

**STATE OF MICHIGAN
IN THE SUPREME COURT**
(On Appeal from the Michigan Court of Appeals)

RAQUEL RODRIGUEZ,

Plaintiff-Appellee,
and

PACIFIC EMPLOYERS INSURANCE,

Intervening Plaintiff-Appellee.,

v

A.S.E. INDUSTRIES, INC.,

Defendant-Appellant,
and

AMERICAN AXLE & MANUFACTURING
HOLDINGS, INC., and AMERICAN AXLE &
MANUFACTURING, INC., DESIGN SYSTEMS,
INC., INNOVATIVE ENGINEERING, INC., and
PMI MANAGEMENT GROUP, INC.,

Defendants.

Supreme Court
Case No. 133686

Court of Appeals
Case No. 263930

Wayne Circuit Court
Case No. 02-231906-CZ

AMICUS CURIAE BRIEF OF MICHIGAN MANUFACTURERS ASSOCIATION

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STATEMENT OF QUESTIONS INVOLVED

- I. Whether the trial court properly made independent findings in avoidance of the cap on non-economic damages provided for in MCL 600.2946a(1) after the jury had made contrary findings?

Amicus Curiae Michigan Manufacturer's Association answers "No"

- II. Whether the trial court should apportion fault between defendant and American Axle before applying the damages cap

Amicus Curiae Michigan Manufacturer's Association answers "No"

STATEMENT OF INTEREST OF AMICUS CURIAE

Michigan Manufacturers Association (“MMA”) is a business association composed of more than 2,700 Michigan businesses, organized and existing to (1) study matters of general interest to its members, (2) promote its members’ interests, as well as the interests of the general public, in the proper administration of the laws relating to its members, and (3) otherwise promote the general business and economic welfare of Michigan. An important part of MMA’s activities is representing the interests of its members in matters of importance before the courts, Congress, the Michigan Legislature, and state agencies.

This case presents two important questions regarding the application of Michigan’s tort reform legislation to the type of liability commonly faced by manufacturers. As an association of manufacturers, the MMA has a particularly strong interest in ensuring that the tort reform statutes are applied in the manner intended by the legislature. The holding of the trial court and court of appeals in this matter, if adopted by this Court, would unfairly and improperly undermine both the application of damage caps and the policy of fair-share liability allocation between tortfeasors. Simply stated, it would be detrimental to manufacturers to allow statutory provisions that are designed to help the manufacturing community (and this state’s economy as a whole) by imposing limitations on non-economic damages and fairly allocating tort liability to be subverted by the holdings of the lower courts.

On the first point at issue, this Court should reverse the Court of Appeals because nothing in the tort reform statutes authorizes a court to ignore and contradict the jury’s findings of fact. Contrary to the Court of Appeals holding, the statutes at issue would not be rendered nugatory by a reading that respects the jury’s authority to find facts.

On the second point at issue, it would defeat the entire point of both damages caps *and* fair-share allocation of fault/liability to determine the allocation of fault among multiple tortfeasors before applying the cap because it could allow Plaintiff's to recover more than they should under the cap, and it could result in joint liability, which was expressly abolished as part of tort reform.

This Court invited MMA's participation as *amicus curiae* in the order granting leave to appeal. Pursuant to MCR 7.306(D)(1), this brief is timely filed within 21 days after the filing of the appellee's brief.

STATEMENT OF FACTS

MMA adopts and incorporates the statement of facts included in the brief of Defendant-Appellant A.S.E. Industries, Inc. ("ASE").

ARGUMENT

I. The trial court erred in making independent findings in avoidance of the cap after the jury had made contrary findings.

The court of appeals' holding was based, primarily, on its conclusion that a reading of MCL 600.2946a(3) and 600.2949a requiring the court to adhere to the jury's factual findings would render the last clause of MCL 600.2946a(3) a nullity. This conclusion is simply wrong.

On its face, MCL 600.2946(a)(3) is not a nullity because one clause addresses the effect of a specific finding by the trier of fact, and the other clause addresses the effect of a specific finding by the court. Under the statute, if the trier of fact finds gross negligence, then the damages cap does not apply. Likewise, if the court determines the matters set forth in MCL 600.2949a are true, then the damages cap does not apply. Because the two sections apply to separate circumstances (one where a finding is made by the trier of fact and the other where a

determination is made by the court), each *necessarily* has an independent meaning. Therefore, neither clause can be deemed a nullity.

