

MICHIGAN

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

The State of Michigan does not allow the privilege except for limited instances in the hospital context. *Tinman v. Blue Cross & Blue Shield of Michigan*, 176 F.Supp.2d 743, 746 (E.D. Mich. 2001).

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

Michigan does not specifically address the issue of litigation funding, but refers back to its rules of evidence in addressing litigation funding.

Michigan permits 3rd party litigation funding. However, Michigan courts have expressly rejected the doctrine of champerty, thus permitting outsiders to provide financial support to litigants. In addition, in Michigan, courts have held that litigation finance agreements are not regulated by usury law, as long as there is some risk at the time of the agreement that the funder will not be repaid.

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

This issue is governed by MCR 2.305(C), which states:

(C) Place of Examination.

(1) A deponent may be required to attend an examination in the county where the deponent resides, is employed, or transacts business in person, or at another convenient place specified by order of the court.

(2) In an action pending in Michigan, the court may order a nonresident plaintiff or an officer or managing agent of the plaintiff to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the defendant of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.

(3) If it is shown that the deposition of a nonresident defendant cannot be taken in the state where the defendant resides, the court may order the defendant or an officer or managing agent of the defendant to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.

4. What are the benefits or detriments in your State by admitting a driver was in the “course and scope” of employment for direct negligence claims?

A driver acting within the course of scope, creates a cause of action against the employer under the legal theories of respondeat superior and vicarious liability.

When the issue of “course and scope” is not in question, there are not unique benefits or detriments in Michigan. However, it does simplify litigation and allows the employer to better manage the defense of the litigation. It also permits for earlier settlement negotiations.

The detriment is the liability shifts to the employer.

5. Please describe any noteworthy nuclear verdicts in your State?

\$14,450,683 – Estate of Lary Blahnik v. Republic Services, et al. Decedent’s vehicle was broadsided, when Defendant driver failed to stop at a stop sign. The accident resulted in a fatality and it was estimated Mr. Blahnik experienced 15 minutes of pain and suffering. The verdict amount included the sum of \$5,040,000 for Blahnik’s conscious pain and suffering. Kalamazoo County Circuit Court

\$17,810,734 – Vaylma Dorado v. McCoig Concrete Company, LLC, et al. Plaintiff was rear-ended by a cement truck, forcing Plaintiff’s vehicle into a utility pole. Plaintiff suffered injuries to her shoulder, neck, and back as well as a traumatic brain injury. Plaintiff did not seek treatment until 5 months post accident. Plaintiff underwent two anterior and posterior lumbar fusions two years post accident. Wayne County Circuit Court.

6. What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?

On July 2, 2020 Michigan amended its no-fault statutes to allow insureds to cap coverage on medical expenses. It is expected that future litigation under the new statutes will revive the issue of paid versus billed. In the meantime, the standard for liability for medical expenses remain, those charges which are “reasonable and necessary.”

For litigation arising from accidents prior to July 2, 2020, medical expenses are generally not admissible in Michigan in a motor vehicle accident case because the PIP carrier is responsible to pay all reasonable and necessary medical expenses.

Pursuant to the no-fault act, a no-fault insurer is not liable for the amount of any charge that exceeds the healthcare provider's customary charge for a like product, service, or accommodation in a case not involving insurance. Mich. Comp. Laws Ann. § 500.3157.

Currently, there is no standard jury instruction on medical expenses.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

The Affordable Care Act requirement for patients to have access to cost went into effect January 1, 2021. Currently in Michigan, there is not clear case law regarding enforcement of the Act to obtain amounts charged and accepted. There is public access to the Medicare rates online, which some Plaintiff have argues is sufficient.

<https://www.cms.gov/medicare/physician-fee-schedule/search/overview>

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

In Michigan, the Worker’s Disability Compensation Act of 1969 provides the sole and exclusive remedy of an injured. Michigan will apply its workers compensation laws to the injury of a non-resident employee who is injured while in Michigan.

Further, MCLA 600.705 provides seven factors for determining limited personal jurisdiction over individuals.

