

# DIGEST OF INSURANCE LAW

## MICHIGAN

Not Revised for this Edition

### CIVIL JUDICIAL SYSTEM

#### Courts of Original Jurisdiction

Courts of original jurisdiction are: Circuit Courts and District Courts.

Circuit Courts have original jurisdiction for equity matters and for actions at law in excess of \$25,000. District Courts do not have equitable jurisdiction for most matters, but do have jurisdiction in civil actions for monetary damages for \$25,000 or less. MCL 600.8301, 600.8302; MSA 27A.8301, 27A.8302.

Probate Courts have jurisdiction over estates of deceased or incompetent or infant persons, and other related matters. MCL 600.841; MSA 27A.841.

#### Appellate Courts

The Michigan Court of Appeals is intermediary appellate court between Circuit Courts and the Michigan Supreme Court. There is review by right of final orders from Circuit Courts. MCL 600.308; MSA 27A.308. Circuit Courts act as appellate courts of right from District Court. MCL 600.8342; MSA 27A.8342. A panel of the Court of Appeals must follow the rule of law established by the Supreme Court or a prior decision of the Court of Appeals issued on or after November 1, 1990.

The Clerk of the Court of Appeals adheres to a strict enforcement policy. The Clerk will make available its internal operating procedures to those who request it.

The Michigan Supreme Court is the court of last resort. It is composed of seven Justices elected statewide, one of whom is designated Chief Justice. Its decisions are final, excepting cases involving Federal Constitution. Review is by leave only.

Appeals from Probate Courts are made either to Circuit Courts or to the Court of Appeals. MCR 5.801. Review of proceedings by Workers' Compensation Appellate Commission is direct to the Court of Appeals or the Supreme Court by leave to appeal. MCL 418.861a; MSA 17.237 (861a). Review of orders issued by the Commissioner of Insurance is made by the Circuit Court. MCL 500.244; MSA 24.1244.

Michigan Court Rules became effective March 1, 1985, replacing General Court Rules of 1963. MCR 1.102.

### LAW

#### Abbreviations

Am. – Amended.  
F. Supp. – Federal Supplement.  
F.2d – Federal Reporter, Second Series.  
MCR – Michigan Court Rules.  
MCL – Michigan Compiled Laws.  
MCLA – Michigan Compiled Laws Annotated.  
Mich. – Michigan Reports.  
Mich. App. – Michigan Appeals.  
MSA – Michigan Statutes Annotated.  
N.W. – Northwestern Reporter.  
N.W.2d – Northwestern Reporter, Second Series.  
P.A. – Public Acts.  
Sec. – Sections refer to Compiled Laws of 1948.

### ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract Law. Health and disability policies may provide for cancellation by insurer with five days written notice, MCL 500.3448; MSA 24.13448, whereas statute concerning cancellation of casualty policies require notice of cancellation at least ten days prior to the effective date of that cancellation, MCL 500.3020 (a) (b); MSA 24.13020. Statute permitting insurer to cancel policy by mailing notice to insured does not require actual notice to or receipt by the insured as condition of cancellation. *Nowell v. Titan Insurance Co*, 466 Mich. 478, 648 N.W.2d 157 (2002). The notice must comport with the policy provisions, be peremptory, explicit and unconditional. *Beaumont v. Commercial Cas. Ins. Co.*, 245 Mich. 104, 222 N.W. 100 (1928).

Renewal. Renewal of insurance policy constitutes a separate contract governed by general contract principles, but insurer may be bound by greater coverage in earlier policy where renewal contract is issued without calling insured's attention to reduction in policy cover-



age. *Industro Motive Corp. v. Morris Agency*, 76 Mich. App. 390, 256 N.W.2d 607 (1977) (commercial liability policy); *Transamerica Ins. Corp. v. Buckley*, 169 Mich. App. 540, 426 N.W.2d 696 (1988) (auto liability policy); *Parmet Homes, Inc. v. Republic Ins. Co.*, 111 Mich. App. 140, 314 N.W.2d 453 (1981) (builder's risk policy).

Disease Induced by Accident. Recovery under an accident policy is only permitted where the injury is accidental and it is a direct result of an accident. *Rynerson v. National Cas. Co.*, 203 Mich. App. 562, 513 N.W.2d 436 (1994). Death induced by accident may be distinguishable from death by accidental means. *Collins v. Nationwide Life Ins. Co.*, 409 Mich. 271, 294 N.W.2d 194 (1980). In order to determine if death is accidental, a court must view events through the eyes of the insured to determine whether death was a foreseeable circumstance. *Wynglass v. Prudential Life Ins. Co.*, 68 Mich. App. 514, 242 N.W.2d 824 (1976). Loss of eye from gonorrheal infection resulting from splashing of water into eye held accidental. *Sullivan v. Modern Brotherhood*, 167 Mich. 524, 133 N.W. 486 (1911). Under policy excluding liability for injury resulting directly or indirectly from disease, recovery permitted for loss of leg by amputation because of gangrene resulting from burn in hot-air bath. *Jiroch v. Travelers*, 145 Mich. 375, 108 N.W. 728 (1906). The presence of terminal disease at time of fatal accident not a bar to recovery. *Bristol v. Mutual Benefit Health & Acc. Ass'n*, 305 Mich. 145, 9 N.W.2d 38 (1943). Pre-existing heart disease precludes claim where death results from cardiovascular disease and stressful event. *Scharmer v. Occidental Life*, 349 Mich. 421, 84 N.W.2d 866 (1957); *Ann Arbor Trust v. Canada Life*, 810 F.2d 591 (6th Cir. 1987). Carpal Tunnel Syndrome held to be a "sickness" and not an "accidental bodily injury" within the meaning of disability policy, thus precluding extended benefits which were available for accident, but not for sickness. *Nehra v. Provident Life & Acc. Ins. Co.*, 454 Mich. 110, 559 N.W.2d 48 (1997). Where term "regular occupation" not defined, term is ambiguous - interpreted in favor of insured. *Carolyn v. Mutual of Omaha Ins. Co.*, 220 Mich. App. 444, 559 N.W.2d 407 (1997).

Double Indemnity. MCL 500.4014; MSA 24.14014 permits policies to accept from incontestability (after policy in force for two years) clause provisions relative to benefits in event of permanent and total disability and provisions which grant additional insurance specifically against death by accident. See *Dedic v. Prudential Ins. Co.*, 14 Mich. App. 274, 165 N.W.2d 295 (1968). Heat exhaustion by insured who voluntarily entered steam bath not "accidental event" under double indemnity. *Ruona v. New York Life*, 68 F. Supp. 923 (W.D. Mich. 1946). Insured was passenger on streetcar until he had

safely alighted, within provision for double indemnity "while traveling as passenger on a street car." *Quinn v. New York Life*, 224 Mich. 641, 195 N.W. 427 (1923). Fact question can exist under these provisions. A slip and fall by a partially paralyzed insured resulting in a fracture, gangrene, amputation and death may warrant double indemnity where testimony can support that the bodily injury and death were caused by external, violent and accidental means, and not by a pre-existing infirmity. *McKenna v. New York Life*, 314 Mich. 304, 22 N.W.2d 376 (1946). Fact question of accidental nature of skin abrasion permitting infection to enter thus causing fatal blood poisoning. *Thirkill v. Kansas City Life*, 278 Mich. 588, 270 N.W. 797 (1937). Double indemnity denied "Homicide" exemption. *Wozniak v. John Hancock*, 288 Mich. 612, 286 N.W. 99 (1939). *Contra*, *Hooper v. State Mut.*, 318 Mich. 384, 28 N.W.2d 331 (1947) (where policy excluded homicide or death resulting directly or indirectly from any one of twelve circumstances, and no evidence to support homicide caused by any one of twelve circumstances). Insured, shot and killed by son after insured threatened wife, not accidental so as to require double indemnity. *Peterson v. Aetna Life*, 292 Mich. 531, 290 N.W. 896 (1940). Death by suicide precludes double indemnity where policy requires bodily injury solely through external, violent and accidental means. *Cummins v. John Hancock*, 337 Mich. 629, 60 N.W.2d 490 (1953). Presumption against suicide. *Dimmer v. Mutual Life Ins. of New York*, 287 Mich. 168, 283 N.W. 16 (1938).

Notice and Proof of Loss. A written proof of loss must be presented to the insurer within ninety days of the occurrence or termination of the period for which the insurer is liable. Failure to do so will not reduce benefits payable if it was not reasonably possible, but barring absence of legal capacity, proof of loss should be furnished no more than one year from the time it was originally required. MCL 500.3414; MSA 24.13414. Notice of receipt of a proof of loss, acceptance of a proof of loss, or investigation of facts surrounding a proof of loss shall not operate as a waiver of any coverage defense. MCL 500.2260; MSA 24.12260. Continuing negotiations five years from the date of death waived if return of beneficial society's constitutional requirement that claims be filed within two years. *Wieschnik v. Polish Roman Catholic Ass'n*, 289 Mich. 336, 286 N.W. 637 (1939). Insurer's erroneous statement regarding expiration period for extended insurance precluded insurer from denying liability where insured died before date stated. *Hetchler v. American Life Ins. Co.*, 266 Mich. 608, 254 N.W. 221 (1934). Failure to require doctors' reports in support of proof of loss created estoppel situation. *Cochran v. National Cas. Co.*, 261 Mich. 273, 246 N.W. 87 (1933). Estoppel cannot be used to create a li-

ability contrary to the expressed provisions of the contract. *Ruddock v. Detroit Life Ins.*, 209 Mich. 638, 177 N.W. 242 (1920).

Excepted Risks. Occupations from which the commission of or attempt to commit a felony are contributing cause of loss precludes liability. MCL 500.3452; MSA 24.13452. Exception of death or injuries resulting directly or indirectly from poison, extends to case where poison is administered by mistake of druggist or physician. *Early v. Standard Life*, 113 Mich. 58, 71 N.W. 500 (1897). Death from inhalation of carbon monoxide gas does not “result from poison” within such exception. *Kingsley v. American*, 259 Mich. 53, 242 N.W. 836 (1932). Where officer seeking to arrest insured shot him either recklessly or in self-defense, without knowing him, such was not within exception against injuries resulting from design, on part of insured or any other person. *Utter v. Travelers*, 65 Mich. 545, 32 N.W. 812 (1887) (followed 111 Mich. 148, 69 N.W. 249). Voluntary or unnecessary exposure to danger means “realization that accident will in all probability result. Danger of injury must be obvious.” *Hunt v. U.S. Accident*, 146 Mich. 521, 109 N.W. 1042 (1906). Jumping from moving train with two heavy satchels, without any necessity for so doing, held voluntary exposure to unnecessary risk. *Smith v. Preferred*, 104 Mich. 634, 62 N.W. 990 (1895). Provision excepting accidents when “engaged in any profession, employment or exposure not rated as preferred” does not apply to act of bank cashier in operating buzz-saw to saw board to be used in bank since incidental to employment. *Hess v. Preferred*, 112 Mich. 196, 70 N.W. 460 (1897). Where insured had clerical position in city but spent weekends on his farm, management of which in his absence was in persons hired by him, he was not farmer within provision classing such as hazardous. *Johnson v. London*, 115 Mich. 86, 72 N.W. 1115 (1897). Exception of injuries received “while entering or leaving, or while upon step, or platform or running board of any conveyance,” held not applicable where injury received while leaving passenger elevator. *Davis v. Great Eastern*, 209 Mich. 258, 176 N.W. 446 (1920).

### ACCIDENTAL MEANS

Definition. The term “accidental means” refers to the occurrence or happening which produces the result, rather than a result; it is concerned with the cause of the harm rather than the character of the harm. *Collins v. Nationwide Life Ins.*, 409 Mich. 271, 294 N.W.2d 194 (1980). See also, *Rynerson v. National Cas. Co.*, 203 Mich. App. 562, 513 N.W.2d 436 (1994). Where injury is the result of a voluntary act or where the one doing voluntary act was ignorant of a material circumstance, resultant injury is regarded as caused by “accidental

means.” *Aetna v. Kent*, 73 F.2d 685 (6th Cir. 1934). “Accident” means undesigned contingency, casualty, happening by chance, out of the usual course of things, fortuitous, not anticipated, not naturally expected. *Secura v. Blotsky*, 182 Mich. App. 637, 452 N.W.2d 899, 465 N.W.2d 324 (1990). If death from ordinary means, voluntarily employed, not unusual or unexpected way, not “accidental means” or “accidental death.” *Gates v. New York Life Ins. Co.*, 21 Mich. App. 21, 174 N.W.2d 862 (1969). Efficient proximate cause is the ultimate test of liability. *Kangas v. New York Life*, 223 Mich. 238, 193 N.W. 867 (1923). Neither the level of foreseeability requisite for tort liability nor for criminal recklessness is sufficient to render mishap a “non-accident” under terms of accidental death policy. *Collins v. Nationwide*, 409 Mich. 271, 294 N.W.2d 194 (1980). The word “accidental” is not ambiguous insofar as its ordinary meaning includes the temporal and spatial elements discussed in no-fault cases. *Nehra v. Provident Life & Acc.*, 454 Mich. 110, 559 N.W.2d 48 (1997).

Following are held to have been accidental means: Accidental death from alcohol poisoning. *Bruce v. Cuna Ins.*, 219 Mich. App. 57, 555 N.W.2d 718 (1996), *Iv denied*, 569 N.W.2d 168 (1997). Self-destruction by insane person. *Blackstone v. Standard*, 74 Mich. 592, 42 N.W. 156 (1889). Intentional homicide for which insured was in no way responsible. *Furbush v. Maryland*, 131 Mich. 234, 91 N.W. 135 (1902); Death from ptomaine poisoning. *Johnson v. Fidelity*, 184 Mich. 406, 151 N.W. 593 (1915); Death from freezing while lost in woods. *Ashley v. Agricultural*, 241 Mich. 441, 217 N.W. 27 (1928); Inhalation of carbon monoxide gas. *Kingsley v. American*, 259 Mich. 53, 242 N.W. 836 (1932); Death from anesthetic administered for operation. *Wheeler v. Title*, 265 Mich. 296, 251 N.W. 408 (1933); Death from infection caused by negligent use of instruments by hospital attendant. *Hoff v. Mutual*, 266 Mich. 380, 254 N.W. 137 (1934); Whether death was caused by drowning or acute dilation of heart was question of fact for jury. *Kudla v. Prudential*, 272 Mich. 555, 262 N.W. 407 (1935).

In *Abbott v. Travelers*, 208 Mich. 654, 176 N.W. 473 (1920), the court was evenly divided on question of whether, if accident was “efficient dominant, proximate cause,” recovery could be had even though existing disease contributed to death. In *Kangas v. New York Life*, 223 Mich. 238, 193 N.W. 867 (1923), the court held that provision of accident policy covering death “resulting directly and independently of all other causes from bodily injuries effected solely through external and accidental cause” means that injury must have been efficient, proximate cause. Dormant internal ailments which injury awakens “are conditions rather than causes.” (Followed in *Nickola v. United Commercial Travelers of America*, 372 Mich. 600, 127 N.W.2d 309 (1964)). Injury inten-

tionally inflicted on insured by third party held to be accidental. *New Amsterdam v. Jones*, 135 F.2d 191 (1943). Murder, *Hooper v. State Mut.*, 318 Mich. 384, 28 N.W.2d 331 (1947). Intentional Homicide, *Reed v. Mutual Benefit*, 345 Mich. 586, 76 N.W.2d 869 (1956). Unexpected injuries caused by voluntary intoxication are "accidental injuries." *Collins v. Nationwide*, 409 Mich. 271, 294 N.W.2d 194 (1980).

Following are held to not have been accidental means: Insured intended or expected results; insane or mentally ill may intend or expect results of injuries personally caused even though unable to form requisite intent to be held criminally liable. *Auto-Owners v. Churchman*, 440 Mich. 560, 489 N.W.2d 431 (1992). No coverage where policy excluded suicide, sane or insane, if insured intended to take his own life. *Mirza v. Macca-bees*, 187 Mich. App. 76, 466 N.W.2d 340 (1991). Stress from normal part of employment not accident. *Coffer v. American*, 168 Mich. App. 144, 423 N.W.2d 587 (1988). Attempt to repair truck and voluntary exertion in attempt to unscrew bolt does not constitute an "accident." *Ryner-son v. National Cas.*, 203 Mich. App. 562, 513 N.W.2d 436 (1994). Hitting decedent causing him to fall back, hit his head and die held excluded from coverage because a reasonable person would expect injury to result therefrom. *Allstate Ins. Co. v. Jacob Dempsey*, 477 Mich. 874, 721 N.W.2d 591 (2006)

### ADJUSTERS

Persons are not allowed to advertise, solicit or hold themselves out to the public as adjusters unless they are licensed as adjusters. MCL 500.1222; MSA 24.11222. A license is required except for persons admitted to practice law in the state or employees of insurers authorized to transact insurance in the state. Adjusters must have licenses on forms approved by the Commissioner and may be required to complete examinations as well as be available for investigation by the Commissioner of Insurance as required. MCL 500.1224; MSA 24.11224. Adjusters for insureds are subject to special rules which govern their conduct. They may not represent that they are a representative of an insurer, that they are fire investigators or that they are connected with the fire department. They may not charge a rate in excess of 10% of the amount paid by the insurer as their fee. MCL 500.1226; MSA 24.11226. A contract which is executed within 48 hours after conclusion of the loss-producing occurrence shall be voidable at the option of the insured for 10 days after execution of the contract. MCL 500.1226; MSA 24.11226.

The conduct of an adjuster may bind the company because of admissions or denial of liability made by the adjuster. *Cohen v. London Guar. & Acc. Co.*, 247 Mich.

226, 225 N.W. 549 (1929). The conduct of an adjuster may bind the insurance company to waiver of certain policy requirements. *Bowyer v. Professional Underwriters*, 269 Mich. 87, 256 N.W. 814 (1934).

### AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE"; "NEGLIGENCE"; "RELEASE."

The drinking age is 21 years. MCL 436.1701. The age of majority is 18 years. MCL 722.52; MSA 25.244 (52).

### AGENTS AND BROKERS

**Agency Termination.** The insurer must, upon agency termination, provide notice to the commissioner and the agent immediately. MCL 500.1209; MSA 24.11209.

**Authority During Termination.** The agent's authority during the period following notice of termination shall be governed by the written agreement between the agent and the insurer. MCL 500.1209; MSA 24.11209. The independent agent's responsibility continues until the policies are canceled, replaced or expired. MCL 500.1209; MSA 24.11209. The authority is further governed by the written contract.

**Reasons.** An insurer may only terminate an insurance agent's contract for malfeasance, breach of fiduciary duty or trust, violation of the Essential Insurance Act, failure to perform as provided by the contract, or submission of less than twenty-five applications for home insurance and auto insurance in a year. MCL 500.1209; MSA 24.11209.

An insurer cannot terminate an agent's contract for geographic location of personal lines business, actual or expected loss experience of auto or home business related in whole or in part to the geographic area, or for performance of an agent's obligations under the Essential Insurance Act. MCL 500.1209; MSA 24.11209.

An insurer may not threaten or restrict to terminate an agent's binding authority concerning home or automobile insurance business because of the agent's refusal or failure to adhere to the insurer's practices which are themselves a violation of the Essential Insurance Act. Department of Commerce Bureau Bulletin 93-01.

**Essential Insurance Act.** An agent shall provide an eligible person with the lowest available premium quotation and inform the buyer of insurers represented. May not attempt to channel buyer away from an insurer to avoid obligation to submit application to insurer. For auto policies, must annually provide insured with explanation of point system and statement that if eligible, may

qualify for lower rates through another insurer and that agent will get quote, upon request. MCL 500.2116; MSA 24.12116.

Insurer cannot adjust commission for auto or home insurance based on loss experience or geographic location of risk. MCL 500.2116; MSA 24.12116.

Expiration Dates. Upon termination of the agency relationship, if the agent's financial obligations are paid in full, all rights to the expiration date of the existing coverage procured by the agent belong to him. *Woodruff v. Auto-Owners*, 300 Mich. 54, 1 N.W.2d 450 (1942).

Notice. Notice to an agent is not necessarily notice to an insurer. An agent who is not an employee of the insurer and is not an authorized agent, is not able to bind the insurer based on notice received from the policyholder. *Steelcase, Inc. v. AMICO*, 907 F.2d 151 (6th Cir. 1990); *West Bay Exploration v. AIG Specialty Agencies*, 915 F.2d 1030 (6th Cir. 1990); *American Cas. Co. v. Rahn*, 854 F. Supp. 492 (W.D. Mich. 1994).

Premium Audits. There was no misrepresentation by an agent where joint and several liability of the named insureds on a workers' compensation policy was never discussed. *St. Paul Fire and Marine v. CEI Florida*, 864 F. Supp. 656 (E.D. Mich. 1994); Also see "Special Relationship Rule," *infra re*: duty to advise of adequacy of coverage.

Principal-Agent Liability – Agent Not Responsible For Paying Claims. The law is clear in Michigan that an insurance agent is not responsible for the payment of loss under an insurance policy and nothing that the agent does can be construed as estoppel. *Hoye v. Westfield Ins. Co.*, 194 Mich. App. 696, 487 N.W.2d 838 (1992).

Authority. Insurance agents must be authorized in writing by the insurer and the extent of the authority must be specified except as to apparent authority. MCL 500.1201; MSA 24.11201.

The scope of the agency contract controls the form of the relationship between the insurer and its agent. *Jones v. Jackson Nat. Life Ins. Co.*, 819 F. Supp. 1372 (W.D. Mich. 1993).

The authority of the agent to bind the principal may be either actual or apparent. "Implied authority" is authority that the agent believes the agent possesses. *Alar v. Mercy Mem. Hosp.*, 208 Mich. App. 518, 529 N.W.2d 318 (1995).

Where the principal is disclosed and the agent is known to be acting as such, the agent cannot be personally liable unless he agreed to do so. *Hall v. Encyclopedia Britannica*, 325 Mich. 35, 37 N.W.2d 702 (1949);

*Huizenga v. Withey Sheppard Assoc.*, 15 Mich. App. 628, 167 N.W.2d 120 (1969).

A principal may be held liable for actions of his agent where the actions are within the scope of the agent's authority, regardless of whether the party had knowledge of the agency relationship. *Parment Homes v. Republic Ins. Co.*, 111 Mich. App. 140, 314 N.W.2d 453 (1981).

Collecting Premiums. The agent is usually the agent for the insurer for purposes of receiving and collecting premiums. *AFCO Credit v. Michigan Mut. Ins. Co.*, Mich. Ct. of App., No. 161759, May 5, 1995 (unpublished).

