
N E W S

PRACTICE

LE T T E R

POINTERS

April 3, 2009

**Michigan Supreme Court Shift in Power
Confirmed: Non-Party at Fault Statutory
Scheme Superseded by Supreme Court
Ruling Precluding Fault Apportionment
in the Absence of a Legal Duty**

***CARDELLI, LANFEAR
& BUIKEMA, P.C.***

322 W. Lincoln
Royal Oak, Michigan 48067
(248) 544-1100
(248) 544-1191 (FAX)

125 Ottawa Avenue, N.W.
Suite 370
Grand Rapids, Michigan 49503
(616) 285-3800
(616) 285-1150 (FAX)

Practice Pointers is published seasonally as a service to our clients and friends.
Your comments and articles are invited.

PRACTICE

POINTERS

April 3, 2009

Summary: Michigan Supreme Court Shift in Power Confirmed: Non-Party at Fault Statutory Scheme Superseded by Ruling Precluding Fault Apportionment in the Absence of a Legal Duty.

In our last alert, we noted that the Michigan Supreme Court's conservative majority had been disturbed by the election of Justice Diane Hathaway to replace Chief Justice Clifford Taylor. In the first substantive opinion since the appointment, the newly constructed Court has ruled that, notwithstanding statutory language to the contrary, fault may not be apportioned against a non-party that does not owe a legal duty to the plaintiff.¹

Prior to tort reform in the mid-1990s, a defendant would have to pay damages equal to its own share, as well

as the shares of all other parties and non-parties. A defendant would then have to pursue reimbursement from the other parties and non-parties. In the mid-1990's, the Michigan Legislature enacted comprehensive tort reform. As part of this tort reform, the Legislature enacted statutes providing that a trier of fact must consider the percentage of fault attributable to all parties and non-parties. MCL 600.2957. Each defendant would, in turn, only be responsible for its percentage share of the fault, if any. MCL 600.6304. The Legislature broadly defined "fault" to include "breach of a legal duty," but also any act or omission that was a proximate cause of the plaintiff's damages. MCL 600.6304(8).

In 2002, the Michigan Court of Appeals concluded that fault could not

¹ *Romain v Frankenmuth Ins Co*, __ Mich __; __ NW2d __ (Docket No. 135546, Mar. 31, 2009).

April 3, 2009

be apportioned against a non-party that did not owe the plaintiff a duty. *Jones v Enertel, Inc*, 254 Mich App 432 (2002). In 2005, a different Court of Appeals panel reached the opposite conclusion. *Kopp v Zigich*, 268 Mich App 258 (2005). In *Romain*, the trial court refused to acknowledge *Kopp*. Thus, the Michigan Supreme Court was asked to clarify that *Kopp* was controlling law.

Unfortunately, the conservative majority that granted the application for leave to appeal was converted to a conservative minority with the election of Justice Hathaway. The new majority concluded that the *Jones* decision correctly stated the law. The majority opined that because a party cannot be negligent unless it owes a duty to the plaintiff, a nonparty cannot be at “fault” unless it owed a duty to the plaintiff.

The majority did not address the fact that MCL 600.6304(8) specifically defines “fault” to be broader than the common law definition. The majority did not even respond to the lengthy dissenting opinion. Indeed, the three dissenting Justices explained at length how the majority opinion not only deviated from the express language of the statutory scheme, but wrote language out of the statutory scheme.

We will continue to monitor the appellate landscape for similar shifts. Unfortunately, this ruling is likely to be just the first of many such plaintiff-oriented changes in Michigan law.

Anthony F Caffrey III

Attorney Caffrey specializes in appellate law, insurance coverage, and major motion practice. For input on how the newly constituted court may impact a particular pending case or issue, feel free to contact him at (616) 285-3800 or by email at acaffrey@cardellilaw.com.