Notably, what MCL 600.2946a(3) does *not* do is address *when* the court may or must make its determination regarding the truthfulness of the matters stated in MCL 600.2949a, or whether, in making a determination of the truthfulness of the matters stated in MCL 600.2949a, the trial court may make a factual determination *contrary* to a factual determination that has already been made by the jury. For purposes of this brief, MMA assumes that a determination by the court that the defendant willfully disregarded actual knowledge of a substantial likelihood of injury is contrary to a finding that the defendant was not grossly negligent. MMA's assumption is based on the fact that the Court itself posed the question in its grant order assuming that "the jury had made contrary findings."¹

MMA's position on the first issue is that, where the statute is either silent or ambiguous on the question of timing and the question of whether the trial court may contradict the jury, this Court should interpret the statute in a manner consistent with the constitutional right to have factual questions resolved by a jury. By concluding that the statute allowed the trial court to

¹ The Court's assumption is justified. Here, the trial court defined gross negligence for the jury as "conduct or failure to act that is so reckless that it demonstrates a substantial lack of concern whether an injury would result." (TR 12/10/04, pp. 54-55, Defendant's Apx 138a-139a). Actual knowledge is defined by statute as "actual knowledge that the product was defective and that there was a substantial likelihood that the defect would cause the injury that is the basis of the action, and the defendant willfully disregarded that knowledge in the manufacture or distribution of the product." MCL 600.2949a. The actual knowledge standard requires a higher level of *mens rea* than the gross negligence standard. In fact, as applied in the Workers' Compensation intentional-tort exception, MCL 418.131(1), a very similar actual knowledge standard is equivalent to, and will support, a finding that an employer committed an intentional tort. Gross negligence does not rise to the level of an intentional tort, and this Court has noted that it is not possible to be both grossly negligent and be acting with intent when committing an act. *Jennings v Southwood*, 446 Mich 125, 131; 521 NW2d 230 (1994) (superseded by statute in *Vine v County of Ingham*, 884 F Supp. 1153, 1162 (WD Mich 1995)). As such, gross negligence is a lesser standard of *mens rea* than actual knowledge, which is more akin to intent.

reach a contrary factual determination *after* the jury rendered its verdict—where the statutory language does not address the question of timing and does not expressly provide that the court may contradict the jury—the court of appeals erroneously made a determination about the legislature’s intent that was not based on the language set forth in the statute. In so doing, the court of appeals ignored its obligation to derive statutory intent solely from the language expressed in the statutes. *See Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 414; 596 NW2d 164 (1999) (holding that “a court should refrain from speculating about the Legislature’s intent beyond the words employed in the statute”).

It is beyond dispute that both MCL 600.2946a(3) and MCL 600.2949a are silent regarding when the trial court is to make the determination of actual knowledge. Textual clues from other tort reform statutes, however, suggest that the determination must be made in advance of the presentation of the case to the jury. In addition to precluding application of the cap on non-economic damages, a finding of actual knowledge under MCL 600.2949a *also* expressly precludes reliance on the sophisticated user defense set forth in MCL 600.2947(4), and the presumption of nonliability set forth in MCL 600.2946(4). Neither of these provisions could be given any practical effect if the key factor determining their applicability were subject to determination *after* the trial and verdict.

A defendant is entitled to “have its defense considered in the jury room, distinguished from the courtroom, in the light of such statutory presumption.” *Garrigan v La Salle Coca-Cola Bottling Co*, 362 Mich 262, 264; 106 NW2d 807 (1961). When the trial court directly or indirectly removes from the jury consideration of a statutory presumption consisting of a defense, “at the very least, there must be clear, positive and credible evidence *opposing* the presumption.” *Id.* Since both the presumption of nonliability and the sophisticated user defense

necessarily must be addressed before the trial or during the presentation of evidence to the jury, it stands to reason that the legislature contemplated that the court's determination of actual knowledge under MCL 600.2949a would occur *before* the presentation of evidence to the jury.

An additional textual clue that the legislature did not intend for the court's determination of actual knowledge to be completely divorced from the jury's factual findings comes from a comparison to the language used in MCL 600.2947(1). There, the legislature specifically provided that considerations about product alteration and the reasonable foreseeability of alteration "are legal issues to be resolved by the court." In other words, the legislature made it absolutely clear that these pseudo-factual questions were not subject to jury determination, but instead were within the sole province of the court. The legislature could have made the same clear pronouncement with respect to the determination of actual knowledge under MCL 600.2949a and MCL 600.2946a(3), but it chose not to do so. It is well-settled that "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

If possible, the statute should also be construed in a manner consistent with the constitution. *Greater Bible Way Temple v City of Jackson*, 478 Mich 373, 408 n 27; 733 NW2d 734 (2007). The Michigan Constitution guarantees the right to trial by jury for civil suits. Const 1963, Art. 1, §14. The right to a jury trial includes the right to have factual questions determined by a jury. *Hughes v John Hancock Mut Life Ins Co*, 351 Mich 302, 310; 88 NW2d 557 (1958).

