terms of objective behavior as indicated by time and activities shared and overall characteristics of their relationship. In making this assessment, the Court of Appeals held that an award of \$20,729 to a son for the death of his mother out of settlement proceeds of \$400,000 was fair and equitable compensation for loss of society, companionship, and financial support, where the son's relationship with his deceased mother was strained because of his repeated incarcerations, he only attempted to foster a relationship with his mother when he found himself in trouble and needed help, and it was the decedent's husband who stayed with her throughout her long illnesses.

Similarly, in *McTaggart v Lindsey*, 202 Mich App 612; 509 NW2d 881 (1993), the Court of Appeals held that the trial court properly denied the decedent's father any loss of society and companionship damages, where the evidence supported the fact that the father failed to develop any family relationship with his deceased daughter. There was evidence that the father never contributed to the financial needs of his daughter, never visited her or had any interest to do so, and never took any steps to assert his parental rights.

But the Michigan appellate courts have held that evidence of a surviving spouse's remarriage was inadmissible in a wrongful death action on the issue of damages for loss of the deceased spouse's society and companionship. *Wood v Detroit Edison Company*, 83 Mich App 153; 268 NW2d 325 (1978), affirmed 409 Mich 279; 294 NW2d 571 (1980). The rationale for this rule rests on three factors: (1) the cause of action for wrongful death arises at the time of the death, and the amount of damage suffered is fixed at that time; (2) allowing evidence of a subsequent marriage to influence the amount of damages awarded for the loss of society and companionship of a prior marriage is highly speculative and inappropriately invites qualitative

inquiry, comparison of relationships, and inappropriate probing scrutiny by the trial court; (3) similar to the collateral source rule, evidence of the effect of a subsequent marriage should have no bearing on the amount due a plaintiff following a wrongful death because compensation received from another source should not affect the responsibility owed to the injured party by the tortfeasor. *Id.* at 287.

In *Wesche v Mecosta Co Rd Comm*, 480 Mich 75 (2008), the Supreme Court ruled that a wrongful death claim for loss of society and companionship was not an exception to governmental immunity. “Accordingly, we hold that the wrongful-death act does not expand the waiver of immunity set forth in the motor/vehicle exception to include loss-of-consortium claims.” *Id.* at 92. The Wrongful Death Act does not authorize a loss of consortium claim when a plaintiff would not have been entitled to seek damages for the claim under the motor vehicle exception if death had not ensued. *Id.* at 93.

In *Jenkins v Patel*, 471 Mich 158 (2004), the court addressed a claim for loss of society and company arising out of a wrongful death claim related to the defendant’s medical malpractice. The court concluded that the medical malpractice noneconomic damage cap contained in MCL 600.1483(1) applied to such claims.

In *McClain v Univ of Michigan Bd of Regents*, 256 Mich App 492 (2003), the Court of Appeals explained that a party does not have an action for wrongful death on behalf of a non-viable fetus because a non-viable fetus is not a person within the meaning of the Wrongful Death Act. *Id.* at 495. The court concluded that any claims for loss of society and companionship of the fetus were inapplicable for the same reasons. *Id.* at 495-496.

In *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450 (2001), the court concluded that a decedent’s daughter and siblings were not required to testify at a wrongful death trial in order to recover damages when there was other testimony offered regarding the decedent’s close relationship with his family and the manner in which the siblings had been involved in the decedent’s life. “When some objective evidence of an eligible claimant’s relationship with the decedent exists in a wrongful death action, the claimant’s failure to himself offer testimony regarding his loss does not preclude the claimant’s recovery.” *Id.* at 462. But the court concluded that the trial court erred in awarding interest on damages awarded for loss of future society and companionship. *Id.* at 469.

In *Beaudrie v Anchor Packing Co*, 231 Mich App 242 (1998), the Court of Appeals concluded that, when an employee is fatally injured and his dependents and personal representative file a wrongful death action, any recovery for damages resulting from the employee’s death is subject to the employer’s or carrier’s right of reimbursement under the Workers Compensation Act. This even includes damages for loss of society and companionship. *Id.* at 247.