Life Insurance Agents. Life insurance agents are generally the agents of the insurance company by statute. MCL 500.1209 (2); MSA 24.11209 (2); *Vutci v. Indianapolis Life*, 157 Mich. App. 429, 403 N.W.2d 157 (1987).

Notice to Agent of Occurrence. Notice of an occurrence to an agent is not binding on insurer if agent not "authorized agent." *West Bay Exploration v. AIG Specialty Agencies*, 915 F.2d 1030 (6th Cir. 1990).

An insurance agent who is furnished with blank applications and with policies, duly signed by the company's officers, and has been authorized to issue policies by simply signing his name as an agent, as well as to cancel policies without consulting home office, is an authorized agent, and the knowledge of that agent is knowledge of the insurance company. *Hawkeye Cas. Co. v. Holcomb*, 302 Mich. 591, 4 N.W.2d 477 (1942).

Agent was determined not to be "authorized agent" of the insurer under Michigan law and thus, did not bind the insurer by receiving notice of occurrence. *American Cas. Co. v. Rahn*, 854 F. Supp. 492 (W.D. Mich. 1994). Although the agent in question was the "agent of record," he acknowledged that he needed specific authorization from the insurer to sign the binder, and could not modify the policy without its consent. Further, since the agent could have placed this type of insurance with another carrier, he was an independent insurance agent. *Id.*

Ordinarily Agent For Insured. The general rule is that an insurance broker is the agent of the insured, not the insurer. *Auto-Owners v. Michigan Mut.*, 223 Mich. App. 205, 565 N.W.2d 907 (1997); *Harwood v. Auto-Owners Ins. Co.*, 211 Mich. App. 249, 535 N.W.2d 207 (1995). Broker hired by insured is solely the agent of the insured in connection with procuring insurance. *Steelcon v. Beaver Ins. Co.*, 650 F. Supp. 520 (W.D. Mich. 1986); *Mate v. Wolverine Mut. Ins. Co.*, 233 Mich. App. 14, 592 N.W.2d 379 (1998).

Independent agent is not an insurer's ostensible agent where the insurer does not in any way hold out the independent insurance agent as its agent. *St. Paul v. In-gall*, 228 Mich. App. 101, 577 N.W.2d 188 (1998). Independent insurance agency which represented the interests of the insureds before it represented the interest of any insurance companies was not an agent of the insurer responsible for the insurers' alleged "misrepresentations." *Smart v. New Hampshire Ins. Co.*, 148 Mich. App. 724, 384 N.W.2d 772 (1985); See "Life Insurance Agents" this section. Insurer not bound by certificate of insurance issued by independent agent with incorrect inception date. *Auto-Owners Ins. Co. v. Michigan Mut. Ins. Co.*, 223 Mich. App. 205, 565 N.W.2d 907 (1997). Agent's mistakenly issued certificate of insurance not binding on insurer even if insurer received a copy of it. *West American v. Gutekunst*, 230 Mich. App. 305, 583 N.W.2d 548 (1998).

### SPECIAL RELATIONSHIP RULE

Duty to Advise of Adequacy of Coverage. Agent generally does not have duty to advise insured regarding adequacy of coverage unless: 1) the agent misrepresents the nature or extent of the coverage offered or provided; 2) an ambiguous request is made that requires clarification; 3) an inquiry is made that may require advice and that agent, though he need not, gives advice that is inaccurate; or 4) the agent assumes an additional duty by either express agreement with or promise to the insured. *Pressey Enterprises, Inc. v. Barnett-France Insurance Agency*, 271 Mich. App. 685, 724 N.W.2d 503 (2006). There is no genuine issue of material fact regarding the absence of a special relationship rule where there is no evidence that the policyholder inquired about the scope of coverage. *Hedquist v. Murphy*, Mich. Ct. of App., No. 180955, August 13, 1996 (unpublished).

Fact question existed since policyholder purchased all coverage there since 1977. Therefore, summary judgment was inappropriate. *St. Paul Fire and Marine v. CEI Florida*, 864 F. Supp. 656 (E.D. Mich. 1994).

Interaction on Coverage Question. For a special relationship to exist there must be something more than the standard relationship to give rise to the duty. Instead, there must be a longstanding relationship, some type of interaction on the question of coverage, with the insured relying on the expertise of the agent to the insured's detriment. *Bruner v. League General Ins.*, 164 Mich. App. 28, 416 N.W.2d 318 (1987).

Using Other Agents. If an agent is unable to immediately provide coverage requested and obtains coverage through another agent for a client, the agent must notify the buyer in writing that there is no coverage until the

buyer receives written evidence. MCL 500.1207; MSA 24.11207.

Standing. Intended beneficiaries of insurance contracts such as passengers, had a right to sue agent. *Auto-Owners v. Michigan Mut.*, 223 Mich. App. 205, 565 N.W.2d 907 (1997). There is also standing of beneficiary to sue in negligence. *Id.*

### ARBITRATION

Arbitration specifically is provided for by Michigan statute. MCL 600.5001; MSA 27A.5001. The statute allows parties who have a valid arbitration agreement to have the arbitration award certified as a judgment in a circuit court of the state and is able to be enforced thereafter as a judgment. The existence of a contract to arbitrate is a judicial question. *Ehreseman v. Bultynck*, 203 Mich. App. 350, 511 N.W.2d 724 (1994). Insurance policies which provide for arbitration agreements are favored, and the court will enforce arbitration provisions in insurance contracts. *Northland Ins. Co. v. Cyn*, 98 Mich. App. 507, 296 N.W.2d 292 (1980). Appraisal clause in fire insurance policies, which provides for determination by umpire constitutes common law arbitration agreement and court will not use strict standard of review used in statutory arbitration proceedings. *Davis v. National Am. Ins. Co.*, 78 Mich. App. 225, 259 N.W.2d 225 (1977). Arbitrator, rather than the courts, determines the procedure to follow in arbitration. *Amtower v. Wm C Roney & Company (On Remand)*, 590 N.W.2d 580 (1998). Issues regarding order to enforce, vacate or modify an arbitration award are reviewed de novo. *Cusumano v. Velger*, 690 N.W.2d 309 (2004). Arbitration awards can be vacated if there is an error of law which is obvious on the face of the award. *St. Luke's Hosp. v. SMS Computer Systems*, 785 F. Supp. 1243 (E.D. Mich. 1991). Non-unanimous arbitration award is a fully valid decision with same force as a unanimous award for purposes of mediation or case evaluation sanctions. *Cusumano v. Velger*, 690 N.W.2d 309 (2004). Arbitration agreements may not provide for utilization of courts in a manner not authorized by the statute; if it does, offending provisions are stricken. *Brucker v. McKinley Transport*, 454 Mich. 8, 557 N.W.2d 536 (1997).

### ATTORNEYS

See "MALPRACTICE."

Appointment and Authority. Model Rules of Professional Conduct adopted, effective October 1, 1988. Rule 1.13. Lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.



Conflict of Interest. See Model Rules of Professional Conduct 1.7-1.9.

Malpractice. Negligence based on attorney's standard of care as opposed to community standard. *Babbit v. Bumpus*, 73 Mich. 331, 41 N.W. 417 (1889). Legal malpractice defined. *Cassidy v. Wisti*, 43 Mich. App. 356, 204 N.W.2d 252 (1973). Plaintiff has burden of proving: 1) attorney-client relationship; 2) negligence of attorney; 3) proximate cause; and 4) damages. *McCluskey v. Womack*, 188 Mich. App. 465, 470 N.W.2d 443 (1991). Two year statute of limitations applies to actions involving breach of duty owed by one rendering professional services to a person who has contracted for such services. Suit must be brought within two years of date of last service or within 6 month of date discovered or should have been discovered. *Dowker v. Peacock*, 152 Mich. App. 669, 394 N.W.2d 65 (1986). A claim of inadequate representation sounds in tort and is governed by statute of limitations for malpractice actions. *Aldred v. O'Hara-Bruce*, 184 Mich. App. 488, 458 N.W.2d 671 (1990). Absent contractual relationship for professional services, lawsuit sounds in negligence, not malpractice, and two year period does not apply. *Law offices of Stockler v. Rose*, 174 Mich. App. 14, 436 N.W.2d 70 (1989). Under theory of equitable subrogation, insurer may sue insured's defense counsel in malpractice, notwithstanding no attorney-client relationship with insurer. *Atlanta Int'l v. Bell & Hertler, P.C.*, 438 Mich. 512, 475 N.W.2d 294 (1991).

Fees. Absent statute or court rule, insured not allowed fees in excess of taxable costs for declaratory action to enforce coverage. *Shiebout v. Citizens*, 140 Mich. App. 804, 366 N.W.2d 45 (1985), *aff'd*, *Powers v. DAIIE*, 427 Mich. 602, 398 N.W.2d 411 (1986).

Insurer insolvency. Property and Guaranty Act does not entitle attorney to payment for legal work completed for insolvent insurers prior to insolvency. *Metry v. Michigan Property*, 79 Mich. App. 226, 261 N.W.2d 267 (1978), *aff'd in part, rev'd in part*, 403 Mich. 117, 267 N.W.2d 695 (1978). MCL 500.7901, *et seq.*; MSA 24.17901; MCL 500.7925; MSA 24.17925.

Reporting requirement imposed on every attorney licensed in Michigan who represents plaintiff or defendant in regard to municipal liability claim arising in Michigan or a professional liability claim against a licensed health care provider. MCL 500.2477c; MSA 24.12477 (3).

## AUTOMOBILES

See Law Digest Tables.

See "LIABILITY INSURANCE"; "NEGLIGENCE"; "NO-FAULT."

Age. Minimum age for operator's license, 18; restricted at 17. MCL 257.303; MSA 9.2003 and MCL 257.310; MSA 9.2010. Chauffeur, 18, MCL 257.303; MSA 9.2003.

Agency. MCL 257.401; MSA 9.2101 provides that owner of a motor vehicle is liable for an injury caused by the negligent operation of the vehicle when the vehicle is being driven with the owner's express or implied consent or knowledge. It is presumed that the motor vehicle is being driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family. A person engaged in the business of leasing motor vehicles under a lease for a period of 30 days or less is liable for an injury caused by the negligent operation of the leased motor vehicle only if the injury occurred while the vehicle was being operated by an authorized driver under the lease agreement or by the leasee's spouse, father, mother, brother, sister, son, daughter, or their immediate family member. Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor's liability under the owner's liability statute is limited to \$20,000/\$40,000. MCL 257.401 (3); MSA 9.2101. The leasing company must notify a leasee that the lessor is liable only up to the \$20,000/\$40,000 and only if the leased motor vehicle was being operated by the appropriate individuals and that the leasee may be liable to the lessor up to the \$20,000/\$40,000 and to an injured person for amounts awarded in excess of the \$20,000/\$40,000. MCL 257.401 (4); MSA 9.2101. Nephew rooming with owner and paying board is not member of his family within meaning of this provision. *Rogers v. Kuhnreich*, 247 Mich. 204, 225 N.W. 622 (1929). There is rebuttable presumption, in general, that person is driving with owner's knowledge or consent. *Pulford v. Mouw*, 279 Mich. 376, 272 N.W. 713 (1937). Not liable, however, if "Use being beyond express or implied consent or knowledge." *Kalinowski v. Odlewany*, 289 Mich. 684, 287 N.W. 344 (1939). *Also Rabaut v. Ford Motor*, 285 Mich. 111, 280 N.W. 129 (1938) (where owner not liable because "consent did not extend to uses other than...business of" defendant). Essential consent is consent to the driving of the vehicle by others. Once owner permits vehicle to be driven by another he has consented to vehicle being driven by third party despite express prohibition against. *Cowan v. Strecker*, 394 Mich. 110, 229 N.W.2d 302 (1975). Presumption of consent nearly irrebuttable, even if restriction in writing, where keys voluntarily handed over. *De-laney v. Burnett*, 63 Mich. App. 639, 234 N.W.2d 741 (1975), *contra*, *Caradonna v. Arpino*, 177 Mich. App. 486, 442 N.W.2d 702 (1989). Presumption rebuttable by positive, unequivocal, strong and credible evidence such



as rental contract provision prohibiting car's operation by anyone under age of twenty-five. *Bieszek v. Avis*, 459 Mich. 9, 583 N.W.2d 691 (1998). Need not prove liability under doctrine of respondeat superior. It is enough to prove vehicle driven with express or implied consent. *Citizens' v. Houtz*, 361 Mich. 309, 104 N.W.2d 763 (1960); *Frazier v. Rumisek*, 358 Mich. 455, 100 N.W.2d 442 (1960). Negligent entrustment valid theory, must show car driven with permission, driver incompetent, owner knew and causal relationship. *Perin v. Peuler*, 373 Mich. 531, 103 N.W.2d 4 (1964). There is no duty upon the vehicle owner to investigate the driving record of one driving the owner's vehicle. *Tortora v. General Motors Corp.*, 373 Mich. 563, 130 N.W.2d 21 (1964).

Comparative Negligence. See "NEGLIGENCE."

Compulsory Insurance Coverage. Financial Responsibility, MCL 257.501, *et seq.*; MSA 9.2201. Automobile dealership customer who wrecked automobile during test drive is insured under dealership policy as permissive driver. *Universal v. Vallejo*, 436 Mich. 873, 461 N.W.2d 364 (1990). But auto dealership and its insurer have subrogation rights against customer when customer assumed liability for damage to the car in writing. *Universal Underwriters v. Kneeland*, 235 Mich. App. 646, 599 N.W.2d 519 (1999). Four-wheeled go-cart when operated on public street is subject to registration and insurance requirements. *Coffey v. State Farm*, 183 Mich. App. 723, 455 N.W.2d 740 (1990), *distinguished Nelson v. Trans-American*, 441 Mich. 508, 495 N.W.2d 370 (1992).

Alcohol/DWI. MCL 257.625; MSA 9.2325 criminalizes the operation of a vehicle while intoxicated. The statute provides that a person operating a vehicle with an alcohol content of .08 grams or more per 100 milliliters of blood is "operating while intoxicated." Also, a person shall not operate a vehicle when, due to the consumption of alcohol, a controlled substance, or a combination thereof, the person's ability to operate the vehicle is visibly impaired. A person less than 21 years of age shall not operate a vehicle with "any bodily alcohol content." "Any bodily alcohol content" means an alcohol content of .02 grams or more but less than .08 grams per 100 milliliters of blood. *Id.* Violation is punishable by imprisonment and fines. MCL 257.625; MSA 9.2325.

Blood alcohol level shall be admissible in evidence in specified criminal prosecutions. Manner and presumption of test. MCL 257.625a; MSA 9.2325 (1). Failure to take chemical test results in at least six month suspension depending on prior record. MCL 257.625f; MSA 9.2325 (6).

Motorist's due process rights were not violated due to arresting officer's failure to give defendant a reason-

able opportunity for an independent chemical test because officer had no constitutional duty to assist motorist. *People v. Anstey*, 719 N.W.2d 579 (2006).

Motorist stopped due to missing tire and damage to rim was in "accident" for purposes of the automobile exception to physician-patient privilege so that blood tests were admissible in prosecution against motorist. *People v. Green*, 260 Mich. App. 392, 677 N.W.2d 363 (2004).

To determine causation element for operating while intoxicated and causing death, it must be determined whether operation of vehicle was a factual cause, and proximate cause of death. *People v. Schaefer*, 473 Mich. 418, 703 N.W.2d 774 (2005).

Damages. See "DAMAGES."

Family Purpose Doctrine. Michigan does not recognize family purpose doctrine. *Shaler v. Reynolds*, 360 Mich. 688, 104 N.W.2d 779 (1960).

Guest Cases. Guest Statute held unconstitutional. *Manistee Bank v. McGowan*, 394 Mich. 655, 232 N.W.2d 636 (1975).

Purposes of through highway; privileges of traffic thereon; duties of traffic on subordinate street. *Churukian v. La Gest*, 357 Mich. 173, 97 N.W.2d 832 (1959). Rights and duties of motorist approaching intersection and facing green light. Right to assume other vehicle will obey red light. Comparative negligence is jury question. *Stillwell v. Grubaugh*, 357 Mich. 344, 98 N.W.2d 490 (1959). Open intersection – judgment for plaintiff affirmed by equally divided Court. *Cousino v. Briskey*, 366 Mich. 1, 114 N.W.2d 365 (1962).

Imputed Negligence/Joint Enterprise. Joint enterprise between passenger and automobile driver within law of negligence, there must be community of interest in use of vehicle, there must be finding of common responsibility for its negligent operation, and it must be found that the driver is acting as agent of the members' enterprise. MCL 257.401; MSA 9.2101, *Boyd v. McKeever*, 384 Mich. 501, 185 N.W.2d 344 (1971).

Last Clear Chance. Superseded by adoption of comparative negligence. *Petrove v. Grand Trunk*, 437 Mich. 31, 464 N.W.2d 711 (1991). Doctrine also discarded as a formulation of gross negligence. *Jennings v. Southwood*, 446 Mich. 125, 521 N.W.2d 230 (1994).

Ownership/Title. Owner is person holding title or lessee or person with exclusive use for more than 30 days. MCL 257.37; MSA 9.1837. Owner liable for injury occasioned by negligent operation of vehicle if used with owner's permission, except if title holder is in business of leasing vehicles over 30 days. MCL 257.401a;

MSA 9.2101 (1). Certificate of title, transfer and issuance. MCL 257.219 *et seq.*; MSA 9.1919.

**Pedestrians.** It is duty of motorist to notice persons in the street, to use reasonable and ordinary care not to run down pedestrians, and to obey statutes governing use of automobiles. *Birkhill v. Todd*, 20 Mich. App. 356, 174 N.W.2d 56 (1970).

**No-fault.** See “NO-FAULT.” Constitutionally upheld. *Shavers v. Kelley*, 402 Mich. 554, 267 N.W.2d 72 (1978).

**Motorized Bicycles.** All rights and duties of auto driver applicable to driver of vehicle except as provided. MCL 257.657; MSA 9.2357. Shall not be operated on any limited access highways. MCL 257.679a; MSA 9.2379 (1).

**Seat Belts.** Driver and front seat passenger shall wear seat belt. Child under 4 must be restrained by prescribed safety system. Child between 4 and 16 must be secured by safety belt. MCL 257.710d; MSA 9.2410 (4). Enforcement no longer requires secondary act when driver stopped for another violation. Failure to wear belt may be evidence of negligence and may reduce damages up to 5%. MCL 257.710e; MSA 9.2410 (5).

**Service of Process Upon Nonresident Motorists.** MCL 257.403; MSA 9.2103 provides that where motor vehicle owned or operated by nonresident is involved in accident on public highway of this State, such nonresident may be served with process by service upon Secretary of State or his Deputy, provided notice of such service and copy of summons are either served on defendant, personally, or sent to defendant by registered mail. If personal service is had, officer shall so certify in his return, or if service is made by registered mail, then plaintiff or his attorney shall make affidavit showing such service, and shall attach thereto true copy of summons and notice so served and registry receipt of defendant. Death of nonresident has no effect and his executor or administrator may therefore be served. *Plopa v. Du Pre*, 327 Mich. 660, 42 N.W.2d 777 (1950). Where resident becomes non-resident service may now be made on Secretary of State and this nullifies provision suspending period of limitations during time absent from state. *Hammel v. Bettison*, 362 Mich. 396, 107 N.W.2d 887 (1961). Defendant must have actual notice.

**Speed Limit.** Maximum speed on all highways not otherwise fixed is 65 mph; certain freeways may have speed limit of 70 mph. The minimum speed on all freeways is 45 mph. MCL 257.628; MSA 9.2328.

**Trailers/Weight Limits.** Axle spacing greater than 9 feet: 18,000 lbs./axle; 3½ to 9 feet: 13,000 lbs./axle; under 3½ feet: 9,000 lbs./axle. Exceptions for time of year

and type of pavement; local exceptions allowed. MCL 257.722; MSA 9.2422.

**Uninsured and Underinsured Endorsements.** Owned vehicle exclusion clause stating uninsured motorist benefits would not accrue for injuries sustained by use of car owned by policyholder or relative unless auto named in declarations held valid. *Automobile Club Ins. Ass'n v. Page*, 162 Mich. App. 664, 413 N.W.2d 472 (1987). The “insured” need not suffer bodily injury to claim uninsured coverage. *Auto Club Ins. Co. v. DeLagarza*, 433 Mich. 208, 444 N.W.2d 803 (1989). Uninsured motorist coverage optional after October 1, 1973; underinsured motorist coverage not addressed by statute. Consent to settle provision valid for UIM coverage. *Lee v. Auto-Owners*, 208 Mich. App. 207, 527 N.W.2d 54 (1994). UIM set off provision for other payments to injured person valid. *Mead v. Aetna*, 202 Mich. App. 553, 509 N.W.2d 789 (1993).

## AVIATION

**Aeronautics Code.** MCL 259.1, *et seq.*; MSA 10.101.

**Action For Wrongful Death.** In action for wrongful death sustained when airplane crashed killing both occupants, either of whom might have been operating plane equipped with dual controls, plaintiff had burden of proof of establishing that defendant's decedent rather than plaintiff's decedent was pilot. *Madyck v. Shelley*, 283 Mich. 396, 278 N.W. 110 (1938).

**Liability.** Owner, operator, person or organization responsible for maintenance or use of an aircraft shall be liable for any injury occasioned by the negligent operation of the aircraft if aircraft used with owner's express or implied consent or knowledge MCL 259.180a; MSA 10.280 (1).

**Manager's duty to supervise maintenance and operation of city airport** was “public duty” and was not different in kind with regard to pilot killed in plane crash, and thus, Michigan's public duty doctrine barred tort claims against manager, even though general public suffered only economic injury as a result of manager's alleged breach. *Ludwig v. Lear-Jet, Inc.*, 830 F. Supp. 995 (E.D. Mich. 1993).

**Monetary damages not available to airport tenant for airport authority's breach of Aeronautics Code in failing to enforce uniform rules and fees; injunction was not inadequate remedy.** *General Aviation, Inc. v. Capital Region Airport Auth.*, 224 Mich. App. 710, 569 N.W.2d 883 (1997).

