FOR MORE INFORMATION

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Michigan

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

Michigan follows an open, broad discovery policy that permits liberal discovery of any matter not privileged that is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party; but commitment to open and far-reaching discovery does not encompass fishing expeditions. MCR 2.302(B)(1).

Logical relevance is the foundation for admissibility. *People v. VanderVliet*, 444 Mich. 52, 60, 508 N.W.2d 114 (1993). Logical relevance is defined by MRE 402 and MRE 401. MRE 401 defines "relevant evidence" as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

Internal accident reports and crash preventability reports are generally both discoverable and admissible in Michigan. The admissibility of the documents will depend on their relevance and whether they fall under the work-product doctrine or attorney-client privilege. A factor to consider will be whether the document is reflective of a company's internal policies or procedures as opposed to a determination of fault or negligence.

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?

The Michigan Rules of Professional Conduct do not preclude a lawyer from financing litigation costs through a loan from a third-party lending institution provided the lawyer discloses to the client the terms and conditions of the loan and the client consents in a written contingent fee agreement, upon conclusion the client receives a written statement reflecting interest advanced by the lawyer and charged to the client as an expense in the matter, and the lawyer, but not the client, is obligor on the loan. MRPC 1.8(e), RI-168, MRPC 5.4(c) and 1.6; ABA Formal Opinion 93-379.

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

Michigan law lays out very specific guidelines about minors who have suffered an injury. The period allowed to file a suit depends on the age of the child and the type of

injury suffered.

Generally, for personal injuries to a minor, the law allows you to file a claim up to three years from the date of the injury and up to one year after the child's 18th birthday. For wrongful death of a minor, there is a three-year window from the date of the incident to file a claim.

MCR 2.420 et seq. governs the entry of a consent judgment, a settlement, or a dismissal pursuant to settlement in an action brought for a minor or a legally incapacitated individual person by a next friend, guardian, or conservator or where a minor or a legally incapacitated individual is to receive a distribution from a wrongful death claim. Before an action is commenced, the settlement of a claim on behalf of a minor or a legally incapacitated individual is governed by the Estates and Protected Individuals Code.

A proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned, and the judge shall pass on the fairness of the proposal. If the claim is for damages because of personal injury to the minor or legally incapacitated individual, he minor or legally incapacitated individual shall appear in court personally to allow the judge an opportunity to observe the nature of the injury unless, for good cause, the judge excuses the minor's or legally incapacitated individual presence, and the judge may require medical testimony, by deposition or in court, if not satisfied of the extent of the injury.

If the next friend, guardian, or conservator is a person who has made a claim in the same action and will share in the settlement or judgment of the minor or legally incapacitated individual, then a guardian ad litem for the minor or legally incapacitated individual must be appointed by the judge before whom the action is pending to approve the settlement or judgment.

If a guardian or conservator for the minor or legally incapacitated individual has been appointed by a probate court the terms of the proposed settlement or judgment may be approved by the court in which the action is pending upon a finding that the payment arrangement is in the best interests of the minor or legally incapacitated individual, but no judgment or dismissal may enter until the court receives written verification from the probate court, on a form substantially in the form approved by the state court administrator, that it has passed on the sufficiency of the bond and the bond, if any, has been filed with the probate court.

Additionally, If the settlement or judgment requires payment of more than $5,000 to the minor either immediately, or if the settlement or judgment is payable in installments that exceed $5,000 in any single year during minority, a conservator must be appointed by the probate court before the entry of the judgment or dismissal. The judgment or dismissal must require that payment be made payable to the minor's conservator on behalf of the minor. The court shall not enter the judgment or dismissal until it receives written verification, on a form substantially in the form approved by the state court administrator, that the probate court has passed on the sufficiency of the bond of the conservator. If the settlement or judgment does not require payment of more than $5,000 to the minor in any single year, the money may be paid in accordance with the provisions of MCL 700.5102.

If a settlement or judgment provides for the creation of a trust for the minor or legally incapacitated individual, the circuit court shall determine the amount to be paid to the trust, but the trust shall not be funded without prior approval of the trust by the probate court pursuant to notice to all interested persons and a hearing.

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

Michigan recognizes respondeat superior and evidence of direct company negligence as two distinct areas of liability. In Michigan, direct negligence can be alleged, and evidence of direct negligence can be admitted at trial, regardless of the truck company's admitting respondeat superior for the negligent act of the truck driver. See *Elliott v. A.J. Smith Contracting Co*., 358 Mich. 398, 100 N.W.2d 257 (1960).

