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Filing a Notice of Non-Party Fault can Increase Defendants' Exposure

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In a recent published opinion, the Michigan Court of Appeals has held that joint and several liability in medical malpractice actions extends to the damages caused by the actions of named non-parties.

In *Bell v Ren-Pharm, Inc., et al* (No. 255977, rel'd 01/19/06), a minor child suffered burns on his legs after his grandmother applied an ointment supplied by the defendant pharmacy. The plaintiffs, the co-guardians of the minor child, sued the pharmacy and its co-owner pharmacist. The plaintiffs did not sue the minor's grandmother because they were unsure if the contribution statute, MCL 600.2925a, survived the tort reform legislation.[1] The grandmother was named, however, as a non-party at fault.

The jury returned a special verdict, which found that the negligence of the grandmother and the defendants was the proximate cause of the minor child's injuries. The jury determined that the grandmother was 80 percent at fault, while the defendants were 20 percent at fault. The trial court held that the defendants were jointly and severally liable for the damages resulting from the grandmother's negligence.

On appeal, the defendants argued that their joint and several liability should not extend to non-parties. The defendants maintained that the plain language of MCL 600.6304(6)(a) extends joint and several liability only to "each defendant" and that if the legislature intended to extend this liability to at-fault non-parties, the statute would have specified "each defendant and non-party". The plaintiffs, in turn, argued that the statute clearly made each defendant, including non-parties, jointly and severally liable. The Court of Appeals rejected both parties' arguments, stating the statute was silent on the issue of the extension of joint and several liability to non-parties.

The court began its analysis by stating that there was no Michigan precedent on the question of the extension of joint and several liability to at fault non-parties under MCL 600.6304(6)(a). Therefore, because the statute was silent on this issue, the court resolved the question by turning to generally

[1] Although MCL 600.6304(1)(b), Michigan's tort reform statute, replaced joint and several liability with "fair share liability", MCL 600.6304(6)(a) preserved joint and several liability in medical malpractice actions where the plaintiff has been determined to be without fault.

accepted principles of joint and several liability. The appellate court cited the Third Restatement of Torts, which states that if, the "independent tortious conduct of two or more persons is the legal cause of an injury, each person is jointly and severally liable" The court noted that the Restatement refers to the conduct of "persons," and not just to parties to the litigation.

The appellate court further notes that the Restatement's commentary states that a plaintiff may recover all damages from any defendant found liable and the burden of joining "other potentially responsible persons" as parties to the litigation is on the defendant. Therefore, the court concluded that under the general principles of joint and several liability, a defendant is liable for all damages, including those resulting from the acts of non-parties.

Relying on the opinion in *Johnson v Billot,* 109 Mich. App. 578; 311 NW2d 808 (1981), the appellate court in this case reasoned that the purpose of joint liability is to place the burden of injustice on the wrongdoer, not the innocent plaintiff. Therefore, under both the Restatement of Torts and *Johnson,* joint and several liability extends to non-parties at fault in medical malpractice actions under MCL 600.6304(6)(a).

For a complete copy of the Michigan Court of Appeals published decision on *Bell v Ren-Pharm, Inc., et al* (No. 255977, rel'd 01/19/06), click here.

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