It is true that this Court has recognized that, in certain circumstances, a trial court may reduce a jury's verdict of damages without violating the right to a jury determination of damages. *Heinz v Chicago Road Investment Co*, 216 Mich App 289, 299-300; 549 NW2d 47 (1996) (a

reduction in jury verdict for the amount a plaintiff receives from a collateral source does not violate the right to a jury trial); *Phillips v Mirac, Inc*, 470 Mich 415; 685 NW2d 174 (2004) (statutory damage caps do not violate right to a jury trial). However, the holding in *Phillips* was based on the reasoning that damage caps do not invade the province of the jury to *determine the facts and the amount of damages incurred*, and that damage caps merely affect the legal consequences of the facts found by the jury after the jury's function has been completed. *Id.* at 431. This reasoning is distinguishable from the case at bar because the trial court's basis for ignoring application of the damages cap was based on a factual finding made contrary to the jury's determination which invaded the province of the jury to resolve issues of fact.

Here, the trial court's application of MCL 600.2946a and MCL 600.2949a resulted in a judgment inconsistent with the factual finding the jury. This is a critical distinction because, as noted, the right to a jury trial requires that questions of fact be resolved by the jury. Where a statute operates to trump a jury's factual findings without a finding that the verdict was against the great weight of the evidence, the constitutional right to a jury trial has been violated. Cf. *Zdrojewski v Murphy*, 254 Mich App 50, 84; 657 NW2d 721 (2002) (dissenting opinion).

This Court has enumerated several situations in which a court may alter a jury's verdict by operation of law, including the use of judgment notwithstanding the verdict, remitter, additur and the application of treble damages under court rule or statute. *Phillips, supra* at 428-29. In each of those situations, however, the court is not determining the facts of the case or determining issues of liability that were submitted to the jury, but is simply applying the law to the facts found by the jury, or determining that the jury's findings were against the great weight of evidence. But in products liability cases the jury *does* determine the level of the defendant's mens rea, which is a factual finding that directly impacts the applicability of the damage caps.

Here, the trial court denied Plaintiff's motion for judgment notwithstanding the verdict, expressly finding that there was sufficient evidence to support the jury's finding that ASE was not grossly negligent, thereby not finding that the jury verdict was against the great weight of the evidence. Then, in the same breath, the trial court trumped the jury's finding that the damage caps would apply by making an independent finding of actual knowledge on the part of ASE. This was done without regard for the jury's determination of the issues and arbitrarily removed the specific resolution of factual questions from the jury in violation of the Michigan Constitution. The Court of Appeals then simply dismissed the significant consequences of the trial court's application and the legislature's framework, by stating that

the Legislature may have established the second basis for avoiding the damages limitation to provide limited authority to the trial court to override the jury's determination of gross negligence. That is, it may have been a legislative choice to allow the trial court to waive the damages limitation, even where a jury concludes that there was no gross negligence.

Rodriguez v ASE Indus, 275 Mich App 8, 13; 738 NW2d 238 (2007). In so holding, the court of appeals failed to consider that the legislature is prohibited from removing from the jury the power to determine the facts of a case under Michigan's constitutional framework.

In sum, the MCL 600.2949a provides an opportunity for the court to make a finding of actual knowledge in advance of the jury. Once the parties decide to submit the question of gross negligence to the jury, then the jury is the arbiter of the facts. But once the jury has resolved the question, it is *finally* resolved, subject to the standard means for avoiding a jury's factual determinations. The jury's conclusion that ASE was *not* grossly negligent answered the question regarding application of the damage cap, mooted any need for a subsequent, contrary resolution from the trial court. For this Court to conclude that the trial court may reach a contrary and specific factual determination after the jury has reached its conclusion ignores the facts (1) that

the statute is silent on the question of *when* the court is entitled to make a finding under MCL 600.2949a; (2) the statute does not expressly authorize a finding contrary to the jury determination or provide that the issue is one of law and, therefore, not tied to the jury's determination; and (3) that construing the statute in the manner asserted by plaintiff would remove a factual question from the jury in a manner inconsistent with the constitutional right to trial by jury.

II. When a damage cap applies, fault must be apportioned *after* application of the cap.

MCL 600.2946(1) sets forth a cap on non-economic damages. The statute does not specify whether the cap is to be applied before or after allocation of fault between the various tortfeasors.² But if the cap were to be applied *after* allocation of fault/liability, the goal of fair-share allocation would be defeated. Because the damages cap statute is silent as to the timing of its application, this Court should construe the statute in a way that does not frustrate the purpose of a different section of the tort reform statutes.