In *Colbert v Primary Care Medical PC*, 226 Mich App 99 (1997), the Court of Appeals concluded that evidence of abuse by the decedent was relevant for claims of loss of society and companionship. *Id.* at 102-103.

### **3. Damages for Loss of Services**

In *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644 (2008), the court concluded that, by permitting recovery for loss of financial support and the loss of society and companionship of the deceased, the Wrongful Death Act also allows recovery for damages for the economic value of household services a decedent would have provided. The court concluded that such damages are economic damages that are separate and distinct from the compensation for loss of society or companionship. *Id.* at 666. Therefore, they are not subject to the damage cap for medical malpractice.

### **4. Damages for Pain and Suffering**

Damages are recoverable under Michigan's Wrongful Death Act for pain and suffering that the decedent may have suffered while conscious from the time of injury to the time of death.

In *Brereton v United States*, 973 F Supp 752 (E.D. Mich. 1997), the United States District Court for the Eastern District of Michigan held that pain and suffering could be recovered under the Michigan Wrongful Death Act for the deceased pilot's emotional distress or injury during the period of time in which he may have suffered conscious fright and terror prior to the airplane's fatal impact with the ground.

In *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500; 556 NW2d 528 (1996), affirmed 458 Mich 582; 581 NW2d 272, the Michigan appellate courts held that an award of \$100,000 for the conscious pain and suffering prior to death of a motorist who was killed in a single-vehicle accident was proper in a wrongful death action against the automobile manufacturer, as the award was supported by expert testimony that the decedent's fatal head injury occurred toward the very end of the accident sequence and that the decedent suffered injury to her arm and other minor injuries, and by eyewitness testimony that the decedent's vehicle flipped over multiple times before coming to rest.

In *Byrne v Schneider's Iron and Metal, Inc*, 190 Mich App 176; 475 NW2d 854 (1991), the Michigan Court of Appeals held that the deceased child's consciousness and resulting pain and suffering could be inferred by the jury from evidence that the child died of suffocation.

In *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450 (2001), the Court of Appeals concluded that it was appropriate for the jury to consider the pain and suffering of the decedent in a wrongful death action based in the decedent's drowning. The court noted that expert testimony indicated that a drowning victim might struggle in the water for between 20 and 60 seconds before succumbing. The court also noted that this was consistent with the fact that the decedent expelled water when brought on shore, which is consistent with conscious aspiration of water. *Id.* at 460-461.

### **5. Damages for Loss of Financial Support and Future Earnings**

Damages for loss of financial support and future earnings are recoverable under Michigan's Wrongful Death Act.

In *Brown v Oestman*, 362 Mich 614; 107 NW2d 837 (1961), the Michigan Supreme Court held that evidence of the decedent's monthly earnings, his age and life expectancy, and the ages and life expectancies of his widow and children, in addition to testimony that the decedent was the sole supporter of his family, were sufficient to enable the jury to establish the family's pecuniary loss in an assault and battery case under the Wrongful Death Act.

The Michigan Court of Appeals has held that damages for loss of financial support extend beyond the claimant's 18th birthday. For example, in *Settington v Pontiac General Hospital*, 223 Mich App 594; 568 NW2d 93 (1997), the Court of Appeals held that the Wrongful Death Act permitted the decedent's minor children to receive an award of damages for loss of financial support beyond their 18th birthdays.

#### **6. Pre-Injury Fright and Terror**

In *Platt v McDonnell Douglas Corp*, 554 F Supp 360 (E.D. Mich. 1983), the United States District Court for the Eastern District of Michigan held that Michigan's Wrongful Death Act allows recovery for the deceased airline passengers' pre-impact fright and terror. The court reached the same conclusion regarding a decedent pilot in *Brereton v U.S.*, 973 F Supp 752 (1997).

