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The death of alternative liability

By Richard M. Mitchell April 30, 2019

It is the classic law school problem. A hunter is shot in the woods when two of his friends fire their guns. There is no question that both of them performed the same act at the same time, but it is impossible to tell which one actually hit him. Are they jointly and severally liable? Is the injured hunter relieved from the burden of proving the identity of the actual tortfeasor? In Michigan, and several other states, the answer appears to be that the burden still rests squarely with the hunter.

Our firm recently won the dismissal of a case that turned on this interesting legal issue. The plaintiff was allegedly cut at two separate nail salons within a short period of time. She subsequently contracted a virus that she claimed was able to enter her bloodstream due to one of these cuts.

Yet, she was unable to prove, even through expert testimony, which one (if either) caused the actual injury. She argued that she was relieved of this burden of proof through the theory of alternative liability because both defendants allegedly committed the same act. We argued that the injury could have resulted from a different source and, therefore, she could not prove causation. We further argued that the theory of alternative liability is inconsistent with current Michigan law. The court agreed that plaintiff could not satisfy her burden of proof and dismissed the case.

In Michigan, the theory of alternative liability was articulated in *Abel v. Eli Lilly & Company*, 418 Mich. 311 (1984). Under that theory, a plaintiff is relieved of the burden of establishing that a specific defendant was the cause in fact of her injury and allowed to hold all potentially liable defendants jointly and severally liable for that injury. The core foundation of alternative liability is the plaintiff's ability to hold the defendants jointly and severally liable. In Michigan, however, this is no longer the law.

In 1995, the Michigan Legislature enacted sweeping tort reform and, in most cases, eliminated joint and several liability. *Gerling Konzern Allgemeine Versicherungs AG v. Lawson*, 472 Mich. 44 (2005). This means a plaintiff must prove the actions of each defendant and, importantly, the percentage of fault to be allocated to each. In our case, we asserted that the burden of proof on causation cannot be shifted to the defendants through alternative liability because, after tort reform, a plaintiff must prove fault as well as allocation. As the theory is premised on a legal principal no longer recognized under Michigan law, it cannot be used to create a viable cause of action.

In *Napier v. Osmose, Inc.*, 399 F.Supp 811 (WD Mich. 2005), the United States District Court for the Western District of Michigan was asked to decide whether a plaintiff could pursue a claim against three pesticide manufacturers on an alternative liability theory, as plaintiff was not able to prove which defendant made the pesticide that actually caused her injury. The court held that Michigan

law requires an allocation of fault among the defendants, which includes a determination of the extent of the causal relationship between the conduct and the damages claimed.

While the Michigan Supreme Court has not expressly ruled on the continued viability of *Abel, supra*, the language of Michigan's tort reform statute seems to make it logically impossible for that theory and *Abel* to coexist. It would seem to be an issue the Supreme Court will have to address expressly at some point.

Several other states have addressed the theories of alternative and joint liability. At least eight other states have expressly abolished joint liability, which appears to impact the viability of any alternative liability argument. It is an intriguing legal issue that certainly impacts the right of that hunter to collect for his damages.

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