*In Re Air Crash Disaster*, 86 F.3d 498 (6th Cir. 1996), the Sixth Circuit made several rulings in an avia-



tion disaster case under Michigan law. Some of the key rulings are summarized as follows:

1. Trial court did not err in severing airline's third-party claims against manufacturer of circuit breaker box and against car rental company whose lamppost was struck after take off, or in adhering to original discovery schedule after airline filed third-party claims on the last day such filing was permitted; to do otherwise would have thwarted court's trial date goal, and airline could still place evidence before jury on possible liability of manufacturer and rental company, and could, under Michigan law, bring subsequent action against those parties for contribution or indemnity.

2. In action to apportion liability for fatal crash between airline and manufacturer, jury could find that airline had violated specified FAA regulations without expert testimony and could consider such violations as evidence of negligence; jury could reasonably have found, based on ordinary experience and its presence for 18 months at trial, that airplane's crew failed to execute pre-flight cockpit checklist properly and deliberately pulled a circuit breaker in clear violation of federal regulations.

3. Airline could be found to have engaged in "willful or wanton misconduct," so as to be liable above contractual limitations to employees aboard plane involved in fatal crash if it knew of situation requiring ordinary care and diligence to avert injury to another, had the ability to avoid resulting harm by ordinary care and diligence, and failed to use such care and diligence to avert threatened danger when, to the ordinary mind, it would have been apparent disastrous result was likely; finding of intent to harm or equally culpable mental state was not required.

4. Jury's exoneration of airplane manufacturer from responsibility for fatal crash precluded manufacturer and airline from having a common liability in tort, and thus manufacturer did not have right to seek indemnity or contribution from airline for settlement amounts paid to victims. *See also*, MCL 600.2925 (a); MSA 27A.2925.

5. Equitable doctrine of subrogation permitted airplane manufacturer to recover from commercial airline for settlement payments to certain victims of fatal crash based on jury's finding that airline was 100% at fault for crash, even though those victims, in settling with the manufacturer, released airline from further liability.

## BROKERS

See "AGENTS AND BROKERS."

## BURGLARY INSURANCE

Under cargo policy excluding "theft" by employees, the word "theft" includes larceny by conversion. *Hunter v. Pearl*, 292 Mich. 543, 291 N.W. 58 (1940). Insured whose salesman was robbed near locked automobile containing diamonds could recover under policy covering robbery of employee having "care and custody" of diamonds. *Birgbauer v. Aetna Cas. & Sur.*, 251 Mich. 614, 232 N.W. 403 (1930).

"Theft" in homeowners policy requires felonious intent, not merely a taking. *Hoye v. Westfield*, 194 Mich. App. 696, 487 N.W.2d 838 (1992). "Forcible entry" requirement is valid. *Edgar's v. USF&G*, 375 Mich. 598, 134 N.W.2d 746 (1965).

## CANCELLATION

Contracts. Cancellation of insurance contracts is governed generally by the Michigan Insurance Code of 1956, MCL 500.100, *et seq.*; MSA 24.1100. Casualty insurance may be cancelled at any time by an insurer by mailing written notice of cancellation to the insured, at the insured's last known address, or to the authorized agent of insured, 10 days prior to the cancellation. MCL 500.3020; MSA 24.13020. Home insurance may be cancelled by the insurer by mailing written notice of termination to the named insured at the insured's last known address at least thirty days prior to the termination. MCL 500.2123; MSA 24.12123. Disability insurance may be cancelled by the insurer if written notice of cancellation is mailed and delivered to the insured's last known address at least 5 days prior to the date of termination. MCL 500.3448; MSA 24.13448. No-fault automobile insurance may be cancelled only if written notice of termination is sent by the insurer by certified mail, return receipt requested, to the insured's last known address at least twenty days prior to cancellation.

A carrier may cancel a health insurance policy and thus terminate liability for conditions arising during the life of the policy unless the expenses are pregnancy-related. *Providence Hosp. v. Morell*, 431 Mich. 194, 427 N.W.2d 531 (1988). If health coverage is canceled by employer, not by insurer, insurer is not liable for conditions existing at time of cancellation. *Wolfe v. Employers Health Ins. Co.*, 194 Mich. App. 172, 486 N.W.2d 319 (1992).

Notice. Although there must be actual receipt by the insured of the notice of cancellation to effectuate cancellation of an automobile liability policy, the act of mailing the written notice of termination by the insurer creates a rebuttable presumption that the insured received notice. *Gooden v. Camden Fire Ins. Ass'n*, 11 Mich. App. 695, 486 N.W.2d 116 (1968); *State Farm v.*

*Allen*, 191 Mich. App. 18, 477 N.W.2d 445 (1991). Notice of cancellation is not required if the policy is to expire on its own. *Blekkenk v. Allstate Ins. Co.*, 152 Mich. App. 65, 393 N.W.2d 883 (1986).

Misrepresentations. A fact or representation in application is “material” within meaning of statute permitting insurer to avoid policy where communication of information would bring about rejection of the risk or charging an increased premium; the proper question is whether the policy issued at the premium rate agreed upon would have been issues notwithstanding the misrepresentation. *Oade v. Jackson National Life Ins. Co. of Michigan*, 465 Mich. 244, 632 N.W.2d 126 (2001). An insurer is required to rescind the policy upon the discovery of misrepresentation and refund the premiums or cancel the policy. *Burton v. Wolverine Mut. Ins. Co.*, 213 Mich. App. 514, 540 N.W.2d 480 (1995).

### CONSTRUCTION OF POLICY

Insurance policy is a contract between insurer and policyholder. *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 489 N.W.2d 431 (1992). Court interprets terms of insurance policy in accordance with well-established principles of contract construction. *Citizens Ins. Co. v. Pro-Seal Service Group, Inc.*, 477 Mich. 75, 730 N.W.2d 682 (2007). Interpretation of an insurance contract is a question of law. *Cole v. Auto Owners Ins. Co.*, 272 Mich. App. 50, 723 N.W.2d 922 (2006).

Court must determine what agreement is and enforce it when dispute arises between parties over the meaning of policy. *Kass v. Wolf*, 212 Mich. App. 600, 604, 538 N.W.2d 77 (1995). Contract read as a whole and meaning given to all terms contained within policy. *Auto-Owners, supra*. Courts interpret words and phrases used in insurance contract reading in accordance with commonly used meanings. *Citizens, supra*. An insurance contract must be construed so as to give effect to every word, clause, phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory. *Royal Property Group LLC v. Prime Insurance Syndicate, Inc.*, 267 Mich. App. 708, 706 N.W.2d 426 (2006). Conflicts in clauses should be harmonized, interpretation should not render contract unreasonable. *Fresard v. Michigan Millers Mut. Ins. Co.*, 414 Mich. 686, 327 N.W.2d 286 (1982). However, unambiguous contract provision providing for a shortened period of limitations is to be enforced as written, regardless of reasonableness. *Rory v. Continental Ins. Co.*, 703 N.W.2d 23 (2005). Court will not hold insurance company liable for a risk that it did not assume. *Auto-Owners v. Churchman*, 440 Mich. 560, 489 N.W.2d 431 (1992).

Ambiguities. Insurance policy is considered ambiguous when, after reading entire document, language can be reasonably interpreted in different ways. *Trierweiler v. Frankenmuth Mut. Ins. Co.*, 449 Mich. App. 653, 550 N.W.2d 577 (1996). If provisions of a contract or insurance policy irreconcilably conflict, the contractual language is ambiguous which presents a question of fact for the jury. *Cole v. Auto Owners Ins. Co.*, 272 Mich. App. 50, 723 N.W.2d 922 (2006). A contract or insurance policy is not ambiguous simply because dictionary definitions differ. *Id.* Contracts and insurance policies are construed against drafter where there is a true ambiguity and the parties’ intent cannot be discerned through all conventional means, including extrinsic evidence. *Id.*

Unambiguous insurance contracts must be enforced as written. *Arco Indus. Corp. v. American Motorists Ins. Co.*, 448 Mich. 395, 531 N.W.2d 168 (1995). Provision making “you” or any “family member” an “insured” not ambiguous, not construed to extend coverage to employees. *Michigan Twp. Participation Plan v. Pavolich*, 232 Mich. App. 378, 591 N.W.2d 325 (1998). Exclusionary clauses strictly construed in insured’s favor. *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 489 N.W.2d 431 (1992). A clear and specific exclusion must be given effect. *Id.* Insurer required to show injury intended or reasonably should have been expected because of direct risk of harm intentionally created by insured’s actions *Nabozny v. Burkhardt*, 461 Mich. 471, 606 N.W.2d 639 (2000). An adhesion contract must be enforced according to its plain terms unless a traditional contract defense applies. *Rory v. Continental Ins. Co.*, 473 Mich. 457, 703 N.W.2d 23 (2005).

Duty to Defend. Duty to defend broader than duty to indemnify. *Shefman v. Auto-Owners Ins. Co.*, 262 Mich. App. 631, 687 N.W.2d 300 (2004). If allegations of underlying suit arguably fall within the coverage of the policy, the insurer has duty to defend insured. *Id.* Duty to defend is dependent upon allegations in complaint and an insurer must look behind the allegations to analyze whether coverage is possible. *Id.* If coverage is not possible, there is no duty to defend. *Arco Indus. Corp. v. American Motorists Ins. Co., (on remand)*, 215 Mich. App. 633, 546 N.W.2d 709 (1996). Any doubt regarding whether complaint alleges liability covered under a policy must be resolved in the insured’s favor. *Shefman, supra*. When insurer breaches its duty to defend, insurer is bound by any reasonable settlement between policyholder and third party. *Alyas v. Gillard*, 180 Mich. App. 154, 446 N.W.2d 610 (1989). A court grants coverage if policyholder, upon reading of contract, is led to reasonable expectation of coverage. *Marlo Beauty Supply, Inc. v. Farmers Ins. Group*, 227 Mich. App. 309, 575 N.W.2d 324 (1998).

The standard Commercial General Liability policy language, providing coverage for property damage during the policy period, unambiguously dictates application of an injury-in-fact trigger of coverage. *Gelman Sciences, Inc. v. Fidelity & Cas. Co. of N.Y.*, 456 Mich. 305, 572 N.W.2d 617 (1998), amended by *Arco Industries Corp. v. American Motorists Ins. Co.*, 576 N.W.2d 168 (1998).

Where conflict between printed form and endorsement, endorsement controls. *Jones v. Atkins*, 143 Mich. App. 150, 371 N.W.2d 508 (1985). Typed or manuscript endorsement controls over printed form. *Martin v. Ohio Cas.*, 9 Mich. App. 598, 157 N.W.2d 827 (1968).

Application only an offer, must be accepted to be contract. *G.P. Enterprises, Inc. v. Jackson Nat'l Life Ins. Co.*, 202 Mich. App. 557, 509 N.W.2d 708 (1993), citing *Gorham v. Peerless*, 368 Mich. 335, 118 N.W.2d 306 (1962). The mutually agreed upon conditions in the application must be met before contract becomes effective. *Id.* Receipt of application without premium not binding unless unreasonable delay under certain circumstances. *Bellak v. United Home*, 211 F.2d 280 (6th Cir. 1954).

Binder is temporary contract, insurance effective until policy issued or risk declined. *State Auto v. Babcock*, 54 Mich. App. 194, 220 N.W.2d 717 (1974).

Third-party beneficiary law controlled by statute. MCL 600.1405; MSA 27A.1405. Objective test used to determine if third party beneficiary. *Kammer Asphalt v. East China Twp.*, 443 Mich. 176, 504 N.W.2d 635 (1993); *Commercial Union v. Medical Protective Co.*, 136 Mich. App. 412, 356 N.W.2d 648 (1984), *aff'd in part*, 426 Mich. 109 (1986). Primary insurer did not owe direct duty to an excess insurer to act in good faith to defend or settle a claim against a common insured. *Commercial Union v. Medical Protective Co.*, 426 Mich. 109, 393 N.W.2d 479 (1986); *Local 80 v. Tishman*, 103 Mich. App. 784, 303 N.W.2d 893 (1981). Incidental beneficiary has no right to sue for breach. *Greenlees v. Owen Ames Kimball Co.*, 340 Mich. 670, 66 N.W.2d 227 (1954). Third-party beneficiary status requires express promise to act for benefit of third party. *Dynamic Const. Co. v. Barton Malow Co.*, 214 Mich. App. 425, 543 N.W.2d 31 (1996). Insurer's liability personal to policyholder. *Lisiewski v. Countrywide*, 75 Mich. App. 631, 255 N.W.2d 714 (1977).

## DAMAGES

See also "NEGLIGENCE"; "NO-FAULT"; "PRODUCTS LIABILITY."

Appeals. The inadequacy or excessiveness of an award is evaluated by whether it is supported by the evi-

dence. MCR 2.611. Other factors include whether award shocks conscience, is reasonable, is comparable to similar cases or is based upon corruption, passion or partiality. Overturn only if abuse of discretion. *Palenkas v. Beaumont Hosp.*, 432 Mich. 527, 443 N.W.2d 354 (1989).

Arbitration. Award stands unless: procured by corruption, fraud or undue means; biased arbitrator; exceeds power of arbitrator; or substantial prejudice to party's rights. MCR 3.602. Vacate only where error substantially alters award. *DAIIE v. Gavin*, 416 Mich. 407, 331 N.W.2d 418 (1982). Unless set aside, parties cannot contest merits of dispute in court. *Siller v. Hart*, 400 Mich. 578, 255 N.W.2d 347 (1977).

Common law generally governs compensatory damages.

Comparative Negligence. If plaintiff's percentage of fault exceeds combined fault of other parties and non-parties, plaintiff's economic damages reduced by such percentage and non-economic damages precluded. MCL 600.2959; MSA 27A.2959.

Damage Caps. Non-economic damages for medical malpractice capped at \$280,000; \$500,000 cap where injury to brain or spinal cord resulting in permanent functional loss of limb(s), permanent impairment of cognitive ability, or permanent inability to procreate. MCL 600.1483; MSA 27A.1483. Products liability actions capped at \$280,000 non-economic damages. \$500,000 cap where defect resulting in person's death or permanent loss of a vital bodily function. Cap inapplicable where finding of gross negligence. MCL 600.2946a; MSA 27A.2946a. Amount of cap is to be determined as of the date of the court enters its written judgment, rather than on the date the jury renders its verdict. *Wessels v. Garden Way, Inc.*, 263 Mich. App. 642, 689 N.W.2d 526 (2004).

Double/Treble Damages. Damages multiplied by statute where fiduciary fraudulently sells decedents real estate, MCL 700.662; MSA 27.5662; tenant guilty of waste, MCL 600.2919; MSA 27A.2919; embezzlement or alienation of property of deceased person, MCL 700.171; MSA 27.5171; common carrier violates railroad act, MCL 462.19; MSA 22.38; and for civil arrest of exempt person, MCL 600.1821; MSA 27A.1821.

Exemplary Damages. Purpose of exemplary damages in Michigan is not to punish defendant but to make plaintiff whole. *Hayes-Albion Corp. v. Kuberski*, 421 Mich. 170, 364 N.W.2d 609 (1984). Exemplary damages may be awarded for mental distress and anguish where conduct is malicious or willful and wanton. If mental distress and anguish are part of compensatory damages, exemplary damages improper. *Veselenak v. Smith*, 414

Mich. 567, 327 N.W.2d 261 (1982). Damages for mental distress or exemplary damages are not recoverable in action for breach of insurance contract. *Kewin v. Massachusetts Mut.*, 409 Mich. 401, 295 N.W.2d 50 (1980), or in action for breach of employment contract, *Valentine v. General American*, 420 Mich. 256, 362 N.W.2d 628 (1984).

**Indemnification.** Indemnity possible by express contract, implied contract or under common law. *Grayson v. Chambersburg*, 139 Mich. App. 456, 362 N.W.2d 751 (1984). Express contractual indemnity for own negligence must be clearly articulated. *Chrysler v. Brenal*, 146 Mich. App. 766, 381 N.W.2d 814 (1985). Indemnity strictly construed against drafter and indemnitee. *Fischbach v. Power Process*, 157 Mich. App. 448, 403 N.W.2d 569 (1987). If ambiguous, court to determine and give effect to intent. *Pritts v. Case*, 108 Mich. App. 22, 310 N.W.2d 261 (1981). Indemnity in construction contract for one's sole negligence void as against public policy. MCL 691.991; MSA 26.1146 (1). Common law, implied contractual indemnity applies only where indemnitor is free from active fault. *Dale v. Whiteman*, 388 Mich. 698, 202 N.W.2d 797 (1972); *State Farm v. SuperCity*, 125 Mich. App. 65, 335 N.W.2d 714 (1983); *Feaster v. Hous*, 137 Mich. App. 783, 359 N.W.2d 219 (1984). Indemnification costs are damages paid to compensate for injury suffered through unlawful act, omission or negligence of another. *Gelman Sciences v. Fireman's Fund*, 183 Mich. App. 445, 455 N.W.2d 328 (1990).

**Interest.** Insurer liable for prejudgment interest in excess of policy limits. *Denham v. Bedford*, 407 Mich. 517, 287 N.W.2d 168 (1980); *Pinto v. Buckey Union*, 193 Mich. App. 304, 484 N.W.2d 13 (1992). Both excess and primary carrier responsible for prejudgment interest on policy limits. *Matich v. Modern Research*, 430 Mich. 1, 420 N.W.2d 67 (1988). Excess carrier may exclude coverage for judgment interest. *Canadian Universal v. Hartford*, 184 Mich. App. 546, 458 N.W.2d 657 (1990).

**Joint and Several Liability.** Abolished except in medical malpractice cases. MCL 600.2956; MSA 27A.2956; MCL 600.6304; MSA 27A.6304. Trier of fact must assess liability against both parties and nonparties in proportion to fault. MCL 600.2957; MSA 27A.2957. Party may file a motion within 91 days after identifying nonparty for purpose of comparative fault. MCR 2.112 (K). A finding of fault against a nonparty does not subject the nonparty to liability in that action and may not be introduced as evidence of liability in another action. MCL 600.2957. Prior prohibition against considering fault of settled parties abolished. The fault of parties legally exempt or immune from liability may

be considered. MCL 500.3135; MSA 24.13135. Despite rule against imputing parent's negligence to a child, under Michigan's tort reform legislation, liability must be apportioned to parents of an injured child. *Dresser v. Cradle of Hope Adoption Center*, 421 F. Supp. 2d 1024 (2006).

**Loss of Consortium.** Child's claim for loss of parental society and companionship recognized. *Berger v. Weber*, 411 Mich. 1, 303 N.W.2d 424 (1981). Parent's loss of child's society and companionship not recognized. *Sizemore v. Smock*, 430 Mich. 283, 422 N.W.2d 666 (1988). No cause for sibling. *Malik v. Beaumont*, 168 Mich. App. 159, 423 N.W.2d 920 (1988).

**Psychic Injuries.** Mental Pain and Suffering. Claim for mental pain and anxiety which naturally flow from the injury allowed. *Ledbetter v. Brown City Bank*, 141 Mich. App. 692, 368 N.W.2d 257 (1985). Emotional distress claim requires physical injury. *Gore v. Rains & Block*, 189 Mich. App. 729, 473 N.W.2d 813 (1991). Mental anguish claim not so limited. *Veselenak v. Smith*, 414 Mich. 567, 327 N.W.2d 261 (1982).

## DEATH

See Law Digest Tables.

**Presumption of Death.** Former statutory provision regarding presumption of death after seven years, MCL 567.47; MSA 26.1053 (37), has been repealed by the provisions of MCL 567.221; MSA 26.1005 (1), Uniform Unclaimed Property Act. A claim for life insurance still accrues at the end of seven years based on the former seven year presumption of death. MCL 600.5835; MSA 27A.5835. The conflict between these statutory provisions has not been resolved.

**Wrongful Death Act.** All claims under Wrongful Death Act must be brought in name of personal representative. Act specifically provides recovery for loss of companionship, pain and suffering from injury resulting in death. MCL 600.2922; MSA 27A.2922. Wrongful death action may not be brought on behalf of fetus in utero born alive if, following expulsion or extraction from the mother, there is lacking an irreversible cessation of respiratory and circulatory functions or brain functions. *Estate of McDowell v. Stubbs*, 455 Mich. 853, 564 N.W.2d 463 (1997). Potential heirs under intestacy laws who can prove compensable injury are entitled to share in amount recovered. *Crystal v. Hubbard*, 414 Mich. 297, 324 N.W.2d 869 (1982). Statute of limitation and accrual of action based upon theory of liability for wrongful act. *Lindsay v. Harper Hosp.*, 213 Mich. App. 422, 540 N.W.2d 477 (1995), *appeal granted*, 453 Mich. 905, 554 N.W.2d 902 (1996).

Venue in wrongful death action is controlled by general venue statute applicable to the underlying claim. *Huhn v. DMI, Inc.*, 215 Mich. App. 17, 544 N.W.2d 719 (1996).

Suicide and whether self injury resulting in death was intentional is to be evaluated from the standpoint of the decedent. *Bruce v. Cuna Mut. Ins. Soc'y*, 219 Mich. App. 57, 555 N.W.2d 718 (1996).

### DISABILITY

Total disability is an inability to perform essential acts necessary to exercise of one's profession. *Hallock v. Income Guaranty*, 270 Mich. 448, 259 N.W. 133 (1935). "Due Proof" of disability requires reasonable evidence thereof. *Forman v. New York Life*, 267 Mich. 426, 255 N.W. 222 (1934). Where a life policy pays disability in lieu of a death benefit for total disability, the test for disability under federal common law is based on the insured's ability to pursue gainful employment based on all circumstances, and interpretation of the contract provision in such a manner that one must not be utterly helpless to be considered "disabled." *Vanderklok v. Provident Life*, 956 F.2d 610 (6th Cir. 1992). "Total and irrevocable loss" means loss of practical, useful function and not total loss, i.e. blindness. An issue is often times one of fact. *Lewis v. Metropolitan Life*, 397 Mich. 481, 245 N.W.2d 9 (1976). The insurance company is not liable for total and permanent disability which resulted after expiration of insurance, even though injury occurred while policy was in force. *Boyd v. Equitable*, 274 Mich. 1, 263 N.W. 780 (1935).