#### **7. Recovery of Property Damage**

In *Taylor v Michigan Power Company*, 45 Mich App 453; 206 NW2d 815 (1973), the Michigan Court of Appeals held that where the decedent's apartment was totally destroyed by an explosion, the trial court properly allowed the plaintiff and her husband to appraise property damage loss resulting from the explosion and fire which killed the plaintiff's decedents.

### **C. NON-RECOVERABLE DAMAGES**

#### **1. Hedonic Damages**

In *Brereton v United States*, 973 F Supp 752 (E.D. Mich. 1997), the United States District Court for the Eastern District of Michigan held that hedonic damages are only available under Michigan's Wrongful Death Act to living plaintiffs who have been permanently injured such that they cannot enjoy life's pleasures. Thus, the court did not permit recovery of damages for the deceased pilot's loss of enjoyment of life that would have been experienced but for his untimely demise in an airplane crash and did not allow damages for the pilot's loss of enjoyment of life in the seconds between when the airplane struck the trees and the time it crashed into the ground, killing the pilot instantly.

#### **2. Exemplary Damages**

The Wrongful Death Act contains no provision for recovery of exemplary damages. Thus, the Michigan appellate courts and federal courts have held that there is no recovery for exemplary damages. *Bernier v Board of County Road Commissioners*, 581 F Supp 71 (W.D.

Mich. 1983); *Fellows v Superior Products Company*, 201 Mich App 155; 506 NW2d 534 (1993).

### **3. Punitive Damages**

Michigan courts do not allow recovery of punitive damages, and specifically, there is no provision in the Wrongful Death Act to allow for punitive damages. MCL 600.2922; *Bernier v Board of County Road Commissioners*, 581 F Supp 71, 80 (W.D. Mich. 1983); *Kewin v Massachusetts Mutual Life Insurance Company*, 409 Mich 401; 295 NW2d 50 (1980); *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 652-653 (2008).

## **VI. Caps/Limits On Damages**

There is no specific cap or limit on damages in a wrongful death action. However, there are caps on recovery in product liability cases and in medical malpractice cases which would extend to a wrongful death action brought under either of those theories. See *Jenkins v Patel*, 471 Mich 158 (2004).

### **A. Product Liability Cases**

Michigan tort reform created limits for damages in product liability cases under certain circumstances.

#### **1. The Legislation**

MCL 600.2946a provides:

(1) In an action for product liability, the total amount of damages for noneconomic loss shall not exceed \$280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed \$500,000.00. On the effective date of the amendatory act that added this section, the state treasurer shall adjust the limitations set forth in this subsection so that the limitations are equal to the limitations provided in section 1483. After that date, the state treasurer shall adjust the limitations set forth in this subsection at the end of each calendar year so that they continue to be equal to the limitations provided in section 1483.

(2) In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations under subsection (1). The court shall adjust an award of noneconomic loss to conform to the limitations under subsection (1).

(3) The limitation on damages under subsection (1) for death or permanent loss of a vital bodily function does not apply to a defendant 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, or if the court finds that the matters stated in section 2949a are true.

(4) If damages for economic loss cannot readily be ascertained by the trier of fact, then the trier of fact shall calculate damages for economic loss based on an amount that is equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer in the same manner as provided in subsection (1). MCL 600.29469.

## **2. Implications**

In a product liability action, the total amount of damages for noneconomic loss may not exceed \$280,000 (which is now adjusted to \$410,800), unless the defect in the product caused either the person's death or permanent loss of a vital bodily function; in which case, the total damages for noneconomic loss may not exceed \$500,000 (which is now adjusted to \$733,500). The state treasurer must adjust the limitations at the end of each calendar year so that they continue to equal the limitations provided in MCL 600.1483. MCL 600.1483 limits the noneconomic damages recoverable in a medical malpractice action to \$280,000, except under certain circumstances in which noneconomic damages may not exceed \$500,000. It requires the state treasurer to adjust this limitation annually to reflect the change in the consumer price index.)