Although MCL 600.2946(1) does not address the timing of its application, it does provide some textual clues that will assist the Court in adopting the correct construction. Most notably, the statute specifically states that the effect of the cap on non-economic damages is to limit “*the total amount* of damages for noneconomic loss” that can be recovered by a plaintiff in a product liability “action.” (Emphasis added). Simply stated, “damages” that *cannot be recovered* in a product liability “action” are irrelevant. In fact, one could argue that they are not really even “damages” if, as a matter of law, they cannot be recovered by a tort plaintiff as compensation for

² While not binding precedent, the Michigan court of appeals, citing to *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004) (interpreting medical malpractice statutory damage cap), has held that the damage caps are to be applied to the total award prior to the allocation of the award among multiple defendants pursuant to their percentage of fault, finding that although the statute is silent on timing for application of the damage caps, the plain language of the statutory scheme surrounding damage caps for products liability indicates such an interpretation. *Wessels v Garden Way, Inc.*, 263 Mich App 642, 649-650; 689 NW2d 526 (2004)

non-economic injuries. As such, they should not operate to confuse the allocation of fault/liability between tortfeasors.

There are two possible effects of allowing the allocation to occur before application of the damages cap, both of which would be inconsistent with MCL 600.6304, which states that damages in products liability actions are to be awarded according to the allocation of each tortfeasors' percentage of total fault. One possibility is that the plaintiff would be allowed to collect a total amount greater than permitted by the damages cap, by collecting separately from each defendant up to the cap amount. The other possibility is that the defendants would be jointly and severally liable for amounts greater than their fair share of the whatever the post-cap allocation would have been. The first possibility would be contrary to the express language of MCL 600.2946(1), which expressly states that the cap limits the total amount of non-economic damages that the plaintiff can recover in the action. The second possibility would be contrary to MCL 600.6304(4), which expressly provides that post-allocation liability "is several only and not joint." The second possibility also would be contrary to MCL 600.6312, which limits joint liability to specific situations, not including responsibility for amounts allocated before the application of a damages cap.

An example may be helpful. Assume the jury finds two defendants 50% at fault in an amount of \$2,000,000. Pre-cap allocation would reduce each defendant's liability to \$1,000,000. If the \$500,000 cap applied, the total liability of each defendant (\$1,000,000) would exceed the cap. If the plaintiff were allowed to recover up to the cap from each defendant, then the plaintiff would recover a total amount of \$1,000,000 (two times \$500,000), which would be in excess of the "the total amount of damages for non-economic loss" the plaintiff would be permitted to recover in a product liability "action" under MCL 600.2946a(1).

The other option that could result from pre-cap allocation would be to limit the plaintiff's total recovery to the cap amount (\$500,000), but to allow the plaintiff to pursue each separate defendant up to the amount of its own pre-cap allocation. Under the hypothetical here, the plaintiff would be able to pursue each defendant up to an amount of \$500,000 (the cap amount) because each defendant's pre-cap allocation would be \$1,000,000. The end result would be joint and several liability between the two defendants for the entire amount of the cap. This would be directly contrary to the express language in MCL 600.6304(4), which expressly provides that post-allocation liability "is several only and not joint."

The only possible way to give effect to both the limitation in MCL 600.2946a(1) that the plaintiff recover no more than the total amount of the cap *and* the provision in MCL 600.6304(4) that each defendant's liability is several and not joint, would be to apply the allocation *after* applying the damage cap. This would also make more sense intuitively because the court would be working with the numbers that are relevant to the plaintiff's actual legal recovery. As the applicable statutes are in *pari materia*, with respect to the question of the timing of allocation, this Court must interpret MCL 600.2946a(1) in such a way as to give effect to both the express language of MCL 600.2946a(1) (limiting total recovery to the plaintiff) and MCL 600.6304(4) (providing for several liability only). *Jennings v Southwood*, 446 Mich 125, at 136-137.

A final textual clue that damages are to be allocated *after* application of the cap comes from MCL 600.6304(3), which provides that "[t]he court shall determine the *award* of damages" according to the percentages of fault determined by the jury." (Emphasis added). The "award" of damages is the total amount of damages that the plaintiff is entitled to recover in a judgment, not the theoretical amount of damages determined by the jury before application of the cap. Only the amount subject to the cap may be *awarded* to plaintiff in a judgment.

CONCLUSION

For the reasons stated herein, and in the brief of ASE, this Court should hold that MCL 600.2946a(3) does *not* provide a trial court with authority to reach a factual conclusion contrary to a factual conclusion already reached by the jury. This Court should also hold that in order to give effect to both the damages cap and the policy of fair-share allocation, the liability to be allocated must be the damages that the plaintiff is actually entitled to recover. This requires application of the damages cap *before* allocation between tortfeasors.

Respectfully Submitted,

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Date: January 8, 2008

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