Michigan courts have continually reviewed to what extent an individual must be injured and unable to work in order to obtain disability benefits. Cases in which benefits have been allowed are as follows. Where a real estate broker, as a result of dislocated right shoulder, was practically unable to do any kind of work, although he did go to his office daily, he was entitled to recover on policy granting compensation to one "immediately and wholly" disabled. *Turner v. Fidelity*, 112 Mich. 425, 70 N.W. 898 (1897). Barber, who, after injury to his back, was able to work in his shop little but suffered intense pain and fainted and was finally confined to his bed, was entitled to compensation under policy providing compensation for assured "immediately, continuously and wholly disabled." *Hohn v. Inter-State*, 115 Mich. 79, 72 N.W. 1105 (1897). Where assured was incapacitated by incurable malady for any kind of business or work, could not dress himself without help and went out only occasionally for exercise under doctor's orders, he was entitled to compensation under "house confinement" disability clause. *Van Dusen v. Interstate*, 237 Mich. 294, 211 N.W. 991 (1921). Leaving house occa-

sionally for consultation with, or by direction of, a physician is permissible under provision requiring continuous confinement in-house. *Hoffman v. Michigan Home*, 128 Mich. 323, 87 N.W. 265 (1901). A physician who worked as an emergency room physician prior to disability, but who worked as a prison doctor after becoming disabled entitled to collect disability benefits because of his inability to perform his "regular occupation" of emergency room physician after injury. Income as prison physician did not trigger lesser payments under partial disability provision of policy. *Carlyon v. Mutual of Omaha Ins. Co.*, 220 Mich. App. 444, 559 N.W.2d 407 (1996). Cases which have held that the assured is not entitled to collect disability benefits are as follows. Laborer who worked the week after receiving his injury, although in slight pain, was not entitled to recover under policy giving compensation for disability immediately following his injury. *Letherer v. U.S. Health*, 145 Mich. 310, 108 N.W. 491 (1906). Where insured was not able fully to attend to his business of managing store for year following operation, but was able to be out and went to his business regularly, and after year expired was able to fully manage his business, he was not entitled to recover under policy giving compensation for "total and permanent bodily injury." *Brod v. Detroit*, 253 Mich. 545, 235 N.W. 248 (1931). Man totally disabled in 1930 and again for period in 1932 was not permanently disabled within meaning of insurance policy giving compensation to insured "wholly and permanently disabled." *Wetherall v. Equitable*, 273 Mich. 580, 263 N.W. 745 (1935). Resumption of employment for several months interrupted continuity of disability and precluded recovery for subsequent disability. *Hasson v. Mutual Benefit Health & Acc. Ass'n of Omaha*, 309 Mich. 331, 15 N.W.2d 659 (1944). Where assured lost four fingers and for four months could not engage in his occupation as lumberman, but thereafter performed part, but not all of his daily duties, he was entitled to compensation for total disability for four months and thereafter only for partial disability. *Peterson v. Great Northern Life Ins. Co.*, 250 Mich. 176, 229 N.W. 427 (1930).

Treatment by chiropractor is not within the provision of disability policy requiring insured to be under the care of a licensed physician or surgeon. *Erdman v. Great Northern Life Ins. Co.*, 253 Mich. 579, 235 N.W. 260 (1931). Loss of hand in cogs of road roller is not within policy covering injury from wrecking a vehicle or being thrown therefrom. *Drogula v. Federal Life Ins. Co.*, 248 Mich. 645, 227 N.W. 692 (1929). Explosion of auto tire while being inflated is not within the policy covering injury caused by wrecking of auto in which the insured is riding or by being thrown therefrom. *Eynon v. Continental Life Ins. Co. of Missouri*, 252 Mich. 279, 233 N.W. 228 (1930). Insured thrown from seat of binder



was thrown “therefrom” within meaning of policy although he landed on machine and not on ground. *Stevens v. Federal Ins.*, 255 Mich. 95, 237 N.W. 388 (1931). Indemnity against being “gored” does not include a blow from head of bull which does not pierce body of injured person. *Decker v. Federal Life Ins. Co.*, 272 Mich. 20, 260 N.W. 782 (1935).

A disability policy’s coordination clause with an automobile benefit policy is valid. *Albright v. Butterworth HMO*, 196 Mich. App. 283, 492 N.W.2d 457 (1992). Michigan’s No-Fault Statute, MCL 500.3109 (a) allows for the offsetting of long term disability benefits as “other health and accident coverage.” *Rettig v. Hastings Mut. Ins. Co.*, 196 Mich. App. 329, 492 N.W.2d 526 (1992).

### FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

MCL 257.501, *et seq.*; MSA 9.2201. When accident occurs in state, scope of liability coverage determined by Financial Responsibility Act. *Farmers v. Anderson*, 206 Mich. App. 214, 520 N.W.2d 686 (1994). No defense as to garnishment by injured party that policy covered only business driving in view of provisos of Financial Responsibility Law. *Judd v. Vollmer*, 338 Mich. 581, 61 N.W.2d 776 (1953). Minimum coverage \$20,000/\$40,000. MCL 257.520; MSA 9.2220.

Minimum coverage raised to \$20,000/\$40,000. Jan. 1, 1973.

### FIRE INSURANCE

The contents of fire insurance policies are set forth by statute. MCL 500.2833; MSA 24.12833. Michigan adopts by reference the standard 165 line policy known as the “Michigan Standard Policy.” Insurers are by statute allowed to write actual cash value policies allowing for depreciation. MCL 500.2826; MSA 24.12826 or replacement cost policies which indemnify the insured for the difference between actual cash value and the cost to replace the property. MCL 500.2827; MSA 24.12827. If the replacement cost of the damaged property exceeds the limits of the replacement cost policy, the insured can receive the amount of replacement cost without actually rebuilding. MCL 500.2827 (3); MSA 24.12827. An insurer may not base a defense under the terms of a fire insurance policy on a breach of warranty occurring before the loss unless the breach contributes to the loss. Losses under fire policies must be paid within 30 days after receipt of proof of the amount of loss, notwithstanding any provision in the contract to the contrary. MCL 500.2836; MSA 24.12836. Certain municipalities within the State of Michigan, by enactment of ordi-

nances may require insurance carriers to deposit 15% of the amount of actual cash value or settlement or judgment with the clerk of that municipality until such time as the property is repaired or demolished. MCL 500.2845; MSA 24.12845.

**Arson.** Arson may be established by circumstantial evidence. The insurer must prove by a preponderance of the evidence that the insured set the fire or caused the fire to be set. *George v. Travelers*, 81 Mich. App. 106, 265 N.W.2d 59 (1978). Michigan recognizes the “Innocent Co-insured” Rule; fraud bars only the claim of the insured that committed fraud. *Williams v. Auto Club Group Ins. Co.*, 224 Mich. App. 313, 569 N.W.2d 403 (1997). Innocent co-insured entitled to recover even if arson proved against another insured, including spouse. *Id.* Innocent co-insured rule also applies to defense of misrepresentation, fraud or concealment. *Borman v. State Farm*, 446 Mich. 482, 521 N.W.2d 266 (1994).

**Appraisal.** If the parties do not agree on the value of the loss, either the insured or the insurer may choose appraisal and ask the court for appointment of an umpire if the parties are unable to agree. Matters of coverage, however, may not be decided by the appraiser but are properly the subject of a declaratory judgment action before a court. *Auto-Owners Ins. v. Kwaiser*, 190 Mich. App. 482, 476 N.W.2d 467 (1991).

**Assignment.** An insurance policy is a personal contract of indemnity. It is not assignable, except with the consent of the insurer. *Hall v. Niagara*, 93 Mich. 184, 53 N.W. 727 (1910). If an insurer receives an assignment of the policy, however, and takes no action to cancel, they may be liable to the assignee. *VanReken v. Allstate*, 150 Mich. App. 212, 388 N.W.2d 287 (1986).

**Cancellation.** The standard policy provides that the policy may be canceled at any time at the request of the insured. The policy may be canceled by the company on 10 days written notice with payment of excess of short rate premium over pro rata premium also refunded.

**Construction of Policy.** Since the Michigan fire policy is a standard policy made mandatory by the Legislature, provisions of a standard fire policy will be impressed on policies even if not actually contained within them. *Dasen v. Frankenmuth Mut. Ins. Co.*, 39 Mich. App. 582, 197 N.W.2d 835 (1972).

**Damages.** Coverage for “damage by fire” extends to damage necessarily following therefrom including soot and smoke. *Freed’s v. American Home*, 305 Mich. 89, 8 N.W.2d 923 (1943). Including water damage to put out fire. *Davis v. INA*, 78 Mich. App. 225, 259 N.W.2d 433 (1977).

Damage to articles inadvertently placed in furnace is not covered by fire policy and it is unnecessary to word policy so as to exclude such contingency. *Harter v. Phoenix*, 257 Mich. 163, 241 N.W. 196 (1932). Loss from explosion and ensuing fire caused by incendiary throwing lighted match into gasoline in building, held caused by hostile fire. *Cole v. United*, 265 Mich. 246, 251 N.W. 400 (1933). Increasing hazard basis for denial of recovery. *Freed's v. American*, 305 Mich. 89, 8 N.W.2d 923 (1943). Insurer not liable from son setting fire if policy excludes expected or intended conduct. *Michigan Millers v. Berry*, 123 Mich. App. 634, 333 N.W.2d 70 (1983). Before insure is liable for difference between actual cash value and replacement cost, insured must actually repair, replace or rebuild home. *Smith v. Michigan Basic*, 441 Mich. 181, 490 N.W.2d 864 (1992). Insureds are not entitled to exemplary damages based upon an insurer's wrongful failure to pay since a prior insurance contract is ordinarily one of a commercial nature. *Riggs v. Fremont*, 85 Mich. App. 203, 270 N.W.2d 654 (1978).

**Examination Under Oath.** A fire insurance policy which grants the insurer the right to have an examination under oath as a condition precedent to bringing a civil action is valid and enforceable. The insured's failure to comply, however, is not generally an absolute bar to recovery, but acts to suspend the right to recovery until the examination is held. *Yeo v. State Farm*, 219 Mich. App. 254, 555 N.W.2d 893 (1996).

**Increase of Hazard.** Ordinarily, the question of whether the insured has increased the risk of loss so as to preclude a claim under the policy is a question of fact. Where evidence clearly establishes an increase of hazard, however, the court may find, as a matter of law, that the hazard was increased. *Cole v. Michigan Mut.*, 116 Mich. App. 51, 321 N.W.2d 839 (1982).

**Insurable Interest.** Vendors and purchasers under land contract have separate and distinct insurable interest. *McCoy v. Continental Ins.*, 326 Mich. 261, 40 N.W.2d 146 (1950). Mortgagors and Mortgagees have insurable interests. *Cole v. Michigan Mut.*, 116 Mich. App. 51, 321 N.W.2d 839 (1982).

**Limitation of Actions.** One-year limitation period in fire insurance policies, which do not contain statutory tolling provision is invalid. *Randolph v. State Farm*, 229 Mich. App. 102, 580 N.W.2d 903 (1998). Limitation period under fire policy one year from date of loss, but tolled from time insured notifies insurer until formal denial of claim. *Id.*

**Mortgage Clause.** Standard policy provides if loss hereunder is made payable, in whole or in part, to designated mortgagee not named herein as insured, such in-

terest in this policy may be canceled by giving to such mortgagee ten days' written notice of cancellation. If insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in form herein specified within 60 days thereafter and shall be subject to provisions hereof relating to appraisal and time of payment and of bringing suit. MCL 500.2833; MSA 24.12833.

**Proof of Loss.** Standard policy requires immediate written notice of loss and furnishing of proof of loss within 60 days. In absence of waiver or extension of time, failure to render proof of loss within 60 days bars action on policy. *Reynolds v. Allstate*, 123 Mich. App. 488, 332 N.W.2d 583 (1983). Denial by insurer that any policy exists waives proof of loss. *Johnson v. Yorkshire*, 224 Mich. 493, 195 N.W. 45 (1923); and where, after investigation, company denies liability, it waives right to proofs of loss. *First State Bank v. National Fire*, 244 Mich. 668, 222 N.W. 116 (1928). Where insurer held policies knowing of loss and thus prevented insured from making proofs, it cannot defend on ground of such failure. *Struble v. National Liberty*, 252 Mich. 566, 233 N.W. 417 (1930). Where adjuster denies liability on behalf of insurer on ground that insured had started fire, proof of loss is waived. *Johnson v. National Fire*, 254 Mich. 126, 235 N.W. 864 (1931); but denial of liability by agent authorized merely to solicit policies is not waiver of proof of loss. *Gambino v. Northern*, 232 Mich. 561, 205 N.W. 480 (1925). False statements in proofs cannot be relied on after adjuster makes compromise adjustment not based on proofs. *Alma v. Springfield*, 268 Mich. 631, 256 N.W. 573 (1934). While standard policy requires proofs to be signed and sworn to by insured, they may be made by agent when insured is insane. *Valisano v. Continental*, 254 Mich. 122, 235 N.W. 868 (1931); is non-resident. *Brunswick v. Northern*, 142 Mich. 29, 105 N.W. 76 (1905); or is critically ill. *Burns v. Michigan Manufacturers*, 130 Mich. 561, 90 N.W. 411 (1902). Time to file suit tolled from time insured gives notice to denial by insurer. *Aldalali v. Uyod's*, 174 Mich. App. 395, 435 N.W.2d 498 (1989).

**Repair.** MCL 500.2826; MSA 24.12826 and MCL 500.2827; MSA 24.12827. Cost to repair is actual cash value of item, unless additional riders for depreciation or replacement are purchased. *Mitchell v. St. Paul*, 92 Mich. 594, 52 N.W. 1017 (1892). A fire insurer may elect to repair under the contract even after they have agreed to submit the fire loss claims to appraisal. *Ijames v. Republic Ins. Co.*, 33 Mich. App. 541, 190 N.W.2d 366 (1971).

**Replacement Value.** Equals cost to replace irrespective of actual cash value. *Fireman's v. Hemley*, 252 F.2d

780 (6th Cir. 1958). See *McCahill v. Commercial Ins.*, 179 Mich. App. 761, 446 N.W.2d 579 (1989).

### HOSPITALS

Records. The hospital medical records are protected under law, disclosure only with patient's consent. MCL 333.20201 (c); MSA 14.15 (20201). Same for mental health records, MCL 330.1748; MSA 14.800 (748), and substance abuse records, MCL 333.6111-.6113; MSA 14.15 (6111-6113), and MCL 333.6521; *Gartner v. Michigan*, 385 Mich. 49, 187 N.W.2d 429 (1971). Identity of roommates of a patient also protected by physician-patient privilege. *Dorris v. Detroit Osteopathic Hosp.*, 220 Mich. App. 248, 559 N.W.2d 76 (1997). HIPAA's requirements are stricter and afford more protection for a patient's health information than Michigan Law and the Michigan Court Rules, so HIPAA controls. *Belote v. Strange*, unpublished opinion per curiam of the Court of Appeals, decided October 25, 2005 (Docket No. 262591).

Immunity. Governmental immunity for public general hospitals abrogated. MCL 691.1407; MSA 3.996 (108). Charitable immunity abolished. *Parker v. Port Huron Hosp.*, 361 Mich. 1, 105 N.W.2d 1 (1960).

Liability. Expert testimony against hospital required. *Warfield v. City of Wyandotte*, 117 Mich. App. 83, 323 N.W.2d 603 (1982). Two-year statute of limitations for hospitals applies in negligence/malpractice claim. *Adkins v. Annapolis Hosp.*, 420 Mich. 66, 360 N.W.2d 150 (1984). Even where claim is for failure to supervise, review privileges, such a claim is the equivalent of a malpractice claim, and therefore, the two-year statute of limitations applies and plaintiff is required to produce expert testimony. *Danner v. Holy Cross Hosp.*, 189 Mich. App. 397, 474 N.W.2d 124 (1991). Those persons involved in peer review are accorded qualified immunity. *Regualos v. Community Hosp.*, 140 Mich. App. 455, 364 N.W.2d 723 (1985). Decision to not appoint a physician to staff is typically not subject to judicial review. *Dutka v. Sinai Hosp.*, 143 Mich. App. 170, 371 N.W.2d 901 (1985).

### HUSBAND AND WIFE

Property. Michigan is a non-community property state. MCL 557.252-254; MSA 26.16 (22-24). Interspousal immunity is abolished. *Hosko v. Hosko*, 385 Mich. 39, 187 N.W.2d 236 (1971).

Michigan is among a minority of states retaining the common law tenancy by entirety. *In Re Grosslight*, 757 F.2d 773 (6th Cir. 1985). Under Michigan law, neither the husband nor the wife acting alone can alienate any interest in property held by both in tenancy by the

entireties nor can creditors of one levy upon such property. *United States v. 44133 Duchess Drive*, 863 F. Supp. 492 (E.D. Mich. 1994).

Premarital Agreements. Antenuptial agreements are not unenforceable as a matter of law, but rather, to determine if valid, the trial court must decide if it was obtained through fraud, duress or mistake, misrepresentation or non-disclosure of material fact or if the contract was unconscionable when executed. *Booth v. Booth*, 194 Mich. App. 284, 486 N.W.2d 116 (1992).

Damages. Recovery on a claim for loss of consortium is contingent on injured spouse's recovery of damages for alleged underlying injury. *Zimmer v. AT&T of MI*, 947 F. Supp. 302 (E.D. Mich. 1994), *aff'd*, 78 F.3d 585 (6th Cir. 1996).

### INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age"; "RELEASE."

Contracts. The Age of Majority Act establishes 18 as the age at which a minor gains legal status as an adult. MCL 722.51, *et seq.*; MSA 25.244 (51). An infant's contract is voidable. *Payette v. Fleischman*, 329 Mich. 160, 45 N.W.2d 16 (1950). Newly born children are automatically covered for 31 days following birth under a parent's disability insurance contract that provides coverage on an expense incurred basis for family members. MCL 500.3611; MSA 24.13611, MCL 500.3403; MSA 24.13403.

Negligence. Minor under the age of seven years old is presumed incapable of committing negligent or criminal acts or intentional torts. *Bragan ex rel. v. Symanzik*, 687 N.W.2d 881 (2004). However, when a minor engages in a dangerous and adult activity, e.g. driving an automobile, he is charged with the same standard of conduct as an adult. *Constantino v. Wolverine Ins. Co.*, 407 Mich. 896, 284 N.W.2d 463 (1979).

Claims Against Parent. Parents may be liable for failing to exercise control necessary to prevent their children from intentionally harming others, but only if they know, or have reason to know, of the necessity and opportunity for doing so. *Zapalski v. Benton*, 178 Mich. App. 398, 444 N.W.2d 171 (1989). Under MCL 600.2913; MSA 27A.2913, a person may bring suit against the parent of an unemancipated minor for malicious destruction of property or for bodily harm up to \$2,500. Parental immunity is abolished; therefore, a child may maintain a lawsuit against her parent for injuries suffered as a result of the alleged ordinary negligence of the parent. *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972).

## LIABILITY INSURANCE

Notice. Failure to give notice within time specified in policy does not preclude coverage where not reasonably possible to comply. MCL 500.3008; MSA 24.13008. Statute does not prohibit claims-made policies. *Stine v. Continental Cas. Co.*, 419 Mich. 89, 349 N.W.2d 127 (1984).

Cancellation. See “CANCELLATION.”

Compromise – Right of Insurer to Settle or Litigate. No statutory provision. Where policyholder settles litigation subsequent to insurer’s improper denial of coverage, coverage may not be contested based upon policy provision prohibiting settlement without insurer consent. *Elliott v. Casualty*, 254 Mich. 282, 236 N.W.2d 782 (1931). When insurer exhibits bad faith in failing to settle claim on behalf of insured, and judgment in excess of policy limits, insurer liable for excess limited to amount collectible from insured. *Frankenmuth v. Keeley, (on re-hearing)*, 436 Mich. 372, 461 N.W.2d 161 (1990); *Wakefield v. Globe*, 246 Mich. 645, 225 N.W. 643 (1929).

Contribution Between Joint Tortfeasors. See MCL 600.2925a; MSA 27A.2925. Insurer’s duty to use good faith in settlement efforts runs to the insured, not injured party. *Reurink Bros. v. Clinton County*, 161 Mich. App. 67, 409 N.W.2d 725 (1987).

Co-operation of Insured in Defense of Action. See *Bernadich v. Bernadich*, 287 Mich. 137, 283 N.W. 5 (1938).

Coverage. See “CONSTRUCTION OF POLICIES.”

Defense of Action. Participation in defense of action by insurer pursuant to terms of policy but after having repudiated liability thereon, does not estop insurer from denying liability in action by insured. *Sargent v. Travelers*, 165 Mich. 87, 130 N.W. 211 (1911); nor in garnishment proceedings by injured party. *Kidd v. Minnesota*, 261 Mich. 31, 245 N.W. 561 (1932), distinguished in *Beals v. Central*, 269 Mich. 477, 257 N.W. 868 (1934). Continuing defense of action after knowledge of facts and without conditional disclaimer estops insurer from relying on breach of conditions of policy. *Beals v. Central*, 269 Mich. 477, 257 N.W. 868 (1934). See also *Standard Acc. v. Carlson*, 271 Mich. 199, 259 N.W. 887 (1935). Insurer relieved where it afforded defense without knowledge of true facts. *Brogdon v. American*, 290 Mich. 130, 287 N.W. 406 (1939). Duty to defend generally controlled by allegations in third-party complaint; extends to actions even arguably within the complaint, and insurer must look beyond four corners of complaint. *Detroit Edison v. Michigan Mut.*, 102 Mich. App. 136, 301 N.W.2d 832 (1980). If complaint drafted

merely to trigger coverage, no duty to defend. *Fremont Mut. v. Wieschowski*, 182 Mich. App. 121, 451 N.W.2d 523 (1989). Criminal conviction admissible to determine defense obligation. *State Farm v. Moss*, 182 Mich. App. 559, 452 N.W.2d 816 (1989). Defense obligation arises when pleadings or other facts known to insurer bring action within policy terms. *Celina Mut. Ins. Co. v. Citizens Ins. Co.*, 133 Mich. App. 655, 349 N.W.2d 547 (1984).

Company abandoned defense of insured; held liable for insured’s expense of conducting own defense. *City Poultry v. Hawkeye*, 297 Mich. 509, 298 N.W. 114 (1941); but no such liability if claim arises out of accepted risk. *Duval v. Aetna*, 304 Mich. 397, 8 N.W.2d 112 (1943). Wrongful failure to defend, insured settles, insurer must pay reasonable good faith settlement. *Alyas v. Gillard*, 180 Mich. App. 154, 446 N.W.2d 610 (1989).

Intentional Acts. Insured assaulted customer, who sued. Insurer refused to defend. Defense owed as injury accidental as to customer. *New Amsterdam v. Jones*, 45 F. Supp. 887 (E.D. Mich. 1942). No coverage where insured pleads guilty to assault. *Burton v. Travelers*, 341 Mich. 30, 67 N.W.2d 54 (1954); *Estate of Halmaghi*, 184 Mich. App. 263, 457 N.W.2d 356 (1990). Plea of nolo contendere improper basis to deny coverage. *Ramon v. Farm Bureau*, 184 Mich. App. 54, 457 N.W.2d 90 (1990).