MCL 600.2946a(1) provides that, in awarding damages in a product liability action, the trier of fact must itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party may inform the jury of the maximum limits on the award for noneconomic damages. The court must adjust an award of noneconomic loss to conform to the statutory maximum. If the damages for economic loss cannot readily be ascertained by the trier of fact, then the trier of fact must calculate damages for economic loss based on an amount that is equal to the state average median family income as reported in the immediately preceding federal decennial census and adjusted by the state treasurer in the manner provided above.

The limitation on damages for noneconomic loss for death or permanent loss of a vital bodily function does not apply to a defendant if:

(1) 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 ("Gross negligence" is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.), or

(2) If the court finds that, at the time of manufacture or distribution, the defendant had actual knowledge that the product was defective and willfully disregarded that knowledge. This

is provided for in MCL 600.2949a

MCL 600.2445(1) defines "noneconomic loss" as any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages.

MCL 600.2445(c) defines "economic loss" as objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitative services, custodial care, loss of wages, loss of future earnings, burial costs, loss of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.

**a. Supporting Arguments**

Proponents of the 1995-1996 product liability reform legislation argued:

A cap on awards for noneconomic losses, such as pain and suffering, in product liability cases will reduce the frequency of unrealistic jury awards while still protecting the right of an injured party to recover the full amount of economic damages, such as medical expenses and lost wages.

There is a common belief that noneconomic damages are a significant source of overly generous and arbitrary payments. This is because these claims cannot be easily translated into monetary amounts and, as a result, arriving at an award for noneconomic losses can be a very subjective and emotional process for the jury. By capping noneconomic damages in product liability cases, the Acts continue the reforms started in 1986, which placed a similar cap on noneconomic damages in medical malpractice cases.

**b. Opposing Arguments**

Opponents of the 1995-1996 product liability reform legislation argued:

One of the positive aspects of product liability litigation is its deterrent effect. A manufacturer will increase product safety in order to avoid legal liability, or will alter a product in order to remedy an area that has been subject to litigation. In making these decisions, a manufacturer most frequently will employ a cost-benefit analysis and ask, "Will the cost of the increased safety be less than or equal to the potential liability costs?" By capping noneconomic damage awards and eliminating joint and several liability, however, the Acts will give manufacturers less incentive on a cost-benefit basis to make safe products.

Capping noneconomic damages reflects a distrust in the jury system, which represents the cornerstone of this nation's system of justice. It is the same jurors, now being blamed for excessive awards, who will be responsible for making the difficult allocation of fault among product liability defendants.

By setting limits on the amount of noneconomic damages plaintiffs may be awarded, the Acts single out the most severely injured victims to afford relief to blameworthy manufacturers and their insurers. The burden on these victims will be no less real by virtue of the fact that only "noneconomic" injury will not be fully compensated. Noneconomic injuries include not only pain and suffering in loss of enjoyment, but also grief, anxiety, shock, indignity, humiliation, and terror.

It is inappropriate and unfair to judge all cases of noneconomic damages by the same measure. For example, the pain and suffering that result from injury to or even loss of a limb cannot be compared with those which result from being rendered a quadriplegic for the remainder of one's life.

It is misleading to allow a jury to award whatever amount it deems proper in the belief that its verdict will be given effect, and then require the award to be reduced to the statutory cap.

## **B. Medical Malpractice Cases**

MCL 600.1483 limits the noneconomic damages recoverable in a medical malpractice action to an amount annually adjusted by the State Treasurer to reflect the change in the Consumer Price Index. MCL 600.1483 provides:

(1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed \$280,000.00 unless, as the result of the negligence of I or more of the defendants, I or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed \$500,000.00:

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of I or more limbs caused by I or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to

procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, 'noneconomic loss' means damage or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, 'consumer price index' means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

## **VII. Punitive Damages**

As discussed in Section V.C.3. above, Michigan law generally does not allow for the recovery of punitive damages. Here damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan. The exception is if they are expressly authorized by a statute. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400 (2006). As noted above, there is no allowance for punitive damages in wrongful death actions.