The well settled law in Michigan allowing both a negligence and vicarious liability claim is based upon a public policy reason to protect the public. Deaths on the highway are "one of [Michigan's] most pressing social problems…" *Id.* Resolution of the issue was necessary to "bring a measure of overdue aid, not only to an understandably perplexed profession but also to Michigan's beset and dismally failing effort to prevent traffic carnage." *Perin v. Peuler*, 373 Mich. 531, 535, 130 N.W.2d 4 (1964) overruled on other grounds by *McDougall v. Schanz*, 461 Mich. 15, 597 N.W.2d 148 (1999) (emphasis added).

A disadvantage of not admitting that a motor carrier is vicariously liable for the fault of its driver is that plaintiff is able to introduce into evidence the prior bad acts or driving record of the driver, which would otherwise be potentially inadmissible. The most cited case on this issue is *Perin v Peuler*, 373 Mich 531, 130 NW2d 4 (1964).

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

Michigan does not recognize spoliation of evidence as a separate tort. *Panich v. Iron Wood Prods. Corp*., 445 N.W.2d 795 (Mich. Ct. App. 1989). However, Michigan has never explicitly refused to consider spoliation of evidence as an actionable tort claim if the right facts were present. *Wilson v. Sinai Grace Hosp*., 2004 WL 915044 (Mich. App. 2004).

Spoliation of evidence is controlled by a jury instruction, M. Civ. J.I.2d 6.01(d), which provides that a trier of fact may infer the evidence not offered in a case would be adverse to the offending party if: (1) the evidence was under the offending party's control; (2) could have been produced by the offending party; (3) that no reasonable excuse is shown for the failure to produce the evidence. When these three elements are shown, a permissible inference is allowed that the evidence would have been adverse to the offending party. However, the trier of fact remains free to determine this issue for itself. *Lagalo v. Allied Corp*., 592 N.W.2d 786, 789 (Mich. Ct. App. 1999). When there is evidence of willful destruction, a presumption arises that the non-produced evidence would have been adverse to the offending party, and when left unrebutted, this presumption requires a conclusion that the unproduced evidence would've been adverse to the offending party. *Trupiano v. Cully*, 84 N.W.2d 747, 748 (Mich. 1957). 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. *Johnson v. Secretary of State*, 406 Mich. 420, 440, 280 N.W.2d 9 (Mich. 1979); *Berryman v. K Mart Corp*., 193 Mich.App. 88, 101, 483 N.W.2d 642 (Mich. 1992); *Ritter v. Meijer, Inc*., 128 Mich.App. 783, 786, 341 N.W.2d 220 (Mich. 1983). It is well settled that only when the complaining party can establish "intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth" can such a presumption arise. *Trupiano v. Cully*, 349 Mich. 568, 570, 84 N.W.2d 747 (Mich. 1957), quoting 20 Am. Jur., Evidence, § 185, p. 191; *Lagalo v. Allied Corp*., 233 Mich.App. 514, 520, 592 N.W.2d 786 (Mich. 1999).

Is the amount of medical expenses actually paid by insurance or others (as opposed to the amounts billed) discoverable or admissible in your State?

Under Michigan's No-Fault Act, an injured person is entitled to recover "allowable expenses" consisting of "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation." MCL 500.3107(1)(a). Under MCL 500.3157(1), insurers may only pay a provider a "reasonable amount" which "must not exceed the amount the [provider] customarily charges for like treatment or training in cases that do not involve insurance." Insurers "must determine in each instance whether a charge is reasonable in light of the service or product provided." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 379; 670 NW2d 569 (2003). Michigan courts have expressly approved an insurer's determination of reasonableness when the insurer reimbursed 100% of a health care provider's charge where that charge did not exceed the highest charge for the same service charged by 80% of other providers rendering the same service. *Id*. at 381-382. Accordingly, the amount of medical expenses paid by insurance can be used to prove whether a charge is reasonable and is both discoverable and admissible at trial. Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

EDR data can be obtained in one of three ways: search warrant, consent of the automobile owner, and obtaining the data from the impounded vehicle. In civil litigation, the EDR is typically obtained via consent of the automobile owner and impound lot (if applicable). Prior to and/or during litigation, an insurance adjuster and/or insurance defense attorney can request the EDR download be performed by an accident reconstruction expert if the vehicle owner agrees and signs a consent form. During litigation, the insurance defense attorney can request the download through a Request for Production of Documents, file a Notice of Vehicle Inspection, and give all parties an opportunity to attend.