Misrepresentation. Misrepresentation by insured as to responsibility for accident does not relieve insurer when no prejudice results. *Bernadich v. Bernadich*, 287 Mich. 137, 283 N.W. 5 (1938) and *Leach v. Fisher*, 345 Mich. 65, 74 N.W.2d 881 (1956). Policy void ab initio where material misrepresentation by applicant. Misrepresentation of driving record deemed material. *Keys v. Pace*, 358 Mich. 74, 99 N.W.2d 547 (1959).

Jury. Disclosure of available insurance. Despite acknowledged danger of jury learning that defendant insured, disclosure not reversible error unless improper use of information. *Sutzer v. Allen*, 236 Mich. 1, 209 N.W.918 (1926); *Ward v. DeYoung*, 210 Mich. 67, 177 N.W. 213 (1920); *Deffenbaugh v. Motor Freight*, 254 Mich. 180, 235 N.W. 896 (1931). But see contra, *Darr v. Buckley*, 355 Mich. 392, 94 N.W.2d 837 (1959); *Benmark v. Steffen*, 374 Mich. 155, 132 N.W.2d 48 (1965). Intentional and repeated disclosure to jury of insurance coverage not cured by instruction to disregard said knowledge. *Easton v. Medema*, 246 Mich. 130, 224 N.W. 636 (1929). Reversal appropriate where jury informed of insurance at voir dire. *DeGross v. Clark*, 358 Mich. 274, 100 N.W.2d 214 (1960).

Rights of Injured Party Against Insurer. See “CONSTRUCTION OF POLICY.”

Bankruptcy. Liability insurance must contain provision that insolvency/bankruptcy of insured shall not release insurer from payment. Writ of garnishment may be maintained by injured person against such insurer. MCL 500.3006; MSA 24.13006.

Violation of Law. Where policy provided that insurer not liable for damages while insured's car was being operated in violation of law, recovery barred: (a) when owner driving on wrong side of road without justification, *Ross v. Michigan Mut.*, 224 Mich. 263, 195 N.W. 88 (1923); (b) when operator did not have driver's license. *Zabonick v. Ralston*, 272 Mich. 247, 261 N.W. 316 (1935). But where policy permitted automobile to be driven by any member of insured's family "except that there shall be no liability under this policy unless driver shall comply with the state law," held that provision not applicable to owner. *Pawlicki v. Hollenbeck*, 250 Mich. 38, 229 N.W. 626 (1930). See also *Davis v. Detroit Auto*, 356 Mich. 454, 96 N.W.2d 760 (1959).

Settlement. Prior to trial, insurer shall not settle action brought by third party against insured under commercial liability policy absent 10 days prior notice. MCL 500.2204; MSA 24.12204.

Premiums. Insurer delivering liability policies in Michigan must establish "merit rating plan" to adjust rates for commercial policy using risk management technique implemented by insured. MCL 500.2404; MSA 24.12404.

Intentional Acts. Subjective test whether insured expected or intended injury unless injury certain to follow. *Allstate v. Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989). No coverage where assault with club in robbery attempt. *Secura v. Blotsky*, 182 Mich. App. 637, 452 N.W.2d 899 (1990). See *Freemont v. Wieschowski*, *supra*. Where insured insane, cannot form intent to act intentionally. *Mattson v. Farmers*, 181 Mich. App. 419, 450 N.W.2d 54 (1989). But see *Mirza v. Maccabees*, 187 Mich. App. 76, 466 N.W.2d 340 (1991), no coverage where policy excluded suicide whether sane or insane, if insured intended to take his own life.

Statute of Limitations. Applicable limitations period determined focusing on nature of interest allegedly harmed; crucial question is whether plaintiff seeks damages for injuries to property or person; six-year period applies where damages sought are for injury to plaintiff's financial expectations. *Blue Cross & Blue Shield v. Folkema*, 174 Mich. App. 476, 436 N.W.2d 670 (1988).

Punitive Damages. See "DAMAGES."

## LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Limitation of Time for Commencement of Action. The period of limitation for breach of contract is 6 years. MCL 600.5807; MSA 27A.5807. The period of limitation for death, injury to person or property is 3 years. MCL 600.5805; MSA 27A.5805. The period of limitation for false imprisonment, malicious prosecution, assault and battery is 2 years. MCL 600.5805; MSA 27A.5805. The period of limitation for libel and slander is 1 year. MCL 600.5805; MSA 27A.5805. The period of limitation under the Dram Shop Act is 2 years. MCL 436.1801 (4). A plaintiff seeking damages under the Dram Shop Act must notify defendants within 120 days of entering into an attorney-client relationship. *Id.* The period of limitation on enforcement of judgments, covenants and deeds and mortgages is 10 years. MCL 600.5809; MSA 27A.5809.

Accrual. The claim accrues at the time the wrong is done without regard to when the damage occurs. MCL 600.5827; MSA 27A.5827. The statute does not begin to run until all elements of cause have occurred. *Filcek v. Utica Bldg.*, 131 Mich. App. 396, 345 N.W.2d 707 (1984).

Contractual Limitation. Unambiguous contract provision shortening period of limitations must be enforced as written regardless of reasonableness. *Rory v. Continental Ins. Co.*, 473 Mich. 457, 703 N.W.2d 23 (2005).

Medical Malpractice. Claim accrues at time of act or omission which is basis for claim in tort. Period of limitations for medical malpractice is 2 years from date of accrual. MCL 600.5805; MSA 27A.5805. Action may be commenced within the 2-year period or within 6 months after plaintiff discovers or should have discovered existence of claim. MCL 600.5838; MSA 27A.5838; MCL 600.5838a; MSA 27A.5838 (1). No claim should be brought later than 6 years after date of act or omission for tort except in the case of fraudulent conduct by healthcare professional against claimant, or permanent injury to reproductive system resulting in inability to procreate. MCL 600.5838a; MSA 27A.5838 (1). Statute of limitations in effect at the time of the malpractice applies, irrespective of when discovery occurs. *Marysville v. Pate, Hirn & Bogue, Inc.*, 196 Mich. App. 32, 492 N.W.2d 481 (1992).

Accident and Health Insurance. Standard policy provides no action may be brought prior to 60 days after proofs of loss filed, nor later than 3 years after time for filing proofs of loss. MCL 500.3422; MSA 24.13422.

Fire Insurance. Action must be brought within 1 year after loss or within time specified in policy, whichever is longer. MCL 500.2833; MSA 24.12833. Same provision is made as to Mutual Fire, Cyclone and Hail companies not using standard policy. MCL 500.6864; MSA 24.16864. Standard policy provides that loss is payable 60 days after proof of loss; but absolute denial of liability by adjuster waives benefit of this provision and suit may be commenced immediately. *Popa v. Northern*, 192 Mich. 237, 158 N.W. 945 (1916).

In actions based on foreign claims, apply shortest statute of limitations except that where claimant is Michigan resident, Michigan statute of limitations applies. MCL 600.5861; MSA 27A.5861.

Seven year presumption of death accrues at end of 7 years. MCL 600.5835; MSA 27A.5835.

Statute of limitations for slander of title is one year statute. *Bonner v. Chicago Title Ins. Co.*, 194 Mich. App. 462, 487 N.W.2d 807 (1992).

Tolling. Statute will toll if claim pending. Also, if cause fraudulently concealed, there must be affirmative acts or presentations as silence is not enough. *Lumber v. Siegler*, 135 Mich. App. 685, 355 N.W.2d 654 (1984). After discovery of fraud, the act must be brought within two years. *Walerych v. Isaac*, 63 Mich. App. 478, 234 N.W.2d 573 (1975).

Discovery Rule. MCL 600.5827 precludes use of a broad common-law discovery rule to toll the accrual date of claims for purposes of applying statute of limitations, overruling *Johnson v. Caldwell*, 371 Mich. 368, 123 N.W.2d 785 (1963) and its progeny. *Trentadue v. Gorton*, 479 Mich. 378, 738 N.W.2d 855 (2006).

Waiver. Statute of limitation defense may be waived by failure to plead. *Lothian v. Detroit*, 414 Mich. 160, 324 N.W.2d 9 (1982). Continuation of negotiations by insurer to within less than 30 days from termination of limitation period waives limitation. *Friedberg v. Insurance*, 257 Mich. 291, 241 N.W. 183 (1932). See *Kuhlman v. American Sur.*, 259 Mich. 547, 244 N.W. 158 (1932).

Bonds. Contractual one-year limitation period in surety bond upheld as reasonable. *Camelot Excavating v. St. Paul*, 410 Mich. 118, 301 N.W.2d 275 (1981). *Jackovich v. General Adjustment Bureau*, 119 Mich. App. 221, 326 N.W.2d 458 (1982). See also *Rory v. Continental Ins. Co.*, 473 Mich. 457, 703 N.W.2d 25 (2005) (holding unambiguous contract provision shortening period of limitations must be enforced as written regardless of reasonableness).

## MALPRACTICE

See "ATTORNEYS."

Physician must use ordinary care of physicians of ordinary learning, judgment, and skill in his own or similar localities, *Fortner v. Koch*, 272 Mich. 273, 261 N.W. 762 (1935). Specialist's standard of care not limited to his own or similar localities. Board certified general surgeon is specialist and therefore subject to national standard of care. *Francisco v. Parchment Medical Clinic*, 407 Mich. 325, 285 N.W.2d 39 (1974). Residents may be deemed "specialists" for purposes of determining applicable standard of care. *Gonzalez v. St John Hospital & Medical Center*, 275 Mich. App. 290, 739 N.W.2d 392 (2007). See MCL 600.2912a; MSA 27A.2912 (1) describing standard of acceptable professional practice for general practitioner and specialist. Lay proof comparing defendant's behavior to that of local doctors is not enough. *Naccarato v. Grob*, 384 Mich. 248, 180 N.W.2d 788 (1970). Except in extreme cases, surgeon has no right to operate on child without consent of its parents or guardian, *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935). Physicians working together may be liable for joint acts, *Rodgers v. Canfield*, 272 Mich. 562, 262 N.W. 409 (1935). Physician not liable for ordinary negligence in good faith emergency care at scene, MCL 691.1501, MSA 14.563. Physician's informal communications with treating physician does not establish physician/patient relationship. *Hill v. Kokosky*, 186 Mich. App. 300, 463 N.W.2d 265 (1990). "Occurrence" in medical malpractice policies refers only to the injury not to the separate acts of negligence which resulted in the injury. *Gibbs v. Armovit*, 182 Mich. App. 425, 452 N.W.2d 839 (1990).

Statute of limitations for malpractice now covers all state licensed professionals. Malpractice statute does not apply to newspaper reporters. *Michigan Microtech v. Federated Publications*, 187 Mich. App. 178, 466 N.W.2d 717 (1991). Medical malpractice statute of limitations applies to arbitration. *Nielson v. Barnett*, 440 Mich. 1, 485 N.W.2d 666 (1992).

Medical Malpractice. Claimants and health professionals or facilities may agree in writing to submit claim to binding arbitration. MCL 600.2912g; MSA 27A.2912 (7).

Wrongful Birth. Cause of action for wrongful birth based on physician's failure to warn of birth defects is not recognized in Michigan. *Taylor v. Kurapati*, 236 Mich. App. 315, 600 N.W.2d 670 (1999). Cause exists for failure to diagnose pregnancy. *Rinard v. Biczak*, 177 Mich. App. 287, 441 N.W.2d 441 (1989).

Vicarious Liability. Ostensible agency arises when circumstances cause third party to reasonably rely on

existence of agency. *Sasseen v. Community Hosp.*, 159 Mich. App. 231, 406 N.W.2d 193 (1987). Hospital not liable for negligence of independent contractor physician, unless patient looked to hospital to provide treatment. *Strach v. St. John Hosp.*, 160 Mich. App. 251, 408 N.W.2d 441 (1987). Psychiatric hospital had no special relationship with patient that imposed duty to warn third-party of patient's dangerousness. *Hinkelman v. Borgess*, 157 Mich. App. 314, 403 N.W.2d 547 (1987).

Other Professionals. Shearson Lehman's policy manual is not discoverable as it did not establish a stockbroker standard of care. *Hartmann v. Shearson Lehman*, 194 Mich. App. 25, 486 N.W.2d 53 (1992). Basis of malpractice action against certified public accountants per MCL 600.2962; MSA 27A.2962.

Medical Malpractice Tort Reform, effective April 1, 1994, imposed new procedures and substantive requisites to filing an action. Pre-suit Notice of Intent per MCL 600.2912b; MSA 27A.2912 (2); Affidavit of meritorious action by qualified medical professional per MCL 600.2912d; MSA 27A.2912 (4). Expert witness qualifications per MCL 600.2169; MSA 27A.2169. Affidavit of meritorious defense per MCL 600.2912e. Statute requiring affidavit of meritorious defense in medical malpractice suits does not apply to city medical personnel entitled to governmental immunity. *Costa v. Community Emergency Med. Servs., Inc.*, 475 Mich. 403, 716 N.W.2d 236 (2006).

## NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES."

Generally. See *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977); Premises. *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 614 N.W.2d 88 (2000); Contractors and owners liability. *Hardy v. Monsanto Enviro-Chem Systems, Inc.*, 414 Mich. 29; 323 N.W.2d 270 (1982).

Age. Child may maintain lawsuit against his parent for injuries suffered as result of alleged ordinary negligence of parent, subject to exceptions. *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972).

Assumption of Risk. Abolished as defense in tort cases. Doctrine only applies in employment situations and cases of express contractual assumption. *Felgner v. Anderson*, 375 Mich. 23, 133 N.W.2d 136 (1965).

Nuisance. Doctrine and definitions discussed. *Bluemer v. Saginaw Central*, 356 Mich. 399, 97 N.W.2d 90 (1959); *Galea v. Detroit*, 357 Mich. 333, 98 N.W.2d 503 (1959) and *Hadfield v. Oakland*, 430 Mich. 139, 422 N.W.2d 205 (1988).

Attractive Nuisance. Doctrine discussed. *LeDuc v. Detroit Edison*, 254 Mich. 86, 235 N.W. 832 (1931); *Lyshak v. Detroit*, 351 Mich. 230, 88 N.W.2d 596 (1958).

Attending doctors do not have independent duty to incompetent patient's family to employ reasonable care in consulting with and obtaining their consent prior to any decision with respect to the treatment of the incompetent patient, but only to patient or patient's surrogate decision maker if incompetent. *Young v. Oakland Gen. Hosp.*, 175 Mich. App. 132, 437 N.W.2d 321 (1989).

Comparative Negligence. Adopted in *Placek v. Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979). Jury has discretion to determine percentage of comparative fault whatever the proportion. *Murphy v. Muskegon*, 162 Mich. App. 609, 413 N.W.2d 73 (1987). Comparative negligence available where contributory negligence formerly inapplicable. *Vining v. Detroit*, 162 Mich. App. 720, 413 N.W.2d 486 (1987). Failure to wear seatbelt in violation of statute may be considered evidence of negligence and may reduce recovery of damages arising out of ownership maintenance, or operation of vehicle, but not by more than 5%. MCL 257.710e; MSA 9.2410 (5).

Definition/Duty. A business owner has a duty to exercise reasonable care for protection of business invitee. *Jackson v. White Castle*, 205 Mich. App. 137 517 N.W.2d 286 (1994). No duty to protect trespassers from criminal acts of third parties. *Ellsworth v. Highland Lakes*, 198 Mich. App. 55, 498 N.W.2d 5 (1993).

Emergency Doctrine. As discussed does not apply if emergency resulted from conduct of one seeking to invoke its benefit. *Barringer v. Arnold*, 358 Mich. 594, 101 N.W.2d 365 (1960).

Governmental Immunity. Lower level government officials, employees, agents immune from tort liability if performing discretionary not ministerial act. *Ross v. Consumers Power*, 420 Mich. 567, 363 N.W.2d 641 (1985). Ross applies retroactively to suits commenced on or pending on date of its release, Jan. 22, 1985. *Helmer v. Peoples Hosp.*, 161 Mich. App. 675, 411 N.W.2d 823 (1987). *Charbeneau v. Wayne County Gen. Hosp.*, 158 Mich. App. 730, 405 N.W.2d 151 (1987); *Mauer v. McManus*, 161 Mich. App. 38, 409 N.W.2d 747 (1987). Ross could not be applied retroactively if issue not raised in action prior to decision. *Fulton v. Pontiac Gen. Hosp.*, 160 Mich. App. 728, 408 N.W.2d 536 (1987). Governmental agencies remain liable for injuries caused by dangerous or defective conditions in public buildings. *De-Sanchez v. Genovese-Andrews*, 161 Mich. App. 245, 410 N.W.2d 803 (1987). Non-profit mental health corporations not immune where retained separate corporate ex-



istence except as obligated self by contract. *Jackson v. New Center Mental Health Svc.*, 158 Mich. App. 25, 404 N.W.2d 688 (1987). Breach of contract claim based on same facts as negligence claim not barred by governmental immunity. *Lawrence v. Ingham County Health Dept.*, 160 Mich. App. 420, 408 N.W.2d 461 (1987). Decisions made by professionals concerning diagnosis and discharge of a patient are discretionary and immune. *Canon v. Thumudo*, 430 Mich. 326, 422 N.W.2d 688 (1988).

Pedestrian required to provide notice to commission within 120 days of injury on defective highway no matter how much prejudice suffered when missed deadline by 20 days, overruling *Hobbs v. Dept of State Hwys.*, 398 Mich. 90, 247 N.W.2d 754 (1976), and *Brown v. Manistee Co. Rd. Comm.*, 452 Mich. 354, 550 N.W.2d 215 (1996). *Rowland v. Washentaw County Road Comm.*, 477 Mich. 197, 731 N.W.2d 41 (2007).

Statute of Limitations. Two year period applies to actions involving breach of duty owed by one rendering professional services to a person who has contracted for such services; absent contractual relationship, lawsuit sounds in negligence, not malpractice, and two year period does not apply. *Law Offices of Stockler v. Rose*, 174 Mich. App. 14, 436 N.W.2d 70 (1989). For fraudulent concealment to toll statute, fraud must be manifested by affirmative act or misrepresentations, not merely silence; exception exists where fiduciary relationship gives rise to affirmative duty to disclose. *Bradley v. Gleason Works*, 175 Mich. App. 459, 438 N.W.2d 330 (1989). Statute is tolled during time prior suit is pending between parties of prior action and is not adjudicated on its merits; "pending" includes appellate litigation. *In re forfeiture of \$11,800 in U.S. Currency*, 174 Mich. App. 727, 436 N.W.2d 449 (1989).

Under tort reform, governmental agencies immune from tort liability where engaged in exercise of governmental function, and without regard to ministerial or discretionary nature of conduct, employees and agents immune while in course of employment if acting within scope of authority, agency is exercising governmental function, and conduct is not grossly negligent. MCL 691.1407; MSA 3.996 (107). Immunity not granted to governmental agency with respect to ownership or operation of hospital or county medical care facility, or to employees and agents. MCL 691.1407; MSA 3.996 (107).

Gross negligence. At least "willful and wanton conduct" Elements outlined in *Kieft v. Barr*, 391 Mich. 77, 214 N.W.2d 838 (1974).

Infants. Infant under 7 years of age incapable of contributory (presumably now comparative) negligence

as matter of law. *Baker v. Alt*, 374 Mich. 492, 132 N.W.2d 614 (1965). Standard for minor over 7 years for contributory (presumably now comparative) negligence is issue for jury, commensurate with standard for child of that age, intelligence, etc. *Sarazin v. Johnson Creamery*, 372 Mich. 358, 126 N.W.2d 706 (1964).

Imputed Negligence. Doctrine abrogated as to gratuitous passengers. *Bricker v. Green*, 313 Mich. 218, 21 N.W.2d 105 (1946). Never was applied with respect to minors. *Mullen v. City of Owosso*, 100 Mich. 103, 58 N.W. 663 (1894); *Stabler v. Copeland*, 304 Mich. 1, 7 N.W.2d 122 (1942); city firemen, *McKernan v. Detroit St. R.R.*, 138 Mich. 519, 101 N.W. 812 (1904); occupants of public carriers for hire, *Cuddy v. Horn*, 46 Mich. 596, 10 N.W. 32 (1881); occupants of private carriers for hire, *Lachow v. Kimmich*, 263 Mich. 1, 248 N.W. 531 (1933); employees, *Philip v. Heraty*, 135 Mich. 446, 97 N.W. 963 (1904). Negligence of driver not imputed to owner suing other driver for damage to automobile notwithstanding ownership statute. *Universal Ins. Co. v. Hoxie*, 375 Mich. 102, 133 N.W.2d 167 (1965).

Doctrine also abrogated in suits between parties related as joint venturers or principal and agent. *Bostrom v. Jennings*, 326 Mich. 146, 40 N.W.2d 97 (1949).

Defense remains however, though properly called contributory negligence, in suits by or against third parties, where relationship of principal and agent or joint adventurers exists or right to control is retained. *Parks v. Pere Marquette*, 315 Mich. 38, 23 N.W.2d 196 (1946) (where injured passenger was owner, even though minor); *Bostrom v. Jennings*, 326 Mich. 146, 40 N.W.2d 97. As to joint owner-passenger see *Sherman v. Korff*, 353 Mich. 387, 91 N.W.2d 485 (1958).

Proximate Cause. *Roberts v. Lundy*, 301 Mich. 726, 4 N.W.2d 74 (1942).

Liability of manufacturer because of doctrine of foreseeability and continuing causation, jury question notwithstanding subsequent act of negligence which was potential proximate cause of injury. *Comstock v. General Motors*, 358 Mich. 163, 99 N.W.2d 627 (1959).

Plaintiff may recover from single defendant even though that defendant may not be sole proximate cause of plaintiff's injury; there may be two or more proximate causes of accident. *Barringer v. Arnold*, 358 Mich. 594, 101 N.W.2d 365 (1960).

Premises Liability. Owner has no absolute duty to warn of open and obvious dangers. *Riddle v. McLouth Steel*, 440 Mich. 85, 485 N.W.2d 676 (1992).

Res Ipsa Loquitur. Res Ipsa Loquitur, also termed Doctrine of Circumstantial Evidence of Negligence.