## **VIII. Statutes Of Limitation**

MCL 600.2921 provides that all actions and claims survive death, stating:

All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next section. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death. MCL 600.2921.

Further, MCL 600.5852 allows for the commencement of a cause of action with additional time if the person dies before the period of limitations has run or within 30 days after that period has run, providing:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal

representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

The statute of limitations for a wrongful death or survival action depends on the theory of recovery. Michigan's statutes of limitation are set forth in MCL 600.5805, which provides, in part:

(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

\* \* \*

(6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

\* \* \*

(10) The period of limitation is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

\* \* \*

The period of limitation is 3 years for a product liability action. However, in the case of a product that has been in use for not less than 10 years, the plaintiff, in proving a *prima facie* case, shall be required to do so without benefit of any presumption.

A cause of action is not tolled for a wrongful death claim for a minor child. Pursuant to MCL 600.2922(6)(c) and MCL 700.3924(2)(c), a guardian ad litem is appointed by the probate court to represent the interests of the minor and to pursue damages on his behalf in the event that the cause of action is filed by a personal representative of the estate or a settlement is reached without a formal cause of action. See, e.g., *Kull v Watzke*, 119 Mich App 451; 326 NW2d 540 (1982); *Hebert v Cole*, 115 Mich App 452; 321 NW2d 388 (1982).

#### **IX. Additional Pertinent Information: Joint And Several Liability, Allocation Of Fault To Non-Parties, Impairment Defense, And Comparative Negligence**

Michigan tort reform legislation has had an impact on wrongful death and survival actions by the elimination of joint and several liability, by the allocation of fault to non-parties, and by the enactment of an impairment defense.

The rule of joint and several liability provides that when a person has suffered an injury

caused by two or more defendants in a lawsuit, each defendant may be held individually liable for the entire amount of damages; however, a defendant who pays more than his or her share has a right to "contribution" from other defendants - that is, he or she can sue to get repaid the share of other defendants. In its traditional form, the rule means that if there are two defendants and one is 75% at fault and the other 25% at fault, each is liable for 100% of the damages awarded if the other cannot pay. The standard justification for the rule is that the injured party has a right to full compensation, and each defendant is obligated to the injured party, because he or she has committed a negligent act that was a proximate cause of the harm. Without each person's action, the injury would not have occurred.

The 1995-1996 tort reform legislation was introduced to abolish joint and several liability in many kinds of cases, eliminate plaintiffs recovery of noneconomic damages if the plaintiffs percentage of fault is greater than the fault of others, and allow percentages of fault to be imposed on non-parties.

**A. The Legislation: Contribution And Application-Of- Fault Provisions**

MCL 600.2956 provides:

Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employees.

MCL 600.2957 provides:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

(2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

(3) Sections 2956 to 2960 do not eliminate or diminish

a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

MCL 600.2958 provides:

Subject to section 2959, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar that plaintiff's recovery of damages.

MCL 600.2959 provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

MCL 600.2960 provides:

- (1) The person seeking to establish fault under sections 2957 to 2959 has the burden of alleging and proving that fault.
- (2) Sections 2957 to 2959 do not create a cause of action.

MCL 600.6304 was amended by the tort reform legislation and now provides:

- (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) 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 under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

(5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several, whether or not the defendant is a person or entity described in section 5838a(1).

(b) If the plaintiff is determined to have fault

under subsections (1) and (2), upon motion made not later than 6 months after a final judgment is entered, the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, whether or not another party is a person or entity described in section 5838a(1), according to their respective percentages of fault as determined under subsection (I). A party is not required to pay a percentage of any uncollectible amount that exceeds that party's percentage of fault as determined under subsection (I). The party whose liability is reallocated continues to be subject to contribution and to any continuing liability to the plaintiff on the judgment.