What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

For general tort and personal injury cases, there is no cap on compensatory or exemplary damages. Exemplary damages are awardable to compensate a plaintiff 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. See *Peisner v. Detroit Free Press*, 364 N.W.2d 600 (Mich. 1984).

Punitive damages are not recoverable in Michigan. *Gregory v. Cincinnati, Inc*., 450 Mich, 1, 23 n. 31 (Mich. 1995).

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

No, as punitive damages are not recoverable in Michigan. *Gregory v. Cincinnati, Inc*., 450 Mich, 1, 23 n. 31 (Mich. 1995).

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

FMSCRs have been adopted by Michigan pursuant to MCL 480.11a as provided by 49 CFR 329.9. Accordingly,

FMCSR's have been used to help define certain phrases that are not defined in insurance contracts. P*eople v. Yamat*, 475 Mich. 49, 54-58; 714 NW2d 335 (2006). Experts like a truck safety expert are permitted to testify as to the content or applicability of the FMCSRs.

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

Michigan Courts will consider the relationship between the broker or shipper to the motor carrier for purposes of personal injury or wrongful death claims. The extent of the relationship and liability will depend on the language of the specific broker or carrier agreement applicable to the parties involved in the subject accident. The contract will determine, for example, who employs the truck driver and when the transfer of ownership occurs.

Provide your state's comparative/contributory/pure negligence rule.

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, Michigan Courts shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based. (MCL 600.2959).

Plaintiff's claim for pain and suffering and economic loss compensation is "assessed on the basis of comparative fault," meaning that the plaintiff's recovery will be reduced by a percentage equal to the plaintiff's percentage of fault for the auto accident. (MCL 500.3135(2)(b)).

However, a plaintiff will be disqualified from recovering pain and suffering compensation – which is also known as noneconomic loss damages – if plaintiff was "more than 50% at fault" for causing or contributing to the crash. (MCL 500.3135(2)(b)). In this scenario, although disqualified from recovering noneconomic loss damages, plaintiff would still be able to collect economic loss damages - reduced by the amount he or she was at fault.

As noted in M Civ JI 36.15, negligence on the part of the plaintiff does not bar recovery by plaintiff against the defendant for damages for noneconomic loss unless plaintiff's negligence is more than 50 percent. If the plaintiff's negligence is more than 50 percent, your verdict will be for the defendant as to plaintiff's claim for damages for noneconomic loss. Where the plaintiff's negligence is 50 percent or less, the percentage of negligence attributable to plaintiff will be used by the court to reduce the amount of damages for noneconomic loss that you find were sustained by the plaintiff."

Provide your state's statute of limitations for personal injury and wrongful death claims.

For PIP causes of action, the statute of limitation is one (1) year. (MCLA 500.1345). For third party causes of action for injury to person or personal property the statute of limitation is three (3) years. (MCLA 600.5805). For breach of contract actions, the statute of limitations is six (6) years. (MCLA 600.5807).

Michigan law does not provide a separate statute of limitations that applies only to wrongful death lawsuits involving car accidents. Instead, the general 3-year statute of limitations for all personal injury claims applies. (MCL 600.5805(2)).

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

The Michigan Wrongful Death Statute (MCL 600.2922) gives authority to family members of the loved one to file

a lawsuit for compensation for accidental deaths, fatal accidents, or intentional acts. Lawsuits can be brought by a spouse, parent, sibling, child, grandparent, or grandchild. If the decedent left a will, any person named in it as an heir of the estate may also have a right to file a lawsuit. Before a claim may be filed, the family member or heir must first be appointed the personal representative of the decedent's estate. This procedure is done through the probate court in the county where the decedent last resided, had property, or in the county where the death occurred. The personal representative has the authority to file, negotiate, and settle a wrongful death claim.

Is a plaintiff's failure to wear a seatbelt admissible at trial?

Evidence of a failure to wear a seat belt can be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, that negligence shall not reduce the recovery for damages by more than 5%. (MCL 257.710e(8)).

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

The Michigan No-Fault Law makes it clear that any person injured in a car accident without insurance is completely disqualified from recovering no-fault PIP benefits if that person was the owner or registrant of the uninsured motor vehicle that was involved in the accident. (MCL 500.3113).

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

Michigan is one of a dozen or so states that follow a no-fault car insurance scheme. This means injured drivers and passengers must typically turn first to their own personal-injury-protection car insurance coverage to get compensation for medical bills, lost income, and other out-of-pocket losses after a crash, regardless of who might have been at fault. A claim against the at-fault driver is only possible in certain scenarios. Michigan's No-Fault Law will apply to accidents occurring in the State of Michigan.