Doctrine discussed in *Indiana Lumbermen's v. Matthew Stores*, 349 Mich. 441, 84 N.W.2d 755 (1957) and *Mitcham v. Detroit*, 355 Mich. 182, 94 N.W.2d 388 (1959). Expert evidence required to establish "but for" negligence when determination is not matter of common understanding. *Jones v. Porretta*, 428 Mich. 132, 405 N.W.2d 863 (1987).

Non-party. Proper for defendant in negligence case to argue liability for accident lies on non-party. *Mitchell v. Steward Oldford*, 163 Mich. App. 622, 415 N.W.2d 224 (1987).

### NO-FAULT

Also see "AUTOMOBILES."

No-Fault act. MCL 500.3101, *et seq.*; MSA 24.13101, *et seq.*

Provisions relating to property damage and motorcycles held to be constitutional. *Shavers v. Kelly*, 402 Mich. 554, 267 N.W.2d 72 (1978), *cert. denied*, 99 S. Ct. 2869. By Special Order, Act held constitutional. *Shavers v. Attorney General*, 412 Mich. 1105, 315 N.W.2d 130 (1982).

Owner of every motor vehicle required to be registered shall maintain insurance for payment of: (a) personal protection benefits; (b) property protection benefits; (c) residual liability insurance. "Motor vehicle" excludes motorcycles and mopeds. Violation of insurance requirements is misdemeanor.

Motorcyclist first looks to policy of owner and driver of striking vehicle for no-fault benefits. MCL 500.3114; MSA 24.13114. Motorcyclist must have residual liability coverage to be eligible for no-fault benefits. MCL 500.3113 (b); MSA 24.13113. Damage to motorcycle sustained in collision with motor vehicle excluded from no-fault property protection insurance coverage. *Murphy v. Dairyland Ins. Co.*, 417 Mich. 602, 339 N.W.2d 628 (1983).

Insurers shall pay benefits for accidental bodily injury including death arising out of ownership, operation, maintenance or use of motor vehicle, for reasonable medical expenses, and to specified degree, for replacement services, work loss and survivor's loss. MCL 500.3105; MSA 24.13105. For exceptions and exclusions, *see* MCL 500.3113; MSA 24.13113 and MCL 500.3106 (2); MSA 24.13106. Priority of insurers to pay benefits, *see* MCL 500.3114 -3115; MSA 24.13114-13115. Reductions, set-offs and reimbursements, *see* MCL 500.3107; MSA 24.13107, 3109; 13109, 3109a; 13109 (1), and 3116; 13116.

Insurer not required to pay for insured's food because insured's ordinary, everyday food expenses were

not expenses for accidental bodily injury within the meaning of the statute where insured's diet was not different from that of an uninjured person and was not part of his treatment plan. *Griffith v. State Farm Mut. Ins. Co.*, 472 Mich. 521, 697 N.W.2d 895 (2005).

Insurers shall pay benefits for property damage occurring to property of others in this state which arises out of ownership, operation, maintenance or use of any insured motor vehicle or driver except for property damage to motor vehicles, their contents and trailers. Benefits limited to \$1,000,000 per accident. MCL 500.3121; MSA 24.13121.

Delay in Payment. Under no-fault insurance act, where court finds insurer unreasonably refused to pay claim or unreasonably delayed in making proper payment, attorney is entitled to reasonable fee for advising and representing a claimant in an action for personal property protection insurance benefits which are overdue. *Bloemsma v. Auto Club Ins. Assoc.*, 174 Mich. App. 692, 436 N.W.2d 442 (1989); MCL 500.3148; MSA 24.13148. Personal protection benefits are overdue if not paid within 30 days after reasonable proof is given by claimant and overdue payments bear simple interest at 12% annually. MCL 500.3142; MSA 24.13142.

Insurers shall provide residual liability insurance covering bodily injury and property damage for tort liability retained in Michigan, and that incurred within U.S., its territories and possessions or Canada equivalent to that required by financial responsibility laws of place where accident occurred. MCL 500.3131; MSA 24.13131.

Right to work loss benefits is subject to common law obligation to mitigate damages. *Marquis v. Hartford Indem.*, 444 Mich. 638, 513 N.W.2d 799 (1994).

Coordination of Benefits. No-fault coordination of benefits clause preempted by ERISA, so no-fault carrier is primary when medical coverage provided by ERISA health plan. *Auto Club v. Frederick & Herrud*, 443 Mich. 358, 505 N.W.2d 820 (1993). Where insured elects to coordinate benefits and also obtains health insurance policy from another insurer containing clause restricting insurer's liability when there is no-fault coverage, policies conflict and health care insurer is primarily liable for insured's medical expenses. *Tousignant v. Allstate*, 444 Mich. 301, 506 N.W.2d 844 (1993). As between two no-fault insurers sharing same priority under statute, liability is shared equally, notwithstanding that one policy covers more vehicles than others. *Citizens Ins. Co. of America v. Clouse*, 176 Mich. App. 138, 439 N.W.2d 304 (1989).

Tort liability arising from ownership, maintenance or use in Michigan of motor vehicle for which required

security is in effect is abolished except for: (a) intentionally caused harm to persons or property; (b) noneconomic losses where injury results in: 1) Death, 2) Serious impairment of body function, 3) Permanent serious disfigurement; MCL 500.3135; MSA 24.13135; (c) allowable expenses, work loss and survivor's loss in excess of those losses paid as personal protection benefits. Serious impairment of body function defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135 (7); MSA 24.13135. Issue of serious impairment is question of law for the court under certain circumstances. MCL 500.3135 (2); MSA 24.13135.

Serious impairment of body function. Statute requires consideration of whether plaintiff "is generally able" to lead his normal life. Although aspects or normal life may be interrupted, if trajectory of plaintiff's normal life is not affected, then injury does not meet "serious impairment" threshold. *Kreiner v. Fischer*, 471 Mich. 109, 683 N.W.2d 611 (2004).

Noneconomic damages may not be assessed in favor of a party who owned and operated the vehicle involved in the accident without required coverages. MCL 500.3135 (2); MSA 24.13135. Noneconomic damages shall be assessed on basis of comparative fault, except no damages for party who is more than 50% at fault. MCL 500.3135 (2); MSA 24.13135. Loss of earning capacity not recoverable. *Oullette v. Kenealy*, 424 Mich. 83, 378 N.W.2d 470 (1985).

Action for personal protection benefits must be commenced within any of following: (a) One year from date of accident; (b) One year from date written notice of injury was given, if given within 1 year from date of accident; or (c) One year from date last payment of personal protection benefits was made by insurer. MCL 500.3145; MSA 24.13145. Minority/insanity tolling provision does not toll the one-year-back limitation for recovery of losses incurred during the year before filing of complaint. *Cameron v. Auto Club Ins. Ass'n*, 718 N.W.2d 784 (2006). Delay of more than one year before discovery of priority insurer did not equitably toll the one-year statute of limitations. *Titan Ins. v. North Point Ins. Co.*, 715 N.W.2d 324 (2006). The one-year-back limitation is not subject to judicial tolling. *Devillers v. Auto Club Ins. Ass'n*, 702 N.W.2d 539 (2005).

Insured's noncooperation not defense in action between injured third-party and insurer. *Coburn v. Fox*, 425 Mich. 300, 389 N.W.2d 424 (1986).

Household Exclusion Invalid. *State Farm v. Sivey*, 404 Mich. 51, 272 N.W.2d 555 (1978). *State Farm v. Shelly*, 394 Mich. 448, 231 N.W.2d 641 (1975).

Uninsured Motorist Benefits. Bicyclist not a pedestrian and not entitled to uninsured motorist benefits. *Cole v. Auto-Owners Insurance Co.*, 272 Mich. App. 50, 723 N.W.2d 922 (2006).

Wrongful Conduct Rule. Wrongful conduct rule does not apply to illegal alien's claim to recover no-fault benefits where illegal presence not proximate cause of accident. *Cervantes v. Farm Bureau General Ins. Co. of Mich.*, 272 Mich. App. 410, 726 N.W.2d 73 (2007).

Domicile. Illegal aliens may be "domiciled in the same household" as insured for purposes of receiving benefits. *Id.*

## PRODUCTS LIABILITY

Growth of Michigan products liability law has progressed to point where manufacturer is liable to all those injured by "defective" product.

Originally, Michigan followed contract theory of recovery. However, privity of contract doctrine was abolished. *Spence v. Three Rivers Builders*, 353 Mich. 120, 90 N.W.2d 873 (1958). Consumer could bring action against manufacturer or anyone else in distributive chain. In *Piercefield v. Remington Arms*, 375 Mich. 85, 133 N.W.2d 129 (1965), court sanctioned recovery by person who could not be categorized as buyer of product under doctrine of implied warranty as imposed by common law, in tort.

On January 2, 1996, Governor Engler signed into law Michigan Senate Bill 344, a Product Liability Reform Act. The Act is consistent with the tort reform legislation signed into law on September 29, 1995, but expands upon the reforms initiated by that legislation and also makes significant changes to Michigan's Product Liability Law. These changes became effective March 28, 1996. Some of the most important changes are discussed below.

1. Limitation of Damages. Non-economic damages in product liability actions are limited to \$280,000, unless the product defect caused death or "permanent loss of a vital body function," in which case the cap is increased to \$500,000. These amounts will be adjusted at the end of each year consistent with the Consumer Price Index. MCL 600.2946a (1); MSA 27A.2946a (1). Significantly, the jury will be required to allocate any award between economic and non-economic damages, but will not be informed of the statutory cap. MCL 600.2946 (a) (2); MSA 27A.2946 (a) (2). The cap would not apply if the jury concludes that the injuries were the result of a defendant's gross negligence, or if the court finds that the defendant had actual knowledge that the product was defective and there was a substantial likelihood that the defect would cause the injury, and the de-

defendant willfully disregarded that knowledge. MCL 600.2946 (a) (3); MSA 27A.2946 (a) (3). The court may decline application of damage cap upon finding “actual knowledge of defect” irrespective of a jury finding of no gross negligence. *Rodriguez v. ASE Industries, Inc.*, 275 Mich. App. 8, 738 N.W.2d 238 (2007). Product liability claim and derivative loss of consortium claim are subject to single statutory cap on noneconomic damages in product liability action. *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526 (2004). Amount of cap is to be determined as of the date the court enters its written judgment, rather than on the date the jury renders its verdict. *Id.*

2. Fault Allocation. The new amendment provides that 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.” MCL 600.2957 (1); MSA 27A.2957 (1). Procedurally, a party must file a motion to amend the pleadings to allege a cause of action against a non-party within 91 days after “identification” of a non-party. MCL 600.2957 (2); MSA 27A.2957 (2). A finding of fault against a non-party does not subject the non-party to liability in that action and shall not be introduced as evidence of liability in another action. MCL 600.2957 (3); MSA 27A.2957 (3).

3. Modified Comparative Negligence for Non-Economic Damages. Michigan no longer is a “pure” comparative fault state. Under prior law, plaintiff could be 99% at fault and collect 1% of his damages, including economic and non-economic (pain and suffering, mental distress, etc.). Economic and non-economic damages were treated the same, regardless of the percentage of plaintiff’s fault. Under the new tort reform, economic and non-economic damages are treated differently. If the plaintiff’s percentage of fault is greater than the combined fault of all other parties and non-parties, plaintiff is barred from recovering non-economic damages. Modified comparative negligence prevents any recovery if the plaintiff’s percentage of fault is greater than 50%. Economic damages would continue to be treated as before, and reduced by the percentage of plaintiff’s comparative fault. Plaintiff could still recover 1% of his economic damages, even if plaintiff was 99% at fault. MCL 600.2959; MSA 27A.2959. It is the court who shall reduce damages by the percentage of comparative fault upon whose injury or death the damages are based. MCL 600.6306; MSA 27A.6356.

4. Burdens of Proof. A defendant alleging non-party fault has the burden of proof. MCL 600.2960; MSA 27A.2960. Although the Act does not specifically indicate what the exact burden is, it can be assumed that

it is the general civil burden, i.e., preponderance of the evidence (51% and over).

5. Product Seller Liability. Under prior law, a retailer or distributor of a product could be sued merely for “being in the chain” of the product’s distribution. This was generally done by alleging breach of “implied warranties,” either under the Uniform Commercial Code and/or common (tort) law. These are known as “passive,” as opposed to “active” claims. The Product Liability Reform Act arguably eliminates passive chain of title claims against product sellers. MCL 600.2947 (6); MSA 27A.2947 (6) provides that: In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true: (a) The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person’s injuries; or (b) The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person’s harm.

6. Successor Liability. A successor corporation not held liable for defective products of predecessor corporation if it merely acquires assets and does not explicitly assume liabilities of predecessor. *Foster v. Cone-Blanchard Machine Co.*, 460 Mich. 696, 597 N.W.2d 506 (1999).

7. Key Product Liability Defenses Codified. The Act also codified several key product liability defenses. These codifications are summarized as follows:

State of the Art Defense. Under new Section MCL 600.2946 (2), MSA 27A.2946 (2), a manufacturer or seller is not liable for a “production defect” unless the plaintiff can establish that: (a) The product was not reasonably safe when it left manufacturer’s or seller’s control; and that according to generally accepted production practices at the time the specific production unit left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available which would have prevented the harm without impairing the usefulness or desirability of the product to users, and without creating equal or greater risk of harm to others.

An “alternative production practice” is practical and feasible at the time of production only if the existing technical, medical or scientific knowledge was developed, available, capable of use in the production of the product and economically feasible for use by the manufacturer, i.e., its use would not significantly compromise the product’s usefulness or desirability. *Id.*

**Risk Utility.** MCL 600.2947 (5); MSA 27A.2947 (5) now provides that manufacturers and sellers are not liable for an inherent characteristic of a product that is commonly recognized by a person with ordinary knowledge in the community and that cannot be eliminated without substantially compromising the product's usefulness or desirability.

**Sophisticated User.** The sophisticated user defense pertains to claims against manufacturers for failing to warn of a product's potential hazards. Pursuant to the statute, a manufacturer is not liable for inadequate warnings if the product is provided to the claimant by a sophisticated user. This defense is not available, however, to manufacturers who fail to meet state or federal statutes or regulations pertaining to warnings. MCL 600.2947 (4); MSA 27A.2947 (4) provides that: Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user. MCL 600.2945 (j); MSA 27A.2945 (j) defines "sophisticated user" as: a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that cause the injury is not a sophisticated user.

A user is "sophisticated" if the user is from a class of professionals that are presumed to be experienced in using and handling the product and who are aware of the dangers associated with such product. *Walker v. Eagle Press & Equip. Co.*, 408 F. Supp. 2d 402 (E.D. Mich. 2005).

**Open and Obvious Doctrine.** This defense pertains to claims or failure to warn about obvious risks in the use of a product. The statute codifies an objective standard for determination of which material risks are obvious. MCL 600.2948 (2); MSA 27A.2948 (2) provides: A defendant is not liable for failure to warn of a material risk that is or should be obvious to a reasonably prudent product user or a material risk that is or should be a matter of common knowledge to persons in the same or similar position as the person upon whose injury or death the claim is based in a product liability action.

**Simple Tool Doctrine.** MCL 600.2947 (5); MSA 27A.2947 (5) provides: A manufacturer or seller is not liable in a product liability action if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is

recognized by a person with the ordinary knowledge common to the community.

**Alteration/Misuse.** An unforeseeable alteration or misuse of a product, after it leaves the manufacturer's custody and control, is a complete defense to any action where the injuries are caused by alteration or misuse. The questions of whether there has been an alteration or misuse, and whether such alteration or misuse was reasonably foreseeable, are now questions of law for the court to decide. MCL 600.2947 (1); MSA 27A.2947 (1) provides, in pertinent part: A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration is reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court. MCL 600.2947 (2); MSA 27A.2947 (2) provides, in pertinent part: A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court. MCL 600.2945 (a); MSA 27A.2945 (a) defines "alteration" as: a material change in a product after the product leaves the control of the manufacturer or seller. Alteration includes a change in the product's design, packaging or labeling; a change to or removal of a safety feature, warning or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product. MCL 600.2945 (e); MSA 27A.2945 (e) defines "misuse" as: use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

Strict liability in tort principle has developed under guise of warranty. Michigan products liability law is independent of warranty provisions of Article 2 of UCC. Notice requirements of Code are immaterial, *Wilson v. Modern Mobile Homes*, 376 Mich. 342, 137 N.W.2d 144 (1965), as are disclaimed provisions, *Browne v. Fenestra*, 375 Mich. 566, 134 N.W.2d 730 (1965). In practice, it is not different from strict liability in tort approaches of Section 402A Restatement of Torts (Second).

Defense of comparative negligence is available in case involving negligence in failure to provide adequate safety device in work place where evidence of worker's negligence exists. *Hardy v. Monsanto*, 414 Mich. 29, 323 N.W.2d 270 (1982). *But see revised and adopted* MCL 600.2959; MSA 27A.2959 (effective March 28, 1996) (*discussed supra*). The 5% cap on comparative negligence for failure to wear seatbelt, MCL 257.710 (e) (6); MSA 9.2410 (5) (6), does not apply to product liability actions. *Klinke v. Mitsubishi Motors*, 458 Mich. 582, 581 N.W.2d 272 (1998).

Test for determining whether product is unreasonably dangerous is whether risk is unreasonable in light of foreseeable risk of injury. *Owens v. Allis-Chalmers*, 414 Mich. 413, 326 N.W.2d 372 (1982). Pure negligence, risk utility test adopted in defective design products liability actions. *Prentis v. Yale*, 421 Mich. 670, 365 N.W.2d 176 (1985).

Duty to Warn. A manufacturer has no duty to warn of a material risk associated with the use of a product if the risk: 1) is obvious, or should be obvious, to a reasonably prudent product user, or 2) is or should be a matter of common knowledge to a person in the same or a similar position as the person upon whose injury or death the claim is based. The statute establishes an objective standard. MCL 600.2948 (2).

One who supplies a dangerous product to another through a third party has duty to warn ultimate user of product's danger if 1) product is defective or dangerous, 2) supplier has no reason to believe user will realize its defective or dangerous condition, and 3) supplier cannot reasonably rely on purchaser/employer to warn ultimate user of dangers. *Tasca v. G.T.E. Corp.*, 175 Mich. App. 617, 438 N.W.2d 625 (1989). A manufacturer of dangerous products has duty to warn of foreseeable misuse. *Shipman v. Fontaine Truck*, 184 Mich. App. 706, 459 N.W.2d 30 (1990). No duty to warn of obvious dangers of a non-dangerous product. *Spaulding v. Lesco*, 182 Mich. App. 285, 451 N.W.2d 603 (1990). Retailer does not have a legal duty to protect a member of the general public from the intentional criminal act of another arising out of the misuse of a product that is neither dangerous nor defective. *Buczowski v. McKay*, 441 Mich. 96, 490 N.W.2d 330 (1992). Manufacturer is held to knowledge of expert with respect to dangers associated with intended or foreseeable use of product. *Bordeaux v. Celotex Corp.*, 203 Mich. App. 158, 511 N.W.2d 899 (1994). Manufacturer of a simple tool has no duty to warn of open and obvious dangerous characteristics. *Adams v. Perry Furniture*, 198 Mich. App. 1, 497 N.W.2d 514 (1994). See also, statutory enactments regarding "simple tool" and "open and obvious" doctrines, *supra*;

MCL 600.2947 (5); MSA 27A.2947, MCL 600.2948 (2); MSA 27A.2948.

With regard to duty-to-warn claim asserted by parents of 13-year-old boy who was paralyzed after he dove into above-ground swimming pool, the "open and obvious danger" rule regarding such pools applies to minors. *Mallard v. Hoffinger Inds., Inc.*, 210 Mich. App. 282, 533 N.W.2d 1 (1995), *vacated in part*, 451 Mich. 884, 549 N.W.2d 573 (1996), *aff'd on remand*, 222 Mich. App. 137 (1997). The court concluded that defendants had no duty to design safety features to protect users from injuries sustained from striking the bottom of their pools. *Id.* Question of whether product-connected danger is obvious is objective one that focuses on typical pool user, and it is not necessary that user understand precise nature of every possible injury that might result from diving into above-ground pool. *Mallard* at 210 Mich. App. 282. The court also concluded that defendants had no duty to design safety features to protect users from injuries sustained from striking the bottom of their pools.

Product manufacturer and seller had no duty to warn mother of minor of material risk involved with ingesting and inhaling product because risk was obvious to reasonably prudent person. *Greene v. A.P. Products, LTD*, 475 Mich. 502, 717 N.W.2d 855 (2006).

Defective Design. When theories of negligence and implied warranty are both premised on an allegedly improper design of a product, legal elements of the two are same. Similar rule prevails in context of claim that manufacturer breached duty to give warning. *Reeves v. Cincinnati*, 176 Mich. App. 181, 439 N.W.2d 326 (1989).

"Open and obvious" danger associated with use of product that is "simple tool" will obviate manufacturer's products liability duty to warn and/or protect. *Treadway v. Smith & Wesson Corp.*, 950 F. Supp. 1326 (E.D. Mich. 1996). In Michigan, "open and obvious danger" rule applies in both failure to warn and design defect products liability cases where the product is a simple tool. *Id.* That rule, which relieves manufacturers of liability on certain design defect and failure to warn claims, recognizes that any product, regardless of its type or design, is capable of producing injury, and that no manufacturer is required to make his product accident-proof or fool-proof. *Id.* In applying the rule, the court does not perform a risk-utility test where plaintiff alleges design defect negligence claim against manufacturer of a simple tool. *Id.* Michigan's "open and obvious danger" rule, therefore, precluded handgun manufacturer's liability on design defect and failure to warn claims asserted by mother whose son was killed when his 14-year-old friend fired loaded gun. *Id.*

Breach of Implied Warranty. Claim for breach of implied warranty of merchantability does not require showing of fault. *Siedlik v. Stanley Works, Inc.*, 205 F. Supp. 2d 762 (E.D. Mich. 2002).

### RELEASE

See Law Digest Tables.

Release from liability requires only nominal consideration. *Cochran v. Ernst & Young*, 758 F. Supp. 1548 (E.D. Mich. 1991). Scope of contract governed by parties' intent as expressed in release; if unambiguous, plain, ordinary meaning applied. *Rinke v. Automotive Moulding Co.*, 226 Mich. App. 432, 573 N.W.2d 344 (1997).