The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:

- (1) The transaction of any business within the state.
- (2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.
- (3) The ownership, use, or possession of real or tangible personal property situated within the state.
- (4) Contracting to insure a person, property, or risk located within this state at the time of contracting.
- (5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.
- (6) Acting as a director, manager, trustee, or other officer of a corporation incorporated under the laws of, or having its principal place of business within this state.
- (7) Maintaining a domicile in this state while subject to a marital or family relationship which is the basis of the claim for divorce, alimony, separate maintenance, property settlement, child support, or child custody.

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Michigan's rule on pre-suit depositions corresponds to Fed.R. Civ. P. 27.

MCR 2.303 permits Depositions Before Action or Pending Appeal

(A) Before Action.

- (1) Petition. A person who desires to perpetuate his or her own testimony or that of another person, for use as evidence and not for the purpose of discovery, regarding a matter that may be cognizable in a Michigan court may file a verified petition in the circuit court of the county of the residence of an expected adverse party. The petition must be entitled in the name of the petitioner and must show:
 - (a) that the petitioner expects to be a party to an action cognizable in a Michigan court but is presently unable to bring it or cause it to be brought and the reasons why;
 - (b) the subject matter of the expected action and the petitioner's interest in it;
 - (c) the facts sought to be established by the proposed testimony and the reasons for desiring to perpetuate it;
 - (d) the names or a description of the persons that the petitioner expects will be adverse parties and their addresses so far as known; and
 - (e) the names and addresses of the persons to be examined and the substance of the testimony that the petitioner expects to elicit from each.

The petition must ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition for the purpose of perpetuating their testimony.

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

There are no unique spoliation issues regarding vehicle/tractor-trailers. The recommendation is to preserve it until Plaintiff indicates they no longer require it or the statute of limitations has expired. The statute of limitations for a third party claim in Michigan is three (3) years.

Many owners do not want to store their vehicles for that length of time, and risk an adverse inference of spoliation.

In Michigan, if spoliation occurs, whether intentionally or unintentionally, causing the other party to be unfairly prejudiced because it is unable to challenge or respond to the evidence, the trial court has the inherent authority to sanction the culpable party to preserve the fairness and integrity of the judicial system. Generally, where a party deliberately destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it. (Emphasis added) *Johnson v Secretary of State*, 406 Mich 420, 440; 280 NW2d 9 (1979); *Berryman v K mart Corp.*, 193 Mich App 88, 101; 483 NW2d 642 (1992); *Ritter v Meijer, Inc.*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A trial court may exclude the “evidence that unfairly prejudices the other party or an instruction that the jury may draw an inference adverse to the culpable party from the absence of the evidence.” *Bloemendaal v. Town & Country Sports Ctr. Inc.*, 255 Mich.App 207, 212, 659 N.W.2d. 684 (2002). The trial court could in the alternative, dismiss the case for spoliation. “Dismissal of a case is a drastic step. Before imposing such a sanction, the trial court must consider lesser sanctions.” *Citizens Ins Co of America v. Juno Lighting, Inc*, 247 Mich.App 236, 243; 635 NW2d 379 (2001).

The rule in Michigan is that a party has a duty to preserve evidence “[e]ven when an action has not been commenced and there is only a potential for litigation... This duty to preserve evidence includes all evidence “that [a party] knows or reasonably should know is relevant to the [anticipated] action.” *Brenner v. Kolk*, 226 Mich.App 149, 162; 573 NW2d 65 (1997).

11. What is your state’s current standard to prove punitive or exemplary damages and is there any cap on same?

Michigan courts do not permit punitive damages, except as provided by statute. *Jackson Printing Co v Mitani*, 169 Mich App 334; 425 NW2d 791 (1988).

Exemplary damages, on the other hand, are those awarded to compensate for mental anguish, humiliation, outrage or increased injury to the plaintiff’s feelings that he or she suffers due to the defendant’s willful, malicious, or wanton conduct or reckless disregard for the plaintiff’s rights. Exemplary damages are not punitive in nature. Thus, exemplary damages generally are only awarded in the context of intentional torts, slander, libel, deceit, seduction, and other intentional, malicious acts.

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

Currently, there is no consistency among courts in Michigan regarding Zoom trials. Some Court are holding trials via zoom, and some jury trials have been conducted. However, there are no current statewide guidelines mandating Zoom trials.

Most recent guidelines indicate it may be until September 2021, before Courts fully re-open.

13. Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?

Michigan courts do not permit punitive damages, except as provided by statute.