(7) Notwithstanding subsection (6), a governmental agency, other than a governmental hospital or medical care facility, is not required to pay a percentage of any uncollectible amount that exceeds the governmental agency's percentage of fault as determined under subsection (1).

(8) As used in this section, 'fault' includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

MCL 600.6306 now provides:

(1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:

(a) All past economic damages, less collateral source payments as provided for in section 6303.

(b) All past noneconomic damages.

(c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.

(d) All future medical and other health care

costs reduced to gross present cash value.

(e) All future noneconomic damages reduced to gross present cash value.

(f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

(2) As used in this section, gross present cash value means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact as provided in section 6305(1)(b).

(3) If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

MCL 600.6312 now provides:

A defendant that is found liable for an act or omission that causes personal injury, property damage, or wrongful death is jointly and severally liable if the defendant's act or omission is any of the following:

(a) A crime, an element of which is gross negligence, for which the defendant is convicted.

(b) A crime involving the use of alcohol or a controlled substance for which the defendant is convicted and that is a violation of 1 or more of the following:

(i) Section 14 of the explosives act of 1970, Act No. 202 of the Public Acts of 1970, being section 29.54 of the Michigan Compiled Laws.

(ii) Section III of the Michigan code of military justice of 1980, Act No. 523 of the Public Acts of 1980, being section 32.1111 of the Michigan Compiled laws.

(iii) Section 625 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625 of the Michigan Compiled Laws.

(iv) Section 185 of the aeronautics code of the state of Michigan, Act. No. 327 of the Public Acts of 1945, being section 259.185 of the Michigan Compiled Laws.

(v) Section 80176 of part 801 (marine safety), 81134 of part 811 (off-road recreation vehicles), or 82127 of part 821 (snowmobiles) of the natural resources and environmental protection act, Act. No. 451 of the Public Acts of 1994, being sections 324.80176, 324.81134, and 324.82127 of the Michigan Compiled Laws.

(vi) Section 353 of the railroad code of 1993, Act No. 354 of the Public Acts of 1993, being section 462.353 of the Michigan Compiled Laws.

(vii) Section 237 of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being section 750.237 of the Michigan Compiled Laws. MCL 600.6312.

## **B. Court Rule Allocating Fault To Non-Parties**

The Michigan Supreme Court responded to the tort reform legislation by amending the Michigan Rules of Court to require defendants to file notice of a claim that a non-party is wholly or partially at fault and to give the plaintiff the opportunity to amend the pleadings to add the nonparty as a named defendant. MCR 2.112(K) provides:

### **(K) Fault of Nonparties; Notice.**

(1) *Applicability.* This rule applies to actions for personal injury, property damage, and wrongful death to which MCL 600.2957; MSA 27A.2957 and MCL 600.6304; MSA 27A.6304, as amended, by 1995 PA 249, apply.

(2) *Notice Requirement.* Notwithstanding MCL 600.6304; MSA 27A.6304, the trier of fact shall not assess the fault of a nonparty unless notice has been given as provided in this sub rule.

(3) *Notice.*

(a) A party against whom a claim is asserted may give notice of a claim that a nonparty is wholly or partially at fault. A notice filed by one party identifying a particular nonparty serves as notice by all parties as to that nonparty.

(b) The notice shall designate the nonparty and set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault.

(c) The notice must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party.

(4) *Amendment Adding Party.* A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. The court may permit later amendment as provided in MCR 2.118.

**C. The Legislation: Impairment Defense**

The tort reform legislation created an impairment defense in all tort actions where none was previously codified.

MCL 600.2955a provides:

(1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an 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 individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

(2) As used in this section:

(a) 'Controlled substance' means that term as defined in section 7104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7104 of the Michigan Compiled Laws.

(b) 'Impaired ability to function due to the influence of intoxicating liquor or a controlled substance' means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance. An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.