Settlement with and discharge of one or more joint tortfeasors does not impair right to collect balance of claim from other joint tortfeasors, if certain requirements met. MCL 600.2925d; MSA 27A.2925 (4). *Larabell v. Schuknecht*, 308 Mich. 419, 14 N.W.2d 50 (1944). A release of one tortfeasor does not release other tortfeasors unless the terms of the release so provide. *Industrial Steel v. Erie State Bank*, 167 Mich. App. 687, 423 N.W.2d 317 (1988). Where no fraud was practiced in obtaining release given in consideration of payment of sum of money recited therein in settlement of claim for injuries, it is conclusive and cannot be set aside on ground that claimant did not read it. *Crawley v. Studebaker*, 183 Mich. 462, 149 N.W. 1019 (1914). But where release evidences settlement which party did not intend to make and was obtained through fraud and deceit, return of money paid need not be tendered before suit on original cause of action. *Barriger v. Ziegler*, 241 Mich. 83, 216 N.W. 417 (1927). Settlement upon advice of own physician held not to constitute fraud on part of insurer. *Welch v. Citizens*, 285 Mich. 82, 280 N.W. 118 (1938). Insured's release of third person from all liability for fire damage "in excess of sums previously received from insurance companies" saves insurer its right of action, but its assignee can only recover amount paid to insured. *Olshove v. Pere Marquette*, 245 Mich. 369, 222 N.W. 771 (1929).

Release is not fairly made and is invalid if the releasor was dazed, in shock, or under influence of drugs, or where the nature of the instrument was misrepresented; misrepresentations must have been made with intent to mislead or deceive in order to rescind release. *Paterek v. 6600 Ltd.*, 186 Mich. App. 445, 465 N.W.2d 342 (1990). Release set aside for mutual mistake as to extent of injury. *Ryan v. Alexy*, 373 Mich. 50, 127 N.W.2d 845 (1964). Illiterate plaintiff signed release, for \$500 in hospital, set aside as question of fact. *Romero v. King*, 368 Mich. 45, 117 N.W.2d 119 (1962).

Release for disputed double indemnity, where given on payment of conceded single indemnity, held valid. *Holmes v. Bankers Life*, 271 Mich. 460, 260 N.W. 747 (1935). Release given by insured constitutes no defense as against insurer in action to enforce its right of subrogation against tortfeasor where tortfeasor has knowledge that insured settled with insurer. *Wolverine v. Klomparens*, 273 Mich. 493, 263 N.W. 724 (1935).

By Infant. Payment of judgment to guardian ad litem of infant plaintiff is release. *Baker v. Pere Marquette*, 142 Mich. 497, 105 N.W. 1116 (1905). Payment of judgment entered by consent of guardian ad litem of infant, without investigation and approval by Circuit Judge appointing him, is not release. *Palazzolo v. Verdier*, 234 Mich. 547, 208 N.W. 677 (1926); but settlement made by general guardian under order duly entered by Probate Court cannot be attacked for want of finding settlement to be for best interests of infant. *Ombrello v. Duluth*, 252 Mich. 396, 233 N.W. 357 (1930); nor for fraud, except by direct attack. *Petranek v. Minneapolis*, 240 Mich. 655, 216 N.W. 467 (1927). Release made for minor by general guardian acting under order of Probate Court, but not under order of Circuit Court, is void when guardian ad litem appointed by Circuit Court was prosecuting action on claim even though general guardian and guardian ad litem were same person. *Dudex v. Sterling*, 237 Mich. 470, 212 N.W. 92 (1927). See MCR 2.420 for settlements for minors procedures.

Validity. To be valid, a release must be fairly and knowingly made and turns on intent of the parties. *Paterek v. 6600 Ltd.*, 186 Mich. App. 445, 465 N.W.2d 342 (1990). Valid if knowingly made; invalid if duress, misrepresentation, or over-reaching. *Brooks v. Holmes*, 163 Mich. App. 413, N.W.2d 688 (1987). Not binding unless made in open court or in writing and subscribed by party offered against. *Metrolife v. Goolsby*, 165 Mich. App. 126, 418 N.W.2d 700 (1987). Challenging party has burden to prove invalidity. *Gortney v. Norfolk & Western Ry. Co.*, 216 Mich. App. 535, 549 N.W.2d 612 (1996).

For setting aside release or avoiding operation of a release, preponderance of the evidence is the standard of proof. *Binard v. Carrington*, 163 Mich. App. 599, 414 N.W.2d 900 (1987). See also, *Denton v. Utley*, 350 Mich. 332, 86 N.W.2d 537 (1957); *Hartford v. Norris*, 363 Mich. 279, 109 N.W.2d 790 (1961), and *Leahan v. Stroh*, 420 Mich. 108, 359 N.W.2d 524 (1984). Tender of consideration recited in the agreement must be made prior to or simultaneous with filing suit where suit is subsequently brought in contravention of agreement. *Stefanac v. Cranbrook, (after remand)* 435 Mich. 155, 458 N.W.2d 56 (1990). See also, *Rinke v. Automotive Moulding Co.*, 226 Mich. App. 432, 573 N.W.2d 344



(1997) (challenging party must tender consideration received before attempting to repudiate release).

### REPRESENTATIONS AND WARRANTIES

False statements in application for any disability insurance may not bar recovery thereunder unless statement materially affected acceptance of risk or hazard assumed by insurer. MCL 500.2218; MSA 24.12218. A misrepresentation is a false representation of facts made as an inducement to contract. MCL 500.2218 (2); MSA 24.12218. Only fraudulent misstatements void policy 3 years after issuance. MCL 500.3408; MSA 24.13408.

Statements made by insureds in application, in absence of fraud, are representations, not warranties. MCL 500.4434; MSA 24.14434. Burden is on insurer to show intent to deceive, or materiality of misrepresentations. *Szlapa v. Nat'l Travelers Life Co.*, 62 Mich. App. 320, 233 N.W.2d 270 (1975).

To void policy because insured misrepresented a material fact, it must be shown that 1) misrepresentation was material; 2) it was false; 3) insured knew it was false at time of representation or recklessly made without knowledge of truth; and 4) insured made representation with intention that insurer would act on it. *Rayis v. Shelby Mut. Ins. Co.*, 80 Mich. App. 387, 264 N.W.2d 5 (1975). Rescission is justified even if innocent misrepresentation, but party relied on misstatement. *Lash v. Allstate Ins. Co.*, 210 Mich. App. 98, 532 N.W.2d 869 (1995).

Insurer's failure to reserve right to avoid liability in event of material misrepresentation does not preclude insurer from doing so. *Wiedmayer v. Midland Mut. Life Ins. Co.*, 414 Mich. 369, 324 N.W.2d 752 (1982).

Misrepresentation of age in application for accident policy, where applicant was within age limits, will not void policy. *Business Men's v. Marriner*, 223 Mich. 1, 193 N.W. 907 (1923). If representation is material, policy is voided although insured was ignorant of falsity. *National v. Nagel*, 260 Mich. 635, 245 N.W. 540 (1932); *Prudential v. Ashe*, 266 Mich. 667, 254 N.W. 243 (1934). Truth or falsity determined in light of what applicant knew at time of application. *Lipsky v. Washington Nat'l*, 7 Mich. App. 632, 152 N.W.2d 702 (1967). False statements that applicant had not consulted with or been treated by physicians or at any hospital, etc., are material to acceptance of risk and will void policy. *Bell-estri-Fontana v. New York Life*, 234 Mich. 424, 208 N.W. 427 (1926). Failure to state recent and extensive treatment by osteopath where question concerned treatment by "physicians and practitioners" held to warrant cancellation of policy. *Mutual Life v. Geleynse*, 241 Mich. 659, 217 N.W. 790 (1928). Representation that

stimulants were not used in excess held material to acceptance of risk and, if false, voided policy. *Krajewski v. Western*, 241 Mich. 396, 217 N.W. 62 (1928). Claim for fraud waived by acceptance of premium after knowledge of misrepresentation. *New England v. Le Vey*, 264 Mich. 282, 249 N.W. 854 (1933). Where copy of application is set out in policy of life insurance, it is duty of insured to know that representations are true. *Metropolitan v. Freedman*, 159 Mich. 114, 123 N.W. 547 (1909); *Bonewell v. North American*, 167 Mich. 274, 132 N.W. 1067 (1910).

### SERVICE OF PROCESS

See "AUTOMOBILES."

### SUBROGATION

Fire policy. Insurer is subrogated to the insured's right of recovery from other parties. MCL 500.2833 (r); MSA 24.12833. Insurer has interest in damages recovered by insured to extent of payment made even in absence of assignment. *Union v. Detroit*, 178 Mich. 346, 144 N.W. 1033 (1914). But such right extends only to amount recovered by insured which, together with sum paid him on policy, is in excess of his loss. *Washtenaw Mut. Fire v. Budd*, 208 Mich. 483, 175 N.W. 231 (1919). If wrongdoer's executory contract to restore property is not performed, insurer may not recover from insured. *Union v. Cons. Ice.*, 261 Mich. 35, 245 N.W. 563 (1932). Insurer's negligence in accepting risk is no defense against its action in right of assured after subrogation against third party. *U.S. Casualty v. Bagley*, 129 Mich. 70, 87 N.W. 1044 (1901).

MCL 600.2041; MSA 27A.2041 and MCR 2.201 provide that suit must be brought in name of real party in interest. Insurance company paying owner for damages to his automobile was real party in interest and must bring suit. *Heck v. Henne*, 238 Mich. 198, 213 N.W. 112 (1927). Michigan recognizes equitable subrogation in absence of contractual subrogation. *Neal v. Farm Bureau*, 219 Mich. App. 490, 557 N.W.2d 133 (1996).

Insured's destruction of insurer's subrogation rights bars recovery under policy. *Stolaruk v. Central*, 206 Mich. App. 444, 522 N.W.2d 670 (1994).

Landlord's insurer cannot subrogate against tenant absent express lease provisions concerning tenant's liability. *New Hampshire v. Labombard*, 155 Mich. App. 369, 399 N.W.2d 527 (1986).

### SUICIDE

There is a presumption against suicide. *Wirtanen v. Prudential*, 27 Mich. App. 260, 183 N.W.2d 456 (1970); *Stuckum v. Metropolitan*, 283 Mich. 297, 277 N.W. 891



(1938). Presumption against suicide is rebutted. *Dimmer v. Mutual*, 287 Mich. 168, 283 N.W. 16 (1938).

### TORT REFORM

See "MALPRACTICE" and "PRODUCTS LIABILITY."

In 1986 Michigan enacted Public Act. 178, in 1993 Michigan enacted Public Act. No. 78, and in 1996 Michigan enacted Public Act No. 161 and No. 249 to amend and add to the Michigan compiled laws governing medical malpractice and certain personal injury actions.

**Abolishment of Joint Liability.** 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 not joint. MCL 600.2956; MSA 27A.2956. This does not abolish an employer's vicarious liability for an act or omission of the employer's employee. MCL 600.2956; MSA 27A.2956. If an action includes a medical malpractice claim, there still might be some joint liability. See MCL 600.6304 (6) (a); MSA 27A.6304 (6) (a). Joint and several liability also applies if defendant's wrongful conduct is a crime of which gross negligence is an element and defendant is convicted. MCL 600.6312 (a); MSA 27A.6312 (a). Further, joint and several liability still applies if the defendant's wrongful conduct involves alcohol or controlled substance, and defendant is convicted of violating various statutes. MCL 600.6312 (b); MSA 27A.6312 (b).

**Certified Public Accountants.** MCL 600.2962; MSA 27A.2962 establishes three situations in which certified public accountants may be sued in connection with public accounting services: (a) a negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant's client; (b) an act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation; (c) a negligent act, omission, decision or other conduct of the certified public accountant if the certified public accountant was informed in writing by the client at the time of engagement that a primary intent of the client was for the professional public accounting services to benefit or influence the person bringing the action for civil damages. MCL 600.2962; MSA 27A.2962.

**Experts.** In an action for death or injury to person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that decision, the court will examine the opinion and basis for the opinion and consider seven

separate factors set forth in the statute. MCL 600.2955 (1); MSA 27A.2955 (1).

In a malpractice action, these provisions are in addition to, and do not otherwise affect, the criteria for expert testimony provided in the existing malpractice statutes. MCL 600.2955 (3); MSA 600.2955 (3).

Further, a novel methodology or form of scientific evidence will only be admitted into evidence if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field. MCL 600.2955 (2); MSA 27A.2955 (2).

**Intoxicating Liquor.** MCL 436.22; MSA 18.993, repealed by P.A. 1998, No. 58 S 1301, effective April 14, 1998.

MCL 436.1801; MSA 18.1175 (801) provides exclusive remedy for money damages against licensee arising out of selling, giving, or furnishing of alcoholic liquor. MCL 436.1801 (10). Except as otherwise provided, individual who suffers damage or personal injury by minor or visibly intoxicated person by reason of unlawful selling, giving, or furnishing of alcoholic liquor to minor or visibly intoxicated person shall have right of action in his or her name, if unlawful sale is proven to be proximate cause of damage, injury, or death, or spouse, child, parent, or guardian of that individual, against person who by selling, giving, or furnishing alcoholic liquor has caused or contributed to intoxication of person or who has caused or contributed to damage, injury, or death. MCL 436.1801 (3); MSA 18.1175 (801). Plaintiff shall have right to recover actual damages of not less than \$50.00 in each case in which court or jury determines that intoxication was proximate cause of damage, injury or death. *Id.* Action under section shall be instituted within two years after injury or death. Plaintiff shall give written notice to all defendants within 120 days after entering an attorney-client relationship for the purpose of pursuing claim. MCL 436.1801 (4); MSA 18.1175 (801). Failure to give written notice within time specified shall be grounds for dismissal of claim as to any defendants that did not receive that notice unless sufficient information for determining that retail licensee might be liable under this section was not known and could not reasonably have been known within 120 days. *Id.* In event of death of either party, right of action shall survive to or against his or her personal representative. *Id.* in each action by husband, wife, child, or parent, general reputation of elation of husband and wife or parent and child shall be prima facie evidence of relation, and amount recovered by either husband, wife, parent, or child shall be his or her sole and separate property. *Id.* Damages, together with costs of action, shall be recovered in action *Id.* If parents of individual who suffered damage or who was personally injured are entitled to

damages, father and mother may sue separately, but recovery by one is bar to action by other. *Id.* Action under section 1801, against retail licensee shall not be commenced unless minor or alleged intoxicated person is named defendant in action and retained until litigation is concluded by trial or settlement. MCL 436.1801 (5). Licensee subject to provisions of subsection (3) regarding unlawful selling, furnishing, or giving of alcoholic liquor to visibly intoxicated person shall have right to full indemnification from alleged visibly intoxicated person for all damages awarded against licensee. MCL 436.1801 (6). All defenses of alleged visibly intoxicated person or minor shall be available to licensee. MCL 436.1801 (7). In action for unlawful sale of alcoholic liquor to minor, proof that retail licensee or defendant's agent or employee demanded and was shown Michigan driver license or official state personal identification card, appearing to be genuine and showing that minor was at least 21 years of age, shall be defense to action. *Id.* There shall be rebuttable presumption that retail licensee, other than retail licensee who last sold, gave or furnished alcoholic liquor to minor or visibly intoxicated person, has not committed any act giving rise to cause of action under subsection (3). MCL 436.1801 (8). In lawsuit against "second-to-the-last" retail licensee, plaintiff must prove drinker was visibly intoxicated under MCL 436.1801 (3) and, with additional evidence, must also rebut the presumption available to that establishment under MCL 436.1801 (8). *Reed v. Breton*, 475 Mich. 531, 718 N.W.2d. 770 (2006). Alleged visibly intoxicated person shall not have cause of action and person shall not have cause of action pursuant to this section for loss of financial support, services, gifts, parental training, guidance, love, society, or companionship of alleged visibly intoxicated person. MCL 436.1801 (9).

It is an absolute defense in an action for the death of an individual or for injury to 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 was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage. MCL 600.2955a (1); MSA 27A.2955a (1).

"Impaired ability to function due to the influence of intoxicating liquor or 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. The same presumption of impaired

ability to function found in the Michigan Vehicle Code will apply. MCL 600.2955a (2) (b); MSA 27A.2955a (2) (b).

**Malpractice.** Lawsuit may not be filed unless claimant first files "Notice of Intent" to potential defendants. MCL 600.2912b; MSA 27A.2912 (2). Person giving "Notice of Intent" waives medical privilege with respect to anyone involved or events on which claim is based. MCL 600.2912f; MSA 27A.2912 (6). Damages for non-economic loss exceeding \$280,000 are not to be awarded except in three instances when a \$500,000 cap is applicable: 1) injury to brain or spinal cord resulting in total permanent functional loss of one or more limbs, 2) cognitive ability permanently impaired, 3) permanent injury resulting in inability to procreate. Limitation increases annually to reflect consumer price index. MCL 600.1483; MSA 27A.1483. Specialist meeting criteria may testify to standard of care. MCL 600.2169; MSA 27A.2169. Requirement of affidavit of merit signed by qualified expert. MCL 600.2912d; MSA 27A.2912 (4). Defendant may file affidavit of noninvolvement instead of answering. MCL 600.2912c; MSA 27A.2912 (3). Interest not allowed on future damages for complaints filed after October 1, 1986. MCL 600.6013 (1). Interest rate depends on date of filing. MCL 600.6013; MSA 27A.6013. Rejection of bona fide reasonable written offer affects interest rate. *Id.* For torts on or after October 1, 1986 claim accrues at time of act or omission. Action must be commenced within 2 years or 6 months after discovers or should have discovered, but not later than 6 years after date of act or omission unless meet exceptions. MCL 600.5838a (2); MSA 27A.5838 (1) (2).

**Mediation.** Malpractice action shall be mediated. MCL 600.4903; MSA 27A.4903. Civil Tort action in which damages exceed \$10,000 shall be mediated. MCL 600.4951; MSA 27A.4951.

**Frivolous Action or Defense.** Costs and fees to party prevailing against frivolous action or defense. MCL 600.2591; MSA 27A.2591.

**Modified Comparative Negligence.** In an action based upon 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, the trier of fact shall consider the fault of each person, regardless of whether the person is or could have been a party. MCL 600.2957 (1); MSA 27A.2957 (1). If the plaintiff's percentage of negligence is greater than the combined fault of all other parties and nonparties, plaintiff is barred from recovering non-economic damages. Economic damages continue to be treated as before, and reduced by the percent-

age of plaintiff's comparative fault. MCL 600.2959; MSA 27A.2959. Person seeking to establish fault under sections 2957 to 2959 has the burden of proving fault. MCL 600.2960; MSA 27A.2960.

**Personal Injury.** Evidence of collateral source payment admissible to reduce judgment. MCL 600.6303; MSA 27A.6303. Jury must answer special interrogatories if action involves fault of more than one party. MCL 600.6304; MSA 27A.6304. Verdict or judgment must include specific findings of past economic and noneconomic loss, and future damages. MCL 600.6305; MSA 27A.6305. Order of judgment. MCL 600.6306; MSA 27A.6306. If future damages exceed \$250,000, defendant must satisfy judgment by purchase of annuity contract. MCL 600.6307; MSA 27A.6307. Prejudgment interest not allowed on future damages unless contractual. MCL 600.6013; MSA 27A.6013. No interest on future damages for complaints filed after October 1, 1986. *Id.* Rejection of bona fide, reasonable written offer affects interest rate. *Id.*

**Venue.** In an action based upon tort or another legal theory seeking damages for personal injury, property damage or wrongful death, venue is proper in (a) the county in which the original injury occurred and in which either of the following applies: (i) the defendant resides, has a place of business or conducts business in that county or (ii) the corporate registered office of a defendant is located. (b) If a county does not satisfy the criteria above, venue is proper in the county in which the original injury occurred and in which either of the following applies: (i) the plaintiff resides, has a place of business, or conducts business or (ii) the corporate registered office of a plaintiff is located. (c) If a county does not satisfy the criteria under subdivision (a) or (b), venue is proper in a county in which both of the following apply: (i) the plaintiff resides, has a place of business or conducts business in that county or (ii) the defendant resides, has a place of business, or conducts business in that county or has its corporate register office located in that county. (d) If a county does not satisfy the criteria under sections (a), (b) or (c), a county that satisfies the criteria of 1621 or 1627 is a county of proper venue. MCL 600.1629; MSA 27A.1629.

### WAIVER AND ESTOPPEL

Waiver generally occurs where one in possession of right conferred either by law or contract, and knowing attendant facts, does or forbears to do something inconsistent with right or an intention to rely upon right. *Burnham v. Interstate*, 117 Mich. 142, 75 N.W. 445 (1898); *Cook Motors v. Casualty*, 239 Mich. 362, 214 N.W. 212 (1927); *Beaumont v. Commercial*, 245 Mich. 104, 222 N.W. 100 (1928); *Marthinson v. North British*,

64 Mich. 372, 31 N.W. 291 (1887). No waiver where holder does not have knowledge of all of facts, or of true facts. *Jacobs v. Queen Ins. Co.*, 183 Mich. 512, 150 N.W.147 (1914); *Oakland v. American Fidelity*, 190 Mich. 74, 155 N.W. 729 (1916); *Martinek v. Firemen's*, 247 Mich. 188, 225 N.W. 527 (1929). Failure of insurer to furnish forms held not waiver of proof of loss. *Baba v. Mutual*, 280 Mich. 531, 273 N.W. 795 (1937). Knowledge and acts of agent having authority to issue policy may constitute waiver. *Wilds v. Fidelity*, 239 Mich. 396, 214 N.W. 118 (1927); *Cook Motor v. Casualty*, 239 Mich. 362, 214 N.W. 212 (1927); *New York Life v. Abromietes*, 254 Mich. 622, 236 N.W. 769 (1931); *Bryant v. Granite*, 174 Mich. 102, 140 N.W. 482 (1913); *Cummings v. National*, 251 Mich. 105, 231 N.W. 61 (1930); *Pollock v. German*, 127 Mich. 460, 86 N.W. 1017 (1901); *McAfee v. Great American Indem. Co.*, 289 Mich. 143, 286 N.W. 189 (1939). Knowledge of soliciting agent for insurer, having no authority to issue policies, that representations made in application were false, does not constitute waiver of misrepresentations on the part of insurer. *Bonewell v. North Amer.*, 167 Mich. 274, 132 N.W. 1067 (1911). Soliciting agent, having no authority to issue policies, cannot waive express provisions of policy. *Serbinoff v. Wolverine Mut.*, 242 Mich. 394, 218 N.W. 776 (1928); *Henne v. Glens Falls*, 245 Mich. 378, 222 N.W. 731 (1929). Soliciting agent does not have authority to waive provision in policy that action on policy must be commenced within one year. *Barry v. Citizens*, 136 Mich. 42, 98 N.W. 761 (1904); but counsel and manager of company may waive such provision. *Dolsen v. Phoenix*, 151 Mich. 228, 115 N.W. 50 (1908). See also *Towle v. Ionia*, 91 Mich. 219, 51 N.W. 987 (1892). Assertions of defense by adjuster having authority to deny liability estop insurer from thereafter raising other defenses. *Cohen v. London Guar.*, 247 Mich. 226, 225 N.W. 549 (1929).

When company denies liability on specific grounds and in same letter reserves, in blanket form, all other objections, defenses not specifically asserted are waived. *Marthinson v. North British*, 64 Mich. 372, 31 N.W. 291 (1887); *Meirthew v. Last*, 376 Mich. 33, 135 N.W.2d 353 (1965); *Dickinson v. Homerich*, 248 Mich. 634, 227 N.W. 696 (1929); *Morrill v. Gallagher*, 370 Mich. 578, 122 N.W.2d 687 (1963). However, waiver should not be invoked when doing so creates liability contrary to the express provisions of the parties' contract. *First Mercury v. Telephone Alarm Sys.*, 849 F. Supp. 559 (W.D. Mich. 1994). When insurer's act or failure to act does not induce insured to act or refrain from acting to his detriment, no waiver. *Dull v. Royal*, 159 Mich. 671, 124 N.W. 533 (1910). Company's failure to state awareness of facts obtained from sources other than claimant, and claimant not thereby induced to take action, no waiver.

*Burnham v. Interstate*, 117 Mich. 142, 75 N.W. 445 (1898). Unconditional acceptance of past due premiums with knowledge of accident constitutes waiver of non-payment breach. *Pastucha v. Roth*, 290 Mich. 1, 287 N.W. 355 (1939). See also *Cochran v. National*, 261 Mich. 273, 246 N.W. 87 (1933). Insurer asking for additional statement with knowledge that prior statement of damages fraudulent, waives fraud claim. *Veenstra v. Farmers*, 195 Mich. 55, 161 N.W. 824 (1917). When insurer accepts second proof of loss without objection after having rejected first as being insufficient, objections with respect to second proofs waived. *Foiles v. Detroit Fire*, 175 Mich. 716, 141 N.W. 879 (1913). When insurer defends suit for itself and insured without giving notice of intention to claim breach, insurer waives or is estopped from asserting breach. *Standard Acc. v. Carlson*, 271 Mich. 199, 259 N.W. 887 (1935). When facts of action taken are undisputed waiver is question of law. *Marthinson v. North British*, 64 Mich. 372, 31 N.W. 291 (1887). Where facts in dispute, question of fact. *Foiles v. Detroit Fire*, 175 Mich. 716, 141 N.W. 879 (1913).

Acknowledgment by insurer of receipt of notice given under accident and health policy, furnishing forms for proof of loss, acceptance of such proofs, or investigation of any claim, shall not operate as waiver of rights of insurer in defense of any claim. MCL 500.2260; MSA 24.12260.

Generally, equitable estoppel prevents insurer undertaking defense, knowing facts that may preclude liability, from subsequently contesting coverage. *Admiral Ins. v. Columbia Ins.*, 194 Mich. App. 300, 486 N.W.2d 351 (1992); *Multi-States v. Michigan Mut. Ins. Co.*, 154 Mich. App. 549, 398 N.W.2d 462 (1986). Equitable estoppel prevents assertion of otherwise unequivocal right or valid defense. *Grand Trunk Western R.R. v. H.W. Nelson*, 116 F.2d 823 (6th Cir. 1941). Only appropriate where party relies upon conduct calculated to mislead and is prejudiced. *American Home v. Evans*, 589 F. Supp. 1276 (E.D. Mich. 1984); *Tobias v. Tobias*, 345 Mich. 263, 75 N.W.2d 802 (1956). Estoppel improper where invocation would create contract different than one made by parties or contrary to express provisions of contract. *Ruddock v. Detroit Life*, 209 Mich. 638, 117 N.W. 242 (1920).

Estoppel inappropriate to broaden coverage beyond scope of contract. *Lee v. Evergreen*, 151 Mich. App. 281, 390 N.W.2d 183 (1986). Exception where carrier denies coverage, subsequently asserting defenses that could have been decided in underlying action. *Id.* Exception where inequity of forcing insurer to pay on a risk for which it never collected premiums is outweighed by inequity suffered by insured. *Ruddock v. Detroit Life*, 209 Mich. 638, 117 N.W. 242 (1920). Estoppel not available

to plaintiff in stating cause of action. *Harrison v. Calisi*, 121 Mich. App. 777, 329 N.W.2d 488 (1982); *Bellows v. Delaware McDonald's Corp.*, 206 Mich. App. 555, 522 N.W.2d 707 (1994); *Dickerson v. Colgrove*, 100 U.S. 578, 25 L. Ed. 618 (1879). Insurer's failure to defend its insured in underlying suit does not foreclose insurer from showing in declaratory action brought by insurer that it is not liable under policy. *St. Paul Ins. v. Bischoff*, 150 Mich. App. 609, 389 N.W.2d 443 (1986). Insurer estopped to deny coverage if insurer with knowledge of defense to coverage undertakes defense of insured for unreasonable time and fails to notify insured of intention to disclaim liability. *Multi-States Transport v. Michigan Mut. Ins. Co.*, 154 Mich. App. 549, 398 N.W.2d 462 (1986).

Insurer estopped from denying liability where disclaimer untimely; inherent conflict in representation controlled by insurer yet purportedly protecting interests of insured. *Meirthew v. Last*, 376 Mich. 333, 135 N.W.2d 353 (1965). Where insurer undertakes defense without timely notice, estoppel may result from rebuttable presumption of prejudice. *Multi-States v. Michigan Mut. Ins.*, 154 Mich. App. 549, 398 N.W.2d 462 (1986).

## WORKERS' COMPENSATION

### BENEFIT RATE

Average Weekly Wage ("AWW"). MCL 418.371; MSA 17.237 (371) – Standard method of using wages and discontinued fringe benefits (as long as the resulting benefit does not exceed 2/3 of State AWW) does not include social security or MESC taxes or workers' compensation premiums. *Ebmer v. Wayne Village*, 197 Mich. App. 307, 494 N.W.2d 842 (1992).

Where AWW is based on less than 39 weeks of work, a percentage or fraction must be used for the first and last weeks if they were less than full weeks. *Rowell v. Security Steel Processing Co.*, 445 Mich. 347, 518 N.W.2d 409 (1994).

Age 65 Reduction. MCL 418.357; MSA 17.237 (357) – The bar against taking this reduction and coordinating under MCL 418.354; MSA 17.237 (354) does not limit employer's ability to switch serially between the two provisions. *Saraski v. Dexter Davison Kosher Meat & Poultry*, 464 Mich. 257, 627 N.W.2d 293 (2001).

Coordination. MCL 418.354; MSA 17.238 (354); MCL 418.358; MSA 17.237 (358) (MESC). Lump-sum pension payment deemed a "retirement benefit" under Employment Security Act is not exempt from coordination with unemployment compensation because claimant received payment despite fact that it was rolled over into an individual's retirement account. *Koontz v. Ameritech Services, Inc.*, 466 Mich. 304, 645 N.W.2d 34 (2002).

A disability pension plan that was modified since March 31, 1982, pursuant to collective bargaining was “renewed” and therefore subject to coordination under MCL 418.354 (14); MSA 17.237 (354). *Graves v. City of Pontiac (on remand)*, 221 Mich. App. 639, 561 N.W.2d 882 (1997). However, if the disability pension plan makes some provision for receipt of both the pension and workers’ compensation, that may bar coordination. *Lemon v. City of Lansing*, 208 Mich. App. 617, 528 N.W.2d 829 (1995); *Sterner v. McClouth Steel Products*, 211 Mich. App. 354, 536 N.W.2d 225 (1995).

Death Cases. MCL 418.321; MSA 17.237 (321), MCL 418.331; MSA 17.237 (331), MCL 418.335; MSA 17.237 (335), MCL 418.341; MSA 17.237 (341).

For the formula in apportioning death benefits to a partial dependent, see *Lesner v. Liquid Disposal, Inc*, 466 Mich. 95, 643 N.W.2d 553 (2002). For the rules whether a minor may obtain additional benefits beyond 500 weeks, see *Murphy v. Ameritech*, 221 Mich. App. 591, 561 N.W.2d 875 (1997).

Dependency (Disability Cases). MCL 418.353; MSA 17.237 (353) – A spouse earning  $\frac{1}{4}$  or more of the couple’s joint income is not a dependent. *Corbett v. Montgomery Ward & Co.*, 194 Mich. App. 624, 487 N.W.2d 825 (1992).

Dual Employment. MCL 418.372; MSA 17.237 (372); *Lawrence v. Toys R Us*, 453 Mich. 112, 551 N.W.2d 155 (1996).

Favored Work. MCL 418.301 (5) (a); MSA 17.237 (301) – Whether the offer is reasonable and whether the employee’s refusal is reasonable both pose similar issues requiring consideration of all relevant factors. *Pulver v. Dundee Cement Co.*, 445 Mich. 68, 515 N.W.2d 728 (1994); *Price v. City of Westland*, 451 Mich. 329, 547 N.W.2d 24 (1996).

Whether work site is reasonable distance from employee’s residence is determined at time of offer, not time of injury. *Jones-Jennings v. Hutzel Hosp.*, 223 Mich. App. 94, 565 N.W.2d 680 (1997).

“Voluntary quit” and “just cause discharge” principles are valid under this section. *Lee v. Koegel Meats*, 199 Mich. App. 696, 502 N.W.2d 711 (1993); *Brown v. Contech, Div. of Sealed Power Technologies*, 211 Mich. App. 256, 535 N.W.2d 195 (1995); *Dimcevski v. Utica Packing Co.*, 215 Mich. App. 332, 544 N.W.2d 763 (1996).

Going out of business terminates favored work offer. *Derr v. Murphy Motors Freight Lines*, 452 Mich. 375, 550 N.W.2d 759 (1996).

A supervening nonoccupational total disability revives benefits for an employee who has unreasonably refused favored work, e.g., a striking employee. *Nederhood v. Cadillac Malleable Iron*, 445 Mich. 234, 518 N.W.2d 390 (1994).

New Wage Earning Capacity. MCL 418.301 (5) (b)- (e); MSA 17.237 (301) – One case indicates that after 100 weeks of post-injury work, regular work will establish a new wage earning capacity, but favored work cannot do so until 250 weeks. *Wade v. General Motors Corp.*, 199 Mich. App. 267, 501 N.W.2d 248 (1993), *Id. denied*, 444 Mich. 935 (1994).

The compensation rate is determined without regard to whether the employee was skilled or common labor, or labeled as total or partial disability. *Wright v. Vos Steel Co.*, 205 Mich. App. 679, 517 N.W.2d 880 (1994).

One-Time Increase Rule. MCL 418.356 (1); MSA 17.237 (356) – The increase may be based merely on inflation or cost of living. *Matney v. Southfield Bowl*, 218 Mich. App. 475, 554 N.W.2d 356 (1996).

## DISABILITY

Definition. MCL 418.301 (4) MSA 17.237 (301). Employee suffers “disability” under Workers Disability Compensation Act if an injury has resulted in a reduction of the employee’s wage earning capacity. *Sington v. Chrysler Corp.*, 467 Mich. 144, 648 N.W.2d 624 (2002). A person suffers disability if any injury results in a reduction of that person’s maximum reasonable wage earning ability in work suitable to that person’s qualifications and training. *Id.*

Minimum Duration. MCL 418.311; MSA 17.237 (311) – Plaintiff must have seven consecutive days of wage loss to be entitled to wage loss benefits. *Peiffer v. General Motors Corp.*, 177 Mich. App. 674, 443 N.W.2d 178 (1989).

## EVIDENCE AND DISCOVERY

Process and procedure in a workers’ compensation case must be conducted as summarily as possible. MCL 418.853; MSA 17.237 (853). To be entitled to workers’ compensation benefits, a plaintiff must prove by a preponderance of the evidence a continuing work-related disability. *Staggs v. Genesse Dist. Library*, 197 Mich. App. 571, 495 N.W.2d 832 (1993). Admissibility of evidence in a workers’ compensation proceeding is not determined with reference to standards of admissibility applicable to trial courts. *Murdock v. Michigan Health Maint. Org.*, 151 Mich. App. 578, 391 N.W.2d 757 (1986). Hearsay is generally inadmissible. *Cooley v. Ford Motor Co.*, 175 Mich. App. 199, 437 N.W.2d 638 (1988).

## EXCLUSIVE REMEDY

Generally, an injured employee's exclusive remedy for a bodily injury is the workers' compensation act. MCL 418.131; MSA 17.237 (131). Unless an injured employee can show that his employer had actual knowledge that he or she would suffer a specific injury and that the employer disregarded that knowledge, an employee's sole remedy is the workers' compensation act. *LaDuke v. Ziebart Corp.*, 211 Mich. App. 169, 535 N.W.2d 201 (1995). The employee must show that the injury was caused by the deliberate act of his or her employer in willfully disregarding actual knowledge that an injury was certain to occur. *May v. Jefferson Smurfit Corp.*, 945 F. Supp. 1076 (E.D. Mich. 1996).

## INJURY

MCL 418.301 (1), 401 (2) (b); MSA 17.237 (301), (401) – Basic definition is a personal injury arising out of and in the course of employment. Damage to eyeglasses, a cane, etc., is not in itself an injury to the person. *Behl v. General Motors Corp.*, 25 Mich. App. 490, 181 N.W.2d 660 (1970).

“Arising out of and in the course of” does not include serious deviations from work, including some horseplay. *Petrie v. General Motors Corp.*, 187 Mich. App. 198, 466 N.W.2d 714 (1991), fights over non-work issues brought into the workplace, *Devault v. General Motors Corp.*, 149 Mich. App. 765, 386 N.W.2d 671 (1986), or injuries from falling on a hard, level floor where the fall was not caused by work. *Ledbetter v. Michigan Carton Co.*, 74 Mich. App. 330, 253 N.W.2d 753 (1977).

Premises. MCL 418.301 (3); MSA 17.237 (301) – If on the premises, including coming to or leaving work and a reasonable time before or after work, the injury is presumed to be in the course of employment. *Zarka v. Burger King*, 206 Mich. App. 409, 522 N.W.2d 650 (1994).

Premises include a “reasonably direct path” between the worksite and an employee parking lot owned, leased, or maintained by the employer. *Simkins v. General Motors Corp.*, 453 Mich. 703, 556 N.W.2d 839 (1996).

Off-Premises. The general rule, that going to and coming from one's employment is not covered under the Act, is riddled with exceptions including: 1) the employee is on a special mission for the employer, 2) the employer derived a special benefit from the employee's activity, 3) the employer paid for or furnished transportation as part of the employment contract, 4) the travel comprised a dual purpose combining employment-required business needs with personal activity, 5) the

employment subjected the employee to “excessive exposure to the common risk,” and 6) the travel took place as a result of an irregular nonfixed working schedule. *Bush v. Parmenter, Forsythe, Rude & Dethmers*, 413 Mich. 444, 320 N.W.2d 858 (1982).

Controlling Injury Date. Carrier liable for a disability remains liable for differential weekly benefits after later sustained injury with favored work at reduced rates. *Arnold v. General Motors Corp.*, 456 Mich. 682, 575 N.W.2d 540 (1998).

Two Exclusions from coverage: 1) MCL 418.301 (3); MSA 17.237 (301) – injuries incurred in an activity the major purpose of which is social or recreational, see *Nock v. M & G Convoy, Inc. (on remand)*, 204 Mich. App. 116, 514 N.W.2d 200 (1994), and 2) MCL 418.305; MSA 17.237 (305) – injuries due to intentional and willful misconduct.

## JURISDICTIONAL ISSUES

Employee. Basic definition in MCL 418.161 (1) (k); MSA 17.237 (161) is a person in the service of another under any contract of hire, thus excluding the true volunteer. An independent contractor is excluded on the principle that he is an employer (MCL 418.161 (1) (m); MSA 17.237 (161)). Questions about employee status are resolved by the “economic reality” test. *Hoste v. Shanty Creek Mgmt., Inc.*, 459 Mich. 561, 592 N.W.2d 360 (1999). Rather, MCL 418.161 (b); MSA 17.237 (161) controls inquiry. *Id.*

Out-of-State Injury. MCL 418.845; MSA 17.237 (845) – Contrary to the language of this section, Michigan residence is not required if the employee's contract for hire was made in Michigan with a Michigan employer. *Boyd v. WG Wade Shows*, 443 Mich. 515, 505 N.W.2d 544 (1993).

## SPECIAL PROOF REQUIREMENTS

Death After Disability. MCL 418.375; MSA 17.237 (375) – If death does not follow immediately after injury, then plaintiff becomes subject to “proximate cause” standard. *Hagerman v. GenCorp Automotive*, 457 Mich. 720, 579 N.W.2d 347 (1988). “Substantial factor” analysis is relevant. *Id.*

Emotional Disability. MCL 418.301 (2); MSA 17.237 (301) – Plaintiff must prove: 1) disability, 2) an actual event, even if misperceived, and 3) that the employment aggravated, accelerated or contributed to the disability in a significant manner. The employer takes its employee with all existing frailties, but non-occupational factors must be considered along with occupational factors. *Gardner v. Van Buren Public Schools*, 445 Mich. 23, 517 N.W.2d 1 (1994).



Heart Conditions. MCL 418.301 (2); MSA 17.237 (301) – Heart or cardiovascular cases require proof of 1) heart damage, 2) a specific work incident or event, and 3) aggravation in a significant manner, considering nonwork factors along with work factors. *Farrington v. Total Petroleum, Inc.*, 442 Mich. 201, 501 N.W.2d 76 (1993).

Other conditions of the Aging Process – MCL 418.301 (2); MSA 17.237 (301). Whether osteoarthritis is a condition of the aging process requires medical proof. *Layman v. Newkirk Electric Ass'n, Inc.* 458 Mich. 494, 581 N.W.2d 244 (1998).

Retiree Presumption. MCL 418.373; MSA 17.237 (373) – Employer has burden to prove that employee terminated “active employment” and is receiving social security or employer-funded pension. *Frasier v. Model Coverall*, 182 Mich. App. 741, 453 N.W.2d 301 (1990); *Brown v. Beckwith Evans Co.*, 192 Mich. App. 158, 480 N.W.2d 311 (1991). Employee has burden to prove inability to do any and all suitable work. *Peck v. General Motors Corp.*, 164 Mich. App. 580, 417 N.W.2d 547 (1987); *McDonald v. Holland Motor Express, Inc.*, 201 Mich. App. 285, 506 N.W.2d 234 (1993).

Specific Loss. MCL 418.361 (2); MSA 17.237 (361) – Loss of industrial use comparable to actual loss of limb is compensable. *Pipe v. Lease Tool & Die Co.*, 410 Mich. 510, 302 N.W.2d 526 (1981). Loss is determined without correction of appliances such as lenses, prosthesis, etc. *Twe v. Hillsdale Tool & Mfg. Co.*, 142 Mich. App. 29, 369 N.W.2d 254 (1985).

Total & Permanent Disability. MCL 418.361 (3); MSA 17.237 (361) – Loss is determined with correction provided by appliances such as lenses or prosthesis. *Hakala v. Burroughs Corp.*, 417 Mich. 359, 338 N.W.2d 165 (1983).

#### SUBROGATION

The lien against a third party recovery is valid against all kinds of damages. In death cases, the lien is valid against all recipients who are directly or indirectly workers’ compensation beneficiaries. *Eddington Estate v. Eppert Oil Co.*, 441 Mich. 200, 490 N.W.2d 872 (1992).

In motor vehicle cases where there is no-fault liability, reimbursement from a third party recovery is available only to the extent the recovery exceeds the no-fault liability (typically medical and 3 years of wage loss). *Great American Ins. Co., v. Queen*, 410 Mich. 73, 300 N.W.2d 895 (1980). The no-fault carrier’s payment

of benefits is not conclusive of the issue whether there is no-fault liability. *McKenney v. Crum & Forster*, 218 Mich. App. 619, 554 N.W.2d 600 (1996).

The lien is not lost by failing to intervene in the third party case. *Wojciechowski v. Central Transport, Inc.*, 187 Mich. App. 116, 466 N.W.2d 372 (1991); *Tucker v. Clare Brothers Ltd.*, 196 Mich. App. 513, 493 N.W.2d 918 (1992).

Co-employees may be sued under the intentional tort exception. *Travis v. Dreis & Krump Mfg. Co.*, 453 Mich. 149, 551 N.W.2d 132 (1996).

#### TIME LIMITATIONS

Claim. MCL 418.381 (1); MSA 17.237 (381) – Claim must be made within 2 years after the later of the date of injury, the date disability manifest itself, or the last day of employment. The time can be tolled in the event of physical or mental incapacity, which means more than mere disability under MCL 418.301 (4); MSA 17.237 (301). *Bates v. Mercier*, 224 Mich. App. 122, 568 N.W.2d 362 (1997).

“Last day of employment” does not mean last day of “work” or “active employment.” *Fitts v. City of Detroit Water Dept. (on remand)*, 218 Mich. App. 558, 554 N.W.2d 65 (1996). Once a claim has been made for workers’ compensation benefits, even for just a closed period, there is no requirement to make a timely second claim. *Bieber v. Keeler Brass Co.*, 209 Mich. App. 597, 531 N.W.2d 803 (1995).

Nursing Care. MCL 418.381 (3); MSA 17.237 (381) – One-year-back rule applies.

Overpayments. MCL 418.833 (2); MSA 17.237 (833) – When accrued benefits have been paid, one-year-back rule starts with date of payment and not the earlier weeks for which benefits were payable. *Ackerman v. General Motors Corp.*, 201 Mich. App. 658, 506 N.W.2d 622 (1993).

Two-Year-Back Rule. MCL 418.381 (2); MSA 17.237 (381) – This rule acts to limit belated requests for medical, as well as for weekly benefits. *Franklin v. Ford Motor Co.*, 197 Mich. App. 367, 495 N.W.2d 802 (1992).

Underpayments. MCL 418.833 (1); MSA 17.237 (833) – One-year-back rule does not apply to request for a rate change or correction, *Wozniak v. General Motors Corp. (after rem.)*, 212 Mich. App. 40, 536 N.W.2d 841 (1995), nor to a claim for a different category of benefits that had been paid previously. *Feldbauer v. Cooney*, 205 Mich. App. 284, 517 N.W.2d 298 (1994).

